
(2009) 11 MP CK 0058

In the Madhya Pradesh High Court

Case No : Writ Petition No. 6056 of 2009

Narmada Bachao Andolan

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226, 243, 243A

Environment (Protection) Act, 1986 — Section 3(2)

Inter State Water Disputes Act, 1956 — Section 6A

Land Acquisition Act, 1894 — Section 18, 5A

Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 — Section 129A ,
129B, 129C, 129D, 129E

Panchayats (Extension to Scheduled Areas) Act, 1996 — Section 3, 4, 4(1)

Citation : (2010) ILR (MP) 553

Hon'ble Judges : A.K. Patnaik, C.J.;Ajit Singh, J

Bench : Division Bench

Judgement

A.K. Patnaik, C.J.—The Petitioner No. 1 is a senior social activist of Narmada Bachao Andolan and was a member of the World Commission on Dams. The Petitioners No. 2 to 7 are persons affected by the canals of Omkareshwar and Indira Sagar Projects in Districts Dhar and Badwani. The Petitioners have filed this writ petition under Article 226 of the Constitution as a public interest litigation claiming appropriate reliefs in respect of the work now being carried on by Respondents No. 1 and 2 in connection with the canals of the Indira Sagar and Omkareshwar Projects on the Narmada river.

2. The background facts are that the Narmada Valley Development Project consists of several large and medium dam projects. Indira Sagar and Omkareshwar Dam Projects are two such projects located in the State of Madhya Pradesh. For the Indira Sagar Project, which was earlier known as Narmada Sagar Project, the Government of India, Ministry of Environment and Forests, granted environmental clearance by Office Memorandum dated 24th June, 1987 and for the Omkareshwar multipurpose Project, the Government of India, Ministry of Environment and Forests, granted environmental clearance by Office

Memorandum dated 13th October, 1993. After the construction of the Indira Sagar and Omkareshwar dams, the construction of the main and branch canals of the Indira Sagar Project started in 1991 and the construction of main and branch canals of the Omkareshwar Project started in 2006. The Petitioners have filed this writ petition praying that no work on the canals be carried out without the execution of Resettlement and Rehabilitation Plans and without completion of Command Area Development Plans and without approval of these plans by the Union Ministry of Environment and Forests. The Petitioners have also prayed that agricultural land in the Narmada region which is already irrigated be protected and displacement of persons be minimised by construction of the canal network. The Petitioners have further prayed that the land acquisition process be quashed and no canal excavation work be carried out without prior consultation with the Gram Sabha in accordance with the provisions of the Panchayat (Extension to Schedule Areas) Act, 1996 (for short "the PESA Act").

3. On 23.6.2009, the Court after hearing Ms. Medha Patkar for the Petitioners issued notices to the Respondents and thereafter on 1.7.2009 after hearing, the parties took the view that if the Court does not pass any order of status quo and the Court finally declares the acquisition proceedings void and directs restoration of the land to the land owners and if the State continues to spend more money on excavation of land and on construction of the canals, the State will suffer greater loss. The Court was of the further view that the better course in the public interest would be to hear the writ petition as early as possible and decide the matter and in the meantime the Respondents should maintain status-quo on the excavation work for the canal and in respect of land acquisition proceedings and accordingly passed an order of statusquo on 1.7.2009.

4. On 1.7.2009, the Court allowed the application for intervention I.A. No. 665 8/2009 filed by Nilesh Patidar, Amichand Patidar, Chand Khan Mansoori, Shivraj Singh, Inder Singh Sisodia and Joginder Singh. Again on 8.10.2009, the Court allowed the application for intervention I.A. No. 9582/2009 filed by M/s Goodwill Advance Construction Company Ltd. which has been entrusted with part of the work of excavation of canals. Replies have been filed by Respondents No. 1, 2 and 3. Counsel for the parties and the interveners were heard at length on 08.10.2009, 09.10.2009, 14.10.2009, 20.10.2009, 21.10.2009, 22.10.2009, 23.10.2009, 27.10.2009 and 28.10.2009.

