

(2014) 06 SIK CK 0001

In the Sikkim High Court

Case No : D.B. WP(C) Nos. 22 and 23 of 2012

Chewang Pintso Bhutia

APPELLANT

Vs

State of Sikkim

RESPONDENT

Date of Decision : 05-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11
Constitution of India, 1950 — Article 21, 226, 25, 26, 29
Environment (Protection) Act, 1986 — Section 3, 3(1), 3(2)(i), 3(2)(v), 3(2)(vi)
Land Acquisition Act, 1894 — Section 4(1)
Limitation Act, 1963 — Section 22
Wild Life (Protection) Act, 1972 — Section 18, 35, 36A, 5, 5(b)

Citation : (2014) 06 SIK CK 0001

Hon'ble Judges : Narendra Kumar Jain, C.J; Sonam Phintso Wangdi, J

Bench : Division Bench

Advocate : Zangpo Sherpa, Mr. Dewen Sharma Luitel, Mr. Pem Tshering Lepcha and Ms. Doma Lepcha, Advocates in D.B. WP(C) No. 22 and 23 of 2012, Advocate for the Appellant; J.B. Pradhan, Additional Advocate General, Mr. Santosh K. Chettri, Mrs. Pollin Rai, Assistant Government Advocates, Mrs. Rita Sharma, Ms. Sabina Chettri, Advocates for Respondent No. 1, Mr. Karma Thinlay Namgyal, Central Government Advocate, Mr. Thinlay Dorjee Bhutia, Advocate for Respondents No. 2 and 3, Mr. V. Giri, Mr. V. Sekhar, Mr. A. Moulik, Senior Advocates, Mr. Nalin Talwar, Mr. Vikram Mehta, Mr. Manish Kumar Jain, Advocates for Respondents Nos. 4 and 5 in D.B. WP(C) Nos. 22 and 23 of 2012, Mr. Jorgay Namka, Ms. Chenga Doma Bhutia, Mr. Jigdal G. Chankapa, Ms. Pema Bhutia, Ms. Mirmitt Lepcha, Advocates for Respondent No. 7, Ms. Indu Malhotra, Senior Advocate and Mr. S.S. Hamal, Advocate for Respondent No. 8 in D.B. WP(C) No. 22 of 2012, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Sonam Phintso Wangdi, J.—Writ Petition (C) Nos. 22 and 23 of 2012 were originally filed before the Hon'ble Supreme Court being Writ Petition (C) Nos. 101 and 102 of 2012 respectively. Vide order dated 08-05-2012 the Hon'ble Supreme Court was pleased to transfer them to this Court for disposal under

Article 226 of the Constitution of India as various issues involved in the cases were of local nature. We may reproduce the said order of the Hon"ble Supreme Court which reads as under:-

The question raised in these writ petitions under Article 32 of the Constitution should, in our view, be first considered by the Sikkim High Court under Article 226 of the Constitution. There are various issues involved which are local in nature and should be considered at that level.

Accordingly, let the writ petitions filed by Tenzing Bhutia and Another and Sonam Lama, which have been registered as Writ Petition (C) Nos. 101 and 102 of 2012, be transferred to the Sikkim High Court, to be treated as writ petitions under Article 226 of the Constitution.

The Registry is directed to arrange for transferring the records of the writ petitions to the Sikkim High Court, within a week from date.

Liberty is given to the petitioners in these writ petitions to mention the matter before the Sikkim High Court for taking up the matters at an early date.

The writ petitions are disposed of accordingly.

2. In pursuance of the above, the cases were thus taken up by this Court and are being disposed of by this common judgment as the questions involved are identical.

3. The Petitioners are members of the Bhutia-Lepcha Community who are predominantly Buddhist by religion. They move the Writ Petitions seeking to assail the implementation of the 97 MW Tashiding-Hydro Electric Project (in short the "HEP") set up by the Respondents on the river Rathong Chu, West Sikkim primarily on two grounds-

(i) Violation of the Petitioners' fundamental rights under Articles 25 and 26 of the Constitution of India; and

(ii) Violation of the environmental laws.

4. The Respondent No. 1 is the State of Sikkim in which the Petitioners reside and the State in which the Project is being implemented under a Memorandums of Understanding (in short the "MoU") by the Respondent No. 4 Company promoted by the Respondent No. 5. Respondent No. 2, is the Ministry of Environment and Forests, which gives clearances and "No Objection Certificates" (in short the "NOCs") to various power Projects after scrutiny under the relevant environment rules and regulations. Respondent No. 3, is the National Board for Wild Life (in short the "NBWL") constituted u/s 5A of the Wild Life (Protection) Act, 1972. Respondent No. 4, Shiga Energy Private Limited is the Hydro Power Company set up as a Special Purpose Vehicles (SPV) to implement the Project in question. Respondent No. 5, T. Nagendra Rao, is the Managing Director of Company called "Rangit Valley Hydro Private Limited" and is the promoter of Respondent No. 4 Company. Respondents No. 7 and 8 are

public financial institutions, which provide funding to power Projects and have been approached by the Respondents No. 4 and 5.

5. It is relevant to note that out of the two Petitioners who had originally filed Writ Petition No. 22 of 2012, the Petitioner No. 1, Tenzing Bhutia, died during the pendency of the case and accordingly his name was struck off on being mentioned leaving the Petitioner No. 2, Chewang Pintso Bhutia, as the sole Petitioner. The Respondents No. 6, 9 and 10 being Rural Electrification Corporation India Limited, Power Trading Corporation of India and Punjab National Bank, respectively were deleted from the array of Respondents by order of this Court dated 23-09-2013 passed in CM Appl Nos. 152 of 2012, 62 of 2012 and 153 of 2012 respectively.

6(i). The first ground taken in the Writ Petitions is that the religious rights of the Petitioners' community under Articles 25 and 26 of the Constitution of India and their rights to conserve their culture under Article 29 thereto have been infringed by the State in commencing with the 97 MW Tashiding HEP in West Sikkim. It is stated that Buddhism is integral to the Bhutia-Lepcha Community and various sites and places considered sacred under Buddhist beliefs have been accorded statutory protection under the Places of Worship (Special Provisions) Act, 1991 by virtue of Notification issued by the Respondent No. 1-State in the year 1998 and 2001. The effect of these Notifications, as per the Petitioners, is that the developmental activity is strictly prohibited at the sacred sites or in close vicinity to places of worship and religious institutions.

(ii) Apart from these, it is averred that the Rathong Chu river is considered sacred by the Buddhists and it finds specific mention in the sacred Buddhist text, namely, "Denjong Neyig". According to this text, Sikkim is the holiest of all the hidden countries of Mahaguru Padmasambhava which finds numerous reflections in most of the sacred Buddhist scriptures. The "Denjong Neyig" (guide to the sacred locations of Sikkim) explicitly mentions that area lying at the stretch of Khangchendzonga-Yuksam-Tashiding alongside the Holy Rathong Chu river must be preserved. It is also written that the Mahaguru Padmasambhava has hidden numerous major and minor Dharma treasures, both visible and invisible in streams, cliffs, rocks, trees, caves, mountains, ridges, etc., of these locations.

(iii) It is stated that the "Bhumchu" ceremony (Bhum = vase and Chu = water) which till date is held on the 15th day of the first lunar month as per Buddhist Calendar is intrinsically connected to the Rathong Chu river and is one of Sikkim's most revered events annually attracting thousands of pilgrims from Sikkim, Nepal, Bhutan, and other States of India. It is said that in the eight century Guru Rinpoche consecrated the "Bhumchu", or the sacred vase, which is the very same one that is preserved today in Tashiding Monastery in West Sikkim. The sacred vase is believed to have been granted its miraculous power by Guru Rinpoche after bestowing the unparalleled Tantric system of tutelary deity [Maha Karunika Avaloketeshwara] (meditation) in the 8th century. This caused the "Yidam and the entire retinue of deities to appear in the sky and immersed in

the water contained in the vase." "Finally Guru Rinpoche concealed the "Bhumchu" as a sublime hidden treasure and entrusted it to the protective deities". The "Bhumchu" is opened during the nights of the 14th day of the first month of the lunar calendar, and three cups of water are taken from it which are replaced with water brought from the blessed Rathong Chu river.

(iv) Considering the above position, the Ecclesiastical Department of the Respondent No. 1-State had on 08-09-1994 clearly expressed its reservations to a 30 MW Rathong Chu Hydel Power Project which was earlier started on the Rathong Chu River in 1994 on the ground of importance and significance of the area and sacredness of the River. This combined with strong protests from the people forced the Respondent No. 1-State to cancel the said Project in 1997 in deference to the religion, history and culture of the Sikkimese people.

(v) It is submitted that ever since the closing down of the 30 MW Rathong Chu Hydel Power Project, no other Hydro Project should have been allowed to come up on the said sacred river.

(vi) However, after a decade, in a curious turn around by the Respondent No. 1-State, agreements were signed with the Respondent No. 4, a Company promoted by Respondent No. 5, for implementation and construction of the three HEPs, namely, 99 MW Ting Ting, 96 MW Lethang HEP and 97 MW Tashiding on the Rathong Chu river.

(vii) It is submitted that numerous scholars and experts have expressed the imperative need to preserve the sanctity of the Rathong Chu river. Prominent amongst them has been Prof. P.S. Ramakrishnan of Jawaharlal Nehru University who stressed on this at various International Conferences and Workshops. This position stands further reinforced by "Kalop" (religious endorsements) of some of the greatest Buddhist Masters including Late His Holiness Dilgo Khyentse Rinpoche, His Holiness Chatral Sangye Rinpoche, His Holiness Doderup Chen Rinpoche, His Holiness Lachen Gomchen Rinpoche and His Holiness Khenpo Dorje Dechen of Sikkim amongst others.

(viii) Interestingly, two of the three HEPs proposed on the Rathong Chu river, namely, 96 MW Lethang HEP and 99 MW Ting Ting HEP, were subsequently scrapped by the Respondent No. 1-State on grounds of religious sentiments and want of environment clearances.

(ix) Apart from the serious affront to Buddhist sentiments, the Project is also alleged to be in gross violation of the applicable environmental laws and procedures.

7(i). On the second ground of attack, it is submitted that the Hon"ble Supreme Court by its order dated 04-12-2006 in Goa Foundation vs. Union of India being Writ Petition (Civil) No. 460 of 2004, had laid down that the Project within 10 kms" radius from the boundary of the National Parks and Sanctuaries had to obtain clearance from the NBWL, the Respondent No. 3. It is alleged that in spite

of the fact that the Project is situated within the 10 kms radius from the boundary of the Khangchendzonga National Park, the mandatory clearance from the NBWL has not been obtained thereby rendering the Project illegal.

(ii) It is stated that several experts have recommended non-implementation of HEPs in the State, especially those involving creation of a dam, as most of the State falls under Seismic Zones IV-V making it a high risk earthquake prone area.

(iii) It is alleged that the regulatory authorities appear to have ignored the aforesaid facts and are deliberately allowing the Project to continue in violation of the mandatory provisions of the law relating to the religious sites as well as damage to the environment and ecology.

(iv) It is further alleged that the various representations by concerned persons including letters by Spalzes Angmo, Member of the National Commission for Minorities, and the concern expressed therein, have remained unanswered and unaddressed.

(v) That the Petitioners have also come to know that unobstructed by the regulatory authorities, the Respondents No. 4 and 5, are raising capital through loans and investments from public sector banks and financial institutions.

(vi) That the prospect of potentially large amounts of public money being tied up in the Project also needs to be addressed immediately in order to prevent public money being squandered away in a patently illegal and dubious activities and that Respondents No. 4 and 5 are deliberately concealing material facts in an attempt to deceive certain public sector financial institutions into investing large amounts of public money.

8. In the above premises, the Petitioners have prayed for-

(i) A writ in the nature of mandamus directing the Respondent State to cancel the 97 MW Tashiding Hydro Electric Project.

(ii) A Writ in the nature of mandamus directing the Respondent No. 2, MoEF along with the national Board for Wild Life to withhold or withdraw clearance granted to the Tashiding Hydro Electric Project.

(iii) A Writ in the nature of prohibition restraining the Respondent financial institutions and all other public financial institutions from lending public money/ further public money or investing or further investing public money in the Tashiding Hydro Electric Project.

(iv) Issue or pass any writ, direction or order, which this Hon"ble Court may deem fit and proper in the facts and circumstances of the case.

9. The Respondents have filed their respective counter-affidavits denying all material allegations made in the Writ Petitions. In their counter-affidavit, the Respondent No. 1-State of Sikkim has raised certain preliminary objections which are set out as under:-

(i) The Writ Petitions have been filed with an inordinate delay which has not been explained and, therefore, liable to be dismissed. That wide publicity was given in respect of the said project in as much as advertisements were issued on 17-05-2009 in various newspapers including local newspapers, both in English and local vernacular language, regarding the Public Hearing being held for the Project by the State Pollution Control Board, Government of Sikkim. The fact that the public participated during the Public Hearing held on 18-06-2009 and raised various issues establishes that the public at large were aware of the implementation of the Project. That notice u/s 4(1) of the Land Acquisition Act, 1894, was also published on 26-07-2010. The Petitioners thus being aware of the implementation of the Project remained silent and did not take any steps for three years thereby allowing the Project to progress resulting in creation of a third party right. The Writ Petitions seeking cancellation of the Project was filed only on 21-03-2012, which is almost after more than three years after the commencement of the process of project implementation.

(ii) The Petitioners have no locus standi to maintain the present Writ Petitions as they are not residents of Tashiding and do not have any activities there and are not affected by the Project. Neither the monks of the Tashiding Monastery nor the public of the area have raised any objection except for the Petitioners who are in fact residents of Sajong, Rumtek, East Sikkim and Singtam, also in East Sikkim respectively.

(iii) The Petitioners are neither spiritual persons nor do they have any record of public services nor have they been associated with any Project or any activities concerned with general public. As such, the Writ Petitions cannot be treated as a Public Interest Litigation (in short the "PIL"). It is also averred that the religious sentiments of an individual or a member of a particular religion cannot be treated as public interest. That the implementation of the 97 MW Tashiding HEP in no way affects the rights of the Petitioners under Articles 25 and 26 of the Constitution of India as the freedom of conscience and free profession, practice and propagation of religion do not get affected by the implementation of the Project.

(iv) That it is a settled principle of law that the Courts do not interfere with economic policy of experts and will not sit in judgment on matters of policy. It is stated that the Project in question was scrutinised/vetted by a Hydro Committee, consisting of technical experts with the task to look into various aspects of hydro power development and make recommendations, and found the Project in consonance with the hydro policy of the State. Even M/s. Shiga Energy Private Limited, Respondent No. 4, to whom the questioned Project was allotted, had engaged WAPCOS, a Government of India Undertaking, to study and prepare a detailed Project Report.

That the implementation of the Project is a State action and the Courts while exercising its power of judicial review of administrative action, is not an Appellate Authority.

(v) The Writ Petitions involve disputed questions of fact and, therefore, liable to be dismissed on the ground alone.

(vi) That no legal or fundamental rights of the Petitioners have been infringed or will be infringed by the implementation of the 97 MW Tashiding HEP and in fact the implementation of the Project will result in the increase of State revenue and increase of employment opportunities to the people of Sikkim and also development of the region.

(vii) That the religious issues raised in the Writ Petitions have already been settled by this Court by order dated 13-12-1995 in Writ Petition No. 10 of 1994 in the matter of Denzong Lho Man Choda & Others vs. Union of India & Others and Writ Petition No. 25 of 1995 in the matter of Chukie Tobdon & Others vs. Union of India & Others wherein it has been held that development of HEP on the Rathong Chu river neither affects the religious sentiments nor interferes with the performance of the "Bhumchu" ceremony. The Petitioners are thus barred from raising the same issues on similar grounds again.

(viii) That as the Petitioners having failed to disclose the Denzong Lho Man Choda (supra) order dated 13-12-1995, the Writ Petitions are liable to be dismissed for concealment of material fact.

(ix) That the present Project has been initiated after duly complying with the relevant requirements under the applicable laws obtaining all the necessary approvals. It is stated that pursuant to the signing of MoU between the Respondent No. 4, M/s. Shiga Energy Pvt. Ltd., with the Government of Sikkim on 03-09-2008, the Detailed Project Report of the Project was approved by the Government of Sikkim. Open Public Hearing for the Project was conducted by the State Pollution Control Board, Sikkim on 18-06-2009. Thereafter, MoEF accorded its final environment clearance on 29-07-2010 after due recommendation from the State Wildlife and Forest Department. The State Pollution Control Board, Sikkim issued the "Consent to Establish" the Project under the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 on 25-11-2010. Further, the revised final approval from the MoEF, vide letter Ref. No. 1368/FCA/FEWMD 955-57 dated 24-09-2011 for diversion of 4.3492 Ha of forest land required for construction of the Project, were received through the Government of Sikkim on 24-09-2011 and the area has also been handed over.

(x) That at the end of 35 years, the Project would be transferred to the Government of Sikkim, which shall provide Sikkim with revenue amounting to crores of rupees for its remaining lifetime.

(xi) That the development of Project is also in line with the Hydro Policies issued by the Ministry of Power which, inter alia, envisages encouragement of investment from private sectors for HEPs by providing conducive environment for such investments.

(xii) That the question raised as regards the mandatory clearance of the NBWL as required under the Order dated 04-12-2006 passed by the Hon"ble Supreme Court in Goa Foundation case (supra) and the judgment In Re: Construction of Park at Noida Near Okhla Bird Sanctuary, , is purely a question of interpretation of the order and the judgment passed by the Hon"ble Supreme Court.

(xiii) It is stated that during the 21st Meeting of the Indian Board for Wildlife held on 21-01-2002, a "Wildlife Conservation Strategy-2002", was adopted vide letter F. No. 1-9/2007 WL-I (pt) dated 25-01-2012 (Annexure R-2) wherein it was proposed that lands falling within 10 kms of the boundaries of National Parks and Sanctuaries should be notified as eco-fragile zones under the Environment (Protection) Act and Rules framed thereunder.

(xiv) Pursuant to the said meeting, letter F. No. 6-2/2002 WL-I dated 09-07-2003 (Annexure R-3) was received by the Chief Wild Life Warden of all the States/ Union Territories whereby it was conveyed that the requisite information pertaining to notifying areas within 10 kms. of the boundaries of National Parks, Sanctuaries and Wild Life corridors as eco-sensitive areas had not yet been received by the Ministry from the State of Sikkim. This was then followed by the order dated 04-12-2006 in WP(C) No. 460 of 2004, i.e., the Goa Foundation case (supra) observing that-

.....

The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent to the Central Government. The communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles. If the States/Union Territories now fail to respond, they would do so at their own risk and peril.

.....

(xv) The Ministry of Environment and Forests vide letter F. No. 6-1/2003 WL-I(pt) dated 19-12-2006 (Annexure R-4) had once again reminded the Chief Secretary of all the States/Union Territories regarding the declaration of Eco-Fragile/Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries within their States. The Chief Wildlife Warden, Government of Sikkim accordingly responded vide his letter No. 69/CWLW dated 09-02-2007 conveying to the Deputy Inspector General of Forest, Ministry of Environment and Forests, New Delhi, the views of the State Government enclosing a copy of the affidavit (Annexure R-6) filed before the Hon"ble Supreme Court in WP(C) No. 460 of 2004 in Goa

Foundation case (supra) wherein it had been, inter alia, averred that the condition of declaring Eco-fragile/Eco sensitive zones within 10 (ten) kilometer limit (crow flying) from the periphery of the PAs was not tenable as per Sikkim conditions and that if the proposed identification is carried out, a substantial portion of the State will be covered under such zones and may intrude with the ongoing developmental process in the State. However, the State Government had already initiated survey in this direction in response to the Hon"ble Supreme Court directives.

