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HANUMAN LAXMAN AROSKAR

v.

UNION OF INDIA

(Civil Appeal No. 12251 of 2018)

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MARCH 29, 2019

**[DR. DHANANJAYA Y CHANDRACHUD AND  
HEMANT GUPTA, JJ.]**

*Environmental Law:*

- C      *Environmental clearance (EC) – Grant of – For development of airport in Goa – Challenged before National Green Tribunal (NGT) – NGT affirmed the EC holding that the project did not compromise with the environment and concluded that further safeguards for environmental protection needed to be incorporated*
- D      *– On appeal, held: Rule of law requires a regime which has effective, accountable and transparent institutions – Responsive, inclusive, participatory and representative decision making are key ingredients to the rule of law – Public access to information is fundamental to the preservation of rule of law – Environmental governance that is founded on the rule of law emerges from the value of the Constitution*
- E      *– Health of environment is key to preserving the right to life as a constitutionally recognized value under Art.21 – Proper structures for environmental decision-making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment u/Art. 14 of the Constitution – In the area of environmental governance, the process of decision-making are as crucial as the ultimate decision – The basic postulate of 2006 Notification was that the path which was prescribed for disclosures, studies, gathering data, consultation and appraisal was designed in a manner that would secure a transparent, responsive and inclusive decision-making – In the present case there was failure to follow binding*
- F      *norms under the 2006 Notification – There were serious flaws in decision-making process – Relevant material was excluded from consideration and extraneous circumstances were borne in mind – EAC as an expert body abdicated its obligations to make an expert determination based on reasons – NGT as an adjudicatory body*
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*failed to exercise the jurisdiction entrusted to it u/s. 16(h) r/w. s. 20 of NGT Act by merely deferring to the decision to recommend and grant an EC – However, the need for setting up a new airport is a matter of policy – In order to bring about a wholesome balance between the development of infrastructure and preservation of environment, in exercise of jurisdiction of Art. 142 of Constitution, EAC is directed to revisit the conditions subject of which it had granted EC, in a time bound manner – Constitution of India – Arts. 14, 21, 51A(g) and 142 – National Green Tribunal Act, 2010 – ss. 16(h) and 20.*

**Government of India approved setting up of an airport in Goa in the year 2000. Ministry of Environment and Forests of Government of India issued Notification in 2006, mandating prior Environmental Clearance (EC). In 2011 State of Goa as the project proponent submitted Form 1 as stipulated in 2006 Notification. In 2015 Expert Appraisal Committee (EAC) which was constituted under 2006 Notification recommended the grant of an EC for the project and the Ministry concerned approved grant of EC. Grant of EC was challenged by the appellants before the National Green Tribunal (NGT). NGT upheld the EC and imposed additional conditions to safeguard the environment. Hence, the present appeals.**

#### **Disposing of the appeals, the Court**

**HELD:** 1. The Constitution (Forty-second Amendment) Act 1976, which came into force with effect from 3 January 1977, inserted Article 48A to the Constitution which mandates that the State shall endeavor to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51A(g) of the Constitution places a corresponding duty on every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. Following the decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972 in which India participated, Parliament enacted the Environment Protection Act 1986 to protect and improve the environment and prevent hazards to human beings, other living creatures, plants and property. [Para 32][951-A-C]

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- A      2. The MoEF, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the 1986 Act read with clause (d) of sub-rule 3 of rule 5 of the Environment (Protection) Rules, 1986, issued a notification imposing restrictions and prohibitions on the expansion and modernisation of any activity or new project unless an EC was granted under the procedure stipulated in the notification. Under the notification, any person undertaking a new project or expanding and modernizing an existing project was required to submit an application to the Secretary, Ministry of Environment and Forests, New Delhi. On 14 September 2006, MoEF released another notification in supersession of the previous notification. The salient objective which underlies the 2006 notification is the protection, preservation and continued sustenance of the environment when the execution of new projects or the expansion or modernization of existing projects is envisaged. It imposes certain restrictions and prohibitions based on the potential environmental impact of projects unless prior EC has been granted by the concerned authority. The EC is required before any construction work, or preparation of land (except for securing the land) is started on the project or activity listed in the Schedule to the notification. [Paras 33, 37 and 40][951-C-E; 952-C; 954-A-B]
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- F      3. The process to obtain environmental clearance as stipulated by the notification for new projects comprises a maximum of four stages, all of which may not apply depending on the specific case stipulated under the notification: Screening; Scoping; Public Consultation; and Appraisal. [Para 43][955-E-G]
- G      4. The 2006 notification embodies the notion that the development agenda of the nation must be carried out in compliance with norms stipulated for the protection of the environment and its complexities. It serves as a balance between development and protection of the environment: there is no trade-off between the two. The protection of the environment is an essential facet of development. It cannot be reduced to a technical formula. The notification demonstrates an increasing awareness of the complexities of the environment and the heightened scrutiny required to ensure its continued sustenance, for today
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**and for generations to come. It embodies a commitment to sustainable development. In laying down a detailed procedure for the grant of an Environmental Clearance (EC), the 2006 notification attempts to bridge the perceived gap between the environment and development. [Para 54][959-C-E]**

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**5. The State of Goa as the project proponent in failing to disclose wet lands, water sources, water bodies, biospheres, mountains and forests within an aerial distance of 15 kilometres as required by Form 1. The disclosure in Form 1 constitutes the very foundation of the process which is initiated on the basis of the information supplied by the project proponent. Following the disclosure in Form 1, Terms of Reference (ToR) are formulated, and this leads to the preparation of the Environmental Impact Assessment (EIA) report. A duty is cast upon the project proponent to make a full, complete and candid disclosure of all aspects bearing upon the environment in the area of study. The project proponent cannot profess an ignorance about the environment in the study area. The project proponent is bound by the highest duty of transparency and rectitude in making the disclosures in Form 1. [Para 67][967-D-F]**

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**6. Form 1 is an important ingredient in the entire process envisaged under the 2006 notification. Hence, clause (vi) of para 8 of the 2006 notification provides that deliberate concealment or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection and lead to the cancellation of a prior EC granted on that basis. The declaration which is required of the project proponent is to a similar effect. [Para 68][967-F-G]**

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**7. Form 1 requires a disclosure of areas which are important or sensitive for ecological reasons, among them, being “forests”. The expression “forests” is used without reference to a statutory or artificial definition and must hence incorporate a meaning which bears upon the ordinary description of the term. The expression “forests”, means a forest as commonly understood, without reference to a notification under the Indian Forest Act 1927 or any other statutory enactment. Such an interpretation will subserve**

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- A the purpose of an (EIA). The purpose is to ensure that all relevant facets of the environment are noticed, that base-lines are documented, and that the potential impact of a project or activity on the environment is assessed. Forests are forests without reference to recognition in a statutory form devised for a specific purpose. Therefore, it is not correct that the disclosure required was of reserved forests comprehended within a notification under sub-section (2) of Section 20 of the Indian Forest Act 1927. [Para 69][967-H; 968-A-C]

*T N Godavarman Thirumalpad v. Union of India*

(1997) 2 SCC 267 : [1996] 9 Suppl. SCR 982;

*Construction of Park at Noida near Okhla Bird Sanctuary Anand Arya v. Union of India* (2011) 1 SCC 744 : [2010] 15 SCR 783 – referred to.

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- D report acknowledges that the “surrounding land use of the airport site is predominantly forest land”. In the context of land environment, the EIA report records that “forest is the predominant land use in the study area”. The EIA report acknowledges that territories in Maharashtra fall within one kilometre from the proposed greenfield airport. Villages falling in Goa and Maharashtra within the 10 kilometre radius were considered for assessment. Para 2.3.1 of Chapter II deals with land use. Land use/land cover statistics for a 10 kilometre radius from the Mopa airport in the State of Maharashtra have been tabulated. [Para 73][969-D-E]
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- F 9. The presence of a “diverse system set as dense and open forest, cultivated lands, sand dune vegetation, wet lands and human habitation” is noticed in para 4.6 dealing with the biological environment. Annexure IX to the EIA report provides land use/land cover maps for both Goa and Maharashtra in the study area. The maps in Annexure IX cover forested areas in Maharashtra and Goa within an aerial boundary of 10 kilometres from the project site. Annexure XI contains the hydro-geo-morphological maps for Goa and Maharashtra. [Para 74] [970-A-B]
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**10. Information furnished in Form 1 is crucial to the preparation of the ToR by the Expert Appraisal Committee (EAC). The EAC comprises of experts. It is constituted, among other reasons, for the specific purpose of assessing the information furnished in Form 1 and preparing comprehensive ToR. There is an intrinsic link between the disclosures in Form 1 which constitute the basis for formulating the ToR and between the ambit of the EIA report required by the ToR and the final EIA report. The ToR guide the preparation of the EIA report. A failure to disclose information in Form 1 impairs the functioning of the EAC in the preparation of the ToR and in consequence, leads to preparation of a deficient EIA report. [Para 75][970-D-E]**

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**11. EACs and State Expert Appraisal Committees (SEACs) are conferred with the authority to reject applications for the grant of an EC at the stage of scoping itself, prior to the preparation of the ToR. The application may be rejected on the basis of the information furnished by the project proponent in Form 1. Claiming an EC as a matter of right merely because the EIA report has assessed parameters that were omitted in Form 1, bypasses the authority of the EAC and SEAC to reject an application at the preliminary stage and cannot be countenanced. The regulatory authority is required to assess the final documents submitted to it “strictly with reference to the ToR” and communicate to the EAC and SEAC any discrepancies between the EIA report and the ToR. A deficient ToR on the basis of the non-disclosure of material information in Form 1 impedes this process. [Para 76][970-F-H]**

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**12. The failure on part of a project proponent to disclose material information in Form 1 as stipulated under the 2006 notification has a cascading effect on the salient objective which underlies the 2006 notification. The 2006 notification represents an independent code with the avowed objective of balancing the development agenda with the protection of the environment. An applicant cannot claim an EC, under the 2006 notification, based on substantial or proportionate compliance with the terms stipulated in the notification. The terms of the notification lay down strict standards that must be complied with by an applicant**

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- A seeking an EC for a proposed project. The burden of establishing environmental compliance rests on a project proponent who intends to bring about a change in the existing state of the environment. Whereas, in the present case, there has thus been a patent failure on part of the project proponent to make mandatory disclosures stipulated in Form 1 under the 2006 notification, that must have consequences in law. There can be no gambles with the environment: a ‘heads I win, tails you lose’ approach is simply unacceptable; unacceptable if environmental governance is to be preserved under the rule of law. [Para 77][971-A-D]
- B 13. The report of the High Level Working Group (HLWG) dated 15 April 2013 recommends that there should be a complete ban on mining, quarrying and sand mining activity in the Ecologically Sensitive Zone (ESZ). Similarly, it recommends that no thermal power project should be allowed in ESZs and that all ‘red category’ industries should be strictly banned. Building and construction projects of 20,000 square metres and above should not be allowed. However, all other infrastructure and development projects, which have been recommended, should be subject to the grant of ECs under Category ‘A’ projects of the 2006 notification. [Para 82][974-B-C]
- C 14. The glaring deficiency which emerges from the EIA report is its failure to notice the existence of ESZs within a buffer distance of 10 kilometres of the project site. On one hand, the EIA report takes note of the HLWG report dated 15 April 2013. But, on the other hand, the EIA report ignores the existence of ESZs within the study area on the ground that the project site is not situated in an ESZ. The purpose and object of the EIA report is to map areas, understand their vulnerabilities, and conduct a study on a scientific basis of the impact of the proposed project on an ecologically sensitive terrain. The EIA report fails to meet a classical requirement of administrative law: to take into account a relevant consideration namely, that within the study area which has to be considered, there is the presence of ESZs. [Para 85] [974-G-H; 975-A-B]
- D 15. In deducing the impact of a proposed activity on an ESZ, it is not sufficient to take recourse to a generic assessment of a

proposed activity on the ecology of the study area. The EIA report must factor in those specific features which make an area ecologically sensitive. These would encompass all aspects of environmental concern which render the area ecologically sensitive. This would include wet lands, water sources, water bodies, costal zones, biospheres, mountains and forests. The vulnerabilities of each of them must be studied as distinctive components together with a holistic analysis of their existence in a chain of bio-diversity. Where an area is ecologically sensitive because of the presence of flora or fauna requiring protection, that must be specifically adverted to and studied. The deficiency of the EIA report emanates from its failure to notice that the purpose of the study was not only to determine whether the project site is ecologically sensitive. Confining itself to this aspect, the EIA report failed to consider a crucial and relevant consideration. [Para 86][975-C-E]

16. Since the entire study area within a radius of 10 kilometres was considered for monitoring air quality, the Court accepts the submission that the location of the sampling points within Goa did not preclude the monitoring of air quality within the study area. The impact of a greenfield airport on the closing of natural channels which feed the water bodies has not been scientifically mapped or studied. While monitoring the noise quality, the EIA report covered a radius of 10 kilometres. In order to obtain baseline data of noise quality, nine monitoring stations were chosen in the study area. While it is true that all nine locations were situated in the State of Goa, one (Patradevi) was situated on the border shared between Goa and Maharashtra. The EIA report contains an impact study and the study area covered includes both the States. The collection of both primary and secondary data of fauna in the EIA report was perfunctory. The primary study is not based on data collected from acknowledged sources such as the Zoological Survey of India, Wildlife Institute of India and Ministry of Earth Sciences as required under the Guidance manual. Similarly, as regard avi-faunal studies, the EIA report lists 385 plant species in table 4.15 of Chapter IV, titled 'Description on Environment'. It also states that 86 species of birds

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- A were observed during the survey in the 10 kilometre study area from the proposed site. According to the Guidance manual, secondary data has to be collected within an aerial distance of 15 kilometres for the parameters specifically specified in column 9(III) of Form 1 of the 2006 notification. This was evidently not done. A careful avi-faunal study was necessary, having due regard to the fact that the proposed project is an airport site. Bearing in mind the profile of airport operations, foraging or nesting by bird species in and around the airport must not be discarded. It must be accepted that in a project involving the setting up of an airport, the EIA report must deal with the impact of the airport on birds and likewise the impact of birds on aircraft operations. [Paras 88, 90 and 94][976-C-D; G-H; 977-A; 979-A-E]
- B 17. The EIA report ought to have scrutinized the number of trees, their nature and longevity. Issues such as the extent to which the trees or some of them were capable of being transplanted had to be considered in the EIA report. The location of the trees is also significant. In a given case, if the trees appear in clusters or in a dense formation in segments of the project site, it would be necessary to determine whether felling all of them was necessary for the project to be implemented. [Para 97][981-G-H; 982-A-B]
- C 18. There was a glaring omission of the factual existence of as many as 54,676 trees in the EIA report. For project proponents, the environment may not possess a human voice. But the purpose of prescribing an EIA report is precisely to undertake a baseline study on all aspects of the environment and to anticipate the impact of a projected activity on the environment. Ignoring *any* component of the environment amounts to a serious dereliction of duty which detracts from the rule of law in matters of environmental governance. [Para 98][982-E-F]
- D 19. The order of the Principal Chief Conservator of Forests mandating transplantation, where possible, and the plantation of ten trees for every tree felled provides a measure of rectification. But there is a reason why issues pertaining to vegetational cover must be taken seriously in the EIA process. The formula of planting a set number of trees for every existing tree felled must
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be alive to the fact that the survival of new plantations is replete with uncertainty. The survival of transplanted trees is equally a matter of uncertainty. Though the development of infrastructure may necessitate the felling of trees, the process stipulated under the 2006 notification must be transparent, candid and robust. A regulatory regime for environmental governance is based on the hypothesis that all stakeholders will act with rectitude. Hiding significant components of the environment from scrutiny is not an acceptable modality to secure project approvals. There was a serious lacuna in regard to disclosures and appraisal on this aspect of the controversy. [Para 99][982-F-H; 983-A-B]

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20. Public consultation involves a process of confidence building by giving an important role to those who have a plausible stake. It also recognizes that apart from the knowledge which is provided by science and technology, local communities have an innate knowledge of the environment. The knowledge of local communities is transmitted by aural and visual traditions through generations. By recognizing that they are significant stakeholders, the consultation process seeks to preserve participation as an important facet of governance based on the rule of law. Participation protects the intrinsic value of inclusion. [Para 101][983-E-F]

21. Public consultation cannot be reduced to a mere incantation or a procedural formality which has to be completed to move on to the next stage. Underlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects. Apart from the intrinsic value of public consultation, it serves an instrumental function as well. The purpose of ascertaining the views of stakeholders, is to account for all the material concerns in the design of the proposed project or activity. For this reason, the process of public consultation involves several important stages. The Pollution Control Board is under a mandate to forward the proceedings to the regulatory authority. The project proponent must address all material environmental concerns and make

- A appropriate changes in the draft EIA and Environment Management Plan (EMP). The project proponent may even submit a supplementary report to the draft EIA. Each of these elements is crucial to the design features of the 2006 notification. A breach will render the process vulnerable to challenge on the ground that: (i) significant environmental concerns have not been taken into account; (ii) there was an absence of a full disclosure when the EIA report was put up for consultation; and (iii) concerns which have been expressed by persons affected by the project have not been adequately dealt with or analysed. [Paras 102 and 103][984-D-H]
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- C *Utkarsh Mandal v. Union of India (2009) SCC Online Del 3836 – relied on.*
  - 22. Crucial objections and environmental concerns which were raised during the consultative process were reduced to a single issue by the project proponent before the EAC: the need for employment opportunities. The project proponent failed in its duty to inform the EAC. The record does not indicate a critical appraisal or analysis by the EAC. The EAC was duty bound to apply its mind to the environmental concerns raised by stakeholders. The duty of the project proponent to place fairly all the environmental concerns raised during the public hearing is the crucial link in the appraisal by the EAC. The Minutes of the meeting indicate that there was no fair and complete disclosure of the objections which were raised during the public hearing before the EAC. There is evidently a failure in the process of applying and implementing the norms laid down in the 2006 notification in this regard. [Para 107][986-F-H; 987-A-B]
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- G *23. Appraisal by the EAC is structured and defined by the 2006 notification. The process of appraisal is defined to mean “a detailed scrutiny” by the EAC of the application and other documents like the EIA report and the outcome of the public consultation, including the public hearing proceedings, submitted by the applicant to the regulatory authority for the grant of an EC. The EAC is under a mandate to conduct the process of appraisal in “a transparent manner”. On the conclusion of these proceedings, the EAC has to make “categorical*
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**recommendations” to the regulatory authority either for: (i) the grant of a prior environmental clearance on stipulated terms and conditions; or (ii) the rejection of the application. The recommendations made by the EAC to the regulatory authority must be based on “reasons”. [Para 108][987-B-D]**

**24. The analysis of the EIA report is sketchy and perfunctory and discloses an abdication of its functions by the EAC. The requirement that the EAC must record reasons, besides being mandatory under the 2006 notification, is of significance for two reasons: (i) The EAC makes a recommendation to the regulatory authority in terms of the 2006 notification. The regulatory authority has to consider the recommendation and convey its decision to the project proponent. The regulatory authority, as para 8(ii) provides, shall normally accept the recommendations of the EAC. Where it disagrees, it would request reconsideration, stating the reasons for its disagreement. In turn, the EAC will consider the observations of the regulatory authority and furnish its views within a stipulated period; and (ii) The grant of an EC is subject to an appeal before the NGT under Section 16 of the NGT Act 2010. The reasons furnished by the EAC for its recommendation are a basic link in the ultimate decision of the regulatory authority. They constitute substantive material which will be considered by the Tribunal when it considers a challenge to the grant of an EC. [Para 111][989-H; 990-A-D]**

**25. The EAC refers to the delay in acquisition proceedings, a larger public interest and the fact that the project proponent “has not concealed facts and circumstances”. Each one of the reasons which has weighed with the EAC betrays a lack of comprehension of the true nature of its function under the 2006 notification. The EAC has failed to consider relevant circumstances bearing on the environmental impact of the project and has instead considered circumstances extraneous to its function. That the project proponent, according to the EAC, has not concealed facts and circumstances is not reason enough to warrant a grant of an EC. Moreover, even this hypothesis is incorrect. There is no analysis of the EIA report. The EAC has failed to answer to the call to its expertise. [Para 112][927-E-G]**