Issue relating to environment

5. Ms. Medha Patkar appearing for the Petitioners submitted that the Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Indira Sagar Project clearly contemplated that Command Area Development Plan will be prepared and made available to the department and further stipulated that the Narmada Control Authority will ensure that environmental safeguard measures are planned and implemented pari passu with the progress of the work on the project. She submitted that similarly the Office Memorandum dated 13th

October, 1993 of the Government of India, Ministry of Environment and Forests stipulated that Command Area Development Plan will be prepared and submitted in March, 1994. She submitted that the Office Memorandum dated 24th June, 1987 and the Office Memorandum dated 13th October, 1993 of the Government of India, Ministry, of Environment and Forests therefore granted environmental clearance subject to the condition that Command Area Development Plans are prepared in advance and submitted to the department. She submitted that the letter dated 1st July, 2009 of the Secretary, Government of India, Ministry of Environment and Forests to the Chief Secretary, Government of Madhya Pradesh annexed to the rejoinder of the Petitioners would show that the Command Area Development Plan of the Omkareshwar Multipurpose project has not been submitted to the Ministry of Environment and Forest, Government of India. She referred to the para 8 of the affidavit filed on behalf of the Ministry of Environment and Forest, Government of India (Respondent No. 3), which also states that till date the Ministry has not received the Command Area Development Plan of Omkareshwar Multipurpose project. She submitted relying on para 3.13 of the writ petition that the lands in villages which have been acquired for Indira Sagar canals and Omkareshwar canals are being irrigated by Narmada water through pumps and pipelines or through strong and deep wells owned by individual farmers and only a small portions of such land are not irrigated. She further submitted relying on para 3.13.2 of the writ petition that many villages in Badwani and Dhar districts which have already lost land and houses because of the Sardar Sarovar Project, are now going to be affected by the Indira Sagar Project canals and Omkareshwar project canals. She also submitted that some of the project affected families have received special rehabilitation package and have purchased alternative land but such land has again been acquired for the canals. She vehemently argued that if Command Area Development Plans for Indira Sagar and Omkareshwar project were prepared in time and submitted, all these problems would have been avoided. She argued that in the absence of Command Area Development Plans of the two projects, no canal excavation work should be carried out and the entire land acquisition process should be stalled.

6. Mr. Vijay Paranjpye appeared as a Technical Expert on behalf of the Petitioners and submitted that Command Area Development Plan is necessary to ensure that the irrigation benefits of a dam project are maximised and must be prepared alongwith the detailed project report of the dam project. He further submitted that the Indira Sagar Project canals and the Omkareshwar Project canals are to irrigate regions in Madhya Pradesh which have black cotton soil and black cotton soil absorbs and retains water and the Command Area Development Plan must therefore ensure a proper drainage system as otherwise there will be water logging and other adverse environmental consequences. He submitted that if Command Area Development Plan is prepared before the canals are built, the alignment of the canals will be proper. Mr. Paranjpey filed documents in support of his submissions and cited para 85 of the judgment of Kripal, J. in Narmada

Bachao Andolan Vs. Union of India and Others, , in which there is a reference to a note sent by the Secretary, Ministry of Environment and Forest to the Prime Minister stating inter alia that environmental management plan should be implemented pari passu with engineering and other works in the Narmada Sagar and Sardar Sarovar projects for harmonising the environmental conservation needs with the development effort. He also referred to a statement in para 85 of the Judgement of Kripal, J. in Narmada Bachao Andolan showing the costs and benefits of the Narmada Sagar and the Sardar Sarovar Dam. He submitted that benefits of a dam project can be optimised if the Command Area Development Plan is submitted alongwith the detailed project report of the dam.

7. Mr. Ravish Agrawal, learned senior counsel appearing for the Respondents No. 1,2,5 and 6, relying on the Additional Return filed on behalf of the Respondents No . 1, 2, 5 and 6, submitted that it would have been a paper formality, if detailed Command Area Development Plans of Indira Sagar Project and Omkareshwar Project were submitted in the years 1987 and 1993 at the time of environmental clearance because the ground realities substantially change if construction of the Canals is undertaken long after the preparation of the Command Area Plans. He submitted that the statutory notifications under Sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 requiring environment clearance to different development projects became effective only in the year 1994 as has been held in para 126 of the judgment in Narmada Bachao Andolan v. Union of India and Ors. (supra) and hence the environmental clearances issued by the Government of India, Ministry of Environment and Forests in the years 1987 and 1993 in the case of Indira Sagar and Omkareshwar Projects were not statutory but essentially administrative in nature. He further submitted that under the Government of India (Allocation of Business) Rules made under Clause (3) of Article 77 of the Constitution, Command Area Development is allocated to the Ministry of Water Resources and not to the Ministry of Environment and Forests and that the Central Water Commission, an expert body of the Ministry of Water Resources, is the authority which approves major and medium irrigation works, water management, etc. He submitted that on a query made by the Principal Secretary & Member (R), Narmada Valley Development Authority, Government of Madhya Pradesh by D.O. letter dated 16.10.2009, the Central Water Commission has opined in the communication dated 23.10.2009 annexed to the Additional Return as Annexure R-2/B that Cammand Area Development Plan does not have any bearing on the design, layout/construction of main and branch canals. He submitted that in any case a comprehensive Command Area Development Plan for Indira Sagar Project was submitted to the Ministry of Environment and Forests alongwith the letter dated 21.08.1992 by Narmada Valley Development Authority, Government of Madhya Pradesh, a copy of which is annexed to the Additional Return as Annexure R-2/C and a command area study of Indira Sagar Project and Omkareshwar Project was conducted by the Indian Institute of Science, Bangalore in April; 1985 and was submitted to the Ministry of Environment and Forests alongwith the letter dated