(xvi) A draft proposal was forwarded by the Forest, Environment and Wildlife Management Department, Government of Sikkim vide letter No. 30/GOS/CWLW/Forests dated 13-04-2011 (Annexure R-8), identifying six Eco-Sensitive Zones around National Park and Wildlife Sanctuaries on the basis of the guidelines issued by the MoEF.

(xvii) However, the MoEF (Wildlife Division) by its letter No. 1-9/2007 WL-I(pt) dated 25-01-2012, conveyed that the proposals were not in accord with the guidelines of declaration of Eco-sensitive Zone and directed that a Committee be constituted to identify the prescribed activities within the Eco-Sensitive Zones and that the revised proposal should contain details as indicated in the said letter.

(xviii) That the PCCF-cum-Pr. Secretary vide Memo No. 101/FEWMD dated 02-08-2012 (Annexure R-11) has since forwarded a revised proposal for declaration of 50 meters as Eco-sensitive Zones around protected areas of Sikkim (Annexure R-12) based on the recommendation of the Committee set up by the State Government as directed by the MoEF. The proposal is still under consideration of the MoEF.

(xix) That the Government of Sikkim had already notified its buffer zones for Khangchendzonga National Park and, the Project did not fall within such buffer zone. However, pursuant to the resolution passed in the meeting of the NBWL on 17-03-2005, it was decided that "..... the delineation of eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities. State Government will have to be consulted in this regard and concurrence obtained." and, therefore, eco-sensitive zones were to be delineated/notified by the State Governments/Union Territories.

(xx) That after the Supreme Court judgment in Anand Arya case (supra), the MoEF has issued "Guidelines for Declaration of Eco-Sensitive Zones around National Parks and Wildlife Sanctuaries" vide F. No. 1-9/2007 WL-I(pt) dated 09.02.2011 ("Guidelines"). The Guidelines at Paragraph 4 dealing with "Extent of Eco-Sensitive Zonse" at sub-paragraph 4.1 set out the following:

4.1 Many of the existing Protected Areas have already undergone tremendous development in close vicinity to their boundaries. Some of the Protected Areas actually lying in the urban set up (E.g. Guindy National Park, Tami Nadu, Sanjay Gandhi National Park, Maharashtra, etc). Therefore, defining the extent of eco-sensitive zones around Protective Areas will have to be kept flexible and

Protected Areas specific. The width of the Eco-sensitive Zone and type of regulations will differ from Protected Area to Protected Area. However, as a general principle the width of the Eco-Sensitive Zone could go upto 10 Kms around a Protected Area as provided in the Wildlife Conservation Strategy-2002.

(xxi) As far as the State of Sikkim is concerned, 28 out of 30 HEPs allotted fall within the 10 kms radius of National Parks and Wildlife Sanctuaries located in Sikkim. These would include HEPs currently under construction, namely, Teesta-III HEP (12000 MW), Teesta-VI HEP (500 MW), Rongni Chu HEP, Chuzachen HEP, Bhasmey HEP, Rangit-II HEP, Dikchu HEP, etc. In the event 10 kms area around Wildlife Sanctuary and National Parks are considered as an eco-sensitive zone, more than 85% of the land area of Sikkim would fall within such eco-sensitive zone resulting in serious ramifications to the State's economic growth.

(xxii) That the Project in question being more than 5 kms away from the nearest boundary of the Khangchendzonga National Park, it neither falls within the eco-sensitive zones envisaged in the Draft Proposal nor within the earlier demarcated buffer zone. Even before the Project got its formal clearances under the earlier notified buffer zone, the APCCF-cum-Chief Wildlife Warden, Department of Forest, Environment and Wildlife Management, Government of Sikkim vide letter F. No. 128/NP&Z/WL/Forest/32 dated 23-01-2007, has issued "NOC" as none of the components of the Project in question fall within the boundary of the Khangchendzonga National Park and its Buffer Zone at Tashiding Kabirthang Village, West Sikkim.

(xxiii) Dealing with the various averments contained in the Writ Petitions, the Respondent No. 1 has denied that the Rathong Chu river is the most sacred river with Tashiding navel to all and that the river has not been classified as a protected place of worship by the Government of Sikkim and that no important places of worship are affected by the Project under construction at Tashiding area.

(xxiv) That a Committee was constituted by the State Government vide Notification No. 80/HOME/2011 dated 24-10-2011 (Annexure R-16) to review and examine issues relating to the implementation of (i) 99 MW Ting Ting HEP (ii) 97 MW Lethang HEP and (iii) 96 MW Tashiding HEP at Yuksam-Tashiding Constituency headed by the Chief Secretary, Government of Sikkim as the Chairman.

(xxv) Based on the recommendation of the Committee the State Government ordered the closure of (i) 99 MW Ting Ting HEP and (ii) 96 MW Lethang HEP vide Notification No. 12/Home/2012 dated 08-02-2012 (Annexure R-18).

(xxvi) That in the Goa Foundation case (*supra*) no direction was issued by the Hon"ble Supreme Court directing reference of all the future Projects to the Standing Committee of NBWL for clearance and that the order did not hold that an area of 10 kms around a National Park/Wild Life Sanctuary will automatically be construed as eco-sensitive zone or that the proposal for development of any Projects in future within 10 kms radius of any National Park/Wild Life Sanctuary

will require approval from NBWL. As regards the cancellation of Lethang HEP is concerned, it is stated that this Project was located at a distance of 0.2 km. from the Khangchendzonga National Park but, this was not relevant in the context of the Project in question. Rejection of the proposal for development of Lethang HEP by the Standing Committee of the NBWL (in its 20th Meeting on 13-09-2010) in consideration of religious sentiments was far in excess of its power and mandate under the Wild Life (Protection) Act, 1972, which only provides for protection of wild animals, birds and plants and matters related thereto. However, as the present Project did not require NBWL clearance, its parallel could not be drawn with the Lethang HEP.

(xxvii) As regards the letter dated 19-09-2011 written by Spalzes Angmo, it is stated that the contention that development of HEPs should not be allowed in seismic regions in view of earthquakes, was misc-conceived and devoid of any substance as there was no evidence that the earthquake was caused due to implementation of HEPs in Sikkim.

10. Respondent No. 2, the Ministry of Environment and Forests, Government of India, in its brief counter-affidavit has stated as under:-

(i) That the MoEF accorded Environment Clearance for 97 MW Tashiding HEP in Sikkim to M/s. Shiga Energy Pvt. Ltd. as per the provisions of Environmental Impact Assessment Notification, 2006, subject to strict compliance of the terms and conditions (Specific and General Conditions) stipulated vide MoEF's letter dated 29-07-2010.

(ii) In order to address the environmental safeguards of the Reserve, the Environmental Clearance Order for Tashiding HEP, inter alia, provides for the following condition under Part A-Specific Conditions:-

(viii) The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court order clearance from NBWL may be obtained (if required).

(iii) The Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP) for 97 MW Tashiding HEP was prepared by M/s. R.S. Envirolinks Technologies Pvt. Ltd., Gurgaon. The Public Hearing was conducted on 18-06-2009. The methodology followed for preparation of EIA and EMP had been thoroughly examined by the Expert Appraisal Committee (EAC) in its meetings held on 22-04-2010 and 30-06-2010 and accordingly recommended for according environmental clearance (EC) to the Project. Thus, the MoEF has followed the due procedure and norms taking into account all relevant factors required for according EC for the Project.

(iv) All State Governments/Union Territories were requested to send their proposals including Sikkim in accordance with the guidelines for declaration of eco-sensitive zones around National Parks and Wild Life Sanctuaries issued by the Wildlife Division of the MoEF.

(v) Eco-Sensitive Zone has not yet been notified around the Khangchendzonga National Park but a proposal has been received from the Government of Sikkim in August, 2012, which is under examination. Further, the Wildlife Division of MoEF has not received any specific proposal with respect to 97 MW Tashiding HEP.

(vi) In view of the above, it is clear that the Environmental Clearance issued to the Project proponent is subject, inter alia, to the Specific Condition of it obtaining clearance from NBWL, if required, in order to make the Environmental Clearance effective.

11. The Respondent No. 3, NBWL, in its counter-affidavit has averred as follows:-

(i) As per the practice in vogue, recommendations of the Standing Committee of the NBWL are necessary along with the environmental clearance for taking up activities within the notified Eco-sensitive zones around Wildlife Sanctuaries and National Parks falling within 10 kms in the absence of delineation of such a zone. Ministry of Environment and Forests has issued guidelines in this respect, which have been circulated to all the States including Sikkim (Annexure-A1).

(ii) Eco-sensitive Zone has not yet been notified around the Khangchendzonga National Park. A proposal in this regard has been received in the MoEF from Government of Sikkim in August, 2012, which is under scrutiny.

(iii) Based on the representation received from the Sikkim Bhutia-Lepcha Apex Committee indicating that the 97 MW Tashiding HEP in West Sikkim is located within 10 kms from the Khangchendzonga National Park, the Government of Sikkim has been requested to look in to the matter to ascertain as to whether the construction of the Project was already underway and, if yes, it was asked to be stopped immediately until further orders as it did not have necessary recommendations of the Standing Committee of the NBWL (Annexure-A2).

(iv) It is also stated that the Ministry of Environment and Forests has so far not received any proposal from the Government of Sikkim with respect to the 97 MW Tashiding HEP over the river Rathang Chu in West Sikkim for consideration by the Standing Committee of NBWL.

12(i). In its counter-affidavit, the Respondent No. 4 has taken the very same objections as the State-Respondent No. 1. It is alleged that there has been inordinate delay of approximately 3 years in filing the Writ Petitions from the date of the Open Public Hearing held by the State Pollution Control Board on 18-06-2009. The Writ Petitions are liable to be dismissed for laches particularly when hundreds of crores of rupees have already been invested in the Project after obtaining all requisite clearances. That the religious issues raised in the Writ Petitions have already been settled by this Court in Denzong Lho Man Choda (supra) and Chukie Tobdon (supra), a fact which has been concealed by the Petitioners. That the Project has fulfilled all the requirements under the applicable laws and is a low impact, environment friendly project.

(ii) That the present Project is entirely in compliance with the requirements

under the applicable laws having obtained all the necessary approvals required for development of the Project and was not in breach of any legal compliance.

(iii) The land acquisition process has been carried out in a lawful and transparent manner.

(iv) The Project is a run-of-river, renewable energy and greenhouse gas free Project and is amongst the most sustainable HEPs in the country. The Project does not involve construction of any large dam but a small barrage to divert part flow of water from the river through a tunnel to the power house and is channelled back to the river. The submergence area of the reservoir is only 1.33 ha while similar capacity hydro projects in the country generally submerge more than ten hectares of land.

(v) As regards the impact of the Project on flora and fauna in the vicinity of the site is concerned, it is stated that the Environment Impact Assessment study conducted by a reputed Agency and approved by the MoEF states that-

6.5 Impacts on Terrestrial Fauna

Disturbance to Wildlife

..... Based on the field survey and interaction with locals, it was confirmed that no major wildlife is reported in the proposed submergence area. The project area and its surroundings are not reported to serve as habitat for wildlife nor do they are located on any known migratory route. Thus, no impacts are anticipated on this account. However, no large-scale fauna is observed in the area. Thus, impacts on this account are not expected to be significant.

(vi) The Project was found to be and continues to be overwhelmingly in larger interest of public. It is submitted that a vast majority of the local population of the region from all communities including those to which the Petitioners claims to represent, have wholeheartedly supported the Project since they recognise that the Project will not only be in the interest of the State, but will also generate revenue and employment.

(vii) That no issue with regard to the religious sentiments was raised during the process of acquisition of the land for the Project, 47% of which was from the members of the Bhutia-Lepcha Community (Annexure R7).

(viii) That a budget of Rs. 4.67 crores has been allocated to be spent on Environmental Management Plan (EMP) for the Project which includes Catchment Area Treatment Plan, Biodiversity Management Plan, etc. The moneys are being spent as per the EMP report approved by the MoEF.

13. The above substantially are the averments which are more or less identical to that of the State-Respondent No. 1. We may not deal with the rest as being immaterial for the disposal of the Writ Petitions.

14. The case of the Respondent No. 7 in its short counter-affidavit is that it has

sanctioned financial assistance of Rs. 325 crores for implementation of 97 MW Tashiding HEP executed by the Respondent No. 4 in consortium arrangement with Respondent No. 8 as being the underwriter and that the loan document is under execution. That clearance of Ministry of Environment and Forests was submitted by the Respondent No. 4 based upon which it had appraised and sanctioned the financial assistance and that as per the environmental clearance dated 29-07-2011, the proposed site is about 5 kms away from the buffer zone of Khangchendzonga Biosphere Reserve requiring NBWL clearance (if required) as per the order of the Supreme Court. This was suitably addressed in the sanction letter issued to the Respondent No. 4 for the financial assistance to be provided for the Project.

15(i). Respondent No. 8 in a separate counter-affidavit apart from taking the objection of delay and laches as the Respondents No. 1 and 4, has stated that the Respondent No. 8 (IFCIL), is a financial institution which was established with a view to overcome the scarcity of long term finance plans in the industrial sector.

(ii) That prior to investing in the Tashiding HEP, the Respondent No. 8 conducted proper and thorough appraisal of the said Project. Upon receiving the proposal from Respondent No. 4, the Respondent No. 8 had duly verified as to whether the Project was in compliance with the necessary legal requirements with required consents and approvals obtained from the relevant Government Authorities. That while investing in the Tashiding HEP, the following factors were into consideration:-

(a) The Detailed Project Report for the Tashiding HEP was approved by the Sikkim Power Development Corporation Limited on 06-04-2009;

(b) The Sikkim Pollution Control Board in terms of the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974 had issued the "Consent to Establish" to the Tashiding HEP on 25-11-2010;

(c) The final approval from the MoEF through the Government of Sikkim for diversion of 4.3492 Ha of forest land required for construction of the Tashiding HEP was obtained on 24-09-2011; and

(d) The procedure and formalities in respect of acquisition of land was substantially complied with.

(iii) That only after having satisfied itself with the various aspects did the Respondent No. 8 execute the syndicated secured term facility agreement with Respondent No. 4 whereby it has underwritten a loan of Rs. 487 crores for the construction and development of the Tashiding HEP. That the Respondent No. 8 has already disbursed Rs. 114.37 crores and in addition it has also entered into an agreement whereby it has committed to invest Rs. 76 crores as equity/preferential capital contribution in Respondent No. 4. Out of this, it has already invested a sum of Rs. 39.72 crores for shareholding of 37.1% in Respondent No.

4.

16(i). Before dealing with the rival contentions of the parties, it would be relevant to note that the Petitioners on 24-07-2012 had moved for stay of the Tashiding HEP on the ground that the mandatory requirement of clearance by the Standing Committee of NBWL had not been obtained by the Respondent No. 4 before commencing with the Project work. By order dated 24-07-2012, this Court had directed that "the execution of the project shall remain subject to the outcome of the writ petition". On the prayer for stay having again pressed on 10-04-2013, it was observed by us as follows:-

.....

We have heard Mr. Ashok Bhan, learned Senior Counsel for respondents No. 4 and 5. Mr. Bhan submits that the work is at an advanced stage and a sum of Rs. 260 crores has already been expended. This amount was raised by respondents No. 4 and 5 by borrowing from public institutions. According to the learned Senior Counsel, it is too late for the petitioner to request for a stay of the work. The order already passed to the effect that the work will be subject to the final outcome of the writ petition, will protect the interest of the petitioner. The respondents No. 4 and 5 are ready to take the risk in going ahead with the construction. We record the submission of the learned Senior Counsel. We inform the respondents No. 4 and 5 that the ongoing work will be at the risk of those respondents. Learned Senior Counsel submitted that even at the time when Hon"ble Apex Court was moved, the work had progressed to a considerable extent and interim order of stay would have been declined at that stage also.

.....

[emphasis supplied]

(ii) The Writ Petitions had thus proceeded in the above premises.

17(i). Opening his arguments, Mr. Zangpo Sherpa, Learned Advocate, appearing for the Petitioners, laid the premises of his arguments on the following-

- (a) religious, cultural and historical aspect;
- (b) aspect of environmental laws as regards the Project in question being regulatory and not prohibitory; and
- (c) inter-generational equity and public trust doctrine.

(ii) The Learned Counsel addressed us firstly on the question as regards the violation of the environmental laws, seeking liberty to address on the others later. Having been permitted to do so, he proceeded to address us by referring to a Press Report appearing in an English daily, the "Telegraph" dated 21-08-1997, stating that the 30 MW Rathong Chu Project was being cancelled which, as per the statement of the Chief Minister of Sikkim, was to honour and uphold the sentiments, religion and culture of the Sikkimese people and to save the

environment. Thereafter, the Gazette Notification dated 02-09-1997 was published by the State Government ordering closure of the Rathong Chu Hydro Electric Project w.e.f. 20-08-1997. As per Learned Counsel, this pertains to an earlier Hydro Electric Project which had been proposed to be set up on the very river Rathong Chu on which the present Project has now been taken up.

(iii) Rebutting the contention as regards the Goa Foundation case (*supra*), it was argued that the order of the Hon'ble Supreme Court was clear to indicate that if the State/Union Territories failed to give proposals identifying areas on the boundaries of National Parks and Wildlife Sanctuaries as eco-sensitive areas within 4 weeks of receipt of the communication from the Ministry, the Court may consider passing orders for implementation of the proposal made in the "Wildlife Conservation Strategy-2002" on 21-01-2002, to notify the areas within 10 kms. of the boundaries of National Parks and Sanctuaries as eco-sensitive zones with a view to conserve the forest, wildlife and environment and having regard to the precautionary principle. That since the States, particularly the State-Respondent No. 1, admittedly have not complied with the direction within the time stipulated by the Hon'ble Supreme, by implication the eco-sensitive area will have to be considered as 10 kms. of the boundaries of the Khangchendzonga National Park. It was also directed upon the MoEF, Respondent No. 2, that all cases where environmental clearances had been given activities of which were within 10 kms zone, should be referred to the Standing Committee of the NBWL. It was submitted that Specific Conditions (viii) of the environmental clearance dated 29-07-2010 (Annexure P/11) granted by the Respondent No. 2 mandates that clearance from NBWL was necessary, if required. As per the Learned Counsel, this requirement was also reflected in paragraph 3 of the General Remarks of the Environment Clearance Status Query Form (Annexure P37 in CM Appl No. 63 of 2013) that the NBWL clearance was required to be obtained immediately.

(iv) That this position also stands confirmed by letter dated 28-05-2012 (Annexure A2) written by the Deputy Inspector General of Forests (WL) addressed to the Pr. Chief Conservator of Forests and HOFF, Government of Sikkim, by which it had been clearly spelt out that as the Project did not have the necessary recommendations of the Standing Committee of the NBWL and, if it was underway, the same may be stopped immediately. As per the Learned Counsel, the affidavit dated 07-10-2013 (CM Appl No. 139 of 2013) filed on behalf of the Respondent No. 2 duly affirmed by the very Deputy Inspector General of Forests, states in most unequivocal terms that as there was no notified eco-sensitive zone, the recommendation of the Standing Committee of the NBWL was mandatory, and needed to be applied for and, that a proposal for an Eco-Sensitive Zone and notification thereof at that date would not absolve the Project authorities from such requirement.

(v) In the above premises, the Learned Counsel would submit that there could be no other conclusion but to hold that clearance from the NBWL was and is a mandatory requirement failing which all actions taken would be held illegal and

under such circumstances the order dated 04-12-2006 in Goa Foundation case (supra) still holds good.

(vi) That although in Anand Arya's case (supra) it was the stand of Respondent No. 2 that in the absence of a declared eco-sensitive zone the construction work did not appear to violate any law which was also the submission on behalf of the State of Uttar Pradesh, in substance the decision did not depart from the essence of the Goa Foundation case (supra) when it was also held that absence of a statute would not preclude the Court from examining the Project's effect on the environment with particular reference to the sanctuary in question as it involved the right to life under Article 21 of the Constitution of India. As per the Learned Counsel, the conditional direction contained in the Goa Foundation case (supra) still subsisted in view of the admitted position that the eco-sensitive area has not yet been declared by the Respondent No. 2.