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- A      **26. Deliberate concealment or the submission of false or misleading information or data material for screening, scoping, appraisal or decision on the application makes it liable for rejection. That the project proponent must submit all information and data without concealing relevant features is a basic hypothesis and expectation of the 2006 notification. The EAC has not applied its mind at all to the environmental concerns raised in relation to the project nor do its reasons indicate an appraisal of those concerns by evaluating the impact of the project. [Para 113] [991-B-D]**
- B      **27. The EAC is an expert body. It must speak in the manner of an expert. Its remit is to apply itself to every relevant aspect of the project bearing upon the environment. It is not bound by the analysis which is conducted in the EIA report. It is duty bound to analyse the EIA report. Where it finds it deficient it can adopt such modalities which, in its expert decision-making capacity, are required. The reasons which are furnished by the EAC constitute a live link between its processes and the outcome of its adjudicatory function. In the absence of cogent reasons, the process by its very nature, together with the outcome stands vitiated. [Para 114][991-D-F]**
- C      **28. The EAC, as an expert body, has to scrutinize all relevant aspects of the project or activity proposed, including its impact on the environment. In taking that decision, the EIA report is an input for its analysis. The scrutiny and appraisal has to be undertaken by the EAC as an expert body and its reasons must reflect that this has been done. As the Minutes indicate, the non-application of mind by the EAC is evident with reference to the presence of 15 ESZs in the study area. The EAC notes that the project is outside the ESZ delineated by the Kasturirangan Committee. In the absence of a critical analysis, the EAC failed in discharging its duties under the 2006 notification. The recommendations of the EAC furnish a guide for the MoEFCC. Indeed, the 2006 notification stipulates that the recommendations of the EAC would normally be accepted. Consequently, a failure of due process before the EAC, as in the present case, must lead to the invalidation of the EC. [Para 116][992-B-E]**
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**29.** In the present case, there was a failure to follow binding norms under the 2006 notification. There were serious flaws in the decision-making process. Relevant material was excluded from consideration and extraneous circumstances were borne in mind. The EAC as an expert body abdicated its obligations to make an expert determination based on reasons. The National Green Tribunal (NGT) as an adjudicatory body failed to exercise the jurisdiction entrusted to it under Section 16(h) read with Section 20 of the NGT Act 2010 by merely deferring to the decision to recommend and grant an EC. The parameters in regard to the existence of substantial questions of law have hence been established in the classical or conventional sense of that expression. [Para 125][998-D-F]

*Vellore Citizens Welfare Forum v. Union Of India (1996) 5 SCC 647 : [1996] 5 Suppl. SCR 241; M C Mehta v Kamal Nath (1997) 1 SCC 388 : [1996] 10 Suppl. SCR 12; M C Mehta v. Union of India (1997) 2 SCC 353 : [1996] 10 Suppl. SCR 973 ; A P Pollution Control Board v. Prof M V Nayudu (Retd.) (1999) 2 SCC 718 : [1999] 1 SCR 235; Narmada Bachao Andolan v. Union of India (2000) 10 SCC 664 : [2000] 4 Suppl. SCR 94 ; Indian Council for Enviro Legal Action v Union of India (2011) 8 SCC 161 : [2011] 9 SCR 146 ; Save Mon Region Federation v. Union of India 2013 (1) All India NGT Reporter 1; Shreeranganathan K P v. Union of India 2014 ALL (I) NGT Reporter (1) (SZ) 1 ; Lafarge Umiam Mining Private Limited v. Union of India (2011) 7 SCC 338 : [2011] 7 SCR 954; Mantri Techzone Pvt. Ltd. v Forward Foundation (2019) 4 SCALE 218 ; Sir Chunilal v. Mehta and Sons, Ltd. v Century Spinning and Manufacturing [1962] 3 Suppl. SCR 549 – referred to.*

**30.** The environmental rule of law provides an essential platform underpinning the four pillars of sustainable development— economic, social, environmental, and peace. It imbues environmental objectives with the essentials of rule of law and underpins the reform of environmental law and

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- A governance. The environmental rule of law becomes a priority particularly when it is acknowledged that the benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effects are on protection of the environment, it also strengthens rule of law more broadly, supports sustainable economic and social development, protects public health, contributes to peace and security by avoiding and defusing conflict, and protects human and constitutional rights. Similarly, the rule of law in environmental matters is indispensable “for equity in terms of the advancement of the Sustainable Development Goals, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.” [Para 128][999-A-D]
- B 31. The rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to the rule of law. Public access to information is, in similar terms, fundamental to the preservation of the rule of law. In a domestic context, environmental governance that is founded on the rule of law emerges from the values of Constitution. The health of the environment is key to preserving the right to life as a constitutionally recognized 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. [Para 140][1004-C-E]
- C F 32. The 2006 notification must hence be construed as a significant link in India’s quest to pursue the Sustainable Development Goals (SDGs). Many of those goals, besides being accepted by the international community of which India is a part, constitute a basic expression of constitutional value system. The fundamental principle which emerges from interpretation of the 2006 notification is that in the area of environmental governance, the means are as significant as the ends. The processes of decision are as crucial as the ultimate decision. The basic postulate of the 2006 notification is that the path which is prescribed for
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disclosures, studies, gathering data, consultation and appraisal is designed in a manner that would secure decision making which is transparent, responsive and inclusive. [Para 141][1004-F-G; 1005-A-B]

33. The need for setting up a new airport is a matter of policy. The role of the decision makers entrusted with authority over the EIA process is to ensure that every important facet of the environment is adequately studied and that the impact of the proposed activity is carefully assessed. This assessment is integral to the project design because it is on that basis that a considered decision can be arrived at as to whether necessary steps to mitigate adverse consequences to the environment can be strengthened. [Para 142][1005-C-E]

34. In the present case, there has been a failure of due process commencing from the non-disclosure of vital information by the project proponent in Form 1. Disclosures in Form 1 are the underpinning for the preparation of the ToR. The EIA report, based on incomplete information has suffered from deficiencies including the failure to acknowledge that within the study area contemplated by the Guidance manual, there is a presence of ESZs. [Para 143][1005-D-E]

35. The EAC, as an expert body abdicated its role and function by taking into account circumstances which were extraneous to the exercise of its power and failed to notice facets of the environment that were crucial to its decision making. The 2006 notification postulates that normally, the MoEFCC would accept the recommendation of the EAC. This makes the role of the EAC even more significant. The NGT is an adjudicatory body which is vested with appellate jurisdiction over the grant of an EC. The NGT dealt with the submissions which were urged before it in essentially one paragraph. It failed to comprehend the true nature of its role and power under Section 16(h) and Section 20 of the NGT Act 2010. In failing to carry out a merits review, the NGT has not discharged an adjudicatory function which properly belongs to it. [Para 144][1005-F-H]

36. Thus, neither the process of decision making nor the decision itself can pass legal muster. Equally, as an area requiring

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- A **balance between development of infrastructure and the environment, appropriate directions should be issued by this Court, which would ensure that while the need for a public project as significant as an international airport is duly factored into the decision making calculus, such development proceeds on a considered view of the importance of the prevailing state of the environment.** Bearing in mind the need to bring about a wholesome balance between the development of infrastructure of an airport and the preservation of the environment, time bound directions should be issued. [Para 145][1006-A-C]
- B **37. It would be appropriate if the EAC is directed to revisit the conditions subject to which it granted its EC on the basis of the specific concerns which have been highlighted in this judgment. Such an exercise primarily is for the EAC to carry out in its expert decision making capacity. The EAC is entrusted with that function as an expert body. The role of judicial review is to ensure that the rule of law is observed. Hence, in exercise of jurisdiction under Article 142 of the Constitution, EAC is directed to revisit the conditions for the grant of an EC. While doing so, it would be open to the EAC to have due regard to the conditions which were incorporated in the order of the NGT and to suitably modulate those conditions in pursuance of the liberty which the Court has preserved to it. To facilitate an expeditious decision, the EAC is directed to carry out this exercise in a prescribed time schedule during which period, the EC shall remain suspended. After the EAC has formulated its views, they shall be placed before this Court in a Miscellaneous Application in the present proceedings, so as to enable the Court to pass final orders. The Miscellaneous Application may be filed either by the State of Goa as the project proponent or by the MoEFCC. No other Court or Tribunal shall entertain any challenge to the ultimate decision of the EAC and final orders thereon shall be passed by this Court in the present proceedings.** [Para 146] [1006-C-G]
- C **[1996] 9 Suppl. SCR 982 referred to Para 15 (I)**
- D **[2010] 15 SCR 783 referred to Para 20 (iv)**
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**Case Law Reference**

<b>[1996] 9 Suppl. SCR 982</b>	<b>referred to</b>	<b>Para 15 (I)</b>
<b>[2010] 15 SCR 783</b>	<b>referred to</b>	<b>Para 20 (iv)</b>

[1996] 5 Suppl. SCR 241	referred to	Para 117	A
[1996] 10 Suppl. SCR 12	referred to	Para 117	
[1996] 10 Suppl. SCR 973	referred to	Para 117	
[1999] 1 SCR 235	referred to	Para 117	
[2000] 4 Suppl. SCR 94	referred to	Para 117	B
[2011] 9 SCR 146	referred to	Para 117	
2013 (1) All India NGT Reporter 1	referred to	Para 120	
2014 ALL (I) NGT Reporter (1) (SZ) 1	referred to	Para 120	
[2011] 7 SCR 954	referred to	Para 122	C
(2019) 4 SCALE 218	referred to	Para 125	
[1962] 3 Suppl. SCR 549	referred to	Para 125	

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 12251  
of 2018. D

From the Judgment and Order dated 21.08.2018 of the National Green Tribunal, Principal Bench, New Delhi in Appeal No. 6 of 2018 (earlier Appeal No. 1/2016/WZ)

WITH E

Civil Appeal No. 1053 of 2019.

K. K. Venugopal, AG, Atmaram N.S. Nadkarni, ASG, Datta Prasad Lawande, Adv. Gen. (Goa), Parag P. Tripathi, Sr. Adv., Ms. Anitha Shenoy, Ms. Rashmi Nandakumar, Ritwick Dutta, Ms. K. V. Bharathi Upadhyaya, Ms. Kanika Sood, Sany Antony, Ms. Srishti Agnihotri, Pratap Venugopal, Ms. Surekha Raman, N. Prashant Kumar, Akhil Abraham Roy, Sahil Singh, Ashish Krishnanath Kuncoliemer, Chinmayee Chandra, Rajesh Shivolker, S. Salvador Rebello, N. Prashant Nair (for M/s. K J John and Co.), Divya Prakash Pande, G. S. Makker, Niraj Kumar, S.S. Rebello, Ms. Suhasini Sen, Suchindran B. N., S. B. Narain, Sriram Srinivasan, Jai A. Dehadrai, Prashant Vaxish, Ms. Manisha Ambwani (for M/s. K J John and Co.), Ms. Aastha Mehta, Mahesh Agarwal, M. S. Ananth, Vanshi Rao, E. C. Agrawala, Annam D. N. Rao, Advs. for the appearing parties. F

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- A      The Judgment of the Court was delivered by  
**DR. DHANANJAYA Y. CHANDRACHUD, J.**

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**A      Introduction**

- G      1. An appeal was filed before the Principal Bench of the National Green Tribunal<sup>1</sup> at New Delhi challenging the grant of an Environmental Clearance<sup>2</sup> for the development of a greenfield international airport at Mopa in Goa. The NGT, by its judgment dated 21 August 2018 came to

<sup>1</sup>NGT

H      <sup>2</sup>EC

the conclusion that the present case “is not a case where the project compromises with the environment”. While affirming the EC, the NGT came to the conclusion that “further safeguards for environmental protection need to be incorporated”. The NGT, accordingly, proceeded to formulate additional conditions, while affirming the grant of the EC.

2. Village Mopa is situated in North Goa, in close proximity to the inter-state boundary which the state shares with Maharashtra. The site of the proposed airport lies at a distance of 35 kilometres from Panaji, the capital of Goa. The village of Mopa is situated in Pernem taluka. The site for the development of the airport is situated on a tabletop plateau which rises to a height of 150 to 180 meters above mean sea level and is surrounded by steep slopes. The soil is predominantly of a laterite character. The airport which presently serves the region is situated at Dabolim, Goa.

3. Since the airport at Dabolim is saturated in terms of its capacity for annual air traffic, the state government initiated a process in 1997 to commission studies and project reports for a proposed international airport, which include the following:

- (i) A project report prepared by Engineers and Management Associates, Spain in 1997;
- (ii) A preliminary technical feasibility study prepared by the Airports Authority of India in May 1998;
- (iii) A final feasibility report for the proposed airport at Goa prepared by the International Civil Aviation Organisation, Montreal, Canada in August 2005;
- (iv) A Goa dual airport study prepared by the International Civil Aviation Organisation in August 2007;
- (v) A report of a Six Member Committee chaired by the Chief Minister of Goa in 2008 to “look into all aspects relating to construction of an international airport at Mopa, Goa”; and
- (vi) A document styled as the “Airport Master Plan” dated 10 February 2012, submitted to the Public Private Partnership<sup>3</sup> cell of the Government of Goa by Ammann & Whitney, USA envisaging: “consultancy services for preparation of master plan, preliminary

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<sup>3</sup> PPP

A project report, tender document and project management services for the proposed greenfield airport and commercial/industrial and allied development near Mopa in the State of Goa”.

4. On 1 May 2000, the Government of India communicated its approval for the setting up of an airport at Mopa and for the closure of B the existing airport for civilian operations on the commissioning of the new airport. Subsequently, on 1 July 2010, the earlier decision was modified to allow for the continuation of civilian aircraft operations at Dabolim even after the commissioning of the new airport. The process of land acquisition commenced in 2008 under the Land Acquisition Act, C 1894. Originally, the land area anticipated for the development of the project was pegged at 4,500 acres. During the pendency of project appraisals, the area required for the proposed airport stood reduced to 2,271 acres.

5. On 14 September 2006, the Government of India in the Ministry of Environment and Forests<sup>4</sup> issued a notification<sup>5</sup> mandating a prior EC D for Category ‘A’ projects (specified in the Schedule) by the Union Government and for Category ‘B’ projects at the state level by the State Level Environment Impact Assessment Authority<sup>6</sup>. Following the 2006 notification, the MoEF placed an EIA Guidance Manual for Airports<sup>7</sup> in the public domain in February 2010. The stages of scoping, public E consultation and appraisal, leading up to the grant of the EC for the proposed airport are governed by the express terms of the 2006 notification.

6. In March 2011, the State of Goa, as the project proponent submitted Form 1 as stipulated in the 2006 notification to the MoEF. On F 8 March 2011, the State of Goa applied for Terms of Reference<sup>8</sup> to the MoEF. The ToR were finalized on 11 and 12 May 2011 by the Expert Appraisal Committee<sup>9</sup> constituted under the 2006 notification. On 1 June 2011, the MoEF issued the ToR for the preparation of the Environmental Impact Assessment<sup>10</sup> report. The ToR was valid for a

G <sup>4</sup> MoEF, later renamed as MoEFCC in 2014

<sup>5</sup> S.O. 1533 ('2006 notification')

<sup>6</sup> SEIAA

<sup>7</sup> Guidance manual

<sup>8</sup> ToR

<sup>9</sup> EAC

<sup>10</sup> EIA

period of two years until 31 May 2013. On 22 November 2012, the Government of Goa revised the project boundary by decreasing the project area from 4,500 acres to 2,271 acres. At its meetings on 28 and 29 January 2013, the EAC recommended an amendment to the ToR as requested by the state government and granted an extension to the validity of the ToR until 31 May 2014. On 19 June 2013, the MoEF communicated its approval for the amendment of the ToR and for the extension of its validity.

7. On 3 October 2014, the state government floated a tender for the development of a greenfield international airport project on a PPP basis. On 20 October 2014, the Directorate of Civil Aviation, Government of Goa submitted a draft EIA report to the Goa State Pollution Control Board, requesting it to initiate steps to conduct a public hearing. A public hearing was conducted at the project site on 1 February 2015. The EAC, at its meetings held on 9-11 March 2015, recommended an extension of the validity of the ToR for another year ending on 31 May 2015.

8. On 20 May 2015, the State of Goa submitted a final EIA report to the MoEFCC, seeking the grant of an EC for the project. On 29 May 2015, the MoEFCC communicated its approval for extending the validity of the ToR until 31 May 2015. Between 24 and 26 June 2015, the EAC, at its 149<sup>th</sup> meeting, deliberated on the EIA report and sought additional information from the project proponent, *inter alia*, on:

- “10 years data regarding rainfall in the area;
- Drawing of traffic circulation plan for smooth circulation of Traffic in the area;
- Minimum 20% energy conservation measures should be adopted in incorporating provisions for use of LED, star rated AC’s, and a revised energy conservation plan to be submitted;
- Measures taken to comply with the CPCB guidelines formulated for noise pollution control in Airport area to be submitted.”

In the meantime, a representation was submitted by the Federation of Rainbow Warriors, one of the appellants before this Court to the EAC. The EAC, at its 151<sup>st</sup> meeting held on 7-9 September 2015,

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- A deliberated upon the representation and sought a clarification from the project proponent on the issues raised. On 28 September 2015, the project proponent submitted its reply to the representation. The EAC, at its 152<sup>nd</sup> meeting on 20 October 2015, sought a further clarification from the project proponent on the reply submitted by the Federation of Rainbow Warriors. At that meeting, the EAC recommended the grant of an EC for the project.
- B 9. On 28 October 2015, the MoEFCC, as the regulatory authority under the 2006 notification for Category 'A' projects, communicated its approval for the grant of an EC. Following the grant of the EC, the tender process which had been initiated on 3 October 2014 was
- C concluded on 26 August 2016. Consequent to the opening of the final bids, a technical scrutiny, evaluation coupled with pre-bid meetings, deliberations on the draft concession agreement and other required steps, GMR Goa International Airport Limited<sup>11</sup> was awarded the contract on a revenue sharing of 36.99 percent to the State of Goa. On 8 November
- D 2016, the concession agreement was executed between the Government of Goa and GGIAL for the development and operation of the airport with the concession period of 40 years. Upon financial closure, the three-year period for the construction of the airport commenced on 4 September 2017. The target date for the commissioning of the first phase of the project is 3 September 2020.
- E 10. The grant of the EC was challenged before the Western Zonal Bench of the NGT<sup>12</sup> by the Federation of Rainbow Warriors. Hanuman Laxman Aroskar also filed an appeal<sup>13</sup> before the Western Zonal Bench of the NGT. These appeals were subsequently renumbered<sup>14</sup> before the Principal Bench of the NGT at New Delhi. On 7 November 2017, the NGT issued an ad-interim order restraining the cutting or felling of trees in the area designated as the site of the proposed airport. On 22 November 2017, the order of restraint was modified on the statement of the Advocate General of Goa that the state shall not cut or fell any trees, nor allow it to take place without valid permission from the lawful authority
- F G for a fortnight thereafter in order to enable the appellants to pursue their

<sup>11</sup> GGIAL

<sup>12</sup> Appeal No. 61 of 2015

<sup>13</sup> Appeal No. 1 of 2016

<sup>14</sup> Appeal Nos. 5 and 6 of 2018

remedies. On 6 February 2018, the Deputy Conservator of Forests granted permission for felling 21,703 trees at the airport site. The appellate authority under the Goa, Daman and Diu Preservation of Trees Act 1984<sup>15</sup> dismissed the appeal on 7 March 2018.

11. On 8 March 2018, the High Court of Judicature at Bombay at its seat at Goa set aside the order of the Deputy Conservator of Forests and remanded the matter to be heard by the Principal Chief Conservator of Forests. On 2 April 2018, the Principal Chief Conservator of Forests stipulated several conditions for the cutting and the felling of trees at the site of the airport including: (i) enumeration of trees; and (ii) the plantation of ten times the number of trees felled. Upon being moved in a Public Interest Litigation<sup>16</sup>, the High Court by its order dated 25 April 2018 allowed the exercise of enumeration to be carried out. As a result, 54,676 trees were enumerated, including the 1,548 trees which had been felled earlier in terms of the order dated 6 February 2018 of the Deputy Conservator of Forests. On 13 January 2018, the High Court issued final directions in the PIL directing the State of Goa to approach the NGT seeking permission for felling and cutting trees. The state was directed to carry out the cutting and felling of trees only after prior permission was granted by the NGT.

12. A Miscellaneous Application<sup>17</sup> was filed by the State of Goa before the NGT on 2 July 2018 seeking permission for the felling of trees. By its judgment dated 21 August 2018, the NGT disposed of both the appeals and the Miscellaneous Application filed by the State of Goa, upholding the EC and imposing additional conditions to safeguard the environment. This Court has been informed that the felling of trees was initiated on 3 September 2018 and completed on 14 January 2019. Assailing the judgment of the NGT, two appeals have been filed before this Court: one by Hanuman Laxman Aroskar<sup>18</sup> and the other by the Federation of Rainbow Warriors<sup>19</sup>.