21.08.1992 of the Narmada Valley Development Authority, Government of Madhya Pradesh. He further submitted that recently by letters dated 16.10.2009 (Annexure R-2/D and E), Command Area Development Plans of Indira Sagar Project and Ornkareshwar Project have been submitted to the Government of India. He submitted that infact by a recent notification dated 17.9.2009, a copy of which has been annexed to the Additional Return as Annexure R 2/F, the Government of India, Ministry of Environment and Forests has set up an independent Committee of Experts to monitor and review canals and command area development of Ornkareshwar Project and this Committee is already monitoring and reviewing canals and command area development of Indira Sagar Project. He cited the observations in the majority judgment of Kripal, J in Narmada Bachao Andolan v. Union of India and Ors. (supra) in para 126 that change in environment does not per se violate any right under Article 21 of the Constitution of India. He also relied on the majority judgment of Rajendra Babu, J in N.D. Jayal and Another Vs. Union of India (UOI) and Others, in which the contention of the Petitioners therein that the work of Tehri Dam should be stopped till the conditions attached to the environmental clearance dated 19.7.1990 including submission of Command Area Development Plan was rejected with the finding that the Petitioners have not established that the project work was being carrying out without complying with the conditions of clearances, although they had produced materials to show that there were lapses at certain stages which had been taken care of by the monitoring agencies.

Findings with reasons:

8. The Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests by which environment clearance was given to the Narmada Sagar Project now renamed as Indira Sagar Project stipulated in paras 4 and 5:

4. The NCA has been expanded and its terms of reference have been amplified to ensure that environmental safeguard measures are planned and implemented to depth and in its pace of implementation pari passu with the progress of work on the project.

5. After taking into account all relevant facts the Narmada Sagar Project, Madhya Pradesh and the Sardar Sarovar Project, Gujarat are hereby accorded environmental clearance subject to the following conditions:

i The Narmada Control Authority (NCA) will ensure that environmental safeguard measures are planned and implemented pari passu with progress of work on projects.

ii The detailed surveys/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment.

iii The Catchment Area Treatment Programme and the Rehabilitation Plans be so drawn as to be completed ahead of reservoir filling.

iv The Department should be kept informed of progress on various works periodically.

Paragraphs 4 and sub-para (i) of para 5 of the Office Memorandum dated 24th June, 1987 of the Government of India, Ministry of Environment and Forests quoted above would show that the Narmada Control Authority (NCA) was to ensure that the environmental safeguard measures are planned and implemented *pari passu* - with the progress of work on the project. This means that alongwith the engineering and other works the environmental management plan was to be made and implemented as contemplated in the note of the Secretary, Ministry of Environment and Forest to the Prime Minister quoted in para 8 of the judgment of Kripal, J in *Narmada Bachao Andolan v. Union of India and Ors.* (supra).

9. The Office Memorandum dated 13th October, 1993 of the Government of India, Ministry of Environment and Forests by which environmental clearance was given to the Omkareshwar Multipurpose project states:

The proposal was considered from environmental angle and approved subject to implementation of the following mitigative measures *pari-passu* with the project construction:

xxxxx

xxxxx

xxxxx

xxxxx

xxxxx

xxxxx

(viii) A detailed Command Area Development Plan should be prepared and submitted in March, 1994 so that benefit stream can be ensured as proposed.

xxxxx

xxxxx

xxxxx

(xiii) The Ministry should be kept informed every 6 months of the follow up action taken on the recommendations and the project should be initiated only after ensuring that all arrangements to execute the environmental mitigative measures have been made as a part and parcel of the project.