(vii) The sensitivity of the Rathong Chu Valley in the context of the environment is clearly set out in the Environmental Impact Assessment and Environmental Management Plan prepared for the Respondent No. 4 by M/s. R.S. Envirolink Technologies Pvt. Ltd., Gurgaon. The report indicates the fragile nature of the ecological lay out, its proximity to the buffer zone of Khangchendzonga Biosphere Reserve, innumerable taxonomic diversity, huge submergence area, the resultant dissemination of rich medicinal plants and trees, loss of flora, effect upon at least 160 species of mammals most of which fall under the endangered species under Schedule I of the Wild Life (Protection) Act, 1972, the avifauna, reptiles, butterflies, fish, etc. The report spells out the adverse impact on account of the immigration of construction workers to the area which is estimated to be about 1010, the impact on the environment due to utilisation of materials from the river bed, degradation of the quality of water of Rathong Chu river by sewage of the construction workers' camps, effluent from crushers, impacts due to damming of river, human activities, discharge of sewage, etc. The Learned Counsel submits that the Environment Management Plan put in place would not be sufficient to mitigate the serious impact on the Rathong River Valley by the Project.

(viii) Mr. Sherpa submits that the procedure for environmental clearance is not linked with clearances from forestry and wild life angle being independent of each other as would be evident from the minutes of the 19th Meeting of the State Environment Impact Assessment Authority held on 21-12-2009 (Annexure P-41). During the said meeting Office Memorandum dated 02-12-2009 (Annexure A1) laying down the procedure for consideration of proposals for grant of environmental clearance under EIA Notification dated 14-09-2006 (Annexure A1 to the counter-affidavit of the Respondent No. 3) was discussed. The Learned Counsel referred to Paragraph 2(i), (ii), (ii)(b) and (iii) of the said Office Memorandum which stipulates that environment clearance will not be linked with the clearances of forestry and wild life angle being independent of each other and, that the application for wild life clearance and clearance from Standing

Committee of NBWL should be submitted by the Project proponent before applying for the environment clearance and a copy of such application should also be furnished along with the environment clearance application. That the Office Memorandum also made it clear that the stipulation of 10 kms radius laid down in Goa Foundation case (supra) would apply. That the Deputy Inspector General of Forests (WL) had only re-emphasised this position when in his letter dated 28-05-2012 he had asked the Pr. Chief Conservator of Forests and HOFF under the Respondent No. 1 to stop the Project in question until further orders as it did not have the necessary recommendations of the Standing Committee of NBWL. This has been further reinforced by the Respondents No. 2 and 3 in their counter-affidavits in stating that the Project proponent needs to obtain clearance from NBWL, if required, in order to make the environmental clearance effective. As per Mr. Sherpa, it is in this light that the statement of the NBWL in its affidavit as Respondent No. 3 that the recommendations of the Standing Committee of the NBWL was also necessary, "as per the practice in vogue", has to be understood.

(ix) It is submitted that the Respondents No. 4 and 5 were aware of this legal position and the requirements prescribed under the procedure as they were available on the website of the Respondent No. 2. The fact that the Respondent No. 5 also was personally aware of the above position can be inferred from the letter of the MoEF dated 04-07-2011 addressed to the Respondent No. 5 as the Director of M/s. T.T. Energy Pvt. Limited, the Project proponent of 99 MW Ting Ting HEP on the very river Rathong Chu, as it refers to the Office Memorandum dated 02-12-2009 (Annexure A1 to the counter-affidavit on behalf of the Respondent No. 3) conveying the necessity of wild life clearance/clearance from the NBWL.

(x) Mr. Sherpa also points out that the Office Memorandum dated 02-12-2009, while laying down the procedure and indicating the mandatory nature of the requirement for seeking forestry and wild life clearances apart from the environmental clearances, also made it clear that "The investment made in the project, if any, based on environmental clearance so granted, in anticipation of clearance from forestry and wildlife angle shall be entirely at the cost and risk of the project proponent and Ministry of Environment and Forests shall not be responsible in this regard in any manner." This, as per the Learned Counsel, was also re-emphasised in the letter dated 19-08-2010 of MoEF, Respondent No. 2, copies of which were endorsed to all the Principal Chief Conservator of Forests, Chief Wildlife Wardens, the Nodal Officer (FCA) of all the States including all Regional Offices of the Ministry. Thus establishing that the State-Respondents were fully aware of the requirement of seeking NBWL clearance in respect of Projects of the kind in question.

(xi) It is submitted that the directions contained in the letter dated 28-05-2012 issued by the Deputy Inspector General of Forests (WL) (Annexure A2 to the affidavit on behalf of the Respondent No. 3, the NBWL) has not yet been

complied with although it was issued in pursuance to Section 3(1) read with Sections 3(2)(i), 3(2)(v) and 3(2)(vi) of the Environment (Protection) Act, 1986 and also Section 5C and Sub-Sections thereunder of the Wild Life (Protection) Act, 1972. Moreover, as per the Learned Counsel, the EIA Notification, 2006, would bring the Project under the purview of Central Government as it falls under Category "A" contained in the Schedule appended thereto.

(xii) Mr. Sherpa further would submit that Office Memorandum dated 02-12-2009 and the letter dated 28-05-2012 have statutory force as the power to issue such directions emanate from Sections 5A, 5B, 5C and 6 of the Wild Life (Protection) Act, 1972. The orders and procedures laid down thereunder are, therefore, binding and unavoidable. The stipulation of 10 kms as the eco-sensitive zone, as per Mr. Sherpa, has been prescribed by the Hon'ble Supreme Court by invoking the precautionary principle as would appear from the observation in the very order that "if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles."

(xiii) Relying upon M.C. Mehta Vs. Union of India (UOI) and Others, and M.C. Mehta vs. Union of India and others: (2012) 8 SCC 132, it was submitted that the EIA Notification, 2006, is mandatory having statutory force.

(xiv) Relying upon Krishnadevi Malchand Kamathia and Others Vs. Bombay Environmental Action Group and Others, it was submitted that it was not permissible for the Respondents No. 1, 4 or 5 to ignore an order as being void and would rather require compliance until it is declared so by a competent forum. The Learned Counsel would submit that until it was decided by an appropriate forum that NBWL clearance was not required for whatever reason, it was not permissible for Respondents No. 1, 4 and 5 to ignore the orders passed by the Respondents No. 2 and 3 holding those as void or non est.

(xv) Although the legal entity of the NBWL as a statutory body created u/s 5A of the Wildlife (Protection) Act, 1972 is self-evident, Mr. Sherpa would refer to Centre for Environment Law, WWF-I Vs. Union of India (UOI) and Others, to re-emphasise the position that statutorily it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological, environmental and security of the country and also its paramountcy over the State Board of Wild Life (SBWL). It was submitted that the "doctrine of public trust" makes it incumbent upon the Government to protect the resources for the enjoyment of the general public rather than to promote their use for private ownership or for commercial exploitation to satisfy the greed of a few as held in Association for Environment Protection Vs. State of Kerala and Others, . It is in order to uphold the doctrine of public trust that the environmental and other

cognate laws have been framed by the legislature. The action of the Respondents No. 1, 4 and 5 would clearly indicate that they have deliberately chosen to flout the mandate of the law and the orders issued by the authorities created thereunder.

(xvi) It is next contended that as per the Annual Report for the year 2008-09 submitted by the Energy and Power Department, Government of Sikkim (Annexure R8/3 to the counter-affidavit of Respondent No. 8) there are almost 50 Projects of Mega, Small, Mini and Micro magnitude Hydel Projects in different stages of progress in the State, of which the Tashiding HEP is one. Therefore, it is incorrect to state that scrapping of the Project would adversely affect the economy of the State and, that because there were already Hydel Projects, on the Rimbi river, the water of the Rathong Chu river stands already polluted and defiled. Mr. Sherpa reiterates that in 1997 a similar Project on the Rathong Chu river had been withdrawn.

(xvii) The Learned Counsel by referring to the notes of the Committee dated 21-11-2007 (Annexure P-18) and the recommendation of the Principle Chief Engineer, Energy and Power Department, submitted that the Project in question had been withdrawn from the Respondent No. 4 by a Cabinet decision dated 18-01-2008 on account of its dubious intentions and incapability but, surprisingly the decision was reviewed and the earlier L.O.I. was revived permitting the Respondent No. 4 to develop the Project. As per the Learned Counsel this did not reflect bona fides on the part of the State-Respondents.

(xviii) It was then contended that as a consequence of the objections from various groups including those whose cause is being espoused by the Petitioner as well as the concerns expressed by the Member, National Commission for Minorities, a Committee was set up by the State Government vide Notification dated 24-10-2011 headed by the Chief Secretary to examine the issues relating to the implementation of the three Projects including Tashiding HEP on the river Rathong Chu. The Committee upon consideration of various factors recommended scrapping of 99 MW Ting Ting HEP and 96 MW Lethang HEP but the decision as to whether or not the 97 MW Tashiding HEP should be scrapped was left on the Government. While doing so, the Committee noted that the Company had incurred an expenditure of more than 124 crores with the work in progress on the verge of constructing 3 adits and head rest tunnel and, that if the Government decided to scrap the Project the Project proponent will require to be compensated in excess of 150 crores. It was also pointed out that if the Project was to continue ramification in terms of public opinion and religious institutions had to be effectively dealt with being a sensitive issue.

(xix) Upon the above recommendations of the Committee the matter was referred for expert opinion but, was curiously marked to the Law Secretary who himself was one of the Members of the very Committee which had made the recommendations. It is submitted that the entire exercise was an eye-wash and a useless formality.

(xx) Mr. Sherpa submits that Shri R.K. Purkayastha, the Law Secretary, could not be considered as an "expert" who was qualified to give an opinion on the question. In any case, even the opinion given by him could not be stated to be of substance as the only consideration for his recommendation that the Project should not be scrapped was that amount of about Rs. 150 crores had been spent on the Project by the Project proponent. It is submitted that the monetary value spent was not such that it could not be compensated and such liability could not over-ride the immense public interest that would have served in scrapping the Project.

(xxi) Of the three, two HEPs, namely, Ting Ting and Lethang HEPs, were cancelled by the Respondent No. 1 by Notification No. 12/Home/2012 dated 08-02-2012 but decided to carry on with the Tashiding HEP on the basis of the opinion of the Law Secretary despite objections from various public organisations including the Sikkim Bhutia-Lepcha Apex Committee and other organisations like "Save Sikkim". References were made to a number of representations including letter dated 25-06-2011 addressed to the District Collector, West Sikkim and representation dated 21-07-2011 addressed to Smt. Jayanthi Natarajan, Union Minister of State, MoEF.

(xxii) The opinion and the decision taken thereon, as per the Learned Counsel, were in conflict with the public trust principle as discussed in the Association for Environment Protection case (supra). That the Respondents No. 1, 4 and 5 were in the breach of the public trust and the statutory orders and notifications, is clearly established by the fact that to a question put in the prescribed format while seeking information under the Right to Information Act, 2005, demanding for copies of the revised report of EIA and EMP of 97 MW Tashiding HEP by the Respondent No. 5 and observations of the Expert Appraisal Committee in its 37th Meeting under the EIA Notification, 2006 held on 22-04-2010, it was stated that the information was not available with the Department.

(xxiii) There is also a conflict as regards the agency which prepared the DPR for the Project. Mr. Sherpa points out that while the Respondent No. 2 in his affidavit has stated that it was by M/s. R.S. Envirolink Technologies Pvt. Ltd., Respondent No. 1, on the other hand, has named WAPCOS as the one which prepared it. There are contradictions on other aspects also which render the bona fides of the Respondents No. 1, 4 and 5 suspect.

(xxiv) It is submitted that environment, ecology and the bounties of nature are for every citizen and the State is the trustee of these which has the responsibility to appropriate them in a just and equitable manner without being influenced by the unwanted commercial exploitation. The "public trust doctrine" initiated by the Courts charges the State with such responsibility with the object to meet inter-generalisation equity by resorting to the principles of sustainable development. Referring to the decision of Fomento Resorts and Hotels Ltd. and Another Vs. Minguel Martins and Others, , it was submitted that the Legislature introduced Article 48-A with the object of protecting and improving environment

and safeguarding forest and wildlife and, Article 51-A enumerated fundamental duties of every citizen, Clause (g) of which enjoins upon every citizen of India to protect and improve the natural environment. The Learned Counsel also referred to Intellectuals Forum, Tirupathi Vs. State of A.P. and Others, to assert that while the State-Respondents invoke the principle of sustainable development, it has failed to maintain balance between the development needs which the Respondent asserts and the environmental degradation. It is submitted that the balance is skewed against protection of the environment and ecology of the State due to the Project in question. It is also asserted that the Writ Petitions cannot be thrown out solely on the consideration of the Respondent No. 4 having invested huge amounts of money. If such be the consideration the Courts will not have any option but to deem a Project legal only because a party has made certain investments.

(xxv) On the point of encroachment on religious and customary rights of the Petitioner, the Learned Counsel would submit that the Petitioners were not against the development of the State and the economic prosperity of the people as was being alleged on behalf of the Respondents. Their objection was only restricted to the Rathong Chu Valley and the river Rathong Chu in the far corner of West Sikkim upon which the 97 MW HEP in question was being set up. It is urged that there were already a large number of Hydro Projects which were in different stages of development and other industries of huge magnitude in other parts of the State against which the Petitioners had not raised any question. It is an admitted position on the part of the State-Respondent that there were at least 30 such Hydro Projects out of which at least 6 of them were Mega Projects with more than 500 MW capacities and the rest were varying between 90-400 MW. Of them, Tessta-V Project having an installed capacity of 510 MW, was partially in commission.

(xxvi) The report of the Energy and Power Department, Government of Sikkim, Annexure R-8/3, indicates 61 MW as the peak load of the State which of course was expected to grow. The entire Hydro Projects taken together would have an installed capacity of 8000 MW. For a State having an area of 2700 sq. miles with a population of about 6 lakhs, the revenue that would be generated from these would be manifold in excess of its requirement to meet the necessary developmental expenditure. Moreover, due to the terrain and altitude of the State only 15% of the total area of the land is cultivable and inhabited and, most of these lie along with the river valleys which are being tapped for Hydro Electric generation. Under these circumstances, as per the Learned Counsel, it was incorrect to state that if the Tashiding HEP on the Rathong Chu river, in a far corner of West Sikkim was stopped, it would adversely affect the development process of the State.

(xxvii) That the Rathong Chu river and the entire area below the Mount Khangchendzonga in West Sikkim is considered as the most sacred area of Sikkim is well-established as would appear from the religious texts and, in

particular, "Neysol" which describes the names of all the deities of Sikkim mentioned by one of its Saints of Sikkim "Gyalwa Lhatsun Chenpo". Referring to the excerpts of the note sheets at pages no. 1 and 2 of the former Secretary of the Ecclesiastical Department, Government of Sikkim (Annexure P4), it has been recorded that strictly from the religious point of view, the Project is located at the heart of the sacred areas of Sikkim indicated in the "Neysol" text and that the Project from the religious perspective would defile the sanctity of the area. It is stated that the Sikkim is the only State which has an Ecclesiastical Department looking after the religious affairs of the State in view of the historical setting. Great Buddhist masters and scholars have also emphasised on the sacredness of the Rathong Chu and its surrounding areas. Mr. Sherpa drew our attention to the views expressed by His Eminence Dodrup Chen Rinpoche, Venerable Lachen Gomchen Rinpoche, HH Dilgo Khyentse Rinpoche and HH Chatral Sangye Dorje Rinpoche, filed as Annexure P22 collectively. Reference was made to the paper "The Importance of Sacred Natural Sites for Biodiversity Conservation" submitted to the UNESCO during the International Workshop on the subject held in Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, between 17-20/02/2003 by Prof. P.S. Ramakrishnan in which he has also referred to the "Neysol" text. The Learned Counsel submits that the paper, inter alia, referring to the "Neysol" text, most lucidly sets out the importance of the Rathong Chu catchment area considered as the mythical "Demajong", that has a clearly defined norms and well-defined boundary of sacredness where the air, soil, water and biota are all sacred with an area measuring about 3,28,000 hectares out of which 28,510 hectares is under snow cover. It is stated that entire cultural fabric of Sikkimese society is dependent upon the conservation of the whole sacred landscape.

(xxviii) The National Biodiversity Strategy and Action Plan (NBSAP) prepared by the Ministry of Environment and Forests, Government of India, Respondent No. 2 (Annexure P24 to the Writ Petition) was also referred to point that the Nodal Agency of NBSAP also consisted of the PCCF/CWLW-cum-Secretary of the Department of Forest, Environment and Wildlife, Government of Sikkim and other Officers of the department. The plan, which is a Government document, also emphasises on the sacredness of the Yuksam valley in which the river Rathong Chu flows. It is submitted that an entire section of the report is devoted to this aspect at serial no. 5 under the head "Sacred Landscapes" which was pointed out to us. It is submitted that the entire Yuksam valley through which the river Rathong Chu flows and the river itself are worshipped by the Buddhists in general and, these form an essential part of their religious practices. He submitted that any encroachment in the natural settings of the valley and the river would encroach upon their rights guaranteed by Articles 25, 26 and also Article 29 of the Constitution of India.

(xxix) He further went on to refer to the case of Orissa Mining Corporation Ltd. vs. Ministry of Environment & Forest & Others: 2013(6) Scale 57 wherein the Hon'ble Supreme Court upon consideration of a similar aspect pertaining to the

Niyamgiri hill of Orissa having religious significance to the tribals of that valley, referred the case back for a fresh public hearing in spite of two public hearings having already been held earlier.

(xxx) On the question of delay in filing the Writ Petitions, it was submitted that there was no delay at all in filing the Writ Petitions. It is stated that the Project was being objected to right from the inception by various groups as would appear from the report on visit of High Powered Committee dated November, 2011 which refers to a Group "Save Sikkim" (Annexure P29), and letter dated 16-11-2011 by District Collector, West to PCE-cum-Secretary, Energy and Power Department, Government of Sikkim (Annexure R-20) forwarding record of discussions held in his Chamber to discuss a representation dated 14-11-2011 submitted by the villagers in the name of "Save Sikkim".

(xxxi) Violation of the guidelines prescribing the procedure for obtaining environmental clearance stand established on the Respondents' own admission. This is a continuing wrong and the cause of action still continues. From the report of the High Powered Committee on the 97 MW Tashiding HEP dated November, 2011, which the Learned Counsel refers to, it is submitted that no physical work of substance appear to have taken place except for payment of land compensation, both private and forest lands, for which Rs. 124 crores had been spent with just about 12% to 14% of the civil works completed.

(xxxii) Similarly, the Sixth Monthly Compliance Report on Status of Environmental Safeguards of 97 MW Tashiding HEP forwarded by letter dated 22-11-2012 by the Environment Officer to the Joint Director, North Eastern Regional Office, MoEF, Annexure P35, also indicates that the construction phase had just started with the financial closure of the Project having been achieved only in July, 2011, after which only the construction of roads in the area commenced. It is, therefore, submitted that on the Respondents' own admission, at the time when the Writ Petitions were filed, the Project was at its initial stage of implementation.

(xxxiii) In view of the widespread protest against the HEPs, the State Government ultimately had constituted a Committee to review and examine the issues pertaining to those by Notification dated 24-10-2011. Pursuant to its decision taken in its meeting held on 21-11-2011, a team of officers comprising of the Commissioner-cum-Secretary, Commerce and Industries Department and Secretary, Energy and Power Department, visited the spot. Based on this report, the Committee in its meeting held on 23-11-2011 proposed closure of Ting Ting and Lethang HEPs but referred the decision on the Tashiding HEP to the Government. The State Government accepted the recommendation for closure of the two but decided to continue with the Tashiding HEP by Notification only on 08-02-2012 (Annexure R-18) leading to the filing of the Writ Petitions on 21-03-2012 before the Hon"ble Supreme Court.