13. On 18 January 2019, notice was issued in the appeals and an order of *status quo* was passed by this Court. The appeals were admitted for hearing and final disposal.

<sup>15</sup> Act 6 of 1984

<sup>16</sup> PIL

<sup>17</sup> MA No. 975 of 2018

<sup>18</sup> Civil Appeal No. 12251 of 2018

<sup>19</sup> Civil Appeal No. 1053 of 2019

**A            B Submissions**

14. We have heard Ms Anitha Shenoy, learned counsel appearing on behalf of the appellants. Mr K K Venugopal, learned Attorney General<sup>20</sup> for India appeared on behalf of the State of Goa. Mr Atmaram S Nadkarni, learned Additional Solicitor General<sup>21</sup> of India appeared on behalf of the MoEFCC. Mr Parag P Tripathi, learned Senior Counsel and Ms Aastha Mehta, learned counsel appeared on behalf of the Concessionaire.

15. Ms Anitha Shenoy, learned counsel appearing on behalf of the appellants urged that the EIA report which is carried out under the terms of the 2006 notification is a tool to evaluate the environmental consequences of a proposed activity. The proposed international airport, being a Category ‘A’ project, is governed by the second, third and fourth stages of scoping, public consultation and appraisal respectively envisaged under the 2006 notification. In addition to the 2006 notification, the Guidance manual furnishes a significant sign post in the procedure envisaged prior to the grant of an EC. The project proponent is required to submit Form 1 complete with relevant details of the proposed project and the status of the environment. The ToR which is finalized by the EAC is founded on the disclosures which are made by the project proponent. In this backdrop, the principal submissions urged by the appellants before the Court are as follows:

- (i) There were material concealments by the project proponent in failing to disclose that as many as 54,676 trees were required to be felled. Form 1, which was submitted by the project proponent, was silent in regard to the number of trees required to be felled. The final EIA report, while dealing with the biological environment in clause 2.1.5 contains the following statement:

“2.1.5 Biological environment  
Construction phase  
Impacts (Significance-Medium)

- G        The area acquired for proposed airport has only few trees, mainly bushes. These will be cleared during site preparation.”

Contrary to the above assertion is the statement contained in the counter affidavit filed by the State of Goa:

<sup>20</sup> AG

H        <sup>21</sup> ASG

“..I say that the permissions which have been obtained for cutting of 54,676 trees have been granted by the concerned authorities in terms of the relevant statutory provisions and after laying down various conditions. I say that the context in which it was mentioned as sparse trees has to be seen from the huge area of the land. The land being 2133 acres, it would proportionally work out to about 25 trees in an area of 1 acre, i.e. 4000 sq. metres., which is one tree in an area of about 160 sq. metres.”

The submission urged by the appellants is that the purpose of the EIA report is to form an assessment of the state of environment as it exists in reality. The project proponent is duty bound to make a proper disclosure and the highest level of transparency is required. Accompanying Form 1 is a declaration of the project proponent that the EC will be liable to be rejected in the event of a suppression or mis-statement of material facts. The State of Goa filed a Miscellaneous Application before the NGT seeking permission to fell around 55,000 trees. This is a clear indicator that the original statement by the project proponent in Form 1 as well as in clause 2.1.5 of the EIA report that only a few trees were required to be felled is factually incorrect;

(ii) There was a concealment of Ecologically Sensitive Zones<sup>22</sup> in the State of Maharashtra. In terms of the Guidance manual, primary data through measures and full surveys; and secondary data from secondary sources have to be collected. Primary data includes the study area within 10 kilometres radius from the Aerodrome Reference Point<sup>23</sup> and covers one season other than the monsoon. Secondary data includes data collected within an aerial distance of 15 kilometres for the parameters which are specifically mentioned in column 9 (III) of Form 1 of the 2006 notification and covers one full year. In the present case, while furnishing details of ESZs falling within an aerial distance of 15 kilometres, the EIA report stipulates that there were none in the State of Maharashtra. The State of Goa has also averred in its counter that there are no ESZs within a radius of 15 kilometres from the ARP and that there are no reserve forests in that radius. After hearings had begun before the NGT, a letter was addressed by the Principal Chief Conservator of Forests on 12 February 2018 to the Director of

<sup>22</sup> ESZ

<sup>23</sup> ARP

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- A Civil Aviation stating that a list of reserved forests had been notified under Section 20 of the Indian Forest Act 1927 in Sawantwadi Forest Division of Sindhudurg district in Maharashtra which was obtained from the working plan of Sawantwadi Forest Division (2014-15 to 2023-24). The letter stated that there was no reserved forest notified under Section 20 of the Indian Forest Act 1927 in the Sawantwadi Forest Division, within a radius of 15 kilometres from the ARP. On this aspect, it was urged on behalf of the appellants that restrictions come into force as soon as a notification under Section 4 of the Indian Forest Act 1927 is issued. Under the Forest Conservation Act 1980, any use of forest land for non-forest purposes requires prior permission of the Union Government, as elaborated in the judgment of this Court in **TN Godavarman Thirumalpad v Union of India**<sup>24</sup> ("Godavarman"). The purpose of elucidating forest areas which fall within an aerial distance of 15 kilometres from the project site is to enable an assessment to be made of the impact of the project on forested areas. Failure to mention forests in the State of Maharashtra was a significant omission in the EIA report;
- (iii) Form 1 requires a disclosure of the details of ESZs within an aerial distance of 15 kilometres of the project boundary. The EIA report rests content in stating that Pernem taluka is not included in an ESZ by the High Level Working Group<sup>25</sup> constituted under the Chairmanship of Dr K Kasturirangan, Member (Science), Planning Commission<sup>26</sup>. The project proponent, in response to the disclosures required for areas which are important or sensitive for ecological reasons – wet lands, water sources or other water bodies, costal zone, biospheres, mountains and forests, left the required details blank. In this context, it was urged by the appellants that the purpose of the EIA report was not only to make an assessment of the project site but also of an area surrounding the project site within an aerial distance of 15 kilometres. The HLWG recognized that there were ESZs. In the present case, several villages are situated at a bare distance of 1.5 kilometres from the project site in Maharashtra. Yet, there was no disclosure of this fact and the EIA report merely recorded that Pernem taluka is not included in an ESZ;
- H <sup>24</sup> (1997) 2 SCC 267  
<sup>25</sup> HLWG  
<sup>26</sup> Kasturirangan report

- (iv) The State of Maharashtra comprises nearly 40 per cent of the study area. Yet, there was no sampling of soil, air and water in Maharashtra. Sampling was carried out in 2011 and 2014-15 in Goa but no sampling site is situated in Maharashtra. In the absence of baseline data generated with regard to environmental parameters in the State of Maharashtra surrounding the project site, the EIA report suffers from a gross deficiency; and A
- (v) The EIA report is grossly deficient in failing to notice wildlife in the surrounding forests. On the contrary, the appellants have relied on a rapid survey conducted to assess the presence of various mammals in the study area. Moreover, no avi-faunal study was done. B
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16. Apart from the above submissions, Ms Shenoy has urged that the stages of public consultation and appraisal under the 2006 notification are crucial to the assessment process. As far as the public consultation is concerned, the draft EIA is given before the hearing. During the course of the public consultation, as many as 70 persons spoke, 1,150 representations were received and 1,586 persons are stated to have participated. The range of concerns expressed during the course of the public consultation covered a variety of environmental issues. Amongst them was the presence of perennial springs, the porous nature of the laterite plateau where permeation is a source of drainage for water collection and the existence of cashew plantations on which the livelihood of the local residents depends. Under the 2006 notification, the State Pollution Control Board<sup>27</sup> was required to collate the issues raised and the response of the project proponent, before submitting required documents to the EAC. Before the EAC, the project proponent in its presentation, indicated that the objections were only about employment opportunities. The project proponent clearly failed in its duty to appraise the EAC about serious environmental concerns which were raised during the course of the public consultation. D

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17. On the aspect of appraisal, it has been urged that the minutes of the EAC meeting recommending the grant of an EC contain, as learned counsel for the appellants submitted, “not a line on the EIA report”. The EAC was required to state its reasons for recommending the grant of an EC in terms of the 2006 notification. The reasons must indicate that G

<sup>27</sup>SPCB

- A there was an appraisal by the EAC. In the present case, the recommendations of the EAC are based on vague considerations such as: (i) larger public interest; (ii) non-concealment of the facts by the project proponent; and (iii) the delay which had occurred in the process. The submission urged is that the EAC, as an expert body, has failed to furnish reasons; acted on the basis of considerations which are not germane to the exercise of its functions and failed to apply its mind to relevant considerations including the environmental consequences of the project.

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- C 18. Finally, it has been submitted that under Section 16(h) of the National Green Tribunal Act 2010,<sup>28</sup> an appellate remedy is provided against the order granting EC. By virtue of the provisions of Section 20, the NGT is under a mandate to apply the principles of sustainable development, the precautionary principle and the polluter pays principle while passing any order, decision or making the award. An appeal lies before this Court under Section 22 from an order, decision or award of
- D the Tribunal on a substantial question of law as specified in Section 100 of the Code of Civil Procedure, 1908. The NGT, by virtue of its adjudicatory authority under Section 16(h), is entrusted with a duty to conduct a merits review. The failure to consider materials on a vital issue constitutes a substantial question of law as does the failure to consider vital issues in the proceedings before it. In the present case, the
- E Tribunal has merely relied on the process conducted by the EAC and its recommendations, abdicating its own jurisdiction to conduct a merits review.

- F 19. Mr ANS Nadkarni, learned ASG appearing on behalf of the MoEFCC urged that the EIA report, besides dealing with environmental concerns, addresses the impact of the project during both the phases of construction and operation. The EAC is sourced from experts from outside the government. The airport project was conceived in 1996; consultants were appointed and three sites were initially short-listed. It was in 2011 that the ToR were sought by and given to the project
- G proponent by the EAC. The draft EIA was placed for public consultation in 2014 and the final EIA report came to be submitted in 2015. The EAC deferred consideration of the EIA report on three occasions, including among them to consider the representation filed by the Federation of Rainbow Warriors.

H <sup>28</sup> NGT Act 2010

20. Countering the submission of the appellants on the non-disclosure of **reserved forests** in Form 1, the learned ASG urged the following submissions:

- (i) The submission of the appellants was not raised either in the public hearing or in the grounds urged before the NGT, but was addressed in the written submissions filed before the NGT and when a map of the Surveyor General of India was produced; A
- (ii) Table 2.1.5 of the EIA report states that there is no reserved forest in the State of Maharashtra while delineating ESZs within 15 kilometres from the project boundary. The report proceeded on the plain meaning of the Indian Forest Act 1927 according to which it is only upon the issuance of a notification under Section 20 that a reserved forest is declared; B
- (iii) As a matter of fact, within the area of 15 kilometres from the project boundary in the State of Maharashtra, no reserved forest stands declared under Section 20(2) of the Indian Forest Act 1927; C
- (iv) The decision in **Godavarman** (*supra*) which adopts the ordinary meaning of the expression ‘forest’ is site specific: the MoEFCC follows it scrupulously even if there is a notification under Section 4 while considering the diversion of forest land for non-forest uses. The decision in **Godavarman** (*supra*) has also been explained in the decision of this Court in **Construction of Park at Noida near Okhla Bird Sanctuary Anand Arya v Union of India**<sup>29</sup> (‘Okhla Bird Sanctuary’); D
- (v) The Guidance manual notices that environmental facets which have to be considered in relation to airport development are categorized into seven groups: (a) land use; (b) water quality; (c) air quality; (d) noise pollution; (e) biological environment; (f) socio-economic changes and occupational health; and (g) solid waste management. Baseline data of these environmental facets is ascertained through primary data extending to one season while secondary data extending to a year is gathered in terms of the Guidance manual and the distance specified in paragraph 4.1; and E
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<sup>29</sup> 2011(1) SCC 744

- A (vi) The EIA report records that the surrounding land use of the airport site is predominantly forest land. Land use and land cover specifically for a 10 kilometre radius from the airport site in Maharashtra is also set out in Chapter II of the EIA report, which indicates a reference to the forest area. Annexure IX of the EIA report incorporates land use with land cover maps, both for Goa and Maharashtra in the 10 kilometre radius, which includes forested areas within the State of Maharashtra; Annexure X of the EIA report elucidates surface water bodies both in Maharashtra and in Goa in the radius of 10 kilometres while Annexure XI provides a hydro-geo-morphological map of Goa and Maharashtra. In other words, it was urged that: (i) a legally designated forest under the Indian Forest Act 1927 requires a notification under Section 20; however, at the same time, (i?) the EIA report contains a clear disclosure of the presence of forest areas in both the States of Goa and Maharashtra within a radius of 10 kilometres including areas of dense forest.
- D 21. As regards the lack of **sampling points** in Maharashtra, the learned ASG urged that while all the six sampling points for ambient air quality within 10 kilometres of the study area were in Goa, the air quality which was being tracked was within the stipulated radius and was not confined to the State of Goa. Similarly, in studying the water environment, the ground water quality was measured at four locations in Goa within 10 kilometres of the study area. As regards the monitoring of noise, nine sampling points were chosen within the State of Goa in accordance with the Central Pollution Control Board<sup>30</sup> guidelines. The monitoring of noise environment, both at the construction and operational phases, has similarly been dealt with in the EIA report. The learned ASG urged that the choice of the sampling locations was not arbitrary: though the sampling points were not in Maharashtra, data required was tracked across a radius of 10 kilometres from the ARP which also included the State of Maharashtra.
- G 22. Dealing with the submission that no avi-faunal study was carried out, it was urged that the EIA report specifically deals with this aspect in paragraph 4.6 of Chapter II which elucidates that 385 species of plants belonging to 88 plant families were documented and identified in the 10 kilometres radial distance of the proposed project site. The study similarly

H <sup>30</sup> CPCB

dealt with faunal diversity. As many as 86 species of birds were observed in the course of the avi-faunal study, which has been elucidated in table 4.17 of the EIA report.

23. On the issue of ESZs, the learned ASG urged that there is a specific reference to the Kasturirangan report, under the heading of 'Environmentally Sensitive Zones' in Chapter IV of the EIA report. The EIA report notices that the proposed airport site falls in Pernem taluka of North Goa which has not been included in the ESZs mapped by the HLWG. Annexure XVI of the EIA report is a notification dated 13 November 2013<sup>31</sup> of the MoEF, which contains a list of villages (state, district and taluk-wise) identified by the HLWG. Paragraph 9 of the 2013 notification which has been issued under Section 5 of the Environment (Protection) Act 1986 specifies the categories of new and expansion projects which are prohibited in the ESZ. The proposed airport project does not fall within the prohibited category. Moreover, since the site of the proposed airport was not included in an ESZ, the prohibition imposed by the 2013 notification had no application.

24. The learned ASG has also urged that the report of the HLWG on Western Ghats, submitted on 15 April 2013, stipulates certain development restrictions in ESZs which are as follows:

- (i) A complete ban on mining, quarrying and sand mining;
- (ii) A complete ban on thermal power projects while hydro power projects may be permitted subjected to conditions;
- (iii) A strict prohibition on 'red category' industries;
- (iv) A prohibition on building and construction projects of 20,000 square metres;
- (v) All other infrastructure and development projects/schemes would be subject to the grant of an EC as Category 'A' projects under the 2006 notification; and
- (vi) All development projects within 10 kilometres of the Western Ghats ESZ and requiring ECs shall be regulated in accordance with the 2006 notification.

Based on the above recommendation of the HLWG, it was submitted that the proposed airport project, which falls under Category

<sup>31</sup> 2013 notification

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- A ‘A’ projects as delineated by the 2006 notification, is regulated by it and does not attract a blanket prohibition.

25. The submission that the EAC had failed to apprise the environmental consequences of the project and should have applied its mind to environmental concerns has been countered by relying on the

- B Minutes of the meetings conducted by the EAC:

(i) At its 149<sup>th</sup> meeting held on 26 June 2015, the EAC sought additional information on six distinct aspects upon receiving the presentation by the project proponent;

- C (ii) At its 151<sup>st</sup> meeting held on 7-9 September 2015, the EAC took note of a representation filed by the Federation of Rainbow Warriors and deferred further consideration of proposal for the grant of EC. The project proponent was called upon to submit a response to the issues raised in the representation; and

- D (iii) At its 152<sup>nd</sup> meeting held on 20 October 2015, the EAC dealt with clarifications issued by the project proponent to the concerns raised by Rainbow Warriors and proceeded to recommend the project for the grant of an EC subject to the stipulated conditions.

On 28 October 2015, the EC was granted by the Union Government. On the basis of the procedure which was followed by the

- E EAC, the following submissions have been urged:

(i) The application of mind by the EAC can be inferred and seen from the record;

(ii) Where considered necessary, the EAC sought information outside the EIA report;

- F (iii) Having appraised the EIA report, the EAC imposed site specific conditions; and

G (iv) The EAC consists of experts in the field and once it has been shown that all relevant considerations were borne in mind, this Court must give due deference to their view.

26. Mr. K K Venugopal, learned Attorney General, appearing on behalf of the State of Goa, urged the following submissions:

(i) The proposed project for setting up an international airport at Mopa has been on the drawing board for nearly two decades.

Successive studies were commissioned to assess the feasibility of the project from diverse sources, both within and outside government. This includes studies by private organisations as well as reports by the Airports Authority of India, the International Civil Aviation Organisation and the six member Committee constituted by the state government under the auspices of the Chief Minister;

- (ii) The setting up of an airport is an imminent need, since the existing airport at Dabolim has reached a saturation point and is unable to cater to the growing volume of passenger traffic into Goa;
- (iii) Tourism, it has been urged, is a major source of revenue for the state, with the banning of mining activities. A balance must be drawn between development and the environment. A distinction needs to be drawn between overwhelming environmental objections which are not reversible and incapable of amelioration, and cases such as the present where the environmental consequences of project are capable of being countered by suitable measures; and
- (iv) Objections primarily based on a defect in procedure should not be sufficient to quash a project conceived in public interest with vast benefits for the development of the state and for the members of the travelling public. It was urged that there was no major environmental objection and the challenge to the EIA report is not substantial enough to overcome the interests of three million passengers. The expected inflow is anticipated to reach 30 million in 2030.

27. On the aspect of the **felling of trees**, the learned AG submitted that following the order of the Bombay High Court, the Principal Chief Conservator of Forests passed an order on 2 April 2018 providing for: (i) enumeration of all trees covered by the project site; (ii) issuance of tree felling permission by the Deputy Chief Conservator of Forests; and (iii) plantation of ten times the number of trees felled under the supervision of the forest department. Thereafter, when the High Court was moved in a PIL, an order was passed on 13 June 2018 that the grant of permission for felling trees and the actual felling of trees will be carried out only after the NGT granted permission in the pending proceedings. A Miscellaneous Application seeking permission for the felling of trees was instituted before the NGT. In its final order dated 21 August 2018,

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- A the NGT disposed of both the appeals as well as the Miscellaneous Application. Moreover, the NGT has specifically dealt with the felling of trees in the course of its distinction.

28. On behalf of the concessionaire, Mr Parag P Tripathi, learned Senior Counsel and Ms Astha Mehta, learned counsel urged that upon

- B the grant of an EC, a concession agreement was executed by it with the State of Goa on 8 November 2016. Possession of the project site was handed over on 4 September 2017 and work commenced on 3 March 2018. The indicative capital for Phase 1 of the development is Rs 1,900 crores while the cost of the entire project is likely to be Rs 3,000 crores.
- C The State of Goa has incurred a total expenditure of Rs 240 crores for land acquisition, rehabilitation, road widening, consultancy and other related aspects while the concessionaire has thus far incurred an expenditure of Rs 230 crores as on 18 January 2019. 14.06 per cent of the project work has been completed and a manpower consisting of 1500 persons has been mobilized at the site together with plant and machinery.

- D 29. The concessionaire has stated that it has tied up with a consortium of banks and the servicing of the loans is linked to project milestones. As on 18 January 2019, the major works in progress include: (i) site preparation and earth works such as excavation and filling up of runways, taxiways, aprons and parking bays; (ii) PTB-foundations and column works; and (iii) excavation of the foundations for the ATC building. The concessionaire has submitted that apart from the plantation of ten trees for every single tree which has been felled, the forest department identified about 500 trees for transplantation, which process is being carried out. In this background, it has been submitted that the project should not be interdicted. The concessionaire, it has been urged, is committed to the completion of the project which accords with all the approvals that have been received.