The Office Memorandum dated 13th October, 1993 of the Government of India, Ministry of Environment and Forests relating to Omkareshwar Multipurpose Project is thus clear that environmental mitigative measures were to be taken *pari passu* with the project construction and a detailed Command Area

Development Plan was to be prepared and submitted in March, 1994 and the Ministry of Environment and Forests was to be kept informed every 6 months of the follow up action taken on the recommendations and that the project was to be initiated only after ensuring that all arrangements to execute the environmental mitigative measures have been made as part and parcel of the project. Thus in the case of Omkareshwar Multipurpose Project also environmental mitigative measures were to be planned alongwith the project to be undertaken and all arrangements to execute the environmental mitigative measures were to be made as part and parcel of the project.

10. Relevant paragraphs of the reply dated 23rd October, 2009 of the Central Water Commission on which Mr. Agrawal relied are extracted hereinbelow:

The Command Area Development (CAD) now forms an integral part of the project to ensure that the irrigation potential created is fully utilized. The CAD would encompass all aspects of water management for efficient and equitable distribution of water in the commands of irrigation projects for optimal utilization in a participatory manner. As per the Guidelines for "Preparation of Detailed Project Report of Irrigation and Multipurpose Projects, 1980", the Detailed Project Report (DPR) of a project is prepared to include separate chapters of (1) Irrigation planning, (ii) CAD and (iii) Estimates.

Whereas all engineering works from source of supply up to outlet are covered in main DPR, all engineering work in Command area comprising of land levelling and shaping construction of water courses lined or unlined, field channels, field drains and field roads are to be covered in Command Area development report. Detailed Project Report and Command Area Development Report shall be submitted together.

The guidelines further stipulate that provisions in the estimate for Earthwork covering main/branch canal(s) shall be based on detailed surveys of main/branch canal(s). Therefore it implies that at the stage of approval of a DPR itself, the alignment of main canal and branch canals have been finalised as provision in the estimates are based on detailed surveys. Therefore it is felt that the Command Area Development Plan, as reported to have not been finalised for the present should not have any bearing on the design, layout/construction of Main and Branch canals.

According to the opinion of the Central Water Commission, therefore, Command Area Development Plan now forms an integral part of the project to ensure that the irrigation potential created is fully utilised and covers all aspects of water management for efficient and equitable distribution of water in the commands of irrigation projects for optimal utilisation in a participatory manner and therefore the Command Area Development Report is to be submitted alongwith the detailed project report, but where the Command Area Development Plan is not finalised, it would not have any bearing on design, layout/construction of main and branch canals. This opinion of the Central Water Commission does not

mention whether environmental safeguards or mitigative measures are to be planned before construction of the main canals and branch canals. In other words, the opinion of the Central Water Commission in the reply dated 23rd October, 2009 is only on the engineering aspects and not on the environmental aspects of command area development.

11. In *N.D. Jayal and Anr. v. Union of India and Ors.* (supra) relied upon by Mr. Agrawal, Rajendra Babu, J delivering the majority judgment has observed in para 45 at page 390 of (2004) 9 SCC:

Command area development primarily aims to avert the problems of waterlogging and emergence of salinity. This is very important in maintaining the environmental balance.

In *Narmada Bachao Andolan v. Union of India and Ors.* (supra) cited by Mr. Agrawal, Kripal, J speaking for the majority has held in para 126 at page 728 of (2000) 10 SCC:

Change in the environment does not per se violate any right under Article 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve the ecology and environment and in case of displacement, prior relief and rehabilitation measures take place *pari passu* with the construction of the dam.

The aforesaid observations in two Supreme Court judgements are emphatic that to prevent water logging and salinity and to maintain the ecology and environment, ameliorative steps have to be planned and implemented *pari passu* with the construction of the project.