It was, therefore, submitted that there was no delay on the part of the Petitioner

in filing the Writ Petition.

(xxxiv) The Learned Counsel urged that even the Office Memorandum dated 02-12-2009 prescribing procedure for consideration of proposals for grant of environmental clearance under EIA Notification, 2006, clearly stated that the investment made in the Project, if any, based on environmental clearance granted in anticipation of the clearance from the Forestry and Wild Life angle, shall be entirely at the cost and risk of the Project proponent.

(xxxv) Mr. Sherpa also referred to the order of this Court dated 24-07-2012 whereby this very principle had been adopted while dealing with the prayer for stay of the Project when it was clarified that "the execution of the project shall remain subject to the outcome of the writ petition" followed by our order dated 10-04-2013 wherein the submission of the Senior Counsel for the Respondents No. 4 and 5 to the effect that they are ready to take the risk in going ahead with the construction, was recorded. Therefore, when substantial portion of the expenditure was incurred by the Respondents No. 4 and 5 during the pendency of the case, they cannot now take the plea of being in a disadvantageous position on the principle of equity. As per the Learned Counsel, the case has been pending for the last almost 3 years having been duly admitted for hearing in consideration of the immense public importance involved in the matter. As such, even on this account the question of delay would pale into insignificance.

(xxxvi) On the Public Hearing conducted by the State Pollution Control Board and the NOCs received from different Monasteries, it is submitted that those do not reflect the correct position from the very records of the Public Hearing filed as Annexure R-8/2 by the Respondents from which it will be manifest that none of the persons belonging to the people whose cause the Petitioner espouses are found to be in the list of people contained in the report. No monks of the premier Monasteries, namely, Dubdi, Premayangtse, Tashiding, etc., were represented during the Public Hearing. He submits that the questions and the answers listed out in the report do not pertain to their religious, customary and traditional aspects at all but deal only with individual benefits accruing out of the Project. The NOC (Annexure R-22 series of the Respondent No. 1) are given by persons who apparently are not authorised. The NOCs are written in English and in computer prints some of which are in verbatim copies which the monks do not understand. Obviously, those were procured or obtained by misleading the signatories. That as per traditional practice, it is the administrative body of the Monastery known as "Udoer Choesum" or "Duchi" Committee who are authorised to make commitments of such nature. This is obvious from Annexure P-28 series filed by the Petitioners, consisting of objections from six Monasteries out of which four Monasteries, viz., Tashiding, Pemayangtse, Khechoperi and Dubdi, are from West Sikkim located in the Rathong Valley and its vicinity and considered to be the premier ones. It is stated that the legitimate authorities of those Monasteries have expressed their opposition to the Project on the river Rathong Chu and its periphery. The NOCs given by the persons indicated in

Annexure R-22 series filed on behalf of the Respondent No. 1 have been denied by them as invalid. The claim of the Respondent No. 4 that monks of the Pemayangtse Monastery had performed the puja purportedly for restart of the Project during September, 2012, contained in the application dated 17-11-2012 has been denied by those very monks and that the said puja was performed for universal peace as requested by the Respondents No. 4 and 5.

(xxxvii) Summing up his submissions, Mr. Sherpa urged that the Project was in violation of the environmental laws for want of the necessary NBWL clearance and that the Project on the river Rathong Chu is in violation of the rights of the Petitioners under Articles 25, 26 and 29 of the Constitution of India guaranteeing freedom of religious practice and conscience and of preserving the customs and tradition of the Petitioners. It is submitted that the closure of the Project would not hinder the development work of the State and, even if there be any, it would be insignificant and worth the cancellation in view of the immense public interest that it would result in. The Project as stated lies in the far corner of West Sikkim.

18(i). Replying on behalf of the State of Sikkim, Mr. J.B. Pradhan, Learned Additional Advocate General, submitted that the oral arguments placed by the Learned Counsel on behalf of the Petitioners were beyond the scope of the pleadings as the only challenge to the Project in question in the Writ Petition is on the violation of the Supreme Court order dated 04-12-2006 passed in Goa Foundation case (*supra*). That although the Petitioners have prayed for cancellation of the Tashiding HEP, the MoU entered between the State-Respondent No. 1 and the Respondent No. 4 and the reassignment of the Project after it had been withdrawn from it earlier have remain unchallenged.

(ii) It was next contended that the Writ Petitions were factually mis-conceived and clarified that while the earlier Rathong Chu HEP which was scrapped by the Government was located upstream the river Rathong Chu and above Yoksum township, the present 97 MW Tashiding HEP is located after the confluence of river Rathong Chu and river Rimbi. Referring to a map (Annexure R21), it was asserted that the name of the river where the present Project is being set up is locally called "Ladong Khola" and, therefore, would not hinder the "Bhumchu" ceremony. That in his letter dated 16-12-2010, Annexure R17, the PCE-cum-Secretary, Energy and Power Department, Government of Sikkim, addressed to the Ministry of Environment and Forests, has stated that 99% of the local people supported the development of the Project and that it did not cause disturbance, displacement or defilement of any kind to any holy place of worship, holy shrine, structural and archeological importance or heritage and the sanctity of the sacred Tashiding "Bhumchu". That the earlier Rathong Chu HEP had been scrapped as open channel (water conductor) of the Project was proposed to pass through Yuksam village where some of the religious structures were located which is not the case in the present Project being is far from those places. That the monks of Denzong Pao Hungry Monastery, Tashiding Monastery, Duchi Committee of Khecheopalri Monastery and Duchi Committee of Dubdi Monastery, West Sikkim,

have given their NOCs in support of the Project. It is contended that the Government Notification No. 70/HOME/2001 dated 20-09-2001 which declared sacred places, lakes, etc., also does not mention the Rathong Chu river as a sacred river.

(iii) It is his submission that the entire Writ Petitions being based on factually incorrect premises, it deserves to be dismissed as such.

(iv) It is contended that the Petitioners were guilty of delay and laches in filing the Writ Petitions in as much as MoU was signed on 03-09-2008, the advertisement for conducting Public Hearing of the Project was published by Sikkim Pollution Control Board on 17-05-2009. On 18-06-2009, Open Public Hearing was conducted wherein the public of that area and many others participated. Notifications u/s 4(1) of the Land Acquisition Act, 1894, for acquisition of land for the Project were published firstly on 26-07-2010 and secondly on 24-03-2011. Environmental clearance from MoEF was obtained on 29-07-2010. NOCs were issued by monks of various Monasteries in October and November, 2010 but, the Petitioners have chosen to approach this Hon''ble Court after a period of two years and nine months from the date of Open Public Hearing. The Writ Petitions are, therefore, hit by unexplained delay and laches and thus not maintainable and liable to be dismissed on this ground alone.

(v) In support of his contention reference was made to D.D.A. Vs. Rajendra Singh and Others, to emphasise on the principle that delay rules were also applicable to Public Interest Litigations (PILs) and that if there was no proper explanation for the delay, PILs are also liable to be summarily dismissed.

(vi) Referring to Narmada Bachao Andolan Vs. Union of India and Others, upon which heavy reliance was placed, it was submitted that when huge amount of public money has already been spent, the Petitioner in the garb of PIL cannot be permitted to challenge a policy decision belatedly and that such challenge after execution of the Project had commenced should be thrown out at the very threshold on the ground of laches if the Petitioner had the knowledge of such decision.

(vii) The Printers (Mysore) Ltd. Vs. M.A. Rasheed and Others, and Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Others, were also referred to on the same point but we need not deal with those being repetitive.

(viii) That the Writ Petitions were also liable to be dismissed as there was no violation of the laws and of the relevant procedures requiring compliance.

(ix) It is asserted that the Petitioners have no locus standi to file the Writ Petitions and is not in public interest but is rather vexatious and frivolous deserving outright rejection. From the very averments contained in the Writ Petitions they are not the residents of the Project area in West Sikkim.

(x) The allegation that the Project in question was arbitrary and was bad for non-application of mind was sought to be repelled by submitting that all relevant

factors have been taken into consideration and necessary procedures followed before finalisation of the Project.

(xi) The Learned Additional Advocate General then went on to submit that it was not for the Courts to interfere with the policies of the Government. A catena of decisions were cited on the point the substance of which is that when State action is challenged the function of the Court is to examine the action in accordance with law and to determine whether the Legislature or Executive has acted within the powers and functions assigned under the Constitution and if not, the Court must strike down the action.

(xii) Relying upon *Union of India (UOI) and Others Vs. J.D. Suryavanshi*, it was submitted that judicial interference by way of PIL is available only if there is injury to public or dereliction or constitutional obligation by the State and that Court should generally not interfere with technical and administrative decisions.

(xiii) Rebutting the contention of the Petitioners of the Respondents having violated the environmental law for failing to seek clearance from NBWL, it was submitted that all relevant approval and consents required for development of the Project had been obtained and the Project is in compliance with the applicable laws. The violation of the order dated 04-12-2006 passed by the Hon"ble Supreme Court in *Goa Foundation case* (supra) is mis-conceived. It was stated that the order did not hold that an area of 10 kms around the National Parks/Wild Life Sanctuaries will automatically be construed as an eco-sensitive zone or that the proposal for development of any Project in future within 10 kms radius of any National Parks/Wild Life Sanctuaries will require approval from NBWL. As per the Learned Additional Advocate General, the area in *Goa Foundation case* (supra) has been clarified in *Anand Arya case* (supra) and by referring to paragraph 32 of the report of the Central Empowered Committee (CEC) extracted in paragraph 73 wherein it was observed that in the absence of a decision/notification presently there is no legal restriction against the implementation of the Project on the ground that the Project was adjacent to the Okhla Bird Sanctuary and further that it was decided by the NBWL that eco-sensitive zone should be specific to each National Parks/Wild Life Sanctuaries.

(xiv) It was then submitted that a Committee was constituted by the PCCF-cum-Secretary on 20-05-2006 to monitor activities in eco-sensitive zones and that the Committee in its meeting held on 30-07-2012 to determine the eco-sensitive zone beyond the boundary of the protected area, submitted a proposal which was forwarded to the MoEF by letter dated 02-08-2012 (Annexure R-11).

(xv) This was also in compliance to letter dated 09-02-2011 written by Deputy Inspector General (WL) to the Chief Wildlife Warden of all States/Union Territories directing them to forward sites specific proposals on the basis of a guideline framed by the Ministry enclosed with the said letter for taking necessary steps.

(xvi) That the *Goa Foundation case* (supra) did not mandate creation of an eco-

sensitive zone within a radius of 10 kms of the boundary of National Parks/Wild Life Sanctuaries is also apparent from the order dated 21-09-2012 passed by the Hon"ble Supreme Court in the case of T.N. Godavarman Thirumulpad vs. Union of India and Others in IA No. 1000 in Writ Petition (Civil) No. 202 of 1995 which also covered the Goa Foundation case (supra) as would appear from the cause title, namely, IA Nos. 170-175 in WP(C) No. 460 of 2004 and IA Nos. 176-178 in WP(C) No. 460 of 2004. The order dated 21-09-2012 records the suggestions of the Central Empowered Committee (CEC) to restrict the safety zone around National Parks/Wild Life Sanctuaries to areas not less than 2 kms. Although this was not decided finally, it clearly illustrates the fact that the extent of the eco-sensitive zone has not yet been decided.

(xvii) In the proposal submitted by the Respondent No. 1 the boundary of the eco-sensitive zone has been proposed at 50 meters of the boundary of the Khangchendzonga National Park. It is urged that the State of Sikkim had filed affidavits in response to the order dated 04-12-2006 in the Goa Foundation case (supra) expressing its reservation in declaring 10 kms area as eco-sensitive zone. It is thus submitted that the assertion made on behalf of the Petitioners that the Project was liable to be cancelled for having failed to obtain NBWL clearance is mis-conceived as being based upon an erroneous interpretation of the Goa Foundation case (supra). As per the Learned Additional Advocate General there was no mandate in law to seek such clearance.

(xviii) On the question of the religious and cultural aspects raised by the Petitioners, it was strongly argued that the Project did not at all interfere with rights of religious practice of the Petitioners in as much as the Rathong Chu river is not at all declared as a sacred river under the Notification issued by the State Government.

(xix) The grievance of the river being defiled by the Project was unjustified as in the first place it is not been indicated as to from which the place of the river the water is drawn for the purpose of "Bhumchu" ceremony. It is submitted that there is already an old Hydro Electric Project on the Rimbi river, a tributary to the Rathong Chu, which would indicate that the water of the Rathong Chu river already stands defiled and made impure and, therefore, the plea that the present Project will defile the river would not stand to sustain any longer. It is submitted that this very question had arisen in Denzong Lho Man Choda case (supra) before this Court and this Court had rejected the plea holding that the damage to the water had already been done and no graver infringement to the purity of the water was expected on account of another Hydro Project on Rathong Chu river.

(xx) Reliance placed upon the report of Prof. P.S. Ramakrishnan was assailed on the ground that it had also been rejected by this Court in Denzong Lho Man Choda case (supra) dated 13-12-1995 holding that Prof. P.S. Ramakrishnan was not an expert in the religious aspect or in social, cultural and religious aspect and that he did not take assistance of any expert in the matter although he had the option to do so.

(xxi) The Learned Additional Advocate General re-emphasises that the religious rights of a few cannot override the paramount right of the State in formulating policies for general good and that a balance has to be struck between two.

(xxii) Reference was made The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , Acharya Jagdishwaranand Avadhuta and Others Vs. Commissioner of Police, Calcutta and Another, , S.R. Bommai and others Vs. Union of India and others etc. etc., and Dr M. Ismail Fraugui and Others Vs. Union of India (UOI) and Others, , which deal with the principle which Mr. Pradhan laid stress upon.

19(i). Appearing on behalf of the Respondents No. 2 and 3, Ministry of Environment and Forests and the National Board for Wild Life respectively, Mr. Karma Thinlay Namgyal, Learned Central Government Counsel, sought to explain the letter dated 28-05-2012, Annexure A2, by submitting that the Project was directed to be stopped until further orders as it did not have the necessary recommendations of the Standing Committee of NBWL as envisaged under Office Memorandum dated 02-12-2009 prescribing the procedure for grant of environmental clearance under EIA Notification, 2006. The said Office Memorandum under Paragraph 2(ii) had made it clear that the proposal for environmental clearance was independent from the Forestry and Wildlife clearances which were required to be obtained as applicable to Project before starting any activity at site and, that while granting environmental clearance to Projects involving land located within 10 kms of the National Parks and Wildlife Sanctuaries, a specific condition should be stipulated that the environmental clearance is subject to their obtaining clearance from the Standing Committee of the NBWL as applicable. This stipulation, as per the Learned Counsel, was inserted in pursuance of the order dated 04-12-2006 in Goa Foundation case (supra). Special Conditions (viii) of the letter, Annexure P11, granting environmental clearance, therefore, stipulated that the proposed site being 5 kms away from the buffer zone of Khangchendzonga Biosphere Reserve as per Hon"ble Supreme Court order, clearance from the NBWL may be obtained (if required).

(ii) The Learned Counsel urged that the expression "if required" had to be understood in the context of the fact that the eco-sensitive zone/biosphere reserve had not been notified as the States had not sent any proposals for declaration of the eco-sensitive zone/biosphere reserve as directed by the Hon"ble Supreme Court in the Goa Foundation case (supra). It is conceded that there is no order passed by the Hon"ble Supreme Court that the eco-sensitive zone/biosphere reserve should mandatorily be 10 kms of the Khangchendzonga National Parks and Wildlife Sanctuaries. It had only observed that if the States did not respond to the MoEF by submitting its proposals within the time stipulated, then only it may consider taking 10 kms as the eco-sensitive zone/biosphere reserve. The Learned Central Government Counsel stressed that the Ministry has not stated that the Project is illegal but that the recommendation of

the Standing Committee of the NBWL was essential in the absence of a notified eco-sensitive zone/biosphere reserve.

(iii) Reiterating its averments contained in the counter-affidavit on behalf of the Respondent No. 2, Ministry of Environment and Forests, Government of India, it is submitted that a proposal has been received from the Government of Sikkim in August, 2012, which is under examination but, the Wildlife Division of the MoEF has not received any proposal from the State with respect to 97 MW Tashiding HEP. It is, therefore, re-emphasised that the Project proposal is subject, inter alia, to the Specific Conditions (viii) of the environmental clearance which stipulate that clearance from NBWL would be necessary, if required, in order to make the environmental clearance effective.

20(i). On behalf of the Respondents No. 4 and 5, Mr. V. Giri, essentially placed the same arguments as that of the State-Respondent. It was submitted that the scope of the Environment (Protection) Act, 1986 and the Wild Life (Protection) Act, 1972, envisages two different schemes. He took us through the various provisions to indicate the scope of these two legislations. He, however, emphasised that under Sections 18 and 35 under Chapter IV of the Act provided for "Protected Areas" it was the State Governments which had been vested with the power to declare Sanctuaries and National Parks respectively. Similarly, u/s 36A the State Government was empowered to declare any area owned by the Government, particularly areas adjacent to the National Parks and Sanctuaries, etc., as a conservation reserve for protecting landscape, seascape, flora, fauna and their habitat.

(ii) Reiterating the submissions made on behalf of the State-Respondent, Mr. Giri pointed out that the Petitioner, as per their own averment contained in Paragraph 6 of the Writ Petition, was not challenging any clearance granted by the regulatory authorities but only pointing out the violation of the Hon'ble Supreme Court order dated 04-12-2006 passed in Goa Foundation case (supra) whereby a Project of the kind involved in the present case requires clearance from the NBWL. It is thus submitted that the only issue involved in the present case is the interpretation of the aforesaid order dated 04-12-2006 and nothing else.

(iii) It is then submitted that the Project in question was cleared after following an elaborate procedure laid down under MoEF Notification dated 14-09-2006 which includes amongst others detailed scrutiny by Expert Appraisal Committee (EAC) provided under List IV of the Notification. That before the grant of environment clearance, a Project is required to comply with various requirements set out in the Check List of Environmental Impacts contained in Appendix II of the Notification. That amongst the Members of the EAC is also an expert in Forestry and Wildlife as would appear under serial no. 2 of the Appendix VI. It is thus submitted that before the environmental clearance was granted all relevant factors had been taken into consideration and, therefore, it could not be heard to say that the aspect as regards the issue raised in Goa Foundation case (supra) was not considered.

(iv) In its 21st meeting held on 21-01-2002, the Indian Board for Wildlife (IBW) for the first time adopted the "Wildlife Conservation Strategy-2002", stipulating that "lands falling within 10 Kms of the boundaries of National Parks and Sanctuaries should be notified as eco-fragile zones u/s 3(v) of the Environment (Protection) Act and Rule 5 Sub rule (viii) & (x) of the Environment (Protection) Rules". In pursuance of this, the Additional Director General of Forests (WL) vide letter dated 06-02-2002 requested all Chief Wildlife Wardens of all States to list such areas within 10 kms of boundaries of National Parks and Sanctuaries and furnish detailed proposals for Notification as eco-sensitive areas under the Environment (Protection) Act, 1986.

(v) Later, on 17-03-2005 in its meeting, the NBWL re-examined the above proposal of the IBW in view of many States having raised concerns over the 10 kms range limits and noted in its meeting on 21-01-2002, that "delineation of the eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities". This decision was communicated to the State vide letter dated 27-05-2005 asking the States/Union Territories to identify suitable eco-sensitive zones.