30. The rival submissions now fall for our consideration.

**G C Scheme of the 2006 notification and the Guidance manual for Airports**

**C. 1 EIA Process**

31. The objective of the EIA process is to ensure that environmental and developmental concerns are appropriately balanced on the basis of the most accurate information available.

32. The Constitution (Forty-second Amendment) Act 1976, which came into force with effect from 3 January 1977, inserted Article 48A to the Constitution which mandates that the State shall endeavor to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51A(g) of the Constitution places a corresponding duty on every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures. Following the decisions taken at the United Nations Conference on the Human Environment held at Stockholm<sup>32</sup> in June 1972 in which India participated, Parliament enacted the Environment Protection Act 1986 to protect and improve the environment and prevent hazards to human beings, other living creatures, plants and property.

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33. On 27 January 1994, the MoEF, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section 3 of the 1986 Act read with clause (d) of sub-rule 3 of rule 5 of the Environment (Protection) Rules, 1986, issued a notification<sup>33</sup> imposing restrictions and prohibitions on the expansion and modernisation of any activity or new project unless an EC was granted under the procedure stipulated in the notification. Under the notification, any person undertaking a new project or expanding and modernizing an existing project was required to submit an application to the Secretary, Ministry of Environment and Forests, New Delhi.

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34. The application, which was to be made in accordance with the Schedule provided in the notification was to be submitted with a project report which included with it an EIA Report, an Environment Management Plan<sup>34</sup> and the details of a public hearing which had been carried out in accordance with guidelines issued by the Central Government from time to time. Limited exceptions to the public hearing process and the submission of an EIA were provided.

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35. MoEF as the Impact Assessment Agency<sup>35</sup> would then evaluate the application and reports submitted. The IAA was empowered to constitute a committee of experts, if necessary, which would have a right of entry into and inspection of the site during or after the commencement of the preparations relating to the project. The IAA

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<sup>32</sup> Stockholm Conference

<sup>33</sup> S.O. 60(E) ('1994 notification')

<sup>34</sup> EMP

<sup>35</sup> IAA

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- A would prepare a set of recommendations based on the documents furnished by an applicant within 90 days from the receipt of the documents and a decision would be conveyed to the applicant within 30 days thereafter. The EC granted was valid for a period of five years and a successful applicant was required to submit half-yearly reports to the IAA. Concealing factual data or submitting false or misleading information would make the application liable for rejection and would lead to the cancellation of any EC<sup>36</sup> granted on that basis.
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36. The 1994 notification was amended to reflect the growing protection accorded to the environment.

- C 37. On 14 September 2006, MoEF released another notification<sup>37</sup> in supersession of the previous notification.

38. The 2006 notification directed thus:

- D “...on and from the date of its publication the required construction of new projects or activities or the expansion or modernization of existing projects or activities listed in the Schedule to this notification entailing capacity addition with change in process and or technology shall be undertaken in any part of India only after the prior environmental clearance from the Central Government or as the case may be, by the State Level Environment Impact Assessment Authority, duly constituted by the Central Government under sub-section (3) of section 3 of the said Act, in accordance with the procedure specified hereinafter in this notification.”
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39. There are significant differences between the 1994 notification and the 2006 notification. They are:

- F (i) The 2006 notification categorically states that an EC must be granted by the regulatory authority *prior* to the commencement of any construction work or preparation of land;
- (ii) The 2006 notification divides all projects into Category ‘A’ and Category ‘B’ projects. The MoEFCC continues to regulate projects of a large scale (Category ‘A’), while the SEIAA regulate comparatively smaller projects (Category ‘B');
- G (iii) Under the 1994 notification, an applicant was required to submit an application along with all reports including the EIA report at the

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H <sup>36</sup> EC

<sup>37</sup> S.O. 1533 ('2006 notification')

time of the application. Under the 2006 notification, prior to the preparation of the EIA report by the applicant, the concerned authority formulates comprehensive ToR on the basis of the information furnished by the applicant addressing all relevant environmental concerns. This forms the basis for the preparation of the EIA report. A pre-feasibility report must also be submitted with the application unless exempted in the notification. Under the 2006 notification, a draft EIA is first prepared and it is only after the public consultation process that a final EIA report must be prepared addressing all the concerns raised during public consultation;

- (iv) The 2006 notification stipulates the creation of a regulatory body at the state level – SEIAA comprising members with expertise in the field of environmental laws which is charged with granting ECs for Category ‘B’ projects;
- (v) Under the 1994 notification, the final approval was granted by the IAA. Under the 2006 notification, though the final regulatory approval is granted by the MoEFCC or the SEIAA, as the case may be, the approval is to be based on the recommendations of the EAC functioning in the MoEFCC or the State Expert Appraisal Committees<sup>38</sup> which are constituted for that specific purpose;
- (vi) Under the 2006 notification, the application can be rejected by the regulatory authority on the basis of the recommendation of the EAC or the SEAC, as the case may be, at the preliminary stage itself, prior to public consultation; and
- (vii) Under the 1994 notification, the public hearing process was overseen by the State Pollution Control Boards<sup>39</sup> which would constitute a public hearing panel for the purpose. Under the 2006 notification, the public consultation process is expanded to include the receipt of written comments from concerned persons. The public hearing component was to be overseen by the SPCBs or the Union Territory Pollution Control Committee<sup>40</sup>.

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<sup>38</sup> SEAC

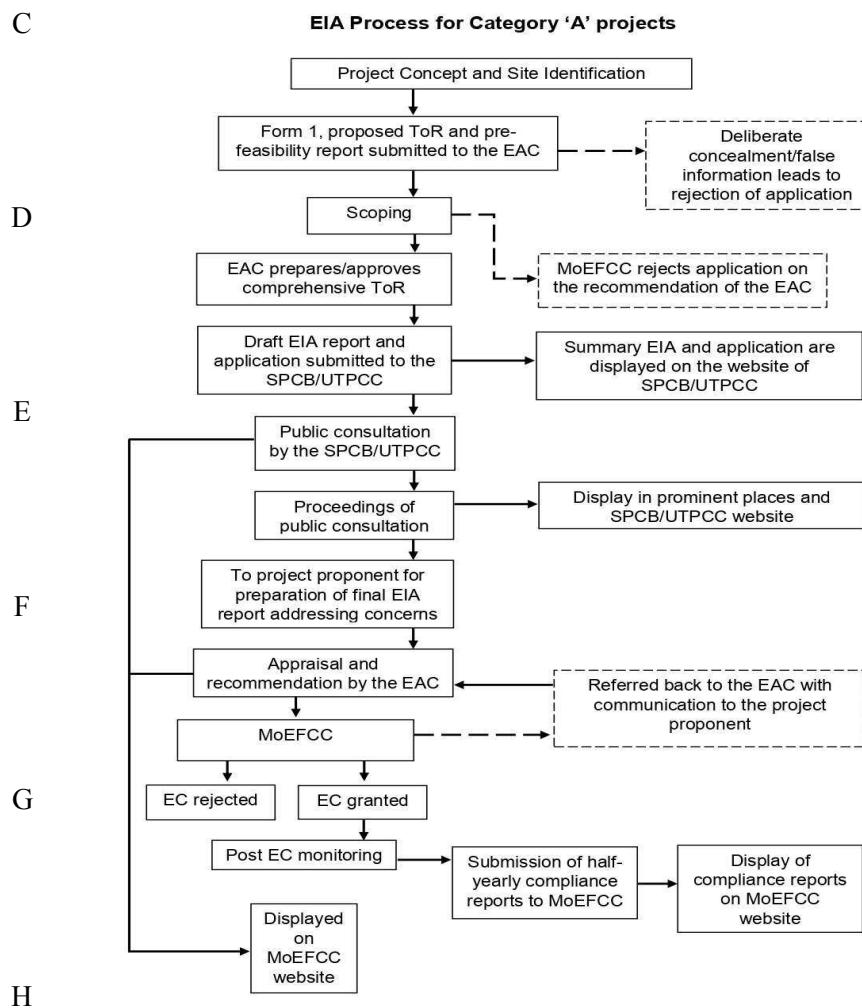
<sup>39</sup> SPCB

<sup>40</sup> UTPCC

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- A        40. The salient objective which underlies the 2006 notification is the protection, preservation and continued sustenance of the environment when the execution of new projects or the expansion or modernization of existing projects is envisaged. It imposes certain restrictions and prohibitions based on the potential environmental impact of projects unless prior EC has been granted by the concerned authority. The EC is required before any construction work, or preparation of land (except for securing the land) is started on the project or activity listed in the Schedule to the notification. The process stipulated under the 2006 notification is illustrated by the following flow-chart:
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41. Based on the spatial extent of the potential impact and the potential impacts on human health and natural and man-made resources, the 2006 notification categorizes all projects into Category ‘A’ and Category ‘B’ projects. The MoEFCC in the Central Government and the SEIAA at the state level constitute the regulatory authorities for the purposes of the notification. Category ‘A’ projects require prior environmental clearance from the MoEFCC, based on the recommendation of the EAC constituted by the Central Government for this purpose. Category ‘B’ projects will require prior environmental clearance from the SEIAA, based on the recommendations of the SEAC. Where no SEIAA or SEAC has been constituted, Category ‘B’ projects are treated as Category ‘A’ projects.

42. Once a prospective site has been identified by the applicant for the proposed project, all applications seeking an EC shall be made in the prescribed Form 1 and Supplementary Form 1A<sup>41</sup>, if applicable. The application must be submitted prior to the commencement of any construction activity, or preparation of the land at the site. A pre-feasibility report must also be submitted with the application except in the cases of construction projects in item 8 of the Schedule, for which a conceptual plan must be submitted. The significance of the information furnished by the applicant in Form 1 shall be explored shortly.

43. The process to obtain environmental clearance as stipulated by the notification for new projects<sup>42</sup> comprises a maximum of four stages, all of which may not apply depending on the specific case stipulated under the notification:

- 1) Screening;
- 2) Scoping;
- 3) Public Consultation; and
- 4) Appraisal.

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<sup>41</sup> Only for construction projects listed under item 8 of the Schedule

<sup>42</sup> Applications for EC for expansions or modernization of existing units as stipulated under the notification are made in Form 1 and shall be considered by the EAC or the SEAC within 60 days, which will decide on the due diligence necessary including the preparation of the EIA and public consultations and the application shall be appraised accordingly for the grant of environmental clearance.

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- A        44. **SCREENING** – This step is restricted only to Category ‘B’ projects. This stage entails an examination of whether the proposed project or activity requires further environmental studies for the preparation of an EIA for its appraisal prior to the grant of an EC. Those projects requiring an EIA are further categorized as Category ‘B1’ projects and remaining projects are categorized as Category ‘B2’ projects. Category ‘B2’ projects do not require an EIA. The categorization is in accordance with the guidelines issued in this regard by the MoEFCC from time to time.
- B        45. **SCOPING** – At this stage, the EAC or the SEAC, as the case may be, formulates detailed and comprehensive Terms of Reference which address all relevant environmental concerns for the preparation of the EIA. Amongst other things, the information furnished by the applicant in Form 1/Form 1A along with the proposed ToR by the applicant form the basis for the preparation of the ToR. The ToR must be conveyed to the applicant within 60 days of the receipt of Form 1, failing which, the ToR proposed by the applicant shall be deemed as approved. Significantly, applications for EC may be rejected by the regulatory authority at this stage itself on the recommendation of the EAC or the SEAC, as the case may be, and the decision along with reasons is to be communicated to the applicant within 60 days of receipt of application.
- C        46. **PUBLIC CONSULTATION** – Prior to this stage, a Summary EIA is prepared in the format given in Appendix IIIA on the basis of the ToR furnished to the applicant. This stage involves the process “by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view of taking into account all the material concerns in the project or activity design as appropriate.” The detailed procedure is stipulated in Appendix IV. Subject to the exceptions provided in the 2006 notification, all Category ‘A’ and Category ‘B1’ projects shall undertake the public consultation process.
- D        This stage comprises two components:
  - G        (i) A public hearing at the site or in its close proximity – district-wise to be carried out in the manner prescribed in Appendix IV; and

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- (ii) Procurement of written responses from concerned persons having a plausible stake in the environmental aspects surrounding the project. A

47. The State Pollution Control Board<sup>43</sup> or the Union Territory Pollution Control Committee<sup>44</sup> is charged with conducting the public hearing in the manner stipulated in Appendix IV and forwarding the proceedings to the regulatory authority within 45 days of a request from the applicant. The regulatory authority is empowered to engage another public agency or authority to carry out the process within a further period of forty-five days in case the SPCB or the UTPCC does not adhere to the prescribed time period stipulated in the notification. The public hearing should be arranged in a “systematic, time bound and transparent manner” to ensure the “widest possible public participation at the project site(s) or in its close proximity District-wise”. The public hearing proceeding is filmed and a copy of the video is submitted to the concerned regulatory authority. B

48. Within seven days of receiving a written request to initiate the public consultation process, the SPCB or the UTPCC shall place the Summary EIA and the application on their website and invite responses. The concerned authority may also make use of other appropriate media in addition to publication on their website to ensure wide publicity of the project. On a written request from any concerned person, the authority will make available a hard copy of the Draft EIA for inspection at a notified place during office hours till the date of the public hearing. A duty is placed on the authority to forward all responses and comments received at this stage to the applicant through the quickest available means. C

49. After the public consultation process, the applicant is duty bound to address all the material environmental concerns expressed during the process and make appropriate changes to the Draft EIA and EMP. The applicant shall then forward the final EIA report to the regulatory authority to initiate the next stage. Alternatively, the applicant may submit a supplementary report to the Summary EIA and EMP. D

50. **APPRAISAL** - This stage involves detailed scrutiny by the EAC or the SEAC of all the documents submitted by the applicant for the E

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<sup>43</sup> SPCB

<sup>44</sup> UTPCC

- A grant of EC. The appraisal is carried out in a transparent manner in a process to which the applicant shall be invited for furnishing clarification in person or through an authorized representative. Appendix V stipulates that the following documents are also submitted to the regulatory authority:
- (i) Final EIA Report
- B (ii) A copy of the video tape or CD of the public hearing proceedings
- (iii) A copy of the final layout plan
  - (iv) A copy of the project feasibility report.
- C 51. The regulatory authority must examine the documents “strictly with reference to the ToR” and communicate any inadequacy to the EAC or the SEAC, as the case may be, within 30 days of receipt of the documents. Within sixty days of the receipt of all the documents, the EAC or the SEAC, as the case may be, shall complete the appraisal process as prescribed in Appendix V. Within the next fifteen days, the EAC or the SEAC shall make categorical recommendations to the concerned regulatory authority to either grant the EC on the stipulated terms and conditions *or* reject the application, together with reasons. The appraisal of projects which are not required to undergo the public consultation process or the submission of an EIA is to be carried out on the basis of the prescribed application Form 1 or Form 1A, as applicable.
52. The MoEFCC or the SEIAA shall thereafter consider the recommendations of the EAC or the SEAC and convey its decision to the applicant within 45 days of receipt of the recommendations. The regulatory authorities shall *normally* accept the recommendations of the EAC or the SEAC, as the case may be. Where there is a disagreement, the regulatory authority shall ask for a reconsideration of the recommendation within 45 days of the receipt of the recommendations. This decision shall be conveyed to the applicant. The EAC or the SEAC shall then reconsider its recommendation within a further period of 60 days and make its recommendations to the regulatory authority. The regulatory authorities shall then take a decision after considering the views communicated to it and convey the decision to the applicant within the next 30 days.

53. If no decision is communicated to the applicant within the time prescribed, the applicant may proceed according to the recommendation of the EAC or the SEAC recommending either the grant or rejection of the EC. The decision of the regulatory authority and the final recommendations of the EAC or the SEAC shall be public documents on the expiry of the prescribed timelines. Deliberate concealment and/or the submission of false or misleading information material to the steps involved in the grant of an EC make the application liable for rejection and cancellation of any EC granted on that basis.

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54. The 2006 notification embodies the notion that the development agenda of the nation must be carried out in compliance with norms stipulated for the protection of the environment and its complexities. It serves as a balance between development and protection of the environment: there is no trade-off between the two. The protection of the environment is an essential facet of development. It cannot be reduced to a technical formula. The notification demonstrates an increasing awareness of the complexities of the environment and the heightened scrutiny required to ensure its continued sustenance, for today and for generations to come. It embodies a commitment to sustainable development. In laying down a detailed procedure for the grant of an EC, the 2006 notification attempts to bridge the perceived gap between the environment and development.

55. It is for this reason that the EAC and SEAC comprise experts in the field of environmental law. The Chairperson of the EAC shall be a person who is an “outstanding and experienced environmental policy expert or expert in management or public administration with wide experience in the relevant development sector”. Appendix VI to the 2006 notification stipulates that the EAC and the SEAC comprise 15 members who are either ‘experts’ or ‘professionals’. Experts must have atleast 15 years of relevant experience in the field or an advanced degree (PhD) with 10 years of relevant experience. Where experts are not available, professionals may be appointed to the EAC.

56. The EAC and the SEAC are charged with evaluating the information submitted by the applicant in Form 1/Form 1A and preparing comprehensive ToR which guide the preparation of the EIA reports. Given that these bodies comprise experts in the field of environmental

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- A law, the recommendation of the EAC or the SEAC to grant EC to an applicant or reject the application is *normally* accepted by the regulatory authority.

57. The regulatory authority at the state level (SEIAA) which is charged with the approval or rejection of an application for EC comprises three members who possess the qualifications in the field as prescribed in Appendix VI. Significantly, sub clause (7) of paragraph 3 of the 2006 notification stipulates that all decisions of the SEIAA shall be unanimous and taken in a meeting. Given the environmental consequences of a proposed project, no difference of opinion is provided for in the grant of an EC at the state level. It is further mandated that the project management submit half-yearly compliance reports to the regulatory authority in respect of the EC and conditions.

58. Under the 2006 notification, the process of obtaining an EC commences from the production of the information stipulated in Form 1/ Form 1A. Crucial information regarding the particulars of the proposed project is sought to enable the EAC or the SEAC to prepare comprehensive ToR which the applicant is required to address during the course of the preparation of the EIA. Some of the information sought is produced thus:

- E (i) Construction, operation or decommissioning of the project involving actions, which will cause physical changes in the locality (topography, land use, changes in water bodies, etc.);  
(ii) Use of natural resources for construction or operation of the Project (such as land, water, materials or energy, especially any resources which are non-renewable or in short supply);  
F (iii) Use, storage, transport, handling or production of substances or materials, which could be harmful to human health or the environment or raise concerns about the actual or perceived risks to human health;  
G (iv) Production of solid wastes during construction, operation or decommissioning;  
(v) Release of pollutants or any hazardous, toxic or noxious substances to air;

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- (vi) Generation of noise and vibration, and emissions of light and heat; A
- (vii) Risks of contamination of land or water from releases of pollutants into the ground or into sewers, surface waters, groundwater, coastal waters or the sea;
- (viii) Risk of accidents during construction or operation of the project, which could affect human health or the environment; and B
- (ix) Environment sensitivity which includes, amongst other things, the furnishing of the following details:
  - a. Areas protected under international and national legislation;
  - b. Ecologically sensitive areas; and C
  - c. Areas used by protected, important or sensitive species of flora or fauna.

59. Under the 2006 notification, the EC process is based on the information provided by the applicant in Form 1. That the information provided in Form 1 is crucial can be borne from the following circumstances:

- (i) The EAC or the SEAC, as the case may be, formulates comprehensive ToRs on the basis of the information furnished in Form 1 which addresses all possible environmental concerns. It is on the basis of the ToR, that further studies and the EIA are carried out on the impact of the proposed project on the environment; E
- (ii) At the appraisal stage, the regulatory authority examines the documents submitted by the applicant “strictly with reference to the ToR” and communicates any inadequacy to the EAC or the SEAC; F
- (iii) Category B2 projects, which do not require scoping, are evaluated by the SEAC on the basis of the information furnished by the applicant in Form 1 alone;
- (iv) The appraisal of all projects or activities which are not required to undergo public consultation, or submit an EIA report, shall be carried out on the basis of the prescribed application Form 1 and Form 1A as applicable; and G

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- A (v) An application for extension of the validity of the EC for certain projects is to be made by submitting a revised Form 1 within the validity period.