12. We are thus of the considered opinion that the Command Area Development Plans of Indira Sagar and Omkareshwar projects were required to be prepared and submitted to the authority entrusted with the responsibility of monitoring planning and implementation of environmental safeguards and this was to be done before the commencement of the work of the canals so that such authority could ensure that the environmental safeguards and mitigative measures had been properly planned and could be implemented *pari passu* with the construction of the canal project. Hence before acquiring land for construction of the canal network of the Command Area and before excavating such land for construction of the canal network, the Command Area Development Plans ought to have been scrutinised by the authority entrusted with the responsibility of ensuring that environmental safeguards or environmental mitigative measures were properly planned and could be implemented along with the engineering works of the canal project. We are also of the considered opinion that if land is acquired and excavated and canals are constructed before preparation and submission of the Command Area Development Plans to such monitoring authority, environmental safeguards or mitigative measures cannot be implemented *pari passu* with the construction of the canal project. Rather if the main canals and branch canals are constructed without keeping in mind the

environmental requirements, there may be immense problem of water logging and salinity disturbing the environmental plans and the authority entrusted to ensure that environmental safeguards and mitigative measures are implemented may not be able to reverse the acquisition of land and work done on the excavation and the construction of main canals and branch canals because of the legal consequences of acquisition of land and the heavy expenditure incurred by the State on acquisition of land, excavation work and construction work of the canals.

13. We however find that by letter dated 21.08.1992 of the Narmada Development Authority, a comprehensive Command Area Plan was sent to Smt. Nalini Bhatt, Scientist (S.E.), Government of India, Ministry of Environment and Forests. Along with the letter, a report prepared by the Indian Institute of Science, Bangalore in April, 1985 on the basis of study of the composite command of Narmada Sagar and Omkareshwar Reservoirs work had also been sent to Smt. Nalini Bhatt, Scientist (S.E.), Government of India, Ministry of Environment and Forests. We also find that by letters dated 16.10.2009 (Annexure R-2/D and Annexure R-2/E), the Chief Conservator of Forest sent copies of the Command Area Development Plan of the Indira Sagar Project and the left bank canal of the Omkareshwar Project. In the two letters, the Chief Conservator of Forest of Madhya Pradesh has also mentioned that endeavor will be made to ensure that Command Area Development Plan is implemented alongwith development of irrigation facilities. We also find that a notification dated 17.9.2009 of the Government of India, Ministry of Environment and Forests has been issued saying that the Committee of Experts which was constituted for the Sardar Sarovar and Indira Sagar Projects on 2.9.2008 will also monitor and review the canals and Command Area Development of Omkareshwar Project and this Committee includes Dr. Pavan Kumar, Director (Environment) of the Narmada Control Authority. Until this Committee of Experts scrutinises the Command Area Development Plans submitted to the Ministry of Environment and Forests and communicates its decision to the Respondent No. 1, there should be no further acquisition of land for the canal network and there should be no further excavation of land and construction of canal network. In a recent decision Karnataka Industrial Areas Development Board Vs. Sri. C. Kenchappa and Others, in para 97 at page 2049 of the AIR the Supreme Court has taken the view that principles of "Sustainable Development" should be followed and before acquisition of land for development, the consequence and adverse impact of development must be properly comprehend.

Issue relating to consultation with" Gram Sabha.

14. Ms. Medha Patkar appearing for the Petitioner submitted that Part IX titled "The Panchayats" was inserted in the Constitution by the Constitution (Seventy Third Amendment) Act, 1992 with, effect from 24.4.1993. She submitted that Article 243M of the Constitution stipulated that nothing in Part IX shall apply to the Scheduled Areas referred to in Clause (1) of Article 243 of the Constitution

but Clause (4) of Article 243M provided in Sub-clause (b) that notwithstanding anything in the Constitution, Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas subject to such exceptions and modifications as may be specified in such law. She submitted that in exercise of this power under Sub-clause (b) of Clause (4) of Article 243M of the Constitution, Parliament has made the PESA Act. She submitted that Section 4 of the PESA Act expressly provides that notwithstanding anything under Part IX of the Constitution, Legislature of a State shall not make any law under Part IX which is inconsistent with any of the features indicated in Clauses (a) to (o) of Section 4 of the PESA Act. She submitted that in Clause (i) of Section 4 of the PESA Act it is provided that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas. She argued that acquisition of land for the Indira Sagar and Omkareshwar canal projects therefore could only be made after consultation with the Gram Sabha. She argued that only after the Command Area Development Plan containing the proposal for constructing the canal network in the concerned village is placed before the Gram Sabha and the views of the Gram Sabha are taken, the process for acquisition of land in Scheduled Areas for the Indira Sagar and Omkareshwar canal projects could not be initiated.