(vi) Taking note of this letter the Hon"ble Supreme Court passed the contentious order dated 04-12-2006 in the Goa Foundation case (supra) vide Writ Petition No. 460 of 2004. That it is in this light that the direction was issued upon the MoEF to give a final opportunity to all States/Union Territories to respond to its letter dated 27-05-2005 and if the proposals were not sent within a period of 4 weeks of the receipt of the communication from the Ministry, the Court may then have to consider passing orders for implementation of the decision that was taken on 21-01-2002 by the IBW. Thus no eco-sensitive zone of 10 kms had been laid down by the Hon"ble Supreme Court.

(vii) In the guidelines of MoEF for declaration of the eco-sensitive zones it has also been stipulated at Paragraph 4.1 that the "extent of eco-sensitive zone around Protected Areas will have to be kept flexible and Protective Area specific". The width of the eco-sensitive zone and type of regulations will differ from Protected Area to Protected Area. However, as a general principle, the width of the eco-sensitive zone could go up to 10 km.

In view of the above, different States have declared different areas as eco-sensitive zone and not 10 kms from the boundary of the National Parks and Sanctuaries.

(viii) In its letter dated 31-12-2012, the MoEF while conveying that the Hon"ble Supreme Court is considering the issue in I.A. No. 1000 in Writ Petition (Civil) No. 202/1995 being T.N. Godavarman Thirumulpad case (supra) and in Writ Petition (Civil) No. 460 of 2004 being Goa Foundation case (supra), asked all States/Union Territories to submit site specific proposals for declaration of eco-sensitive zones latest by 15-02-2013. It reminded the States/Union Territories of the letter dated 11-12-2012 whereby it had been warned that failure to submit

the proposal within 15-02-2013, the activities prohibited as per the guidelines dated 09-02-2011 would stand prohibited within 10 kms of the boundary of the National Parks and Sanctuaries.

(ix) It is stated that the Government of Sikkim submitted its first proposal in April, 2011, in compliance to the above but in view of the clarifications sought for by the MoEF a revised one in August, 2012 and in the final proposal the State Government has proposed 50 meters from the boundary of Khangchendzonga National Park as eco-sensitive zone which is still under consideration of the MoEF although this Court by its order dated 22-08-2013 had directed that a decision be taken on the proposal within one month.

(x) The unreasonableness of the 10 kms stipulation was sought to be illustrated by the Learned Senior Counsel in stating that out of the 30 HEPs, 28 of them fall within 10 kms from the Khangchendzonga National Park. That the State of Sikkim had already prepared a Project document for designating core zone, buffer zone and a transition zone which was accepted by the MoEF on 07-02-2000 directing that those will be designated as Khangchendzonga Biosphere Reserve. That this Biosphere Reserve was for the same purpose for which the eco-sensitive zones were being proposed, i.e., "to create some kind of a "shock absorber" for the Protected Areas". Thus, as the State of Sikkim was already regulating activities in the buffer zone and transition zones, no Project located within buffer zone has been approved by the State and that till the eco-sensitive zones are declared by the MoEF, the object of such declaration is being achieved by the Notification. That the Project in question being 5.84 kms away from the designated buffer zone, it is even outside the transition zone.

(xi) The Office Memorandum dated 02-12-2009 was assailed as being an internal memorandum and not a mandatory order. In any case, the Office Memorandum also stipulates that NBWL clearance would be necessary "if required" and, therefore, since in the present case no NBWL clearance was required, none was obtained. It is further submitted that even otherwise the Office Memorandum was issued only after the application for environmental clearance had been submitted by the Respondent No. 4 and much after the Public Hearing had taken place and, therefore, there was no question of the Respondent No. 4 submitting application for wild life clearance prior to making an application for environmental clearance as required under the Office Memorandum dated 02-12-2009. That neither a show cause notice nor a direction nor any other communication was issued to the Respondent No. 4 to obtain NBWL clearance. It is stated that reference to the Hon"ble Supreme Court order dated 04-12-2006 was a clear misreading of the order by the person issuing the Office Memorandum.

(xii) Similarly, as regards the letter dated 19-08-2010, it was submitted that the said communication, apart from being an internal correspondence between Union and State which was never communicated to the Respondent No. 4, it was issued only in the context of diversion of forest lands for non-forest purposes under the

Forest (Conservation) Act, 1980 and that although the letter states that Projects falling within 10 kms from the boundary were being granted environmental clearances with a condition to obtain recommendations of the NBWL, there was no such stipulation in the case of Respondent No. 4, except that "NBWL may be obtained (if required)".

(xiii) Mr. Giri relying upon *Bharat Sanchar Nigam Ltd. and Another Vs. BPL Mobile Cellular Ltd. and Others*, submitted that internal letters/memorandums were not binding unless communicated to the concerned parties. *P. Mahendran and others Vs. State of Karnataka and others*, was cited on the proposition that Office Memorandums or internal letters cannot have any retrospective application unless specifically stated therein.

(xiv) On the letter dated 28-05-2012 (Annexure A2 to the affidavit of the Respondent No. 3) it was submitted that it was only a response to a representation dated 09-05-2012 submitted by SIBLAC one day after the Hon'ble Supreme Court transferred the Writ Petitions to this Court and, therefore, was preemptive and also hit by the principle of *lis pendens*. That the letter was issued without any notice to the Respondent No. 4 and in complete violation of the principles of natural justice and in violation of Rules 5(ii) and (iii) of the Environment (Protection) Rules, 1986. It is submitted that the Petitioners have suppressed the reply of the State to the said letter issued vide letter No. FCA/FEWMD/1105 dated 08-12-2012 (Annexure A1 to the affidavit of the Respondent No. 1). In the reply it had been conveyed that the Government of Sikkim had already submitted its draft proposal notifying eco-sensitive zone of 50 meters from the boundary of the Khangchendzonga National Park followed by a revised proposal dated 02-08-2012 and that the proposal was under consideration of the MoEF.

(xv) It is then stated that the Petitioners have singled out the Project of the Respondent No. 4 when there are at least 28 HEPs which fall within the eco-sensitive zone requiring NBWL clearance when none of them have taken such clearance. It is submitted that the work on the Project has advanced considerably having completed all three adits of tunnel, 48% of tunneling and 70% of the excavation work of the power house area. Of the Project estimates of 650 crores, 278 crores have already been spent of which 178.35 crores is borrowed from financial institutions with about around 750 people employed directly or indirectly. The Learned Counsel went on to highlight the benefits of the Projects accruing to the State, Nation, the local population and the environment.

(xvi) The question of delay in filing the PIL was also raised by the Learned Counsel but we may not delay ourselves on this as it has been dealt with in *extenso* earlier. We may, however, indicate that a number of other decisions were cited, apart from one cited on behalf of the State-Respondent, which we may enumerate below:-

(a) Chairman and M.D., B.P.L. Ltd. (*supra*); and

(b) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, .

(xvii) On the question of sustainable development and precautionary principle, reliance was placed on the following:-

(a) Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and Others Vs. The State of Gujarat and Others, ;

(b) N.D. Jayal and Another Vs. Union of India (UOI) and Others, ; and

(c) M.C. Mehta Vs. Union of India (UOI) and Others, .

(xviii) Mr. Giri then emphasised on the role of the Courts in matters of policy decisions but, since this has been discussed elaborately while dealing with the submissions made on behalf of the State-Respondent, we may not discuss further on this for the sake of brevity.

(xix) On the question of religious, cultural and customary rights, the stand of the State-Respondent was reiterated in as much as the Project does not violate any sacred rights of the local population and that there is no obstruction to the "Bhumchu" ceremony which has been carried out each year. Referring to and relying upon A.S. Narayana Deekshitulu Vs. State of Andhra Pradesh and Others, and Seshammal and Others, Vs. State of Tamil Nadu, , it was stated that only these religious, cultural and customary rights (sacred rights) especially of the STs which form an integral part of the religion, is to be protected.

(xx) It was finally submitted that the Petitioner has not fulfilled the requirements pertaining to PIL guidelines since the Petitioner has not established his credentials as a public spirited person and that he has concealed and misrepresented several facts and documents and also has indulged in making wild and reckless allegation against the Respondent No. 5 without any proof.

21. Mr. V. Sekhar, Learned Senior Counsel, also appearing on behalf of the Respondents No. 4 and 5 and Ms. Indu Malhotra, Learned Senior Counsel, appearing on behalf of the Respondent No. 8, also addressed us but, we need delay on those as their submissions were substantially the same as was urged by Mr. V. Giri, Learned Senior Counsel appearing on behalf of Respondents No. 4 and 5.

22. We have given our anxious consideration to the rival contentions made on behalf of the parties and have carefully examined the materials placed on record and we find that there are essentially only two questions in the Writ Petition that require determination by us. They are-

(i) Whether the Respondents No. 1, 4 and 5 have violated the order of the Hon"ble Supreme Court dated 04-12-2006 in Goa Foundation case (supra) in setting up the Tashiding HEP in West Sikkim whereby such Projects require clearance from the NBWL?

and

(ii) Whether the river Rathong Chu in West Sikkim and the entire area below Mount Khangchendzonga in West Sikkim through which it flows is sacred? If so, whether the Tashiding HEP being set up on the river is in violation of the Petitioners' right to practice and propagate their religion.

23. Elaborate submissions were made by the Learned Counsel not only on the above two questions but also on other issues which, in our view, would not be of relevance and, therefore, deem it appropriate not to deal with those. We may, therefore, restrict ourselves to the above two questions and deal with them individually hereunder in seriatim.

24. Whether the Project in question was in violation of the order dated 04-12-2006 passed in Goa Foundation case?

(i) For the sake of convenience the order dated 04-12-2006 is reproduced below:-

The order dated 16th October, 2006 refers to a letter dated 27th May, 2005 which was addressed by the Ministry of Environment and Forests (MoEF) to the Chief Wildlife Wardens of all States/Union Territories requiring them to initiate measures for identification of suitable areas and submit detailed proposals at the earliest. The order passed on that date was that MoEF shall file an affidavit stating whether the proposals received pursuant to the letter of 27th May, 2005 have been referred to the Standing Committee of National Board for Wildlife under the Wild Life (Protection) Act, 1972 or not. It was further directed that such of the States/Union Territories who have not responded to the letter dated 27th May, 2005 shall do the needful within four weeks of the communication of the directions of this Court by the Ministry to them.

It seems that despite the letter dated 27th May, 2005 and despite the Ministry having issued reminders and also bringing to the notice of the States/Union Territories the orders of this Court dated 16th October, 2006, the States/Union Territories have not responded. However, we are told that the State of Goa alone has sent the proposal but that too does not appear to be in full conformity with what was sought for in the letter dated 27th May, 2005.

The order earlier passed on 30th January, 2006 refers to the decision which was taken on 21st January, 2002 to notify the areas within 10 km. of the boundaries of national parks and sanctuaries as eco-sensitive areas. The letter dated 27th May, 2005 is a departure from the decision of 21st January, 2002. For the present, in this case, we are not considering the correctness of this departure. That is being examined in another case separately. Be that as it may, it is evident that the States/Union Territories have not given the importance that is required to be given to most of the laws to protect environment made after Rio Declaration, 1972.

The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent

to the Central Government. The communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km. of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment, and having regard to the precautionary principles. If the States/Union Territories now fail to respond, they would do so at their own risk and peril.

The MoEF would also refer to the Standing Committee of the National Board for Wildlife, under Sections 5(b) and 5(c)(ii) of the Wild Life (Protection) Act, the cases where environment clearance has already been granted where activities are within 10 km. zone.

[emphasis supplied]

(ii) On a plain reading of the above and in consideration of the submissions of the Learned Counsel for the parties, there can be no dispute of the fact that the order was a conditional one passed following the precautionary principle. The order clearly reflects the concern of the Hon"ble Supreme Court in the States/ Union Territories having ignored the letters of the MoEF conveying its earlier order dated 16-10-2006 requiring compliance of the MoEF letter dated 27-05-2005 and the fact that due importance was not being given to the laws to protect environment by the States/Union Territories.

(iii) Since the letter F. No. 6-1/2003 WL-I dated 27-05-2005, Annexure A-2, issued by the Assistant Inspector General, MoEF to the Chief Wildlife Warden of all States/Union Territories, has been referred to by the Hon"ble Supreme Court in its order dated 04-12-2006 in Goa Foundation case (supra) and, is of significance for the purpose of this case, we may reproduce its text which reads as under:-

The Wildlife Conservation Strategy 2002 adopted during XX 1st meeting of Indian Board for Wildlife held on 21st January 2002 stipulated that "Lands falling within 10 km of the boundaries of National Parks and Sanctuaries should be notified as Ecofragile Zones u/s 3(V) of the Environment (Protection) Act and rule 5, sub-rule 5(VIII) (X) of the Environment (Protection) Rule". The Member Secretary of the IBWL vide D.O. No. 6-2/2002 WL-I dated 5th February 2002 requested the State Government to list out such areas and furnish detailed proposals for their notification as Ecosensitive areas under the Environment (Protection) Act, 1986.

However many States/Departments had raised concerns over the 10 km range limits. The matter was, therefore, placed before the National Board for Wildlife in its meeting held on 17th March 2005 under the chairmanship of Hon"ble Prime Minister of India. The decision taken in the meeting is mentioned below.

The proposal for augmenting the conservation of the existing Protect areas was

agreed to. However the delineation of eco sensitive zones would have to be site specific, and relate to regulation, rather than prohibition of specific activities. State Government will have to be consulted in this regard and concurrence obtained. This being an area of potential conflict with local communities, no enhancement of area should be done arbitrarily.

I am, therefore, directed to request you to kindly initiate measures for identification of suitable areas and submit detailed proposals at the earliest.

[emphasis supplied]

(iv) It is in this backdrop of the circumstances set out above that by the order dated 04-12-2006 the MoEF was again directed to write to the States/Union Territories giving them a final opportunity to respond to MoEF letter dated 27-05-2005 for submission of proposal for declaration of Eco-Sensitive Zone. The order was apparently an effort at persuading the State Governments to expedite the necessary steps as required for declaring the Eco-Sensitive Zone and nothing further.

(v) Without delving into this further, it would be pertinent to note that the order was also considered in Anand Arya case (supra). It may also be noted that concededly the eco-sensitive zone has still not been declared although a revised proposal was forwarded by the Respondent No. 1, the State of Sikkim, to the Respondent No. 2, MoEF, only on 23-01-2013 which is presently said to be under its consideration. This is apparent from the affidavit dated 07-10-2013 filed on behalf of the Respondent No. 2. Since the averments contained in that affidavit is of considerable significance having a bearing on the interpretation of the order dated 04-12-2006 in Goa Foundation case (supra) we may consider its material portions which read as under:

2. That the issue of notification of Eco-sensitive zones as prayed in these CMA's is a part of a larger process in MoEF, being taken up under the provisions of Environment Protection Act, 1986, u/s 3(2)(v) in the background of earlier adoption of a recommendation of the National Board for Wild Life, for declaration of the Eco-sensitive zone around the Protected Areas for regulating land use. The matter concerns all the States and UT's of the country and is also being overseen by the Hon'ble Supreme Court in Writ Petition (C) No. 202 of 1995 T.N. Godavarman Thirumulpad Vs. Union of India & ors. and W.P. (C) 460/2004 i.e. Goa Foundation Vs. Union of India & ors.

.....

4. The proposal are processed and dealt under the section 5(iii) of the Environment Protection Rules, 1986 which envisages publication of a draft notification in public domain for seeking comments of public, consideration of the comments and thereafter only finalization of the notification in the Government gazette. While it takes effort for the whole process, a time period of 545 days has been prescribed vide notification no. 513(E) 28/06/2012.

This time is prescribed from the date of publication of the notification in the official Gazette, implying that the time taken for rectifications of initial deficiencies in the proposal and approval of draft notification are not a part of this prescribed time limit.

5. It is submitted that the eight revised proposals which include the Khangchenzonga National Park, submitted by the Government of Sikkim vide their letter dated 23/01/2013 are under process in the Ministry.

6. The revised proposals were scrutinized based on criteria proposed for ESZ's to ensure that they are in conformity with the MoEF Guidelines for declaration of Eco Sensitive Zones. However, the extent of the Eco-Sensitive Zone proposed around Protected Areas has been found not justified, in case of Singbha Rhododendron Sanctuary. Accordingly, a meeting was convened with the officials of the State Government of Sikkim on 03/09/2013, in which they have been requested to submit justification on the extent of proposed Eco-sensitive zones of all the 8 proposals of the Sikkim, which include the Khangchenzonga National Park also.

.....

10. That the main petitions W.P. (C)22 of 2012 and W.P. (C) 23 of 2012 under which these CMA's have been filed is about construction of the Tashiding Hydro Electric Project (97 MW) allegedly inviolation of environmental regulation by not obtaining clearance from the Standing Committee of NBWL, even though it is within the 10 kms of the Khangchanzonga National Park. In the environmental clearance granted on 29/07/2010 for this project, specific conditions mentioned is as follows:

PART-A (viii)

The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court Order clearance from the NBWL may be obtained (if required)

As there was no notified Eco-sensitive zone, the recommendations of the Standing Committee of the NBWL were mandatory, and needed to be applied for. A proposal for an eco-sensitive zone and notification thereof at this date cannot absolve the project authorities from this requirement of Wildlife clearance.

As such, the process of declaration of the Eco-sensitive zone as proposed by the State Govt. of Sikkim is not linked to the required wildlife clearance for effective Environment clearance granted in 2010 for the Tashiding Hydro Electric Project.

11. That the declaration of the Eco-sensitive zone is not a limiting factor for an effective Environment clearance/Wildlife clearance of the Tashiding Hydro electric Project (97 MW), which is the subject matter of the main petitions i.e. W.P. (C) 22 of 2012 and W.P. (C) 23 of 2012 under which these CMA's have been filed.

12. It is submitted that these CMA's of the State Govt. of Sikkim seeking

notification of the Eco-sensitive zones and the perceived pace of the process of declaration of ESZ may be seen in the background of above mentioned facts. There is no inaction on the part of the respondents in the matter and the Ministry of Environment and Forests has been taking appropriate action for the notification of the Eco-sensitive zones in all the proposals received from several States. Till the final notification, the requirement of seeking NBWL clearances prevails for the activities being undertaken within the 10 km from the boundary of the National Parks/Wildlife Sanctuaries.

[emphasis supplied]

(vi) As noted earlier, the Learned Counsel for the Respondents No. 1, 4, 5 and 8, would argue that the affidavit is based upon an erroneous interpretation of the order in Goa Foundation case (supra) and, therefore, not legal and binding upon them. In order to get at the bottom of this, we have examined the various Notifications, Office Memorandums and letters that were referred to on behalf of the parties.

(vii) The first of those is EIA Notification dated 14-09-2006 issued by the MoEF which, inter alia, declared that-

.....the Central Government hereby directs that 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.

2. Requirements of prior Environmental Clearance (EC):-The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category "A" in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category "B" in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

(i) All new projects or activities listed in the Schedule to this notification;

(ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product-mix in an existing manufacturing unit included in Schedule beyond the specified range.

.....

8.

(v) Clearances from other regulatory bodies or authorities shall not be required prior to receipt of applications for prior environmental clearance of projects or activities, or screening, or scoping, or appraisal, or decision by the regulatory authority concerned, unless any of these is sequentially dependent on such clearance either due to a requirement of law, or for necessary technical reasons.

[emphasis supplied]

(viii) The next is MoEF Office Memorandum dated 02-12-2009 prescribing procedure for consideration of proposals for grant of environmental clearance under EIA Notification, 2006. The relevant portion of which reads as under:-

The issue regarding the procedure to be followed for consideration of proposals for grant of environmental clearance under EIA Notification, 2006, which involve forestland and or wildlife habitat has been under consideration of this Ministry. The issue has been discussed and deliberated at length and the provisions of EIA Notification, 2006 as contained in para 8(v) of the said notification have also been considered.