60. The information provided in Form 1 serves as a base upon which the process stipulated under the 2006 notification rests. An applicant B is required to provide all material information stipulated in the form to enable the authorities to formulate comprehensive ToR and enable concerned persons to provide comments and representations at the public consultation stage. The depth of information sought in Form 1 is to enable the authorities to evaluate all possible impacts of the proposed project C and provide the applicant an opportunity to address these concerns in the subsequent study. Missing or misleading information in Form 1 significantly impedes the functioning of the authorities and the process stipulated under the notification. For this reason, any application made or EC granted on the basis of a defective Form 1 is liable to be rejected immediately. Clause (vi) of paragraph 8 of the notification provides thus:
- D “Deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or E cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice.”

### C.2 Guidance manual for airports

- F 61. In February 2010, the MoEF brought out its Guidance manual G for airports. The need for a sector specific manual arose because the 2006 notification “re-engineered the entire EC process” under its earlier avatar of 1994 and new sectors were incorporated into the ambit of the EC process. The 2006 notification noted that as many as 39 developmental sectors require prior ECs. Sector specific manuals, it was hoped, would bring about standardisation in the quality of appraisal and obviate potential inconsistencies between the work performed by SEIAAs and SEACs. Chapter IV of the Guidance manual, which is titled ‘Description of Environment’, prescribes the study area for carrying out an EIA:
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“Primary data through measurements and field surveys; and secondary data from secondary sources are to be collected in the study area within 10 km radius from Aerodrome Reference Point (ARP). Primary data should cover one season other than monsoon and secondary data is to cover one full year. The basis for selection of these criteria is that the aircraft gains a height of 1000ft in this area below which noise and air pollution are generated maximum during its take off stage. Secondary data should be collected within 15 km aerial distance for the parameters as specifically mentioned at column 9 (III) of Form I of EIA Notification, 2006. Details of secondary data, the method of collection of secondary data, should be furnished. Similarly, the proposed locations of monitoring stations of water, air, soil and noise etc should be shown on the study area map.”

62. Baseline data of environmental parameters which may be affected by airport activities is collected through primary monitoring in the study area and through secondary sources. The baseline data facilitates the evaluation of the predicted impact on environmental attributes in the study area by using scientific analysis and EIA methodologies. The object is to also aid in the preparation of an EMP that would outline measures for improving environmental quality as well as retain the scope for future expansions in a sustainable manner. The Guidance manual specifically requires collection of baseline data on the following: (i) land environment; (ii) water environment; (iii) air environment; (iv) noise environment; (v) biological environment; (vi) socio-economic environment and (vii) solid waste.

The importance of collecting data on land environment is emphasised in the following extract:

“The terrain and hill slope, general slope and elevation of the area, the flow direction of streams and rivers, the water bodies and wet lands and the vegetation which together describe the physiography of the land, will control the drainage pattern in the region. Land farms, terrain, may get affected due to construction of airport. It may require large scale quarrying, dredging and reclamation, which may cause changes in the topography. This in turn may affect the drainage pattern of the land / terrain. Baseline data pertaining to

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- A existing land at the proposed project area including the description of terrain hill slopes, terrain features, slope and elevation are to be collected. Study of land use pattern, habitation, cropping pattern, forest cover, environmentally sensitive places etc., is to be undertaken by employing remote sensing techniques and ground truthing. Ecological features of forest area; agricultural land; grazing land; wildlife sanctuary land & national parks; migratory routes of fauna; water bodies; and drainage pattern including the orders of the drain and water sheds are to be described. Settlements in the study area may be delineated with respect to ARP on the site map. High rise buildings, industrial areas and zones, slaughter houses and other features of flight safety importance may also be marked on the map. Secondary data from Central Water Board GOI; State ground water department, State Irrigation Department is to be obtained. Geomorphology of the region is to be clearly delineated. Study of land use patterns, habitation, cropping pattern, and forest cover data is undertaken. Information on the location of water bodies, drainage, forests, surface travel routes with respect to the project site is obtained within the study area and plotted on a map. This map will show the natural slopes and the drainage patterns, which give a guideline while planning the drains in the airport project. The drains help in discharge of storm water from the airport to avoid flooding and water logging in the project area.”
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The study of the water environment is necessitated for the following reasons:

- F “Ground water quality is important, as change in its chemical parameters will affect the water quality. Airport activities during construction / operation may have impact on ground water quality. Due to airport construction existing low areas may be reclaimed with dredged spoil. The pollutants from dredged spoil are likely to enter into the ground water. This is likely to increase sedimentation of pollutants in airport area, which may migrate in time to the neighbouring ground water. Also runoff from solid waste if any, may percolate into the ground and may contaminate the ground water. Hence, they need to be studied through primary surveys and secondary sources. Monitoring locations are to be finalized as per CPCB norms which can represent the baseline conditions.”
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On the aspect of air environment, the Guidance manual emphasises A  
that:

“Aircraft engines produce emissions that are similar to other emissions resulting from any oil-based fuel combustion. These, like any exhaust emissions, can affect local air quality at ground level. It is emissions from aircraft below 1,000ft, above the ground (typically around 3km from departure or, for arrivals, around 6km from touchdown) that are chiefly involved in influencing local air quality. These emissions disperse with the wind and blend with emissions from other sources such as emissions from domestic sources, emissions from industries and from surface transport.” B

Local emissions attributed to aircraft operations at airports include Oxides of Nitrogen<sup>45</sup>, Carbon Monoxide<sup>46</sup>, Hydrocarbons<sup>47</sup>, Sulphur Dioxide<sup>48</sup>, and particulate matter (PM 10 and PM 2.5). C

63. The Guidance manual brings into focus the biological environment. It acknowledges that airport operations may alter ecosystems, threaten endangered species and disturb the movement and breeding patterns of wildlife. In this context, the collection of baseline data on sensitive habitats and wild or endangered species in the project area is contemplated. The Guidance manual stipulates thus: D

“Airport operations may cause change in local ecosystems, threaten endangered species, and disturb movements and breeding patterns of local wildlife. Airports are located within a variety of settings (both urban and rural), which support habitats and species of their own, some of which will have direct interaction with those located on the airport and vice versa. Some local areas will also be designated for their nature conservation value. The biological environment of the airport should hence be seen as an integral component of the wider landscape scale ecological network. To accomplish this, E

- Baseline data from field observations for various terrestrial and aquatic systems are to be generated.
  - Comparison of the data with authentic past records to understand changes is undertaken.
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<sup>45</sup> NO

<sup>46</sup> CO<sub>x</sub>

<sup>47</sup> HC

<sup>48</sup> SO<sub>2</sub>

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  - Environmental components like land, water, flora and fauna are characterized and,
  - The impact of airport development on vegetation structure in and around project site is to be understood.
- B Data on sensitive habitats, wild or endangered species in the project area also is to be collected from Zoological Survey of India (ZSI), Botanical Survey of India (BSI), Wildlife Institute of India (WII) and Ministry of Earth Sciences. Wildlife symbolizes the functioning efficiency of the entire eco system. Just as wild flora needs special treatment for preservation and growth, wild fauna as well deserves specific conservatory pursuits for posterity. As per Wildlife Act (1972), the various wild animals are enlisted in the schedules of wildlife Act based on the intensity of threat to them as rare, endangered, threatened, vulnerable etc. Primary data on survey of the wild animals and birds in the study area is collected and identified with the classification into various schedules taken from secondary data.”
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- D 64. It is in the backdrop of the 2006 notification and the Guidance manual that it becomes necessary to assess the process that was adopted in the present case and its outcome.

#### **D Forests**

- E 65. The essence of the challenge to the EC is two-fold:
  - (i) Form 1, which was filed by the project proponent, did not contain any disclosure of the name or identity of forests within an aerial distance of 15 kilometres. Item 2 under the heading of ‘Environmental Sensitivity’ requires a clear disclosure of “areas which are important or
  - F sensitive for ecological reasons – wet lands, water sources or other water bodies, coastal zone, biospheres, mountains and forests”; and
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  - (ii) Table 2.1 of Chapter II of the EIA report delineates ESZs within an aerial distance 15 kilometres from the project boundary. For the State of Goa, the table indicates the presence of forests but not of protected forests. For the State of Maharashtra, Table 2.1 indicates that there were neither reserved nor protected forests within 15 kilometres from the project boundary.

- H 66. The learned ASG made an earnest effort to support this by urging that a reserved forest is one which is notified under Section 20 of

the Indian Forest Act 1927. The issuance of a notification under Section 4, it was urged, is indicative only of an intent and a forest stands reserved under sub-section (2) of Section 20 only upon the issuance of a notification. The ASG submitted that the reliance which the appellants placed on the Survey of India map is misplaced as, in the absence of a notification under Section 20, a forest cannot be regarded as being reserved.

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In the alternative, it was urged that as a matter of fact, the EIA report (save and except Table 2.1) takes into account the forest cover surrounding the site and within the prescribed aerial distance. As regards Form 1, the learned ASG submitted that at that stage, the project proponent may not be expected to be aware of all the features of the environment and hence the omission to refer to forests and other areas which are sensitive ecologically should be discountenanced.

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67. We cannot gloss over the patent and abject failure of the State of Goa as the project proponent in failing to disclose wet lands, water sources, water bodies, biospheres, mountains and forests within an aerial distance of 15 kilometres as required by Form 1. The disclosure in Form 1 constitutes the very foundation of the process which is initiated on the basis of the information supplied by the project proponent. Following the disclosure in Form 1, ToR are formulated, and this leads to the preparation of the EIA report. A duty is cast upon the project proponent to make a full, complete and candid disclosure of all aspects bearing upon the environment in the area of study. The project proponent cannot profess an ignorance about the environment in the study area. The project proponent is bound by the highest duty of transparency and rectitude in making the disclosures in Form 1.

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68. There can be no manner of doubt that Form 1 is an important ingredient in the entire process envisaged under the 2006 notification. Hence, clause (vi) of para 8 of the 2006 notification provides that deliberate concealment or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection and lead to the cancellation of a prior EC granted on that basis. The declaration which is required of the project proponent is to a similar effect.

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69. We are unable to accept the submission that the disclosure required was of reserved forests comprehended within a notification

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- A under sub-section (2) of Section 20 of the Indian Forest Act 1927. Form 1 requires a disclosure of areas which are important or sensitive for ecological reasons, among them, being “forests”. The expression “forests” is used without reference to a statutory or artificial definition and must hence incorporate a meaning which bears upon the ordinary description of the term. The expression “forests”, means a forest as commonly understood, without reference to a notification under the Indian Forest Act 1927 or any other statutory enactment. Such an interpretation will subserve the purpose of an EIA. The purpose is to ensure that all relevant facets of the environment are noticed, that base-lines are documented, and that the potential impact of a project or activity on the environment is assessed. Forests are forests without reference to recognition in a statutory form devised for a specific purpose.

70. The need to construe the expression ‘forests’ in a broad and generic sense was emphasized in the decision of this Court in **Godavarman** (*supra*). This Court held:

- D “4. The Forest (Conservation) Act, 1980 was enacted with a view to check further deforestation which ultimately results in ecological imbalance; and therefore, the provisions made therein for the conservation of forests and for matters connected therewith, must apply to all forests irrespective of the nature of ownership or classification thereof. The word ‘forest’ must be understood according to its dictionary meaning. This description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest (Conservation) Act. The term ‘forest land’, occurring in Section 2, will not only include ‘forest’ as understood in the dictionary sense, but also any area recorded as forest in the government record irrespective of the ownership.”

71. Subsequently, in **Okhla Bird Sanctuary** (*supra*), this Court explained the position:

- G “Almost all the orders and judgments of this Court defining “forest” and “forest land” for the purpose of the FC Act were rendered in the context of mining or illegal felling of trees for timber or illegal removal of other forest produce or the protection of national parks and wildlife sanctuaries.”

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In **Okhla Bird Sanctuary** (supra), trees had been planted with an intent to set up an urban park. This Court found it “inconceivable” that those trees would turn into a forest “within a span of ten to twelve years and the land, which was for agricultural use would be converted into forest land”. Hence, the decision was based on a factually distinguishable situation. The decision emphasises that in construing the term forest, courts must have due regard both to text and to context.

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72. In the context of the 2006 notification and the underlying purpose of facilitating an EIA report, the expression ‘forests’ must receive its ordinary and natural connotation. The effort must not be to overlook and destroy forests but to notice and protect them.

73. Having said this, we must delve into the alternate submission that the EIA report does, as a matter of fact, consider the prevalence of forested areas both in Goa and in Maharashtra within the study area. In this context, para 2 of the Executive Summary introducing the EIA report acknowledges that the “surrounding land use of the airport site is predominantly forest land”. In the context of land environment, the EIA report records that “forest is the predominant land use in the study area”. The EIA report acknowledges that territories in Maharashtra fall within one kilometre from the proposed greenfield airport. Villages falling in Goa and Maharashtra within the 10 kilometre radius were considered for assessment. Para 2.3.1 of Chapter II deals with land use. Land use/ land cover statistics for a 10 kilometre radius from the Mopa airport in the State of Maharashtra have been tabulated. Among them is the following:

Sr.No.	Description	Area (Sq.M.)	Area (Ha)
5	Forest-Tree Clad Area-Dense	66341913.84	6634.19

Similarly para 4.4 in Chapter IV, which is titled ‘description of environment statistically’, provides thus:

“Surrounding land use of the airport site is predominantly forest land. The northern and eastern side of site is reserve forest areas, whereas western side is barren and village cultivated land. The existing land use plan is attached as Annexure IX.”

- A 74. The presence of a “diverse system set as dense and open forest, cultivated lands, sand dune vegetation, wet lands and human habitation” is noticed in para 4.6 dealing with the biological environment. Annexure IX to the EIA report provides land use/land cover maps for both Goa and Maharashtra in the study area. The maps in Annexure IX cover forested areas in Maharashtra and Goa within an aerial boundary of 10 kilometres from the project site. Annexure XI contains the hydro-geo-morphological maps for Goa and Maharashtra.
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75. Though the EIA report adverts to the presence of forests within the study area in Goa and Maharashtra, we have to consider whether this by itself warrants the grant of an EC inspite of the fact that

- C there has been a patent failure on part of the project proponent to make a transparent and candid disclosure of material facts in Form 1. Information furnished in Form 1 is crucial to the preparation of the ToR by the EAC. The EAC comprises of experts. It is constituted, among other reasons, for the specific purpose of assessing the information
- D furnished in Form 1 and preparing comprehensive ToR. There is an intrinsic link between the disclosures in Form 1 which constitute the basis for formulating the ToR and between the ambit of the EIA report required by the ToR and the final EIA report. The ToR guide the preparation of the EIA report. A failure to disclose information in Form 1 impairs the functioning of the EAC in the preparation of the ToR and in consequence, leads to preparation of a deficient EIA report.
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76. The submission that the EIA report deals with the prevalence of forested areas and warrants the grant of an EC cannot be accepted for yet another reason. EACs and SEACs are conferred with the authority to reject applications for the grant of an EC at the stage of

- F scoping itself, prior to the preparation of the ToR. The application may be rejected on the basis of the information furnished by the project proponent in Form 1. Claiming an EC as a matter of right merely because the EIA report has assessed parameters that were omitted in Form 1, bypasses the authority of the EAC and SEAC to reject an application at
- G the preliminary stage and cannot be countenanced. The regulatory authority is required to assess the final documents submitted to it “strictly with reference to the ToR” and communicate to the EAC and SEAC any discrepancies between the EIA report and the ToR. A deficient ToR on the basis of the non-disclosure of material information in Form 1 impedes this process.
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77. The failure on part of a project proponent to disclose material information in Form 1 as stipulated under the 2006 notification has a cascading effect on the salient objective which underlies the 2006 notification. The 2006 notification represents an independent code with the avowed objective of balancing the development agenda with the protection of the environment. An applicant cannot claim an EC, under the 2006 notification, based on substantial or proportionate compliance with the terms stipulated in the notification. The terms of the notification lay down strict standards that must be complied with by an applicant seeking an EC for a proposed project. The burden of establishing environmental compliance rests on a project proponent who intends to bring about a change in the existing state of the environment. Whereas, in the present case, there has thus been a patent failure on part of the project proponent to make mandatory disclosures stipulated in Form 1 under the 2006 notification, that must have consequences in law. There can be no gambles with the environment: a ‘heads I win, tails you lose’ approach is simply unacceptable; unacceptable if we are to preserve environmental governance under the rule of law.

#### **E Ecologically Sensitive Zones (ESZs)**

78. The substratum of the case of the appellants is based on the following extract contained in the EIA report:

“Ecologically Sensitive Zones Ministry of Environment and Forests had constituted a High Level Working Group (HLWG) under the Chairmanship of Dr. K. Kasturirangan, Member (Science), Planning Commission vide office order dated 17.08.2012 to study the preservation of the ecology, environmental integrity and holistic development of the Western Ghats in view of their rich and unique biodiversity. HLWG submitted its report to the MoEF on 15th April 2013. HLWG identified 37% of natural landscape having high biological richness, low forest fragmentation, low population density and containing Protected Areas, World Heritage Sites and Tiger and Elephant corridors as an Ecologically Sensitive Areas (ESA). The present proposed airport site is falling under Pernem taluka of North Goa district. The Pernem taluka has not been included in the Ecologically Sensitive Areas submitted by HLWG. The MoEF order on ESA is attached as Annexure XVI.”

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- A According to Ms Shenoy, the EIA report notices the Kasturirangan report submitted on 15 April 2013. The submission is that the EIA report has conveniently glossed over the areas adverted to by the Kasturirangan report as an ESZ. This includes those areas which fall within the study area on the ground that Pernem taluka, where the project site is situated, has not been included as an ESZ. In this context, reliance is placed on a draft notification dated 3 October 2018 issued by MoEFCC under which the Union Government has proposed to notify 56,825 square metres spread across six states – Gujarat, Maharashtra, Goa, Karnataka, Kerala and Tamil Nadu as the Western Ghats ESZ. The preamble to the draft notification adverts to the steps taken by the Union Government between 2013 and 2016 in pursuance of the report of the HLWG. This includes draft notifications issued on 10 March 2014 and 4 September 2015. The draft notification dated 3 October 2018 emphasises the importance of the Western Ghats as a global biodiversity hot spot:
- D "WHEREAS, Western Ghats is an important geological landform on the fringe of the west coast of India and it is the origin of Godavari, Krishna, Cauvery and a number of other rivers and extends over a distance of approximately 1500 kilometres from Tapti river in the north to Kanyakumari in the south with an average elevation of more than 600 metres and traverses through six States namely, Gujarat, Maharashtra, Goa, Karnataka, Kerala and Tamil Nadu;
- E AND WHEREAS, Western Ghats is a global biodiversity hotspot and a treasure trove of biological diversity and it harbours many endemic species of flowering plants, endemic fishes, amphibians, reptiles, birds, mammals and invertebrates and it is also an important center of evolution of economically important domesticated plant species such as pepper, cardamom, cinnamon, mango and jackfruit;
- F AND WHEREAS, Western Ghats has many unique habitats which are home to a variety of endemic species of flora and fauna such as Myristica swamps, the flat-topped lateritic plateaus, the Sholas and wetland and riverine Eco-systems;
- G AND WHEREAS, UNESCO has included certain identified parts of Western Ghats in the UNESCO World Natural Heritage List because Western Ghats is a Centre of origin of many species as
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also home for rich endemic biodiversity and hence a cradle for biological evolution;” A

79. Ms Shenoy has emphasised that sixteen villages in the Taluka of Sawantwadi of the district of Sindhudurg which fall within the study area have been mapped as an ESZ in the annexure to the draft notification dated 3 October 2018. They are: B

“State	District	Taluk	Village Name
Maharashtra	Sindhudurg	Sawantwadi	Tamboli
Maharashtra	Sindhudurg	Sawantwadi	Kumbhavade
Maharashtra	Sindhudurg	Sawantwadi	Degave
Maharashtra	Sindhudurg	Sawantwadi	Banda
Maharashtra	Sindhudurg	Sawantwadi	Padve Majgaon
Maharashtra	Sindhudurg	Sawantwadi	Ronapal
Maharashtra	Sindhudurg	Sawantwadi	Padve
Maharashtra	Sindhudurg	Sawantwadi	Dandeli
Maharashtra	Sindhudurg	Sawantwadi	Madura
Maharashtra	Sindhudurg	Sawantwadi	Dingne
Maharashtra	Sindhudurg	Sawantwadi	Aros
Maharashtra	Sindhudurg	Sawantwadi	Galel
Maharashtra	Sindhudurg	Sawantwadi	Kondure
Maharashtra	Sindhudurg	Sawantwadi	Satarda
Maharashtra	Sindhudurg	Sawantwadi	Dongarpal
Maharashtra	Sindhudurg	Sawantwadi	Sateli Tarf Soundal”

80. A comparison of the above villages with Annexure IX of the EIA report indicates that several of the above villages which have been mapped as ESZs in the draft notification fall within the 10 kilometre buffer from the project site. Hence, the submission of Ms Shenoy merits a close analysis. F

81. The EIA report has rested content with the observation that Pernem taluka, where the project site is situated, is not an ESZ. That is not sufficient or adequate, since the purpose of the EIA report is to make an assessment of ESZs which fall within the study area. Mr Nadkarni’s response to the above submission is that: (i) neither the Mopa plateau nor Pernem taluka constitute a part of the Western Ghats; (ii) the HLWG chaired by Dr Kasturirangan recommended a prohibition of specified activities while for other activities, the 2006 notification was G

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- A required to be followed; (iii) the EIA report, while considering the project, has also adverted to the Kasturirangan report; and (iv) infrastructure projects except in the prohibited category are permissible, subject to an EIA.