15. Ms. Patkar submitted that after this writ petition was filed and after the Court passed orders on 1.7.2009 directing maintenance of status-quo with regard to acquisition of land and excavation work for the canal, the Respondent No. 1 has hastily and arbitrarily passed orders on 30.7.2009 that the concerned Janpad Panchayat of the areas through which the canal network was proposed to be constructed is required to be consulted. She submitted that the order dated 30.7.2009 passed by the Respondent No. 1 for consultation with Janpad Panchayat instead of Gram Sabhas of the concerned villages is not in accord with the object of Section 4(1) of the PESA Act. She submitted that the object of Section 4(i) of the PESA Act is to be found in Article 40 of the Constitution which provides that the State shall take steps to organise village panchayats and endow them with such powers as may be necessary to enable them to function as units of self-government. She submitted that to achieve this object in Article 40 of the Constitution, Part IX was inserted in the Constitution by the Seventy Third Constitution Amendment. She submitted that in Part IX, "Gram Sabha" has been defined in Article 243(b) to mean a body consisting of persons relating to a village comprised within the area of Panchayat at the village level. She argued with all force that if the object of self-government is to be achieved, before making acquisition of land for a development project and before re-settling or rehabilitating persons affected as provided in Section 4(i) of the PESA Act; the Government must have prior and informed consultation with the Gram Sabha of the concerned village in which the development work is to be undertaken. She submitted that the application of Respondents No. 1, 2, 5 and 6 numbered as. IA. No. 9118/2009 would show that in a mala fide and arbitrary manner the

Respondent No. 1 has consulted the Janpad Panchayats instead of the Gram Sabhas. She submitted that the order of State Government dated 30.7.2009 providing for consultation with Janpad Panchayats instead of Gram Sabhas is therefore vitiated by malafide, arbitrariness and is violative of Article 14 of the Constitution. She vehemently submitted that since consultation with Gram Sabha is mandatory and since there has been no consultation with regard to re-settling and rehabilitation of the villagers in the Scheduled Areas likely to be affected, the Court should quash the land acquisition proceedings and direct the Respondents to consult the Gram Sabha after informing the villagers about the details of proposed canal network which may affect the villagers.

16. Mr. Agrawal, learned senior counsel appearing for the Respondents 1, 2, 5 and 6, on the other hand, submitted that Article 40 of the Constitution is only a Directive Principle of State Policy and Article 37 of the Constitution clearly states that the Directive Principles shall not be enforceable by any Court. He submitted that the State Legislature has power under Articles 245 and 246 of the Constitution read with Entry 5 of List-11 of the Schedule VII of the Constitution to make law on local Government for the purpose of local self-government or village administration. He submitted that the provisions in Part IX of the Constitution are clear. Parliament has no power to legislate on Panchayats and Gram Sabhas. He referred to the provisions of Article 243A and 243C, 243D, 243G, 243H and 243K which confer power on the state legislature to make law on different aspects of Panchayats and Gram Sabhas. He submitted that the State Legislature has made the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 but has not made any provision therein for consultation with Gram Sabha or any Panchayat before acquisition of law in Scheduled Areas for development projects as provided in Section 4(i) of the PESA Act and therefore Section 4(i) of the PESA Act has no legal effect and cannot be enforced by the Court. He cited Principles of Statutory Interpretation by Justice G.P. Singh 11th Edition - 2008 in which it is stated at page 557 that it is not permissible to Parliament to do indirectly what it is prohibited to do directly. He vehemently argued that since Parliament has no power to legislate on any matter relating to self-government or village administration including Gram Sabha and Panchayats, Parliament could not make the PESA Act even indirectly relating to Panchayats and Gram Sabhas.

17. Mr. Agrawal submitted that as a matter of fact acquisitions of land for the Indira Sagar Project and Omkareshwar Dam Project have not been made under any law made by State Legislature but under the Land Acquisition Act, 1894, a Central Act, and a Division Bench of this Court has already held in Naresh Singh and Ors. v. Union of India and Ors. AIR 2009 MP 26 that the embargo in Section 4(i) is not on Parliament but on Legislature of a State and therefore Section 4 (i) of the PESA Act does not apply to acquisition of land made under the Land Acquisition Act, 1894. Mr. Agrawal submitted that without prejudice to the aforesaid stand of the State Government, the State Government has consulted the concerned Gram Sabhas in the Scheduled Areas and as many as 324 Gram

Sabhas have approved, 28 have not approved and 10 Janpad Panchayats have approved the acquisitions of land for the canals. He cited the decision of the Supreme Court in *State of Jammu & Kashmir v. A.R. Zakir and Ors.* 1992 (Supp) I SCC 548 for the proposition that "consultation" does not mean "concurrence and that a writ or direction cannot be issued by the High Court to the legislature to make a law.