2. It has now been decided that the following procedure shall be adopted in dealing with such cases.

(i) The proposals for environmental clearance will not be linked with the clearances from forestry and wildlife angle even if it involves forestland and or wildlife habitat as these clearances are independent of each other and would in any case need to be obtained as applicable to such projects before starting any activity at site.

(ii) While, considering such proposals under EIA Notification, 2006, specific information on the following should be obtained from the proponent:

(a)

(b) Information about wildlife clearance, as applicable to the project should also be obtained. The project proponent should submit their application for wildlife clearance/clearance from Standing Committee of the National Board for Wildlife to the Competent Authority before coming for environment clearance and a copy of their application should be furnished along with environment clearance application.

(iii) The proposal from environmental angle will be appraised by the respective Expert Appraisal Committee and recommendations made on the same which will be processed by the IA Division and approval obtained from Competent Authority. However, while granting environmental clearance to projects involving forestland, wildlife habitat (core zone of elephant/tiger reserve etc.) and or located within 10 km of the National Park/Wildlife Sanctuary (at present the

distance of 10 km has been taken in conformity with the order dated 4.12.2006 in writ petition no. 460 of 2004 in the matter of Goa Foundation vs. Union of India), a specific condition shall be stipulated that the environmental clearance is subject to their obtaining prior clearance from forestry and wildlife angle including clearance from the Standing Committee of the National Board for Wildlife as applicable. Further, it will also be categorically stated in the environment clearance that the grant of environmental clearance does not necessarily implies that forestry and wildlife clearance shall be granted to the project and that their proposals for forestry and wildlife clearance will be considered by the respective authorities on their merits and decision taken. The investment made in the project, if any, based on environmental clearance so granted, in anticipation of the clearance from forestry and wildlife angle shall be entirely at the cost and risk of the project proponent and Ministry of Environment & Forests shall not be responsible in this regard in any manner.

(iv) A copy of the clearance letter, besides others, shall also be endorsed to (i) IGF(FC), MoEF, (ii) IGF(WL), MoEF, (iii) PCCF of respective States and (iv) Chief Wildlife Warden of the State.

Note: There will not be any need to refer the files relating to grant of environmental clearance from IA Division to FC Division and or Wildlife Division during consideration of proposals under EIA Notification, 2006, as done at present in view of the course of action stipulated at paras 2(i)-(iv) above.

.....

[emphasis supplied]

(ix) Next is the environment clearance granted in respect of the Project in question which is dated 29-07-2010 in Part A: Specific Conditions (viii). The following is found to have been stipulated:-

(viii) The proposed site is about 5 km away from the buffer zone of Khangchendzonga Biosphere Reserve as per Supreme Court order clearance from the NBWL may be obtained (if required).

[emphasis supplied]

(x) The other is the contentious letter dated 28-05-2012, Annexure A2, issued by the Deputy Inspector General of Forests (WL), MoEF to the Pr. Chief Conservator of Forests and HOFF, Government of Sikkim, which reads as follows:-

This Ministry has received a representation from the Convenor, Sikkim Bhutia Lepcha Apex Committee regarding construction of the 97 MW Tashiding Hydro Electric Power Project. A copy of the representation is enclosed for your ready reference. It has been mentioned in the representation that the 97 MW Tashiding Hydro Electric Power project slated over the sacred Rathongcha River in West Sikkim has consistently been opposed by the Buddhist people of Sikkim since the river is regarded very sacred as per Sikkimese Buddhist tradition. It has also

been mentioned that the said project is within the 10 kms radius of Kangchengdzonga National Park. They have, therefore, requested that this Ministry may initiate necessary actions urgently for closing down the anti-Buddhist Tashiding HEP.

In this context, it is requested to kindly look into the matter as to whether the construction of the 97 MW Tashiding Hydro Electric Power Project in West Sikkim is already underway and if yes, the same may kindly be stopped immediately until further orders as they do not have necessary recommendations of the Standing Committee of National Board for Wildlife. The said information may kindly be forwarded to this Office Most Urgently.

(xi) There are also other correspondences, but, in our view, the ones set out above are the crucial ones that would shed light on the question. Upon a close examination and a conjoint reading of these documents, it would reveal that the stipulation by the MoEF for obtaining clearance from the Standing Committee of the NBWL was based upon the order dated 04-12-2006 passed in Goa Foundation case (*supra*). As would appear on a bare perusal of the order, the MoEF was directed to give a final opportunity to the States/Union Territories to comply to its letter dated 27-05-2005 requiring them to initiate measures for site specific identification of eco-sensitive zones around the boundaries of National Parks and Sanctuaries and that the communication should make it clear that if the States/Union Territories failed to send their proposal within four weeks of the receipt of the letter, it may then consider passing orders for implementation of its decision taken on 21-01-2002, i.e., Notification of the areas within 10 km of the boundaries of the Sanctuaries and National Parks as eco-sensitive areas, with a view to conserve the forest, wildlife and environment and having regard to the precautionary principles and, further that failure by the States/Union Territories to respond would be at their own risk and peril.

(xii) Apart from this we also find other letters dated 09-02-2011, 11-12-2012 and 31-12-2012 issued by the MoEF reiterating what had been conveyed in the letter dated 27-05-2005 for site specific delineation of eco-sensitive zones.

(xiii) We, therefore, find the expression "if required" inserted in every clearances and notifications or office memorandums issued by the MoEF is dependent upon the extent of the eco-sensitive zones to be notified and that whatever be the extent of the Eco-sensitive Zone, clearance of the NBWL would remain mandatory.

(xiv) The Office Memorandum of the MoEF dated 02-12-2009 referred to above was seriously assailed on behalf of the Respondents No. 4, 5 and 8 in as much it was only an inter-departmental correspondence not having the force of law and not at all brought to the notice of the general public and the Respondent No. 4. We are not able to accept this submission as we find that the Office Memorandum dated 02-12-2009 was issued in furtherance of paragraph 8(v) of the EIA Notification, 2006, prescribing the procedure for obtaining clearances

from the other regulatory bodies or authorities mentioned therein. Contrary to the submissions of Mr. Giri we find that the Office Memorandum had been duly put up in the website of the MoEF as would appear from the endorsement of copies at sl. No. 8 which reads as "Website of the Ministry". Therefore, the Office Memorandum was accessible to the general public. The Respondents No. 4 and 5 are expected to have accessed it as they are vitally interested with the orders and notifications issued by the MoEF in view of their involvement in the Project under consideration. Questioning the validity of the Office Memorandum now cannot detract from the fact that it was in the public domain and that the Respondents were aware of it.

(xv) It appears to us that the Office Memorandum only qualifies that the grant of environment clearance under EIA Notification, 2006, would not absolve a Project proponent from the necessity of obtaining forestry and wildlife clearances as they are distinct from environment clearance and, that while granting environmental clearance to Projects of the present kind, a specific condition should be stipulated that the environmental clearance granted is subject, inter alia, to their obtaining prior clearance from the Standing Committee of the NBWL "as applicable" in conformity with the order dated 04-12-2006 in Goa Foundation case (supra). We, of course, also notice that the Office Memorandum further stipulates that the expenditure incurred on a Project in anticipation of forestry and wild life clearances shall be at the cost and risk of the Project proponent. The stipulation indicated in the Environmental Clearance at Clause (viii) of the Specific Conditions is also indicative of the directions contained in the Goa Foundation order (supra).

(xvi) The correctness of the letter dated 28-05-2012 was also questioned with great vehemence on behalf of the Respondents. It was submitted that the MoEF, Wildlife Division, had no jurisdiction to enter into religious aspects and that the letter was only a reaction to a representation received from Sikkim Bhutia-Lepcha Apex Committee dated 09-05-2012. In our view, this submission also does not appear to be correct as a bare perusal of the letter would show that one of the allegations taken up seriously was that the Project was within 10 kms radius of Khangchendzonga National Park by which obviously reference was being made to the Goa Foundation case (supra).

(xvii) These questions, however, now stand settled and is no more res integra in view of the final judgment of the Hon''ble Supreme Court dated 21-04-2014 in Goa Foundation Vs. Union of India (UOI) and Others, in Writ Petition (Civil) No. 435 of 2012 in which questions have been squarely dealt with by the Hon''ble Supreme Court. We may reproduce below its relevant portions:-

43. When, however, we read the order dated 4.12.2006 of this Court in Writ Petition (C) No. 460 of 2004 (Goa Foundation v. Union of India), we find that the Court has not prohibited any mining activity within 10 kilometer distance from the boundaries of the National Parks or Wildlife Sanctuaries. The relevant portion of the order dated 04.12.2006 is quoted hereinbelow:

The Ministry is directed to give a final opportunity to all States/Union Territories to respond to its letter dated 27th May, 2005. The State of Goa also is permitted to give appropriate proposal in addition to what is said to have already been sent to the Central Government. The Communication sent to the States/Union Territories shall make it clear that if the proposals are not sent even now within a period of four weeks of receipt of the communication from the Ministry, this Court may have to consider passing orders for implementation of the decision that was taken on 21st January, 2002, namely, notification of the areas within 10 km. of the boundaries of the sanctuaries and national parks as eco-sensitive areas with a view to conserve the forest, wildlife and environment and having regard to the precautionary principles. If the State/Union Territories now fail to respond, they would do so at their own risk and peril.

The MoEF would also refer to the Standing Committee of the National Board for Wildlife, under sections 5(b) and 5(c)(ii) of the Wild Life (Protection) Act, the cases where environment clearance has already been granted where activities are within 10 km. zone.

It will be clear from the order dated 4.12.2006 of this Court that this Court has not passed any orders for implementation of the decision taken on 21st January, 2002 to notify areas within 10 kms. of the boundaries of National Parks or Wildlife Sanctuaries as eco sensitive areas with a view to conserve the forest, wildlife and environment. By the order dated 04.12.2006 of this Court, however, the Ministry of Environment and Forest, Government of India, was directed to give a final opportunity to all States/Union Territories to respond to the proposal and also to refer to the Standing Committee of the National Board for Wildlife the cases in which environment clearance has already been granted in respect of activities within the 10 kms. zone from the boundaries of the wildlife sanctuaries and national parks. There is, therefore, no direction, interim or final, of this Court prohibiting mining activities within 10 kms. of the boundaries of National Parks or Wildlife Sanctuaries.

[emphasis supplied]

(xviii) The question that would then follow would be as to whether the absence of the direction from the Hon"ble Supreme Court for maintaining 10 kms as eco-sensitive zone would render the very requirement of delineation of eco-sensitive zone unnecessary.

(xix) In order to answer this question, it would be essential to appreciate the import of the EIA Notification dated 14-09-2006 and the force of the orders issued by the MoEF in pursuance of the Wild Life (Protection) Act, 1972.

(xx) The fact that the EIA Notification, 2006, was issued by the MoEF in exercise of its powers conferred by Section 3 of the Environment (Protection) Act, 1986 cannot be disputed as was also noticed in the Anand Arya case (supra) [paragraphs 49 and 50]. The power to issue orders and notifications by the NBWL can be traced to Section 5C of the Wild Life (Protection) Act, 1972, which

provides that it shall be the duty of the National Board to promote the conservation of wildlife and forest by such measure as it thinks fit and the measures referred to would, inter alia, include making recommendations on the setting up of a management of National Parks, Sanctuaries and other protected areas and on matters relating to restrictions of activities in those areas as provided under Sub-Section 2(c) of Section 5C of the Wild Life (Protection) Act, 1972. The Hon"ble Supreme Court had the occasion to examine the scope of this power in Centre for Environmental Law, World Wide Fund-India (supra) where it has been observed as follows:-

32. Parliament later vide Act 16 of 2003 inserted Section 5-A w.e.f. 22-9-2003 authorising the Central Government to constitute the National Board for Wildlife (in short "NBWL"). By the same Amendment Act, Section 5-C was also introduced eliciting functions of the National Board. Section 5-B was also introduced by the aforesaid amendment authorising the National Board to constitute a Standing Committee for the purpose of exercising such powers and performing such duties as may be delegated to the Committee by the National Board. NBWL is, therefore, the top most scientific body established to frame policies and advise the Central and State Governments on the ways and means of promoting wildlife conservation and to review the progress in the field of wildlife conservation in the country and suggesting measures for improvement thereto. The Central and the State Governments cannot brush aside its opinion without any cogent or acceptable reasons. The legislation in its wisdom has conferred a duty on NBWL to provide conservation and development of wildlife and forests.

57. NBWL has a duty to promote conservation and development of wildlife and frame policies and advise the Central Government and the State Governments on the ways and importance of promoting wildlife conservation. It has to carry out/make assessment of various projects and activities on wildlife or its habitat. NBWL has also to review from time to time the progress in the field of wildlife conservation in the country and suggest measures for improving thereto. Statutorily, therefore, it is the duty of NBWL to promote conservation and development of wildlife with a view to ensuring ecological and environmental security in the country. This Court, sitting in the jurisdiction, is not justified in taking a contrary view from that of NBWL.

[emphasis supplied]

It, therefore, follows that the orders and notifications issued by the NBWL have statutory force requiring due compliance and, even the Courts sitting in Writ jurisdiction will not be justified in taking a contrary view from that of the NBWL.

(xxi) That apart even in the Shah Commission Report on "Illegal Mining in the State of Goa" it has been observed that-

c. Approvals have been granted in many cases under the Forest (Conversation)

Act, 1980 for diversion of forest land for iron ore mining leases in the eco-sensitive zones without placing the project proposals before the Standing Committee of national Board for Wild Life. It is one of the serious lapses on the part of MoEF (FC Section). This has caused an irreversible and irreparable damage to bio-diversity, wildlife, environment and ecosystem as a whole in the eco-sensitive zone of the Western Ghats of State of Goa. Immediate action should be taken in this regard wherever necessary and responsibility and accountability should be fixed on the officers concerned.

[emphasis supplied]

(xxii) In our view, although no direction was passed by the Hon"ble Supreme Court to maintain 10 kms as the eco-sensitive zones around the National Parks and Sanctuaries, it has also not held that such zone should not be declared at all and as a consequence clearance from the NBWL was no more required. Had it been so it was not expected of the MoEF to have insisted on the delineation of the eco-sensitive zones. It has rather persisted with it. This would be evident from the fact that the State-Respondent No. 1 and some other States have submitted their proposals and the same is under consideration before the MoEF. This, therefore, explains the expression "if required" or "as applicable" found mentioned in the order of the Hon"ble Supreme Court in its order dated 04-12-2006 in Goa Foundation case (supra) and the letters, office memorandums and notifications issued by the MoEF as well as the environment clearance dated 29-07-2010 granted by the MoEF in respect of the Project in question.

(xxiii) It is, however, an admitted position that the final Notification is yet to be issued purportedly in view of the various steps that are required to be taken in terms of the statutory provisions and the rules.

25. Violation of the religious and customary rights under Articles 25, 26 and 29 of the Constitution of India.

(i) The Petitioners contend that the river Rathong Chu is a very sacred river and the entire valley below Mount Khangchendzonga with Tashiding as the navel are held with reverence by the entire Buddhists. The sacred landscape that stretches from Mount Khangchendzonga down to lower valley that consists of the Rathong Chu catchment area as per the "Neysol" text (Guide to sacred places of Sikkim) is worshipped by Sikkimese Buddhist as blessed by Guru Padmasambhava with a large number of hidden treasures (ter) concealed by him in the area. It is believed that these treasures are being discovered gradually and only revealed to the enlightened Lamas at proper times. Conserving these treasures and protecting them from polluting influence is considered important for human welfare. Any major disturbance to the river system would disturb the ruling deities of the 109 hidden lakes in existence in that area and of the river, resulting in serious calamity. It is submitted that the very cultural fabric of the Sikkimese Society is dependent upon the conservation of the whole sacred landscape.

(ii)(a) On behalf of the State, the above claims are sought to be repelled by

submitting that the Government while issuing Notification No. 70/HOME/2001 dated 20-09-2001 has not declared river Rathong Chu as a sacred river and, therefore, any claim to the contrary is incorrect.

(b) The next is that the Project in question will not affect the "Bhumchu" ceremony as the water for the ceremony is collected upstream the confluence of river Rimbi and river Rathong Chu whereas the Project is downstream of the confluence.

(c) Next is that the assertion of defilement of the river Rathong Chu no more holds good in view of two Hydel Projects already being in existence on the Rimbi river which flows into the Rathong Chu river. That the name of the river beyond the confluence downstream is not "Rathong" but "Ladong" and, therefore, the proposed barrage that is not on the river "Rathong" but river "Ladong". That there has been no obstruction to the performance of the "Bhumchu" ceremony as would be evident from the fact that festivals are being held uninterruptedly for the last three years during the progress of the Project.

(d) The other aspect raised as noted already, is the impermissibility on the part of the Petitioner to seek prevention of the developmental activities and denial of benefits of the development to the people of the State and the area in question and that sentimental objections cannot be a ground for denials of such benefits to other citizens who also have fundamental rights of better quality and amenities of life. Decision of this Court dated 13-12-1995 in Denzong Lho Man Choda (supra) and Chukie Tobdon (supra) was relied upon in submitting that this question already stands decided to stress that the Petitioners are barred from raising the same issue in the present Writ Petitions.

(iii) The Petitioners, on the other hand, has placed before us a large number of documents in support of his contention as regards the religious significance of the place to the local Buddhists.

(iv) The first of these is a report submitted by a Committee constituted vide Notification No. 54(7) HOME/87/767 dated 28-04-1987 to identify "Security of Important Historical Monuments and Religious Places of Worship of Sikkim" (Annexure P2 to the Writ Petition). In the report under "Historical Monuments and Religious Places of Worship" at paragraph 2(b), mention of the "Dubdi Gumpa", "Sanga Cholling Gumpa", "Pemayangtse Gumpa", "Tashiding Gumpa", was pointed out to emphasise that these Monasteries fall in the valley lying in the lap of Mount Khangchendzonga through which the river Rathong Chu flows.

(v) The next is excerpts from the note sheet pages no. 1 and 2 containing notes written by the former Secretary, Ecclesiastical Department, which contains the following:-

.....

It is to submit that the entire area below the Mount Kanchenjunga in West

Sikkim as indicated in the rough sketch "B" is regarded as most sacred areas of Sikkim in religious texts. A copy of religious text "Neysol" describing the names of all deities of Sikkim by Gyalwa Lhatsun Chenpo is also flaged at "A" below.

It is mentioned that Mount Kanchenjunga, the abode of the guardian deity of Sikkim is surrounded by other deities of Sikkim. The existence of all these deities are identified in the form of mountains, rocks, waterfalls, lakes, trees and sacred caves like Dichen-Phuk and Lharik Nying Phuk. There is mention of Tashiding, Sangachholing, Pemayangtse, and Rabdentse as abodes of deities guarding the land from all directions. It was also mentioned in the text that any burning of undesirable things like meat, killings, destruction of object of worship like chortens, cutting down of trees and plants, misuse of lakes, destruction/ defacement of hills and rocks of the sacred areas of Sikkim would directly affect the deities of Sikkim and will provoke--disasters in the form of natural calamities. With very concern about possibility of such happenings in future and to avoid the same, Gyalwa Khatsun Chenpo prescribed prayers for the deities.

It is therefore, to submit that, strictly judging from the religious point of view, the present project is located at heart of the sacred areas of Sikkim indicated in the "Neysol" text. This project therefore is undesirable from the religious point of view and is against the sanctity of the area concerned, please.

.....

Reference PUC below, the Hon"ble Minister, Ecclesiastical, accompanied by the undersigned, paid a visit to Yoksan on the 5th September, 1994. The areas involved for Rathongchu project was inspected from Yoksan Norbugang. It is found that two approach roads towards the project sources are under construction. In the North side of Yosan Norbuganganear the Rest Houses of Tourism Department, the works are found being initiated for the construction of staff quarters etc. No Govt. officials of the project could be contacted out that day. The location of the project could be contacted out that day. The location of Yolisum Norbugang and its surrounding mountains and hills were photographed to indicate the locations of the project. The roads leading to the project sources are passing through the middle of Yoksan Norbugang hill. The sites acquired for the settlement of staff etc. are within the close proximity of Norbugang Northern.