82. The report of the HLWG dated 15 April 2013 recommends
- B that there should be a complete ban on mining, quarrying and sand mining activity in the ESZ. Similarly, it recommends that no thermal power project should be allowed in ESZs and that all ‘red category’ industries should be strictly banned. Building and construction projects of 20,000 square metres and above should not be allowed. However, all other infrastructure and development projects, which have been recommended, should be subject to the grant of ECs under Category ‘A’ projects of the 2006 notification.

83. The Union Government issued a notification on 13 November 2013 in pursuance of Section 5 of the Environment (Protection) Act 1986 to the effect that from the date of the issuance of those directions, no pending case or fresh case shall be considered by the EACs/MOEF or SEACs/SEIAAs covering the following industries:
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- (a) Mining, quarrying and sand mining;
- (b) Thermal power plants;
- E (c) Building and construction projects of 20,000 square metres area and above;
- (d) Township and area development projects with an area of 50 hectares and above and/or with a built-up area of 1,50,000 square metres and above; and
- F (e) ‘Red category’ industries.

84. The submission of the ASG is that there is no prohibition on setting up a Category ‘A’ project in an ESZ. An infrastructure project such as an airport does not fall within the range of prohibited activities.
- G What is necessary is that the project must be assessed in terms of the 2006 notification.

- H 85. The glaring deficiency which emerges from the EIA report is its failure to notice the existence of ESZs within a buffer distance of 10 kilometres of the project site. On one hand, the EIA report takes note of the HLWG report dated 15 April 2013. But, on the other hand, the EIA

report ignores the existence of ESZs within the study area on the ground that the **project site** is not situated in an ESZ. That, as we have seen, can never be accepted as an adequate response. The purpose and object of the EIA report is to map areas, understand their vulnerabilities, and conduct a study on a scientific basis of the impact of the proposed project on an ecologically sensitive terrain. The EIA report fails to meet a classical requirement of administrative law: to take into account a relevant consideration namely, that within the study area which has to be considered, there is the presence of ESZs.

86. In deducing the impact of a proposed activity on an ESZ, it is not sufficient to take recourse to a generic assessment of a proposed activity on the ecology of the study area. The EIA report must factor in those specific features which make an area ecologically sensitive. These would encompass all aspects of environmental concern which render the area ecologically sensitive. This would include wet lands, water sources, water bodies, costal zones, biospheres, mountains and forests. The vulnerabilities of each of them must be studied as distinctive components together with a holistic analysis of their existence in a chain of bio-diversity. Where an area is ecologically sensitive because of the presence of flora or fauna requiring protection, that must be specifically adverted to and studied. The deficiency of the EIA report emanates from its failure to notice that the purpose of the study was not only to determine whether the project site is ecologically sensitive. Confining itself to this aspect, the EIA report failed to consider a crucial and relevant consideration.

#### F Sampling Points

87. The submission of the appellants is that the Guidance manual requires the collection of primary data through measures and field studies in the study area within 10 kilometres radius from the ARP. Secondary data has to be collected within a 15 kilometres aerial distance for the parameters mentioned in Column 9(III) of Form 1 of the 2006 notification. In the present case, it was urged that not a single sampling station with reference to any of the parameters is situated in Maharashtra. As a result, no sampling sites for any of the parameters fall within 40% of the study area. Consequently, no primary data collection was done despite the carrying out of two samples in 2011 and 2014 respectively. In response to this submission, it has been urged that all sampling points were based on para 4.1 of the Guidance manual. As a result, it was submitted that

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- A areas within Goa and Maharashtra were studied along with impact studies. In order to assess the submission, it is necessary to refer to relevant aspects of the EIA report:

#### **F.1 Air quality**

88. In order to study the ambient air quality in terms of Suspended Particulate Matter, Respirable Particulate Matter, SO<sub>2</sub>, NO<sub>x</sub>, CO and HC, Ambient Air Quality monitoring stations were set up at six locations. They are at Sinechaadvin, Katwal, Mopa village, Pernem, Nagzor and Patradevi. All are in Goa. The location at Patradevi was on the border shared by Goa with Maharashtra. The study area extended to a radial distance of 10 kilometres from the ARP. We accept the submission of the ASG that they would hence cover areas falling within both Goa and Maharashtra. Para 4.1.2 of Chapter IV of the EIA report sets out the baseline data collected at the monitoring stations. Since the entire study area within a radius of 10 kilometres was considered for monitoring air quality, we accept the submission that the location of the sampling points within Goa did not preclude the monitoring of air quality within the study area.

#### **F.2 Water quality**

89. Para 4.2 of the EIA report states that ground water quality was measured at four locations: Mopa village, Pernem, Dargal and Patradevi marked within 10 kilometres of the study area. The surface water quality was measured at three locations: Chapora river, Tiraikol river and Nala near Mopa village within 10 kilometres of the study area. The impact assessment is contained in the EIA report. The Mopa plateau is at a height of 155 metres above mean sea level and water from the plateau flows down to the rivers in the State of Goa. The laterite plateau is an important source of drainage by providing natural channels for water. The impact of a greenfield airport on the closing of natural channels which feed the water bodies has not been scientifically mapped or studied.

#### **F.3 Noise quality**

- G 90. While monitoring the noise quality, the EIA report covered a radius of 10 kilometres. In order to obtain baseline data of noise quality, nine monitoring stations were chosen in the study area. While it is true that all nine locations were situated in the State of Goa, one (Patradevi) was situated on the border shared between Goa and Maharashtra. The

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EIA report contains an impact study and the study area covered includes A both the states.

#### F.4 Flora and fauna

91. The EIA report indicates that the area surrounding the site for the proposed airport has dense forests<sup>49</sup>. These total up to nearly 6,634.19 hectares<sup>50</sup>. Ms Shenoy has urged that it is impossible that the fauna found by the project proponent through both primary sampling and secondary sources was only limited to animals such as: domestic dog, cat and cattle, common house mouse, rat and mongoose, jackal and the three striped palm squirrel. This, in her submission, is a clear indication that the EIA report is faulty and clearly incorrect. B

92. While dealing with the above submissions, it is necessary to note that the Guidance manual contains a specific reference to the collection of data of sensitive habitats and wild/endangered species in the project area. The Guidance manual stipulates thus:

“Data on sensitive habitats, wild or endangered species in the project area also is to be collected from Zoological Survey of India (ZSI), Botanical Survey of India (BSI), Wildlife Institute of India (WII) and Ministry of Earth Sciences. Wildlife symbolizes the functioning efficiency of the entire eco system. Just as wild flora needs special treatment for preservation and growth, wild fauna as well deserves specific conservatory pursuits for posterity”. C

93. The grievance is that no data has been collected from the State of Maharashtra and all secondary data collected by the project proponent related only to the State of Goa. There is substance in the submission which has been urged on behalf of the appellant. A reading of the counter affidavit filed by the State of Goa would seem to support the appellant’s submission. It is stated:

“I say that several recognised publications and research papers were referred to in order to verify and assess the data collected, to name a few of the publications:

- i. Birds of Goa by Heinz Lainer & Rahul Alvares;

<sup>49</sup> See for instance para 2.0 of the executive summary and para 2.3.1 of Chapter I

<sup>50</sup> See Para 2.3.1, Chapter II

- A      ii. The Goan Jungle Book by Nirmal Kulkarni;  
iii. A photographic guide to Butterflies of Goa by Parag Ragnekar;  
iv. Flora of Goa, Diu, Daman, Dadra and Nagarhaveli (Vol.1) by RS Rao;
- B      v. Flora of Goa, Diu, Daman, Dadra and Nagarhaveli (Vol.2) by RS Rao;  
vi. Red data book published by Botanical Survey of India;  
vii. Study materials published in Goa ENVIS Centre were also referred.”
- C      The appellant, on the other hand, has sought to rely upon several independent studies including the following:
  - D      “a. A rapid survey to assess mammal presence at Barazan Plateau, Mopa, Goa, India conducted by Girish Punjabi (Wildlife Biologist) and Atul S Borker (Full Member of IUCN/SSC Otter Specialist Group) that Schedule I species such as gaur, leopard and Indian Pangolin; Schedule II species such as giant squirrel, common palm civet; Schedule III species such as sambar, wild pig and Schedule IV species such as Indian hare, Indian porcupine.
  - E      The report also mentions the presence of the Sawantwadi – Dodamarg wildlife corridor within the 10 km proposed project site.
    - F      b. Report on one day survey conducted to find evidence of Otter presence at Mopa, Goa conducted by Atul Borker (Full Member of IUCN/SSC Otter Specialist Group) that found that a perennial stream on the plateau had presence of the smooth coated otter, that falls within Schedule II of the Wildlife (Protection) Act, 1972.
    - G      c. Report on two days survey to find evidence of plant and bird species at Mopa Plateau conducted by Aparna Watve (Ecologist) and Sanjay Thakur (Wildlife Biologist) that found Schedule I species such as the Indian peafowl and the Dipcadi concanese which is critically endangered. The study clearly mentions that the EIA study is entire deficit as it does not accurately consider the flora and fauna of the area as well as the number of trees to be cut.”
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94. We find that the collection of both primary and secondary data of fauna in the EIA report was perfunctory. The primary study is not based on data collected from acknowledged sources such as the Zoological Survey of India, Wildlife Institute of India and Ministry of Earth Sciences as required under the Guidance manual. Similarly, as regard avi-faunal studies, the EIA report lists 385 plant species in table 4.15 of Chapter IV, titled ‘Description on Environment’. It also states that 86 species of birds were observed during the survey in the 10 kilometre study area from the proposed site. Column 9 (III) of Form 1 refers to “areas” in the following terms:

“areas which are used by protected, important or sensitive species of flora or fauna for breeding, foraging, nesting, resting, over wintering or migration”.

The above column was left blank by the project proponent in Form 1. According to the Guidance manual, secondary data has to be collected within an aerial distance of 15 kilometres for the parameters specifically specified in column 9(III) of Form 1 of the 2006 notification. This was evidently not done. A careful avi-faunal study was necessary, having due regard to the fact that the proposed project is an airport site. Bearing in mind the profile of airport operations, foraging or nesting by bird species in and around the airport must not be discarded. It must be accepted that in a project involving the setting up of an airport, the EIA report must deal with the impact of the airport on birds and likewise the impact of birds on aircraft operations.

#### F.5 Felling of Trees

95. Para 2.1.5 of the executive summary to the EIA report deals with the biological environment. Para 2.1.5 stipulates thus:

**“The area required for proposed airport has only few trees, mainly bushes.** These will be cleared during site preparation.”  
(Emphasis supplied)

Similarly, Chapter II which deals with project description specifies in para 2.3.1 that “**vegetation and trees are sparse at the site**”. That the trees which were required to be felled were far from “few” is evident from the reply filed by the State of Goa in the present proceedings where it has been stated that permissions were granted for the **felling**

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- A **of 54,676 trees.** The EIA report ignored them. The submission in the EIA report that there were only sparse trees is sought to be explained by the state from the perspective of the large area of the land proposed for the project. It is sought to be explained that since the total area is 2,133 acres, the number of trees would proportionately work out to about 25 trees in an area of one acre (about one tree in an area of 160 square metres). In terms of the order passed by the Bombay High Court in the PIL, to which we have adverted earlier, the Principal Chief Conservator of Forests, Goa passed an order on 2 April 2018 providing for (i) the enumeration of all trees; (ii) exploring the possibility of transplanting existing trees which could be safely transplanted into ground areas; (iii) issuance of tree cutting permission by the Deputy Conservator of Forests; and (iv) planting of ten times the number of trees felled by the concessionaire under the supervision of the Forest Department.

96. On 6 February 2018, the Deputy Conservator of Forests had granted permission for felling of 21,703 trees. Following the dismissal of D an appeal under Section 15 of the Goa, Daman and Diu Preservation of Trees Act 1984 filed by the Federation of Rainbow Warriors, a Writ Petition was filed before the Bombay High Court<sup>51</sup>. The High Court set aside the order of the Deputy Conservator of Forests and remanded the proceedings to the Principal Chief Conservator who passed the order which has been noted above. Following the order of the Principal Chief Conservator, 54,676 trees were enumerated. The competent authority granted permission for the felling of trees thereafter on the following dates: (i) 1,422 trees by an order dated 20 April 2018; (ii) 18,408 trees by an order dated 24 July 2018 and (iii) 33,298 trees by an order dated 1 October 2018. Following this exercise, the felling of trees was completed F on 18 January 2019. The Bombay High Court having directed that the order of the Principal Chief Conservator of Forests shall be subject to the specific permission of the NGT in the pending proceedings, a Miscellaneous Application was moved before the NGT. While disposing of the main appeal, the NGT also disposed of the Miscellaneous Application and under the head of 'Biological Environment', the following G directions have been issued:

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<sup>51</sup> WP No. 1 of 2018

**“E. Biological Environment**

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1. Efforts be made to transplant the trees to other locations in the same vicinity by using appropriate mechanical devices which are available these days.

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2. Efforts be made to plant indigenous species which are tall in size rather than small saplings.

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3. Concerns have been raised by appellants with regard to plant species ‘Dipcadi concanense’ which has been claimed to be a threatened plant. This claim of the appellants have been negated by the respondent by producing a documentation of Botanical Survey of India, Western Regional Centre, Pune, Maharashtra titled as “A Note on Occurrence and Distribution of Dipcadi concanense”. By invoking Precautionary Principle, we direct the Project Proponent to draw up a Conservancy by Plan/Scheme for ‘Dipcadi concanense’ in collaboration with Forest Department, State of Goa and Botanical Survey of India and ensure its implementation.”

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97. We express our serious displeasure with the manner in which the EIA report made an attempt to gloss over the existence of trees. The EIA report prevaricated by recording that the area required for the proposed airport has only a few trees, mostly bushes. The EIA report states that vegetation and trees are sparse at the site. A photograph and a google map image are put forth as illustrations in figure 2.3 of Chapter II. To realise later that the project involved the felling of 54,676 trees is indicative of the cavalier approach to the issue and a process of fact finding which is parsimonious with the truth. *Post facto* explanations are inadequate to deal with a failure of due process in the field of environmental governance. The State of Goa would have us gloss over the felling of trees by submitting that 54,676 trees over a project area of 2,133 acres averages out to 25 trees per acre or one tree over an area of 160 square metres. This is a fallacious approach to the issue. Mathematical averages cannot displace factual data about the actual number of trees which were affected by the project. The EIA report ought to have scrutinized the number of trees, their nature and longevity. Issues such as the extent to which the trees or some of them were capable of being transplanted had to be considered in the EIA report. The location of the

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- A trees is also significant. In a given case, if the trees appear in clusters or in a dense formation in segments of the project site, it would be necessary to determine whether felling all of them was necessary for the project to be implemented.
98. In the written submissions which have been filed by the State of Goa, it has been submitted that of the 54,676 trees which were felled: (i) 32,193 trees representing 59% had a girth of 30 to 50 centimeters; (ii) 19,903 trees representing 36% had a girth of 50 to 100 centimeters; and (iii) ‘only 2,580 trees’ had a girth exceeding 100 centimeters. The Goa, Daman and Diu Preservation of Trees Act, 1984 defines the expression “tree” in Section 2(j) in the following terms:
- C “S. 2(j) - “tree” means any woody plant whose branches spring from and are supported upon the trunk or the body and whose trunk or body is not less than ten centimeters in diameter at a height of one meter from the ground level and includes coconut palm.”
- D This definition has been highlighted to indicate that it incorporates a stringent meaning of the expression ‘trees’. The point, however, is simple: there was a glaring omission of the factual existence of as many as 54,676 trees in the EIA report. For project proponents, the environment may not possess a human voice. But the purpose of prescribing an EIA report is precisely to undertake a baseline study on all aspects of the environment and to anticipate the impact of a projected activity on the environment. Ignoring *any* component of the environment amounts to a serious dereliction of duty which detracts from the rule of law in matters of environmental governance.
- F 99. The order of the Principal Chief Conservator of Forests mandating transplantation, where possible, and the plantation of ten trees for every tree felled provides a measure of rectification. But there is a reason why issues pertaining to vegetational cover must be taken seriously in the EIA process. The formula of planting a set number of trees for every existing tree felled must be alive to the fact that the survival of new plantations is replete with uncertainty. The survival of transplanted trees is equally a matter of uncertainty. Though the development of infrastructure may necessitate the felling of trees, the process stipulated under the 2006 notification must be transparent, candid and robust. A regulatory regime for environmental governance is based on the
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hypothesis that all stakeholders will act with rectitude. Hiding significant components of the environment from scrutiny is not an acceptable modality to secure project approvals. There was a serious lacuna in regard to disclosures and appraisal on this aspect of the controversy.

**G Public Consultation**

100. The importance of public consultation is underscored by the 2006 notification. Public consultation, as it states, is “the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to take into account all the material concerns in the project or activity design as appropriate”. This postulates two elements. They have both, an intrinsic and an instrumental character. The intrinsic character of public consultation is that there is a value in seeking the views of those in the local area as well as beyond, who have a plausible stake in the project or activity. Public consultation is a process which is designed to hear the voices of those communities which would be affected by the activity. They may be affected in terms of the air which they breathe, the water which they drink or use to irrigate their lands, the disruption of local habitats, and the denudation of environmental eco-systems which define their existence and sustain their livelihoods.

101. Public consultation involves a process of confidence building by giving an important role to those who have a plausible stake. It also recognizes that apart from the knowledge which is provided by science and technology, local communities have an innate knowledge of the environment. The knowledge of local communities is transmitted by aural and visual traditions through generations. By recognizing that they are significant stakeholders, the consultation process seeks to preserve participation as an important facet of governance based on the rule of law. Participation protects the intrinsic value of inclusion.

102. The 2006 notification postulates:

- (i) A public hearing at or in close proximity to the project site to ascertain the views of “locally affected persons”;
- (ii) Obtaining written responses from “other concerned” individuals having a “plausible stake” in the environmental aspects of the project or the activity;

- A       (iii) The duty of the SPCB to conduct hearings and to forward the proceedings to the regulatory authority within the stipulated time;
- B       (iv) Placing on the website of the Pollution Control Board a summary of the EIA report in the prescribed format and the making available of the draft EIA report by the regulatory authority on a written request by any person concerned, for inspection;
- C       (v) The duty of the applicant to address all material concerns expressed during the process of public consultation;
- C       (vi) The making of appropriate changes in the draft EIA and EMP; and
- C       (vii) The submission of the final EIA report by the applicant to the regulatory authority for appraisal.

Each of these features is crucial to the success of a public consultation process. Public consultation cannot be reduced to a mere incantation or a procedural formality which has to be completed to move on to the next stage. Underlying public consultation is the important constitutional value that decisions which affect the lives of individuals must, in a system of democratic governance, factor in their concerns which have been expressed after obtaining full knowledge of a project and its potential environmental effects.

103. Apart from the intrinsic value of public consultation, it serves an instrumental function as well. The purpose of ascertaining the views of stakeholders, is to account for all the material concerns in the design of the proposed project or activity. For this reason, the process of public consultation involves several important stages. The Pollution Control Board is under a mandate to forward the proceedings to the regulatory authority. The project proponent must address all material environmental concerns and make appropriate changes in the draft EIA and EMP. The project proponent may even submit a supplementary report to the draft EIA. Each of these elements is crucial to the design features of the 2006 notification. A breach will render the process vulnerable to challenge on the ground that: (i) significant environmental concerns have not been taken into account; (ii) there was an absence of a full disclosure when the EIA report was put up for consultation; and (iii) concerns which have been expressed by persons affected by the project have not been adequately dealt with or analysed.