Findings with reasons:

18. Mr. Agrawal is right in his submission that the Legislature of a State has power to make laws for the whole or any part of the State in respect of any of the matters in List II in the VIIth Scheduled of the Constitution under Articles 245 and 246 of the Constitution, but as would be clear from the opening words of Article 245 of the Constitution such power of the Legislature of the State to make any law in respect of any matter in List II in the VIIth Schedule of the Constitution is "subject to the provisions of this Constitution". Thus; even if the Legislature of the State of Madhya Pradesh has exclusive power to make a law on Local Government and Local Authorities for the purpose of local self-government or village administration covered under Entry 5 of List II in the VII Schedule of the Constitution, such power of the State Legislature of Madhya Pradesh is subject to the provisions of the Constitution including the provisions in Part IX of the Constitution. The provisions in Part IX of the Constitution deal with various aspects of the panchayats such as Gram Sabha (243A), Constitution of Panchayats (243B), Composition of Panchayats (243C), Reservation of seats in Panchayats (243D), Duration of Panchayats etc. (243E), Disqualification for membership of Panchayat (243F), Powers, authority and responsibility of Panchayat (243G), Powers to impose taxes by, and Funds of, the Panchayats (243H), Audit and accounts of Panchayats (243J) and Elections to Panchayats (243K), but Article 243M states that nothing in Part IX shall apply to the Scheduled Areas referred to in Clause (1) of Article 244 Article 243M((4)(b) however states:

(4)Notwithstanding anything in this Constitution:

(a)

(b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in Clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368.

Article 243M(4) thus begins with a non-obstante clause and states that notwithstanding anything in the Constitution Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas subject to such exceptions and modifications as may be specified in such law. The result is that to Scheduled Areas referred to in Clause (1) of Article 244 of the Constitution, none of the provisions in Part IX of the Constitution apply and only Parliament has the power to make a law extending the provisions of Part IX to the Scheduled Areas subject

to such exceptions and modifications as may be specified in such law made by the Parliament. It is in exercise of this power under Article 243M(4)(b) that Parliament has enacted the PESA Act in the year 1996. Sections 3 and 4(i) of the PESA Act which are relevant for this case are quoted hereinbelow-

3. The provisions of Part IX of the Constitution relating to Panchayats are hereby extended to the Scheduled Areas subject to such exceptions and modifications as are provided in Section 4.

4. Notwithstanding anything contained under Part IX of the Constitution, the Legislature of a State shall not make any law under that Part which is inconsistent with any of the following features, namely:

(i) the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level.

Thus, by provisions of Section 4(i) of the PESA Act, the Legislature of a State was prohibited from making any law under Part IX of the Constitution inconsistent with the feature that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before resettling or rehabilitating persons affected by such projects in the Scheduled Areas.

19. We find that after the PESA Act, the Legislature of the State of Madhya Pradesh has by MP Act 43 of 1997 inserted Chapter XIV-A titled "Special provisions for panchayats in the Scheduled Areas" in Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short "the Adhiniyam, 1993") and thereafter also amended some of the provisions of Chapter XIV-A by the MP Act 5 of 1999 and the M.P. Act 23 of 2001. On a detailed examination of the provisions of Sections 129-A to 129-F in Chapter XIV-A of the Adhiniyam, 1993 as amended, we do not find therein any provision requiring consultation with the Gram Sabha or the Panchayats at the appropriate level before acquisition of land for a development project or before rehabilitation and re-settlement of persons affected by a development project in Scheduled Areas, and the vires of the Special provisions for Panchayats in the Scheduled Areas in Chapter XIV-A of the Adhiniyam, 1993 have also not been challenged in this writ petition. The State Legislature, in our considered opinion, ought to have made a provision in the Adhiniyam, 1993 in accordance with Section 4(i) of the PESA Act providing for consultation with the Gram Sabha or Panchayats at the appropriate level before acquisition of land in the village for development projects or before resettlement and rehabilitation of persons affected by such projects but in the absence of any special provision in the Adhiniyam, 1993 requiring consultation with the Gram Sabha or Panchayats at the appropriate level before making acquisition of land in the Scheduled Areas for development projects, the Court cannot issue a direction