It is to submit that the entire area below the Mount Kanchengjung in West Sikkim as indicated in the rough sketch "B" are regarded as most sacred areas of Sikkim in religious toxts. A copy of the religious text "Neysol" describing the names of all deities of Sikkim by Gyalwa Lhatsun Chenpo is also flaged at "B" below. It is mentioned that Mount Kanchengjunga, the above of the guard an deity of Sikkim, is surrounded by other deities of Sikkim. The existence of all these deities are identified in the form of mountains, rocks, waterfalls, lakes, trees and sacred cores like Kechen-Phuk and Lhari Nying-Phuk. There is mention of Tashiding, son sancholling, Penayangtac and Rabdentso as abodes of deities garaging the land from all directions. It was also mentioned in the text that any

burning of undesirable thing like meat, killings, destructions of objects of worship like chortens, cutting down of trees and plants, misuse of lakes, destructions/ defacement of hills and rocks of the sacred areas of Sikkim would directly affect the deities of Sikkim and will provoke disasters in the form of natural calamities. With very concern about possibility of such happenings in future and to avoid the same, Cyalwa Lhatsun Chenpo prescribed players for the deities. It is, therefore, to submit that, strictly judging from the religious point of view, the present project is located at the heart of the sacred areas of Sikkim indicated in the "Neysol" text. This project, therefore is considerable from religious point of view and is against the sanctity of the area concerned please.

.....

It may be relevant to note that the observations contained in the notes pertain to the very river "Rathong Chu" where the present Project is under construction and the surrounding areas in the Valley.

(vi) The next is the proceedings of the "International Workshop on the Importance of Sacred Natural Sites for Biodiversity Conservation" held at Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China between 17-20/02/2003. Our attention was drawn to the following portions:-

2. The Concept of "Sacred"

There is wide recognition worldwide and across disciplines that regions of ecological caution exhibit a symbiotic relationship between the biophysical ecosystem and the social system, with strong cultural interconnections between the two. This demonstrates that culture and environment are complementary, and in various stages of evolution (Ramakrishnan 2001). However, these traditional societies are no longer immune to changes occurring everywhere and continually. The predominant culture of the over-consumption of natural resources is making an impression in these societies, resulting in the erosion of their time-tested and value-based institutions.

.....

Sacred landscapes have a particular significance in terms of biodiversity conservation. It is in this context that the "Demajong" landscape of the Tibetan Buddhists in the Sikkim State of the Indian Himalayan region becomes significant.

3. Sacred Landscapes as a Tool for Biodiversity Conservation

Biodiversity-rich mountains have always been home to the gods for many of the world's traditional societies. This sacredness is recognized in the sacred landscapes identified by a variety of mountain societies (Bernbaum 1997) among religious faiths the world over. Though these sacred landscapes have usage restrictions, they form an integral part of traditional cultures. The "Demajong" landscape in west Sikkim is based on Tibetan Buddhist philosophy, with clearly defined norms and a well-defined boundary for sacredness (see Figure 1). The

air, soil, water, and biota are all sacred;

Figure 1.

"Demajong", the land of the "Hidden Treasures"--A pictorial depiction of holy sites in West Sikkim, according to the "Neysol" text of Tibetan Buddhism. Names with "Tso" signify a lake, while "Chu" is a river. This sacred landscape stretches from Khangchendzonga peak down to subtropical forest, natural and human-managed ecosystems, and historical monuments. (Drawing courtesy of Concerned Citizens of Sikkim, Gangtok) any disturbance in the landscape is restricted and bounded by cultural norms, and the guiding principles for natural-resource use are determined by social institutions. With a variety of rituals linked to the diverse communities living within this landscape boundary, who have their own predetermined rights to use natural resources, larger community participation is ensured (Box 1).

Of the Rathang Khola catchment area-the mythical "Demajong" (totalling 328,000 hectares)--28,510 hectares is under snow cover. The vegetation is varied, ranging from alpine Rhododendron scrub vegetation at higher reaches to sub-tropical moist evergreen forests below. These forests cover a distance of about fifteen kilometres, and are extremely rich in plant biodiversity, including medicinal plants of value to traditional Tibetan pharmacopoeia. Due to external pressures on these resources, these ecosystems are degraded in many areas.

.....

The "Demajong" Landscape:

Padmasambhava, worshipped by Sikkimese Buddhists, is considered to have blessed Yoksum and the surrounding sacred land and water bodies in West Sikkim District in eastern Himalaya, having placed a large number of hidden treasures ("ter") in the area. It is believed that these treasures are being discovered gradually and will be only be revealed to the enlightened Lamas, and only at appropriate times. For the Sikkimese Buddhists, conserving these treasures and protecting them from polluting influences is considered important for human welfare. The area below Mount Khangchendzonga in West Sikkim, referred to as "Demojong", is the core of the sacred land of Sikkim. Here offerings are made to the protective deities, but no meaningful performance of Buddhist rituals is possible if the land and water is desecrated. Village-level activities on the land and water resources are permitted.

Any large-scale human-induced disturbance in the land of the holy Yoksum region would destroy the hidden treasures (ters) in such a way that the chances of a visionary recovering them some time in the future will diminish (the last such discovery is thought to have occurred 540 years ago). Any major disturbance to the river system would disturb the ruling deities of the 109 hidden lakes of the river, thus leading to serious calamity. Indeed, the very cultural fabric of Sikkimese society is obviously dependent upon the conservation of the

whole sacred landscape. The uniqueness of this heritage site lies in the holism and interconnection between the soil, water, biota, visible water bodies, the river, and the lake systems on the river bed, together with physical monuments such as monasteries.

(vii) Our attention was then drawn to the National Biodiversity Strategy and Action Plan (NBSAP) constituted by the MoEF, Government of India, a UNDP funded programme with the Department of Forest, Environment and Wildlife Management, Government of Sikkim, as the Nodal Agency for the State. The "Executive Summary" of the NBSAP Project which was brought to our notice is reproduced below:-

..... Its execution was done by a technical and policy core group of various experts from all parts of India, headed by the reputed Indian NGO, Kalpavriksh. The Biotech Consortium India Ltd. coordinated its administration.

The state government of Sikkim approved this project in September 2000. Since June 2001, the Department of Forest, Environment & Wildlife tried to reach out to all sections of people across the length and breadth of the State in a massive effort to formulate the Sikkim Biodiversity Strategy & Action Plan in a participatory manner. This involved the full participation of maximum number of people from all walks of life, having any sort of traditional/scientific knowledge to contribute. Some of the remotest villages were visited as also villages on the peripheries of wildlife protected areas. Besides intensive public hearings, two biodiversity festivals were held at Yuksam in the west and Tsunghang in the north. The first state level steering committee meeting of various luminaries in the field was held at Gangtok on 20th August, 2001.

.....

(viii) The Learned Counsel then drew our attention to Section 5 under Chapter 2 of the above report on the topic "Sacred Landscape" which is reproduced below:-

5. Sacred Landscapes:

Yuksam" is a meeting place of Lamas Lhatsun Chempo, Gnadak Rinzing Chempo and Kathok Sempa Chempo who came to Sikkim from three different directions with an intention of establishing Buddhism. These monks searched for a fourth persons as per the vision of Saint Padma Sambhava (Guru Rim-bo-che). They found Phunstsog Namgyal, who was brought to Yuksam and coronated as the religious king of Sikkim with the title of "Chogyal" meaning "the King who rules with righteousness or Dharma Raja". The event took place in 1642 at Norbugyang. The construction of Dubdi monastery also took place around the same time. The Lamas and the local people of Sikkim and Tibetans implicitly believe that Saint Padma Sambhava, found Sikkim during his journey to Tibet and personally consecrated every sacred spot along the Rathong Chu Valley in Sikkim.

Rathong Chu is an area, which the people of Sikkim perceive as the very basis of

their present culture. Padma Sambhyava, who is highly revered and worshiped by the Sikimese Buddhists is considered to have blessed Yuksam and the surrounding landscape, by having placed within it a large number of hidden treasures (ters) and it is believed that they will only be slowly revealed to enlightened (terten) Lamas and discovered at appropriate time.

Yuksam region is considered to have 109 hidden lakes. Both the visible and less obvious notional lakes identified by religious visionaries are said to be presiding deities, representing good and evil. Propitiating these deities with different ceremonies is considered to be the path for salvation. Conserving and protecting these treasures from polluting and disturbing influences is considered to be vitally important for human welfare. Any major disruption to the river system would disturb the entire system of the area.

Sikkim is the only state with an Ecclesiastical Department in the state government, which is entrusted with the responsibility of the upkeep of the monasteries and other places of worship. Almost all the gompas (monasteries) and other religious institutions are responsible for a considerable degree of (unintentional) biodiversity conservation. Natural landscapes have been consecrated as sacred forests, sacred lakes, sacred boulders, stones and sacred spaces around these monasteries. Even lakes and mountains rocks and caves, springs and rivers here are considered holy as a result of which there is natural inhibition about pollution them. However these traditional beliefs are slowly eroding under the onslaught of modern education, consumptive lifestyles and other western influences.

(ix) Apart from the above, a map showing depiction of holy sites in West Sikkim according to the holy "Neysol" text and the views of the several Buddhist Masters of high acclaim were also placed before us. We, however, need not go into those but suffice it to note that the Learned Counsel has sought to impress us on the unanimity of the views on the sacredness of the river Rathong Chu and the valley on the lap of Mount Khangchendzonga with Tashiding as the navel.

26. Indisputably, the submission made on behalf of the Petitioners is weighty as we find his contentions supported by credible documents. The former Secretary, Ecclesiastical Department is a responsible public servant and his report is based upon a tour of the place in question and the holy text "Neysol".

27. The paper "Biodiversity Conservation: Lessons from the Buddhist Demajong Landscape in Sikkim, India" placed before "UNESCO" by no less than Prof. P.S. Ramakrishnan, has also referred to the "Neysol" text as one of the basis of his opinion. The NBSAP report is undeniably a Government document. The report is consistent with the opinions and comments of the eminent Buddhist Masters who are highly revered not only in Sikkim but all over the Buddhist world.

28. Despite this, we find that there are certain contradictions also. We find that a group of monks from the very Monasteries indicated as "ancient" and "holy" have declared that the river is not sacred and that they would have no objections

if the Project was allowed to continue. There is another group who claim to be the legitimate authorities of the very Monasteries who contend to the contrary by submitting written declarations to that effect. We are conscious of the belief that the entire Yuksam-Tashiding Valley lying below Mount Khangchendzonga consisting of the river Rathong Chu in West Sikkim is holy and considered as the cradle of the Sikkimese history, culture and religion but, we deem it appropriate not to venture into those areas in the present proceedings and would rather issue an appropriate direction to arrive at a finding on those in the manner that will follow hereafter.

29. There are other facts stated on behalf of the State which we find quite contradictory and conflicting. The maps, Annexure R-21 to the counter-affidavit of Respondent No. 4 and Annexure 4 to CM Appl No. 97 of 2013 reflect even the entire portion upstream as "Ladong Khola" leaving only the stretch which actually is "Chorang Chu" as Rathong Chu. These are inconsistent also with the physical map of the State which shows the entire stretch from the source to the point where it joins river Rangit as Rathong Chu. That apart, we find other maps on record which conform to the physical map of the State. Some of them are (i) Annexure R-13 to the counter-affidavit of the Respondent No. 4, (ii) maps found at pages 9 and 12 (internal) of the EIA and EMP (Annexure P-39 to CM Appl No. 114 of 2013) prepared by the Respondent No. 4, which also contains the note under paragraph 3.5 to the effect that "The Tashiding Diversion site is located on Rathang Chu river" and under the head "Taxonomic Diversity" mentioning clearly that "Tashiding H.E. Project area extends from Legship village near the confluence of Rathong Chhu with Rangit river up to Yuksum village and touches the Buffer zone-IV of Khangchendzonga Biosphere Reserve in the catchment of Rathong Chhu" and (iii) map attached to the draft notification dated 03-02-2014, Annexure R4/1 to CM Appl No. 19 of 2014.

30. From the facts and circumstances set out under the two questions discussed above, two conclusions are found to have emerged. Firstly, there is no dispute of the fact that the eco-sensitive zone along the boundary of Khangchendzonga National Park is yet to be declared by the MoEF as the proposal sent by the State Government on 23-01-2013 is still under its consideration.

Secondly, the question as regards the sacredness of the area below the Mount Khangchendzonga through which the river Rathong Chu flows, sacredness of the river Rathong Chu and the defilement of the water of the river by construction of the Tashiding HEP as perceived by both the sides do appear to require serious consideration for the reasons already indicated above. Weighty materials have been placed on behalf of the Petitioners to support their view which we find difficult to ignore completely but, those are questions which we desist ourselves from adjudicating, this being a proceeding under Article 226 of the Constitution of India.

31. No doubt, it was submitted on behalf of the State-Respondent that protection under Articles 25 and 26 of the Constitution envisages protection of religious

practice that are considered as essential and integral part of the religion which the "Bhumchu" ceremony performed at the Tashiding Monastery and the worship of the other sacred places in the Rathong Valley may not be. This principle is indeed well-settled but, in A.S. Narayana Deekshitulu (supra) reiterating this very principle, it was held that "What are essential parts of religion or religious belief or matters of religion and religious practice is essentially a question of fact to be considered in the context in which the question has arisen and the evidence-factual or legislative or historic-presented in that context is required to be considered and a decision reached."

32. However, before we venture to deal with the above, it would be necessary for us to consider two technical objections raised on behalf of the Respondents on the question of (a) delay and laches on the part of the Petitioners to bring the Writ Petition, and (b) that the Writ Petitions are hit by the principle of res judicata on the ground that the very issues involved in this case have already been decided finally by this Court in Denzong Lho Man Choda (supra) and Chukie Tobdon (supra). We may, therefore, proceed to deal with the above in seriatim below.

33. Whether the Petitioners are guilty of delay and laches in bringing the Writ Petition?

(i) On behalf of the Petitioners it was submitted that there was no delay as admittedly the Project was reassigned to the Respondent No. 4 in 2008, the Open Public Hearing had taken place on 18-06-2009, consent to establish the Project was issued by the State Pollution Control Board on 25-11-2010, the environment clearance granted by the MoEF only on 29-07-2010, approval for diversion of forest lands for construction of Project was granted on 18-05-2011 and 24-09-2011 and various approvals granted only between 11-10-2011 to 04-06-2012. Objections were being raised by the Petitioners from time to time, which as per the Petitioners, is evident from the representation, Annexure P-29 dated 21-09-2010; constitution of a High Powered Committee by the State Government vide Notification dated 24-10-2011 to review/examine issues relating to implementation of (i) 99 MW Ting Ting HEP, (ii) 97 MW Lethang HEP and (iii) 96 MW Tashiding HEP at Yuksam-Tashiding Constituency headed by the Chief Secretary; representations dated 25-06-2011, Annexure P15 and 21-07-2011, Annexure P-16; concerns expressed by Member, National Commission for Minorities dated 04-11-2011 reflecting the objections raised by the Buddhists and, other representations submitted from time to time including representation dated 14-11-2011 upon which discussions were held on 16-11-2011. Then finally the Government decision to proceed with the Tashiding HEP was taken on 16-01-2012 based on the recommendation of the Committee and the advice of the Law Secretary which led to the Writ Petitions being filed on 21-03-2012 in the Hon"ble Supreme Court before it was transferred to this Court for disposal on the ground that as local issues were involved in the case, it would be best decided by this Court at the first instance.

(ii) Mr. Sherpa also pointed out that the Respondents No. 1, 4 and 5, were aware of the need to obtain clearance from the Standing Committee of the NBWL right from the inception as would be evident from the fact that the EIA Notification, 2006, and the Office Memorandum dated 02-12-2009 were put up on the website of MoEF. The series of other correspondences exchanged thereafter between them as noted earlier also confirms this position. The fact that the Respondent No. 5 was aware of such necessity is evident also from the Investment Overview Project report dated March, 2010 prepared by M/s. KPMG India Private Limited, which clearly reveals that Rangit Valley Hydro Private Limited, had floated three companies as Special Purpose Vehicles, namely, (i) Dans Energy Private Limited (ii) TT Energy Private Limited (iii) Shiga Energy Private Limited for implementation of three HEPs of which Tashiding HEP, the Project in question, was one. The promoter of all the three companies was Mr. T. Nagendra Rao, Respondent No. 5. M/s. Shiga Energy Private Limited is the Respondent No. 4, the Project proponent of Tashiding HEP.

(iii) The MoEF by letter dated 04-07-2011 (Annexure P-32) had brought to the notice of the Respondent No. 5 as the Director of M/s. T.T. Energy Pvt. Ltd., that EIA Notification, 2006 and Office Memorandum dated 02-12-2009 were necessary to be complied with. The fact that the Respondent No. 4 had not complied with those is evident from its stand that the requirement of getting clearance from the NBWL stipulated by the MoEF being based on an erroneous interpretation of the order dated 04-12-2006 in Goa Foundation case (*supra*), it was not necessary to be complied with and, accordingly did not comply.

We find that the aforesaid facts have remained undisputed and are found to have been borne out by the records. We, therefore, do not have any hesitation in accepting those as true.

(iv) As submitted on behalf of the Petitioner the principle of Section 22 of the Limitation Act, 1963, would have application in the circumstance as the present one. The fact that the Respondents have deliberately not complied with the NBWL requirement for seeking clearance is a continuing wrong and, therefore, a fresh period of limitation would begin to run at every moment of the time during the period which the breach or torts as the case may be continues as provided u/s 22 of the Limitation Act, 1963.

(v) The report on the visit of the High Power Committee to the Project dated November, 2011, reveals that no major construction work had commenced till then and that the expenditure had been incurred mainly on the payment of land compensation, both private and forest lands, which was only to the tune of Rs. 124 crores. It also appears from the "Six Monthly Compliance Report on Status of Environmental Safeguards" of the Project in question dated 22-11-2012, Annexure P-35, that the construction phase on the Project had just started. It, therefore, cannot be said that the Respondents are so adversely situated that the Writ Petitions called for dismissal only on that account. In *Intellectuals Forums* case (*supra*), it has been held "that decision in the case of the present kind

cannot be based solely upon investments committed by any party since, otherwise, it would seem that once any party makes certain investments in a project, it would be a *fait accompli* and this Court will not have any option but to deem it legal".

(vi) We are conscious of the decisions cited on behalf of the Respondents on the principle governing delay particularly, the Narmada Bachao Andolan case (*supra*) but, those do not appear to hold good in the facts and circumstances of the present case and, therefore, are of no assistance to the Respondents. We, therefore, hold that the Petitioners are not guilty of delay and laches in bringing the Writ Petition.

34. Are the Writ Petitions hit by the principle of constructive of *res judicata*?

(i) This principle obviously emanating from Section 11 of the Code of Civil Procedure, 1908, contemplates in substance that a suit would be barred if an issue arising in a subsequent suit was directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, had been heard and finally decided in that suit. It is, therefore, to be seen as to whether questions raised in the present Writ Petition were heard and finally decided in *Denzong Lho Man Choda* (*supra*) and *Chukie Tobdon* (*supra*) as asserted by the Respondents.