104. The public consultation was held on 1 February 2015 at Mopa. Nearly 70 persons spoke on the occasion and 1,586 persons signed the attendance sheet. 1,150 representations were received. Some of the environmental concerns expressed during the public hearing are catalogued below:

- (i) Mopa plateau has multiple water sheds and the discharge of water goes down to the rivers; B
- (ii) Nearly forty springs would be affected along with flora and fauna;
- (iii) The public hearing had been conducted in an area where the land was barren and with no plantation; C
- (iv) The impact on river Chapora, which is within a 10 kilometre radius from the project, has not been adequately analysed;
- (v) Mopa plateau has a natural mechanism for ground water recharge;
- (vi) Protection of the Western Ghats is necessary, particularly with the view to not disturb flora and fauna; D
- (vii) The EIA report has not been made available to the affected areas and Gram Panchayats in the buffer zone;
- (viii) Local plantations would be affected;
- (ix) The number of trees to be felled by the project proponent has not been specified in the EIA report; E
- (x) The Dodamarg Wildlife Sanctuary had been ‘sanitized’ by the High Court;
- (xi) Forest clearance had not been obtained;
- (xii) The sacred groves of the area have not been described, including the Barazan which will be lost; F
- (xiii) The slopes sustain cashew plantations with nearly forty lakh cashew trees resulting in an annual income of Rs Fifty crores; and
- (xiv) No study has been carried out in the 10 kilometre radius falling in Maharashtra. G

105. These concerns are at the forefront of the debate in the present case. What is significant, is the manner in which they were projected before the EAC at its 149<sup>th</sup> meeting on 26 June 2015 where H

- A the project proponent made a presentation. The Minutes of the meeting recorded the following observations of the project proponent:

“x. Public Hearing was conducted on 01.02.2015 at Simechen Adven, Mopa, Goa. **The major issues raised during public hearing and responses sought from the project proponent related to employment opportunities.”**

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(Emphasis supplied)

On the basis of a factual analysis, Ms Shenoy has submitted that only seven out of the 68 objections dealt with the issue of employment.

- C Evidently, the project proponent failed to address the other significant concerns in the manner which is required by the 2006 notification.

106. In **Utkarsh Mandal v Union of India**<sup>52</sup>, the Delhi High Court has succinctly summarized the duty of the EAC to apply its mind to the objections raised in the course of public hearings:

- D “It is that body that has to apply its collective mind to the objections and not merely the MoEF which has to consider such objections at the second stage. We therefore hold that in the context of the EIA Notification dated 14<sup>th</sup> September 2006 and the mandatory requirement of holding public hearings to invite objections it is the duty of the EAC, to whom the task of evaluating such objections

- E has been delegated, to indicate in its decision the fact that such objections, and the response thereto of the project proponent, were considered and the reasons why any or all of such objections were accepted or negated. The failure to give such reasons would render the decision vulnerable to attack on the ground of being vitiated due to non-application of mind to relevant materials and therefore arbitrary.”

- F G 107. Crucial objections and environmental concerns which were raised during the consultative process were reduced to a single issue by the project proponent before the EAC: the need for employment opportunities. The project proponent failed in its duty to inform the EAC. The record does not indicate a critical appraisal or analysis by the EAC. The EAC was duty bound to apply its mind to the environmental concerns raised by stakeholders. The duty of the project proponent to place fairly all the environmental concerns raised during the public hearing is the

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<sup>52</sup> (2009) SCC Online Del 3836

crucial link in the appraisal by the EAC. The Minutes of the meeting indicate that there was no fair and complete disclosure of the objections which were raised during the public hearing before the EAC. There is evidently a failure in the process of applying and implementing the norms laid down in the 2006 notification in this regard.

**H Appraisal by the EAC**

108. Appraisal by the EAC is structured and defined by the 2006 notification. The process of appraisal is defined to mean “a detailed scrutiny” by the EAC of the application and other documents like the EIA report and the outcome of the public consultation, including the public hearing proceedings, submitted by the applicant to the regulatory authority for the grant of an EC. The EAC is under a mandate to conduct the process of appraisal in “a transparent manner”. On the conclusion of these proceedings, the EAC has to make “categorical recommendations” to the regulatory authority either for: (i) the grant of a prior environmental clearance on stipulated terms and conditions; or (ii) the rejection of the application. The recommendations made by the EAC to the regulatory authority must be based on “reasons”.

109. The EAC, at its 149<sup>th</sup> meeting held on 26 June 2015, considered the EIA report and sought a clarification from the project proponent on the following six aspects:

- “i. There is a need to superimpose the layout plan showing the drainage pattern including natural drainage, construction in the area on superimposed map showing clear topography of the region;
- ii. 10 year data regarding rain fall in the area;
- iii. Justification on sustainability of existing traffic and transportation arrangements especially at inter-section points of the approach road to the airport needs to be submitted;
- iv. A traffic circulation plan needs to be evolved for smooth running of traffic in the area;
- v. Measures taken to comply with the CPCB guidelines formulated for noise pollution control in airport areas to be submitted; and
- vi. Minimum 20% energy conservation measures should be adopted incorporating provisions for use of LED, star rated ACs etc. Revised Energy Conservation Plan to be submitted.”

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- A        110. A representation was received from the Federation of Rainbow Warriors, consequent to which the consideration was deferred and the project proponent was requested to submit a “point-wise reply to the issues raised” in the representation. The EAC, at its 152<sup>nd</sup> meeting held on 20 October 2015, observed that the project proponent had provided “pointwise clarifications to the concerns raised by the ‘NGO’”. The EAC noted thus:
- “The EIA report has been updated by the PP after taking into account the issues raised in the public hearing and the same has been put in public domain.
- C        ● The project is outside the ESZ delineated by the Dr Kasturirangan Committee and TERI.
- The project envisages construction of rain water harvesting pits within the plot area, which would contribute to ground water recharge. Hence, the objection of NGO in this regard does not hold.
- D        ● The biological data in respect of flora and fauna was collected by the functional area experts of M/s Engineers India Limited and not by M/s Pragati Labs stationed at Goa during November, 2014 to January, 2015 for collection of ambient air quality, noise, water quality, soil, socio-economics.”
- E        Following the above statement, the EAC recommended the grant of an EC subject to certain conditions. Para 3.1.2 of the Minutes of the EAC is as follows:
- F        “The Committee noted the peculiar circumstances of the case and the difficulties in land acquisition which led to delay in preparation of the EIA report, and the larger public interest involved.
- G        Keeping in view the fact that the project proponent has not concealed facts and circumstances of the case and the project is in the public interest, the Ministry may take an appropriate view on the objection that the public hearing could not have been held, in the absence of valid TOR, though the validity has been extended twice and regularized subsequently. The Committee also noted that the public hearing was attended by about 3000 people and
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hence there is substantive and active public participation as required under the law for public consultation. A

The PP further provided their reply to the rebuttal by the said NGO on various issues.

The EAC, after deliberations, recommended the project for grant of EC subject to the above and the following:- B

- The project proponent shall ensure availability of adequate land at the junction of the Mopa Airport road and Mumbai/Goa NH 17 for traffic circulation/ management and to provide for all the traffic interchanges and proposed clover. C
- The approach and exit roads to the airport would be approved from the NHAI and should be according to IRC norms. D
- A perusal of the Topo sheet superimposed on the runway area indicates that the extreme end of the runway is covering the drainage area partly. The drainage area which is under the runway needs to be channelized. The area between the parallel taxi way and run way needs to be handled carefully to drain the water from the area in the outfall.”

111. The above explanation must be assessed with reference to the norm that the EAC is required to submit reasons for its recommendation. The above extract indicates that the EAC has adverted to the following circumstances: E

- (i) The “peculiar circumstances” of the case;
- (ii) The difficulties in land acquisition which led to a delay in the preparation of the EIA report; F
- (iii) The “larger public interest” involved;
- (iv) The project proponent had not concealed facts and circumstances of the case;
- (v) The project is in the public interest; and G
- (vi) The project proponent had provided a reply to the rebuttal by Rainbow Warriors on various issues.

This analysis of the EIA report is, to say the least, sketchy and perfunctory and discloses an abdication of its functions by the EAC. H

- A The requirement that the EAC must record reasons, besides being mandatory under the 2006 notification, is of significance for two reasons:
  - (i) The EAC makes a recommendation to the regulatory authority in terms of the 2006 notification. The regulatory authority has to consider the recommendation and convey its decision to the project proponent. The regulatory authority, as para 8(ii) provides, shall normally accept the recommendations of the EAC. Where it disagrees, it would request reconsideration, stating the reasons for its disagreement. In turn, the EAC will consider the observations of the regulatory authority and furnish its views within a stipulated period; and
  - (ii) The grant of an EC is subject to an appeal before the NGT under Section 16 of the NGT Act 2010.
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The reasons furnished by the EAC for its recommendation are a basic link in the ultimate decision of the regulatory authority. They

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112. What, then, do the reasons which have been furnished by the EAC tell us? The EAC relies on the “peculiar circumstances of the case” as the basis of its recommendation. What the peculiar

- E circumstances are, is left for pure guess work or surmise. The EAC refers to the delay in acquisition proceedings, a larger public interest and the fact that the project proponent “has not concealed facts and circumstances”. Each one of the reasons which has weighed with the EAC betrays a lack of comprehension of the true nature of its function under the 2006 notification. The EAC has failed to consider relevant circumstances bearing on the environmental impact of the project and has instead considered circumstances extraneous to its function. That the project proponent, according to the EAC, has not concealed facts and circumstances is not reason enough to warrant a grant of an EC. Moreover, even this hypothesis (as we have seen earlier) is incorrect.
- G There is no analysis of the EIA report. The EAC has failed to answer to the call to its expertise.

113. Clause (vi) of para 8 of the 2006 notification stipulates thus:

“(vi) Deliberate concealment and/or submission of false or misleading information or data which is material to screening or

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scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice.”

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Deliberate concealment or the submission of false or misleading information or data material for screening, scoping, appraisal or decision on the application makes it liable for rejection. That the project proponent must submit all information and data without concealing relevant features is a basic hypothesis and expectation of the 2006 notification. The EAC has, in the brief reasons which are contained in para 3.1.2, not applied its mind at all to the environmental concerns raised in relation to the project nor do its reasons indicate an appraisal of those concerns by evaluating the impact of the project.

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114. The EAC is an expert body. It must speak in the manner of an expert. Its remit is to apply itself to every relevant aspect of the project bearing upon the environment. It is not bound by the analysis which is conducted in the EIA report. It is duty bound to analyse the EIA report. Where it finds it deficient it can adopt such modalities which, in its expert decision-making capacity, are required. The reasons which are furnished by the EAC constitute a live link between its processes and the outcome of its adjudicatory function. In the absence of cogent reasons, the process by its very nature, together with the outcome stands vitiated.

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115. Mr ANS Nadkarni, learned ASG urged that the EAC had, in its 149<sup>th</sup> meeting, sought additional information on six issues. Subsequently, at its 151<sup>st</sup> meeting, it deferred consideration upon the representation filed by the Federation of Rainbow Warriors and at its 152<sup>nd</sup> meeting, it analysed the response of the project proponent to the representation. Hence, the EAC must be deemed to have applied its mind. This approach is completely flawed. At its 149<sup>th</sup> meeting, the EAC specifically called for a clarification on six issues. The next meeting was deferred. The Minutes of the 152<sup>nd</sup> meeting contain no assessment of whether the clarifications which were sought by the EAC had been replied to its satisfaction by the project proponent. The objection to the modalities adopted by the EAC, however, are more fundamental. The Minutes of

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- A the 152<sup>nd</sup> meeting indicate that the EAC primarily, if not exclusively, dealt with the “pointwise clarifications” of the project proponent to the representation by the Federation of Rainbow Warriors. Dealing with a representation is not exhaustive of the function of the EAC. Arguably, if no representation was received, or if a representation submitted by an individual objector is found to be incorrect, that by itself is no ground to recommend an EC.
- B 116. The EAC, as an expert body, has to scrutinize all relevant aspects of the project or activity proposed, including its impact on the environment. In taking that decision, the EIA report is an input for its analysis. The scrutiny and appraisal has to be undertaken by the EAC as an expert body and its reasons must reflect that this has been done. As the Minutes indicate, the non-application of mind by the EAC is evident with reference to the presence of 15 ESZs in the study area. The EAC notes that the project is outside the ESZ delineated by the Kasturirangan Committee. In the absence of a critical analysis, the EAC failed in discharging its duties under the 2006 notification. The recommendations of the EAC furnish a guide for the MoEFCC. Indeed, the 2006 notification stipulates that the recommendations of the EAC would normally be accepted. Consequently, a failure of due process before the EAC, as in the present case, must lead to the invalidation of the EC.
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**I The appellate jurisdiction of the NGT: the requirement of a merits review**

117.. The NGT is entrusted with appellate jurisdiction under Section 16 of the NGT Act 2010. Section 16(h) provides thus:

- F “16 Tribunal to have appellate jurisdiction. - Any person aggrieved by,-

.....

- G (h) an order made, on or after the commencement of the National Green Tribunal Act, 2010, granting environmental clearance in the area in which any industries, operations or processes or class of industries, operations and processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986 (29 of 1986);”

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Section 20 mandates that the Tribunal shall, while passing any order, decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle. Several decisions of this Court have given meaning to these principles<sup>53</sup>. A

118. The decision of the NGT indicates that several significant submissions were urged before it. The entire analysis by the NGT is contained in one paragraph of its judgment dated 21 August 2018 which is extracted below: B

“27. We find that the Expert Appraisal Committee had before it point wise reply of the project proponent which we have already quoted above. Therein delay in land acquisition process and collection of fresh baseline data are mentioned. It is also mentioned that data for Maharashtra was also considered. Other issues duly explained are hydro-geological features and data with regard to flora and fauna, socio-economic profile, topography, vegetation, observance of due procedure in public hearing, relevance of study with regard to ecosensitive areas of Western Ghats, feasibility of proposed airport in terms of cost benefit analysis as well as environmental cost benefit analysis. EAC also considered the data compiled by various offices. Mere fact that different opinions have been expressed by other experts is not enough to hold that EAC did not apply its mind. The rehabilitation programme was also produced before the EAC”. C

The next paragraph contains a brief reference to the fact that the requirement of a study over a distance of 15 kilometres is in regard to the collection of secondary data. The above paragraph, in our view, does not fulfil the requirement of a merits review by an expert adjudicatory body vested with appellate jurisdiction. F

119. The NGT Act provides for the constitution of a Tribunal consisting both of judicial and expert members. The mix of judicial and technical members envisaged by the statute is for the reason that the Tribunal is called upon to consider questions which involve the application G

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<sup>53</sup> **Vellore Citizens Welfare Forum v Union Of India**, (1996) 5 SCC 647; **M C Mehta v Kamal Nath**, (1997) 1 SCC 388; **M C Mehta v Union of India**, (1997) 2 SCC 353; **A P Pollution Control Board v Prof M V Nayudu (Retd.)**, (1999) 2 SCC 718; **Narmada Bachao Andolan v Union of India**, (2000) 10 SCC 664; **Indian Council for Enviro Legal Action v Union of India**, (2011) 8 SCC 161 H

- A and assessment of science and its interface with the environment. In order to be eligible for appointment as an expert member, a person must fulfill the following qualifications prescribed in Section 5(2):
  - “(2) A person shall not be qualified for appointment as an Expert Member, unless he,
- B (a) has a degree in Master of Science (in physical sciences or life sciences) with a Doctorate degree or Master of Engineering or Master of Technology and has an experience of fifteen years in the relevant field including five years practical experience in the field of environment and forests (including pollution control, hazardous substance management, environment impact assessment, climate change management, biological diversity management and forest conservation) in a reputed National level institution; or
- C (b) has administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution.”
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The NGT is an expert adjudicatory body on the environment.

- E 120. In two of its previous decisions, the NGT has shown the path along with which it must traverse in arriving at its decisions. In **Save Mon Region Federation v Union of India**<sup>54</sup>, the grant of an EC to a 780 Megawatts Hydroelectric Project in Tawang district of Arunachal Pradesh was challenged. The NGT framed the question before it in broad terms:

- F “...the material issue, therefore, that needs to be answered in the present Appeal is as to whether the process of grant of prior EC to the project in question suffers from vice of faulty scoping process or not.”

- G Having reviewed the information furnished in Form 1 by the project proponent as well as the multiple reports on record on the bird species involved in the site for the proposed project, the NGT held that facts material to the case were not present before the EAC and the consequent ‘vacuum in the EIA report’ lead to aberrations in the appraisal process conducted by it. Suspending the EC granted to the project, the NGT

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<sup>54</sup> 2013 (1) All India NGT Reporter 1

accepted the contention which was urged before it that the NGT has the 'authority to take an appropriate decision on the facts placed before it' and 'set aside or suspend the EC'. A

Similarly, in **Shreeranganathan K P v Union of India**<sup>55</sup>, the grant of an EC to the KGS Aranmula International Airport Project was challenged. The NGT found fault with the process leading up to the grant of the EC since sector specific issues had not been dealt with. The NGT extensively reviewed the information submitted by the project proponent in Form 1, the deficiencies in the EIA report, the process of appraisal conducted by the EAC and the sector specific guidelines laid down with regard to the constructions of airports and held thus: B

"182. ... a duty is cast upon the EAC or SEAC as the case may be to apply the cardinal principle of Sustainable Development and Principle of Precaution while screening, scoping, and appraisal of the projects or activities. While so, it is evident in the instant case that the EAC has miserably failed in the performance of its duty not only as mandated by the EIA Notification, 2006, but has also disappointed the legal expectations from the same. For a huge project as the one in the instant case, the consideration for approval has been done in such a cursory and arbitrary manner without taking note of the implication and importance of environmental issues. ... Thus, the EAC has not conducted itself as mandated by the EIA Notification, 2006 since it has not made proper appraisal by considering the available materials and objections in order to make proper evaluation of the project before making a recommendation for grant of EC. C

187...the Tribunal is of the considered opinion that there is no option but to scrap the impugned EC granted by the MoEF to the 3<sup>rd</sup> respondent/project proponent for setting up the Aranmula airport" D

121. The failure to consider materials on a vital issue and indeed the non-consideration of vital issues raises a substantial question of law leading to the invoking of the jurisdiction of this Court under Section 22 of the NGT Act 2010. The failure of process in the present case has been compounded by the absence of a merits review by the NGT. E

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<sup>55</sup>2014 ALL (I) NGT Reporter (1) (SZ) 1 F

- A 122. The learned ASG has placed reliance on the decision of this Court in **Lafarge Umiam Mining Private Limited v Union of India**<sup>56</sup> (“Lafarge”) to contend that the failure to disclose the presence of trees should not lead to the invalidation of the EC. In that case, an application was made under the 1994 notification for the grant of an EC to a proposed limestone mining project at Nongtrai Village, East Khasi Hills District, Meghalaya. EC was granted for the project in 2001. Pursuant to a letter by the Principal Chief Conservator of Forests to the MoEF drawing attention to the non-disclosure of forests, the project proponent applied for a revised EC and forest clearance under the Forest (Conservation) Act 1980. An ex post facto EC along with forest clearance was granted in 2010. Challenging the grant of the EC, it was urged that there was a failing on part of the project proponent to disclose the presence of forests on the proposed project site.

- A 123. A three judge Bench of this Court rejected the challenge and upheld the grant of the EC to the proposed project. This Court relied, among other factors, on the following: (i) the mining of limestone in the Khasi Hills dates back to 1763 and is an integral part of the culture of the Nongtrai Village; (ii) the site was cleared after thorough consultation with the custodian of the land, who decided to lease the land for the mining project following the loss of revenue caused due to mining by the unorganized sector; (iii) the Headman of the Nongtrai and the village durbar, who participated at the public hearing and filed written submissions before this Court, supported the project and certified that no damage would be caused to adjacent lands; (iv) at the stage of site clearance, the MoEF had before it certificates by the Executive Committee, Khasi Hills Autonomous District Council and the DFO, Khasi Hill Division, Shillong, certifying that there were no forests in the proposed project site; (v) the DFO certified that that the proposed mining site was not a forest as defined in **Godavarman** (*supra*); (vi) the 2006 notification was not applicable; and (vii) the MoEF had, at multiple stages, sought clarifications from the project proponent and had undertaken requisite care and caution to protect the environment. Upholding the grant of the EC and the forest clearance, this Court held thus:

“120...The word “development” is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. **In the present case, we are satisfied that limestone**

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H <sup>56</sup>(2011) 7 SCC 338

**mining has been going on for centuries in the area and that it is an activity which is intertwined with the culture and the unique landholding and tenure system of Nongtrai Village.** On the facts of this case, we are satisfied with the due diligence exercise undertaken by MoEF in the matter of forest diversion. **Thus, our order herein is confined to the facts of this case.”** (Emphasis supplied)

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124. The decision of this Court in **Lafarge** (*supra*), was based on the facts summarized above. Significantly, the standard of judicial review which must be applied in cases relating to the environment has been formulated by the three judge Bench in **Lafarge** (*supra*). Chief Justice S H Kapadia noted that the doctrine of proportionality must be applied to matters concerning the environment as part of judicial review. The principles of judicial review in environmental matters have been enunciated thus:

“In the circumstances, barring exceptions, decisions relating to utilisation of natural resources have to be tested on the anvil of the well-recognised principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the Court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint.”

125. In a recent three judge Bench decision of this Court in **Mantri Techzone Pvt. Ltd. v Forward Foundation**<sup>57</sup>, this Court had the occasion to construe the provisions of Section 22 of the NGT Act 2010. Speaking for the Bench, Justice Abdul Nazeer held that the test to determine whether a substantial question of law arises (within the meaning of Section 100 of CPC) was formulated in the decision of a Constitution Bench in **Sir Chunilal v Mehta and Sons, Ltd. v Century Spinning and Manufacturing**<sup>58</sup>, where it was held thus:

<sup>57</sup> (2019) 4 SCALE 218

<sup>58</sup> 1962 Supp. (3) SCR 549

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- A      “The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

- Re-appreciation of the ‘factual matrix’ has been held to be distinct from a substantial question of law. In the present case, we have indicated the basis for the invocation of the jurisdiction of this Court under Section 22. There was a failure to follow binding norms under the 2006 notification.
- D      There were serious flaws in the decision-making process. Relevant material has been excluded from consideration and extraneous circumstances were borne in mind. The EAC as an expert body abdicated its obligations to make an expert determination based on reasons. The NGT as an adjudicatory body failed to exercise the jurisdiction entrusted to it under Section 16(h) read with Section 20 of the NGT Act 2010 by merely deferring to the decision to recommend and grant an EC. The parameters in regard to the existence of substantial questions of law have hence been established in the classical or conventional sense of that expression.

#### **J   Environmental Rule of Law**

- F      126. Fundamental to the outcome of this case is a quest for environmental governance within a rule of law paradigm. Environmental governance is founded on the need to promote environmental sustainability as a crucial enabling factor which ensures the health of our eco system.
- G      127. Since the Stockholm Conference, there has been a dramatic expansion in environmental laws and institutions across the globe. In many instances, these laws and institutions have helped to slow down or reverse environmental degradation. However, this progress is also accompanied, by a growing understanding that there is a considerable implementation gap between the requirements of environmental laws and their implementation and enforcement – both in developed and

developing countries alike.<sup>59</sup> The environmental rule of law seeks to A address this gap.

128. The environmental rule of law provides an essential platform underpinning the four pillars of sustainable development— economic, social, environmental, and peace.<sup>60</sup> It imbues environmental objectives with the essentials of rule of law and underpins the reform of environmental law and governance.<sup>61</sup> The environmental rule of law becomes a priority particularly when we acknowledge that the benefits of environmental rule of law extend far beyond the environmental sector. While the most direct effects are on protection of the environment, it also strengthens rule of law more broadly, supports sustainable economic and social development, protects public health, contributes to peace and security by avoiding and defusing conflict, and protects human and constitutional rights.<sup>62</sup> Similarly, the rule of law in environmental matters is indispensable “for equity in terms of the advancement of the Sustainable Development Goals<sup>63</sup>, the provision of fair access by assuring a rights-based approach, and the promotion and protection of environmental and other socio-economic rights.”<sup>64</sup> B C D

129. Amartya Sen argues for a broadening of the notion of sustainable development which is the most dominant theme of environmental literature, from a need-based standard<sup>65</sup> to a standard based on freedoms.<sup>66</sup> Thus recharacterized, it encompasses the preservation, and when possible even the expansion of the substantive freedoms and capabilities of people today without compromising the capability of future generations to have similar - or more - freedoms. The intertwined concepts of environmental rule of law thus further intragenerational as well as intergenerational equity. E F

<sup>59</sup> United Nations Environment Programme, First Environmental Rule of Law Report. Available at [https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental\\_rule\\_of\\_law.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y)

<sup>60</sup> Ibid

<sup>61</sup> Ibid

<sup>62</sup> Ibid

<sup>63</sup> SDGs

<sup>64</sup> UN Environment, Environmental Rule of Law. Available at <https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/promoting-environmental-rule-law-0>

<sup>65</sup> Brundtland definition of Sustainable Development

<sup>66</sup> Amartya Sen, Sustainable Development and our responsibilities. Available at <http://www.comitatoscientifico.org/temi%20SD/documents/SEN%20Responsibility&SD%2010.pdf>

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- A        130. Decision 27/9 which was adopted by the United Nations Environment Programme's<sup>67</sup> Governing Body at its first universal session in 2013 on 'Advancing Justice, Governance and Law for Environmental Sustainability' was the first internationally negotiated document to establish the term 'environmental rule of law.' It declared that "the violation of environmental law has the potential to undermine sustainable development and the implementation of agreed environmental goals and objectives at all levels and that the rule of law and good governance play an essential role in reducing such violations". It thus urged governments and organisations to reinforce cooperation to combat noncompliance with environmental laws towards achieving sustainable development. It also called upon the Executive Director to assist with the "development and implementation of environmental rule of law with attention at all levels to mutually supporting governance features, including information disclosure, public participation, implementable and enforceable laws, and implementation and accountability mechanisms including coordination of roles as well as environmental auditing and criminal, civil and administrative enforcement with timely, impartial and independent dispute resolution." Similarly, the first United Nations Environment Assembly in 2014 adopted resolution 1/13, which calls upon countries "to work for the strengthening of environmental rule of law at the international, regional and national levels."
- E        131. In 2016, the First World Environmental Law Congress, cosponsored by the International Union for Conservation of Nature and UN Environment, adopted the IUCN World Declaration on the Environmental Rule of Law<sup>68</sup> which outlines 13 principles for developing and implementing solutions for ecologically sustainable development:
- F              (i)        Obligation to Protect Nature  
                  (ii)      Right to Nature and Rights of Nature  
                  (iii)     Right to Environment.  
                  (iv)     Ecological Sustainability and Resilience  
G              (v)        In Dubio Pro Natura  
                  (vi)     Ecological Functions of Property

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<sup>67</sup> UNEP

<sup>68</sup> IUCN, Environmental Rule of Law. Available at ://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/environmental-rule-law

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|--------|---|---|
| (vii)  | Intragenerational Equity                        | A |
| (viii) | Intergenerational Equity                        |   |
| (ix)   | Gender Equality                                 |   |
| (x)    | Participation of Minority and Vulnerable Groups |   |
| (xi)   | Indigenous and Tribal Peoples                   | B |
| (xii)  | Non-regression                                  |   |
| (xiii) | Progression                                     |   |

132. Dhvani Mehta's doctoral thesis<sup>69</sup> explores this idea of environmental rule of law in the Indian context by analysing the functioning of the three institutions of the government with regard to environmental law. It develops a framework to assess whether the environmental rule of law in India is being strengthened or weakened, through an analysis of the legal instruments of each of the institutions of government—statutes, executive orders, and judicial decisions. The indicators on the basis of which this is done are: a) the capacity of statutes to guide behaviour (one of the organising principles of the rule of law) by clearly articulating goals or balancing competing interests; b) the ability of the executive to take flexible but reasoned decisions grounded in primary legislation; and c) the ability of the judiciary to apply statutory interpretation and consistent standards of judicial review to give effect to environmental rights and principles.

133. In 2015, the International community adopted the 2030 Agenda for Sustainable Development and its 17 SDGs<sup>70</sup>. These 17 goals are:

- |       |                              |   |
|-------|------------------------------|---|
| (i)   | Eradication of poverty;      | F |
| (ii)  | Eradication of hunger;       |   |
| (iii) | Good health and well-being;  |   |
| (iv)  | Quality education;           |   |
| (v)   | Gender equality;             |   |
| (vi)  | Clean water and sanitation;  | G |
| (vii) | Affordable and clean energy; |   |

<sup>69</sup> Dhvani Mehta, *The Environmental Rule of Law in India*, University of Oxford, 2017. Available at <https://ora.ox.ac.uk/objects/uuid:730202ce-f2c4-4d2f-9575-938a728fe82a>

<sup>70</sup> SDGs

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- A       (viii)     Decent work and economic growth;
- (ix)      Industry, innovation and infrastructure;
- (x)      Reduced inequalities;
- (xi)     Sustainable cities and communities;
- B       (xii)     Sustainable consumption and production;
- (xiii)    Climate action;
- (xiv)    Protecting life below water;
- (xv)     Life on land;
- C       (xvi)     Peace, justice and strong institutions; and
- (xvii)    Partnerships to achieve the goals.

134. Each of these goals has a vital connection to the others.
- D   Together, they provide an agenda for human development: development in a manner which accords adequate protection to the environment. The UNEP recognises that the natural environment – forests, soils and wet lands – contributes to the management and regulation of water availability and water quality, strengthening the resilience of water sheds and
  - E   complements investments in physical infrastructure and institutional and regulatory arrangements for water access and disaster preparedness.

135. SDG 13 emphasises the urgent action required to combat climate change and its impacts. This is based on the recognition that extreme weather events such as heat waves, droughts, floods and tropical cyclones have aggravated the need for water management, pose a threat to food security, increase health risks, damage critical infrastructure and interrupt the provision of basic civil services.

136. The statistics on climate change indicate that:

- G       (i)   Between 1880 and 2012, average global temperatures have increased by 0.85 degrees Celsius;
- (ii)   Between 1901 and 2010, as ocean expanded, the global average sea level has risen by 19 centimeters;

- (iii) Since 1990, global emissions of CO<sub>2</sub> increased by almost 50 per cent; and A
- (iv) Between 2000 and 2010, emissions grew at a more rapid rate than each of the three decades preceding it.

137. In this backdrop, SDG 16 emphasises the need to protect, restore and promote sustainable use and management of terrestrial eco systems and forests, combat desertification of river lands, prevent land degradation and halt the loss of biodiversity. Terrestrial eco systems provide a range of eco system services including the capture of carbon, maintenance of soil quality, provision of habitat for biodiversity, maintenance of water quality and regulation of water flow together with control over erosion. Maintenance of eco systems is hence crucial to efforts to combat climate change, mitigate and reduce the risks of natural disasters including floods and landslides. In this backdrop, promoting environmental justice and ensuring strong institutions is quintessential to promoting peaceful and inclusive societies for sustainable development. SDG 16 therefore construes the promotion of the rule of law as intrinsic towards implementing multilateral environmental agreements and progressing towards internationally agreed environmental goals. B

138. On 2 October 2016, India ratified the Paris Agreement<sup>71</sup> on climate change which reaffirmed the goal of ‘limiting global temperature increase to well below 2 degrees Celsius, while pursuing efforts to limit the increase to 1.5 degrees above pre-industrial levels’. Article 5 of the Agreement encourages parties to conserve and enhance sinks and reservoirs of greenhouse gases, which includes forests. Under its Nationally Determined Contributions under the Paris Agreement, India made the following three commitments<sup>72</sup>: C

- (i) Greenhouse gas emission intensity of its Gross Domestic Product will be reduced by 33-35% below 2005 levels by 2030; D
- (ii) 40% of India’s power capacity would be based on non-fossil fuel sources; and E
- (iii) An additional ‘carbon sink’ of 2.5 to 3 billion tonnes of CO<sub>2</sub> equivalent through additional forest and tree cover will be created by 2030. F

<sup>71</sup> Entered into force on 4 November 2016 G

<sup>72</sup> India’s Intended Nationally Determined Contribution: Working Towards Climate Justice at P. 29, submitted to the UNFCCC secretariat H

- A 139. In March 2019, UNEP released the Global Environment Outlook themed ‘Healthy Planet, Healthy People’.<sup>73</sup> Noting clear ‘links between human health and the state of the environment’, the report concludes that clean-up and efficiency improvements are not adequate to pursue the 2030 Agenda and the SDGs and achieve the internationally agreed environmental goals on pollution control. Instead, ‘transformative change’ which reconfigures basic social and production systems and structures is needed. This includes well-designed policies on institutional frameworks, social practices, cultural norms and values along with their implementation, compliance and enforcement. In this view, a systemic and integrated policy action<sup>74</sup> would ensure that a “healthy environment is a prerequisite and foundation for economic prosperity, human health and well-being”<sup>75</sup>

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- D 140. The rule of law requires a regime which has effective, accountable and transparent institutions. Responsive, inclusive, participatory and representative decision making are key ingredients to
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141. The 2006 notification must hence be construed as a significant link in India’s quest to pursue the SDGs. Many of those goals, besides being accepted by the international community of which India is a part, constitute a basic expression of our own constitutional value system. Our interface with the norms which the international community has adopted in the sphere of environmental governance is hence as much a reflection of our own responsibility in a context which travels beyond our borders as much as it is a reflection of the aspirations of our own Constitution. The fundamental principle which emerges from our interpretation of the 2006 notification is that in the area of environmental governance, the means are as significant as the ends. The processes of

<sup>73</sup> Global Environment Outlook 6, UNEP, 4 March 2019

<sup>74</sup> Global Environment Outlook 6, UNEP, 4 March 2019

H <sup>75</sup> Ibid

decision are as crucial as the ultimate decision. The basic postulate of the 2006 notification is that the path which is prescribed for disclosures, studies, gathering data, consultation and appraisal is designed in a manner that would secure decision making which is transparent, responsive and inclusive.

142. Repeatedly, it has been urged on behalf of the State of Goa, MoEFCC and the concessionaire that the need for a new airport is paramount with an increasing volume of passengers and consequently the flaws in the EIA process should be disregarded. The need for setting up a new airport is a matter of policy. The role of the decision makers entrusted with authority over the EIA process is to ensure that every important facet of the environment is adequately studied and that the impact of the proposed activity is carefully assessed. This assessment is integral to the project design because it is on that basis that a considered decision can be arrived at as to whether necessary steps to mitigate adverse consequences to the environment can be strengthened.

143. In the present case, as our analysis has indicated, there has been a failure of due process commencing from the non-disclosure of vital information by the project proponent in Form 1. Disclosures in Form 1 are the underpinning for the preparation of the ToR. The EIA report, based on incomplete information has suffered from deficiencies which have been noticed in the earlier part of this judgment including the failure to acknowledge that within the study area contemplated by the Guidance manual, there is a presence of ESZs.

144. The EAC, as an expert body abdicated its role and function by taking into account circumstances which were extraneous to the exercise of its power and failed to notice facets of the environment that were crucial to its decision making. The 2006 notification postulates that normally, the MoEFCC would accept the recommendation of the EAC. This makes the role of the EAC even more significant. The NGT is an adjudicatory body which is vested with appellate jurisdiction over the grant of an EC. The NGT dealt with the submissions which were urged before it in essentially one paragraph. It failed to comprehend the true nature of its role and power under Section 16(h) and Section 20 of the NGT Act 2010. In failing to carry out a merits review, the NGT has not discharged an adjudicatory function which properly belongs to it.

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- A 145. In this view of the matter, neither the process of decision making nor the decision itself can pass legal muster. Equally, as an area requiring balance between development of infrastructure and the environment, we are of the view that appropriate directions should be issued by this Court, which would ensure that while the need for a public project as significant as an international airport is duly factored into the decision making calculus, such development proceeds on a considered view of the importance of the prevailing state of the environment. Bearing in mind the need to bring about a wholesome balance between the development of infrastructure of an airport and the preservation of the environment, we have come to the conclusion that time bound directions should be issued.

- B 146. Bearing in view the necessity to maintain a balance between the need for an airport and environmental concerns, we are of the view that it would be appropriate if the EAC is directed to revisit the conditions subject to which it granted its EC on the basis of the specific concerns which have been highlighted in this judgment. Such an exercise primarily is for the EAC to carry out in its expert decision making capacity. The EAC is entrusted with that function as an expert body. The role of judicial review is to ensure that the rule of law is observed. Hence, we propose by the directions which we will issue under Article 142 of the Constitution, to direct the EAC to revisit the conditions for the grant of an EC. While doing so, it would be open to the EAC to have due regard to the conditions which were incorporated in the order of the NGT and to suitably modulate those conditions in pursuance of the liberty which we have preserved to it. To facilitate an expeditious decision, we propose to direct the EAC to carry out this exercise in a prescribed time schedule during which period, the EC shall remain suspended. We propose to direct that after the EAC has formulated its views, they shall be placed before this Court in a Miscellaneous Application in the present proceedings, so as to enable the Court to pass final orders. The Miscellaneous Application may be filed either by the State of Goa as the project proponent or by the MoEFCC. We clarify that no other Court or Tribunal shall entertain any challenge to the ultimate decision of the EAC and final orders thereon shall be passed by this Court in the present proceedings.

#### **K Directions**

147. We accordingly issue the following directions:

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- (i) The EAC shall revisit the recommendations made by it for the grant of an EC, including the conditions which it has formulated, having regard to the specific concerns which have been highlighted in this judgment; A
- (ii) The EAC shall carry out the exercise under (i) above within a period of one month of the receipt of a certified copy of this order; B
- (iii) Until the EAC carries out the fresh exercise as directed above, the EC granted by the MoEFCC on 28 October 2015 shall remain suspended;
- (iv) Upon reconsidering the matter in terms of the present directions, the EAC, if it allows the construction to proceed will impose such additional conditions which in its expert view will adequately protect the concerns about the terrestrial eco systems noticed in this judgment. The EAC would be at liberty to lay down appropriate conditions concerning air, water, noise, land, biological and socio-economic environment; C
- (v) The EAC shall have due regard to the assurance furnished by the concessionaire to this Court that it is willing to adopt and implement necessary safeguards bearing in mind international best practices governing greenfield airports; D
- (vi) We grant liberty to the State of Goa as the project proponent and the MoEFCC, as the case may be, to file the report of the EAC before this Court in the form of a Miscellaneous Application so as to facilitate the passing of appropriate orders in the proceedings; and E
- (vii) No other Court or Tribunal shall entertain any challenge to the report that is to be submitted before this Court by the EAC in compliance with the present order. F

148. Before we part with the present case, we consider it appropriate to record a finding on the *bona fides* of the appellants before this Court. It was briefly urged by the respondents that the appellants have invoked the jurisdiction of this Court based on a personal agenda and consequently, the present appeal is liable to be dismissed. This argument cannot be accepted. We accept the submission of Ms Shenoy, learned counsel appearing on behalf of the appellants, that the non-consideration of vital issues by the EAC has led to the invocation of the statutory remedy available to them under Section 22 of the NGT Act 2010. Vague G H

- A aspersions on the intention of public-spirited individuals does not constitute an adequate response to those interested in the protection of the environment. If a court comes to the finding that the appeal before it was lacking *bona fides*, it may issue directions which it thinks appropriate in that case. In cases concerning environmental governance, it is a duty of courts to assess the case on its merits based on the materials present before it. Matters concerning environmental governance concern not just the living, but generations to come. The protection of the environment, as an essential facet of human development, ensures sustainable development for today and tomorrow.
- B 149. The learned Attorney General for India has presented the submissions before this Court with his characteristic sense of objectivity and candour. We wish to record our appreciation for the able assistance rendered to this Court by Ms Anitha Shenoy, learned counsel for the petitioner, Mr ANS Nadkarni, learned Additional Solicitor General for the MoEF, Mr Parag P Tripathi, learned senior counsel and Ms Aastha D Mehta, learned counsel for the concessionaire.

150. The appeal is allowed in the above terms. There shall be no order as to costs.

**Civil Appeal No 1053 of 2019**

- E 151. This appeal is also disposed of in the same terms, conditions, directions and observations as in Civil Appeal No 12251 of 2018.

Kalpana K. Tripathy

Appeals disposed of.