(ii) The above cases were dismissed by a common judgment dated 13-12-1995 by a Bench of this Court rejecting the plea of defilement of the river and the area by the concerned Project but at the same time accepting the sacredness attached to those. This will be evident from the following portions of the judgment:

26. A very important matter agitated on behalf of the petitioners is that the project would pollute the water of Rathong Chu which the Sikkimese Buddhists consider to be purest of the pure from religious point of view. They require to take out a tumbler of water from Rathong Chu River for performance of the Boomchu ceremony on a particular day every year. The petitioners apprehend that existence of some obstruction to the flow of Rathong Chu River would pollute its water. It has been stated that the refuge (*sic*) of the people who would be staying in the locality during the construction of the project and also during the functioning of the project would pollute the water. Moreover, decomposed animal cadavers and other nuisance accumulating in the river on account of obstruction to its flow would contribute to further pollution of the water. It was suggested from the side of the respondents that the place from where the water is collected during Boomchu ceremony is at a place much below the project area and also much ahead of the place where river Rimbi meets with the Rathong River and flow together. There is already a hydel project on Rimbi, therefore, pollution of water in the particular area, if at all be, has already been effected since a number of years. To meet this argument it has been contended by the petitioners that they do not mean the physical purity of the water. It is

something different. The Rathong Chu is a holy river and ancient texts indicate the holiness of its water. Be it physical or otherwise, if any hydel project could cause any damage to the water, it has already been done and no graver infringement to the purity of the water is expected on account of another hydel project on Rathong river. Though we must feel sorry for wounding the religious feeling of a section of people but nothing is left to be done as alleged violation to the purity has already been caused when the Rimbi Hydel project was started.

29. No doubt the region is of value to the Sikkimese of Buddhist faith of this area. No doubt the area is covered with religious monuments and their ruins. No doubt the religious faith in observance of the Boomchu ceremony would get some amount of jolt. But on overall assessment of the entire situation it does not lead us to irresistible conclusion that the scheme is not viable from the socio-cultural and religious consideration. Some amount of tolerance from the side of some section of people helps the State to a great extent in undertaking works which ultimately culminate in maximum benefit to maximum people. As the Hon'ble Supreme Court observed in *Bijoe Emmanuel and Others Vs. State of Kerala and Others*, "our tradition teaches tolerance; our values preaches tolerance; our constitution practices tolerance; let us not dilute it". Same has been echoed in *S.R. Bommai and others Vs. Union of India and others etc. etc.*, . The Government appears to be sincere in taking care of the suggestions on the conditions or safeguards indicated not only in these reports but also in several other reports of several institutions and organisations. It is believed the Government would also make good the deficiencies found in these respects.

[emphasis supplied]

(iii) The Petitions for Special Leave to Appeal filed by the Petitioners before the Hon'ble Supreme Court against the judgment were allowed by order dated 26-03-1996 but the consequent Civil Appeals were disposed of as being infructuous on the declaration of the State Government vide Notification dated 02-09-1997 declaring the closure of that Project. Evidently, therefore, the Appeal was not disposed of on its merits but on the case being rendered infructuous. Considering the trite position that an Appeal is a continuation of the original proceedings, it cannot but be held that there was no finding on the merits of the case and thus could not be said to have been heard and finally decided.

(iv) In our view, when the Government had set at naught the very cause of action, the issues arising in those Writ Petitions stood wiped out and resultantly, the findings on those issues ceased to survive. We may reproduce the order dated 26-03-1996, the Gazette Notification No. 187 dated 02-09-1997 (Annexure P-7) and the order of the Hon'ble Supreme Court dated 21-11-2002 in Civil Appeals No. 5110-5111 of 1996 below:-

Order dated 26-03-1996

Leave granted.

Stay vacated on the undertaking given by Mr. Reddy, Learned Additional Solicitor General that whatever activity-constructional or otherwise, which has been or may in future be done pursuant to the project, that shall be at the risk and peril of the State Government and that in the event of the appeal succeeding, the ecology will put back to its own original position. Mr. Reddy further says that whatever conditions have been imposed by the High Court, they too would be strictly followed. Lastly, it is conceded by Mr. Reddy that but for the project in question no other project would be floated or executed in the Yuksom Valley, till further orders.

Gazette Notification dated 02-09-1997

Sikkim Government Gazette

Extra Ordinary Published by Authority

Gangtok Wednesday, 2nd September, 1997

No. 187

Government of Sikkim Home Department Gangtok

No. 42/A/Home/97

Dated: 2.9.1997

Notification

The State Government is hereby pleased to order the closure of the Rathong Chu Hyde Project with effect from 20th August, 1997.

By order and in the name of the Governor.

Sd/- [K. Sreedhar Rao] Chief Secretary F. No. 54(195) Home/95

Order dated 21-11-2002

The Appeals above-mentioned being called on hearing before this Court on the 21st day of November, 2002 UPON perusing the record and UPON counsel for the appellants herein stating before the Court that in view of subsequent development, these appeals are rendered infructuous. This Court Doth Order:

That the appeals above-mentioned be and are hereby dismissed as having become infructuous:

and This Court Doth Further Order that this ORDER be punctually observed and carried into execution by all concerned.

.....

[emphasis supplied]

(v) The subsequent development noted in the above order is found reflected in a news report published in the "Telegraph" in its issue dated 21-08-1997 which

reads as under:-

The Sikkim government has scrapped the controversial 30 mw hydel power project at Rathongchu in West Sikkim. The project, conceived in 1977 and launched in 1991, had incurred an expenditure of Rs. 13 crore over the last six years. The chief minister, Mr. Pawan Kumar Chamling, said work on the project but (sic) would be stopped to "honour the sentiments, religion, culture of the Sikkimese people".

The chief minister's announcement came at a public meeting in Paljor gymnasium here yesterday. The meeting was attended mostly by lamas from different monasteries and various tribal campaigning against the project.

Mr. Chamling said, "In witness of all. I close the Rathongchu project, in the interest of the Sikkimese people." He said he was ready to sacrifice his chair in the interest of the state. The chief minister said his government had laid greater emphasis on the state and its people as "they were more valuable than the Rs. 13 crore which had already been spent on the project since its inception."

"Keeping in mind the religious sentiment of the people, as the project site houses valuable relies (sic) of the Buddhist preacher, Guru Rimpoche, the government had scrapped the project," he said.

Rathongchu, widely held as a sacred river in Yoksum valley, is believed to have 109 hidden lakes with presiding deities. The project had sparked off resentment among the people, who protested for more than a year. A social activist, Sonam Plajor, had even resorted to a hungerstrike for 28 days from June 8, 1995, to press for the scrapping of the project.

A one man commission headed by Prof. P.S. Ramakrishnan of the School of Environmental Sciences of the Jawaharlal Nehru University, in its report submitted on October 9, 1995 also recommended scrapping of the project. He said-Yuksum was a national heritage site and the Unesco was planning to upgrade it as a world heritage site. However, the chief minister's speech, which was based on the commission report, did not acknowledge the fact.

Yoksum in West Sikkim is referred to as "Denzong" (land of rice) as well as "Baiyul" the hidden valley. Since assuming power two and half-year ago, the Sikkim Democratic Front government faced opposition from various religious groups, environmentalists and social organisations for scrapping the project.

The government even won a case filed by the non-governmental organisations on ground that the project was not economically viable. Having won the case the government went ahead with construction work disregarding the protests mainly from the religious organizations which claimed that the project would submerge important Buddhist monuments.

The fallout of the government's move may be manifold. The Centre was likely to question the rationale of scrapping the project after the state government

received funds for it in 1996-97 Moreover, the contractors would also oppose the decision.

[emphasis supplied]

(vi) Apart from the factual setting indicated above which negates the plea of constructive res judicata raised on behalf of the Respondents we also find that while dealing with this very question in V. Purushotham Rao Vs. Union of India and Others, , it has been held as under:

19. Then again, the principles of Section 11 as well as Order 2 Rule 2, undoubtedly contemplate an adversarial system of litigation, where the court adjudicates the rights of the parties and determines the issues arising in a given case. The Public Interest Litigation or a petition filed for public interest cannot be held to be an adversarial system of adjudication and the petitioner in such case, merely brings it to the notice of the court, as to how and in what manner the public interest is being jeopardised by arbitrary and capricious action of the authorities. The Court repelled the same by holding that the writ petitions are not inter partes disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether for social safety and for creating a hazardless environment for the people to live in, mining in the area should be permitted or stopped. The Court hastened to add: (Collector of Customs, Bangalore Vs. M/s. Western India Plywood Mfg. Co. Ltd. and another,)

We may not be taken to have said that for public interest litigations, procedural laws do not apply. At the same time it has to be remembered that every technicality in the procedural law is not available as a defence when a matter of grave public importance is for consideration before the court. Even if it is said that there was a final order, in a dispute of this type it would be difficult to entertain the plea of res judicata.

..... In our considered opinion, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest which is being served.

[emphasis supplied]

(vii) In any case, as alluded to earlier, there are two distinct issues arising in this case. One, being the sacredness of the river Rathong Chu and the valley below the Mount Khangchendzonga and, secondly, the failure of the Respondents No. 1, 4 and 5 in obtaining the necessary recommendations of the Standing Committee of the NBWL.

(viii) For the aforesaid reasons, we hold that the Writ Petition is not hit by the principle of res judicata.

35. Apart from the above, objections were also taken on the question of (i) the locus standi of the Petitioners in bringing the Writ Petitions as they were not the residents of West Sikkim, and (ii) impermissibility of this Court to interfere in economic and policy matters.

(i) On the first objections of locus standi the grievance expressed in the Writ Petitions pertain to an area considered as sacred by the entire Buddhist Community in the State to which the Petitioners belong and, therefore, place of residence would be of no relevance. The Petitioners as Buddhists are espousing the cause of entire Buddhist Community and, therefore, the objection does not appear to sustain.

(ii) The other objection as regards the interference with the policy and economic affairs are concerned, the facts and circumstances of the case discussed would reveal that these objections also would be of no consequence as the questions involved in the case primarily are the violation of the requirement of obtaining NBWL clearance for the Project and defilement of the Rathong Chu river and the surrounding areas held as sacred by the Buddhists due to the Project in question. We do not intend to interfere with any of the policies of the State Government notwithstanding the trite position that in the event of there being arbitrariness, unreasonableness, illegality and unconstitutionality in a policy decision of the Government, the Court have the necessary jurisdiction to interfere.

Considering the facts and circumstances discussed above, these objections do not appear to have any merit and of no relevance and accordingly, we reject them.

36. Having held so, we may now revert back to our findings on the two questions noted earlier and proceed to deal with those.

37. Whether the Project in question was in violation of the order dated 04-12-2006 passed in Goa Foundation case?

(i) From the entire discussion, there can be no doubt of the fact that in terms of the order dated 04-12-2006 in Goa Foundation case (supra) clearance of NBWL was necessary. This would be evident also from the EIA Notification, 2006, Office Memorandum dated 02-12-2009 and other Office Memorandums and letters issued by the Wildlife Wing of the MoEF. The final judgment dated 21-04-2014 in Goa Foundation case (supra) only clarifies that no specific direction had been issued to notify areas within 10 kms of the boundaries of National Parks and Wildlife Sanctuaries as eco-sensitive areas. It has not, and also could not, have held that in Projects of the present kind clearance from NBWL was not necessary.

(ii) As noted earlier, the stand of the Respondents No. 1, 4 and 5 as regards the necessity of seeking clearance from the NBWL is that there being no direction from the Hon''ble Supreme Court to seek such clearance they had not done so and that the Notifications and the Office Memorandums issued by the MoEF were non est and, therefore, did not require compliance. This, in our considered

opinion, do not appear to be the correct approach. Unless an appropriate forum decides on the validity of such Notifications and Office Memorandums it is incumbent for them to have complied with those. In *Krishnadevi Malchand Kamathia* (supra) it has been held as under:-

19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person.

(iii) The present confusion and the imbroglio appears to have arisen clearly on account of the lack of diligence and reluctance on the part of the States in submitting its proposals in response to the repeated reminders resulting in the delay in deciding on the question of eco-sensitive zones by the MoEF thereby enabling the Project proponents to make a premium out of the nebular situation. This explains the observation of the Hon^{ble} Supreme Court in *Goa Foundation* case (supra).

(iv) Admittedly a proposal by the Respondent No. 1 is under consideration of the MoEF whose expeditious decision on the proposal, in our view, is imperative and a direction to that end is necessarily called for.

(v) Establishment of Biosphere Reserve in Sikkim mentioned in the letter of MoEF dated 07-02-2000 and the subsequent Notification dated 24-05-2010 of the Government of Sikkim upon which the Respondents rely, would have no relevance to the requirement of clearance by the NBWL in view of the mandatory nature of such clearance as the Project in question falls under Category "A" as provided in the Schedule read with paragraphs 4(ii) and 8(v) of the EIA Notification, 2006 and, the Office Memorandum dated 02-12-2009.

38. Violation of the religious and customary rights under Articles 25, 26 and 29 of the Constitution of India.

(i) The next is the question of sacredness of the river Rathong Chu, its defilement and its adverse effect on the "Bhumchu" ceremony held at Tashiding annually. We have already observed that weighty materials have been placed on behalf of the Petitioner in proof of the sacredness of the Rathong Chu river and the Valley below the Mount Khangchendzonga through which it flows. But, there are also conflicting claims made by the monks of the premier Monasteries situated in the valley. Controversy has also been raised by the Respondent-State as regards the very name of the river. However, these are questions which we shall withhold ourselves from entering into except to issue appropriate directions to the extent as shall be revealed hereafter.

(ii) Public Consultation which is mandatorily required to be conducted under the EIA Notification dated 14-09-2006 (Annexure-R8/1) as prescribed under State (3) envisages, inter alia, the following:-

III. Stage (3)-Public Consultation:

(i) "Public Consultation" refers to 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 to taking into account all the material concerns in the project or activity design as appropriate. All Category "A" and Category B1 projects or activities shall undertake Public Consultation, except the following:-

.....

(ii) The Public Consultation shall ordinarily have two components comprising of:-

(a) a public hearing at the site or in its close proximity-district wise, to be carried out in the manner prescribed in Appendix IV, for ascertaining concerns of local affected persons;

(b) obtain responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity.

(iii) the public hearing at, or in close proximity to, the site(s) in all cases shall be conducted by the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) concerned in the specified manner and forward the proceedings to the regulatory authority concerned within 45(forty five) of a request to the effect from the applicant.

(iv) in case the State Pollution Control Board or the Union territory Pollution Control Committee concerned does not undertake and complete the public hearing within the specified period, and/or does not convey the proceedings of the public hearing within the prescribed period directly to the regulatory authority concerned as above, the regulatory authority shall engage another public agency or authority which is not subordinate to the regulatory authority, to complete the process within a further period of forty five days,.

(v) If the public agency or authority nominated under the sub paragraph (iii) above reports to the regulatory authority concerned that owing to the local situation, it is not possible to conduct the public hearing in a manner which will enable the views of the concerned local persons to be freely expressed, it shall report the facts in detail to the concerned regulatory authority, which may, after due consideration of the report and other reliable information that it may have, decide that the public consultation in the case need not include the public hearing.

(vi)

(vii).....

[emphasis supplied]

Quite evidently, the process of Public Consultation is elaborate during the proceedings of which concerns of affected persons and others are mandatorily required to be ascertained with the object to take into account all material concerns in the Project and that responses from others concerned having a plausible stake in the environmental aspects of the Project or activity have to be obtained in writing.

(iii) In the present case the Public Hearing, one of the components of Public Consultation, conducted by the State Pollution Control Board for the purpose of EIA Notification, 2006, upon which the Respondents heavily rely upon also does not appear to be beyond reproach. In Orissa Mining Corporation Ltd. (supra) the Hon"ble Supreme Court while dealing rights of the Scheduled Tribes of worship over the Niyamgiri Hills in Kalahandi and Rayagada districts of Orissa held as under:-

37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No. 107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No. 169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge, innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

.....

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and

propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

.....

58. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.

[emphasis supplied]

(iv) As is apparent from the above, it had been noted by the Hon"ble Supreme Court that issues pertaining to the religious rights of worship over Niyamgiri Hills by the tribals had not been taken into consideration during the public hearing as would appear from the last part of paragraph 58 extracted above. In the present case also we find that the questions and answers recorded in the proceedings of the Public Hearing only deal with the individual claims arising out of the Project. We did not find a whisper on the religious aspect of the river and the area and, other social issues that may be impacted by the Project.

(v) The entire process of Public Hearing in the present case is reflective of the observation of Hon"ble Shri Justice K.G. Balakrishnan, former Chief Justice of India, in his talk during the seminar on "Law and Environment" held at Chandigarh on 23-05-2009 which we may reproduce below:-

..... The impact on the local communities can only be accurately assessed if their concerns are effectively heard through methods such as "Pubic hearings". However, several independent studies have demonstrated the lack of transparency and inclusiveness in such hearings. In some cases, the "Public hearings" are not adequately notified and even held in remote locations, where the concerned stakeholders do not get a say. The picture is even more complicated when business concerns lobby with local officials to ensure that genuine concerns are not voiced. In such situations, the courts are again called on to protect the interests of the local communities who are displaced or adversely affected by developmental projects.

[emphasis supplied]

(vi) Although the decision in Orissa Mining Corporation Ltd. case (supra) was rendered in the context of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, we are of the considered view that the principle forming the basis of the decision would be applicable in the present case also.

(vii) There is no doubt of the fact that the Rathong Chu river is still in its pristine condition flowing through verdant green valley rich in biodiversity. We are of the considered opinion that not notifying a place as sacred by a State Government cannot be considered as a determining factor in deciding as to whether a place is sacred or not. It is the belief and faith of the people and the practice which is considered essential to the faith that would be relevant as a factor for such consideration. It has been accepted that religion, customs and tradition of the people form integral units of the entire biosphere, ecology and environment and, that man and nature make up an indivisible whole. "There is wide recognition worldwide and across disciplines that regions of ecological caution exhibit a symbiotic relationship between the biophysical ecosystem and the social system, with strong cultural interconnections between the two. This demonstrates that culture and environment are complementary, and in various stages of evolution (Ramakrishnan 2001)." [Proceedings of the Workshop on the Importance of Sacred Natural Sites for Biodiversity Conservation-UNESCO, Kunming and Xishuangbanna Biosphere Reserve, People's Republic of China, 17-20/02/2003] We are of the view that the issues raised in the Writ Petitions require serious consideration and cannot be ignored and brushed aside.

(viii) In Orissa Mining Corporation Ltd. case (supra) under somewhat similar circumstance, following directions were issued:-

60. We are, therefore, inclined to give a direction to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

[emphasis supplied]

39. Considering the entire facts and peculiar circumstances of the case, we are of the considered opinion that in the interest of justice it will be appropriate and

expedient if both the issues are referred to the MoEF, Respondent No. 2, for a decision in order to take care of the anxiety which finds expression in paragraph 62 of the judgment in Orissa Mining Corporation Ltd. case (supra) reproduced above.

40. We, therefore, direct as under:-

The MoEF, Respondent No. 2, shall, in due compliance of the MoEF letter dated 27-05-2005, order of Hon''ble Supreme Court dated 04-12-2006 in Goa Foundation case (supra) so far as it is relevant to that letter, and MoEF Office Memorandum dated 02-12-2009 and other related letters, decide on the question of eco-sensitive zone in accordance with law and the procedure prescribed in that behalf within a period of six months from the date of this judgment after affording the parties opportunity of hearing on all aspects including the religious aspect raised by the Petitioners.

41. Having regard to the facts and circumstances, we withhold ourselves from passing any order suspending the Project in question making it clear that the implementation of the Project shall be at the risk and peril of the Respondents No. 4 and 5 as indicated in the Office Memorandum dated 02-12-2009 of MoEF and shall be subject to the decision of the MoEF which it may take after issuance of the final notification.

42. In the interregnum, it shall be open for the State-Respondent No. 1 to take such decision as may be advised unhindered by the proceedings before the MoEF being held by virtue of this order.

43. We also make it clear that the observations or remarks made by us in this judgment shall not be construed as expressions of our opinion on the merits of the case.

44. The Writ Petitions stand disposed of in terms of the above directions.

45. No order as to costs.