or mandamus to the Respondent No. I to consult the Gram Sabha before acquisition of land or before rehabilitation and re-settlement of persons affected by a development project in Scheduled Areas nor can the Court hold that the acquisitions of lands in Scheduled Areas without consultation with the Gram Sabha in accordance with Section 4(i) of the PESA Act are null and void. Moreover, as has been held by this Court in *Naresh Singh and Ors. v. Union of India and Ors.* (supra), the embargo in Section 4(i) of the PESA Act is not on Parliament but on the Legislature of a State and therefore Section 4(i) of the PESA Act does not apply to land acquisition under a Central Act namely the Land Acquisition Act, 1894 unless a provision in the law is made by the State Legislature that land in Scheduled Areas will not be acquired under the Land Acquisition Act, 1894 without consultation with the Gram Sabha or the Panchayats-at the appropriate level as provided in Section 4(i) of the PESA Act.

Issue relating to rehabilitation and re-settlement:

20. Ms. Patkar submitted that the Office Memorandum dated 24.6.1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance for the Indira Sagar Project shows that details were also sought from the project authorities on rehabilitation master plans. She submitted that the O.M. dated 13th October, 1993 of the Ministry of Environment and Forests for the Ornkareshwar Multipurpose project stipulated in Clause (vii) that the rehabilitation programme should be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible and a time bound programme was to be submitted by December, 1993. She submitted that the definition of "displaced person in paragraph 1.1 (a) to whom rehabilitation was to be provided covered not only a person affected by construction of dam but also a person affected by construction of a canal of the project. She submitted that strangely enough the Respondent No. I has taken a stand in its reply that persons affected by construction of canal are not entitled to the benefits of rehabilitation and re-settlement and this is because of an order passed by Respondent No. 2 in July, 2003 so as to exclude a person otherwise affected by the project from the definition of "displaced person". She submitted that persons or families displaced on account of submergence or on account of acquisition of land for canal equally are deprived of their livelihood because of the project and therefore a rehabilitation and resettlement policy which gives benefits to persons affected by submergence of a dam but at the same time denies such benefits to persons affected by construction of canals is based on a classification which has no rational nexus with the object of the policy and is discriminatory and is violative of Article 14 of the Constitution. She also submitted that once the Respondent No. I had promised and assured all project affected persons of the Narmada Valley Project rehabilitation benefits, it cannot now retract from such promise and assurance in the year 2003 by an order passed by the Respondent No. 2.

21. Mr. Agrawal submitted that the definition of "displaced persons" on

rehabilitation policy will not include the canal affected persons. He further submitted that in *Narmada Bachao Andolan v. Union of India and Ors.* (supra), Kripal, J in his majority judgment in para 169 at page "742 of the SCC has agreed with the view that canal affected families need not be treated on a par with oustees in the submergence area as there is a basic difference in the impact of the project in the upstream submergence area and in the beneficiary zone of the command area where the canal affected person continues to live. He submitted that if the canal affected persons have been left out from the benefits of rehabilitation by the order of Respondent No. 2 in 2003, the policy cannot be held to be discriminatory and violative of Article 14 of the Constitution.

Findings with reasons:

22. The majority judgment of Kripal, J in *Narmada Bachao Andolan v. Union of India and Ors.* (supra) held in para 169:

Dealing with the contention of the Petitioners that there will be 23,500 canal-affected families and they should be treated on a par with the oustees in the submergence area, the Respondents have broadly submitted that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area. While people, who were oustees from the submergence zone, required resettlement and rehabilitation, on the other hand, most of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal, leading to greater agricultural output. We agree with this view and that is why, in the award of the Tribunal, the State of Gujarat was not required to give to the canal-affected people the same relief which was required to be given to the oustees of the submergence area.

Para 169 of the majority judgment of Kripal, J quoted above in *Narmada Bachao Andolan* would show that in the award of the Narmada Water Disputes Tribunal, State of Gujarat was not required to give to the canal-affected people the same relief which was required to be given to the oustees of the submergence area and the Supreme Court agreed with the broad submission made by the Respondents in the case that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area inasmuch as people in the submergence area require re-settlement and rehabilitation but people falling under command area were in fact beneficiaries of the projects and their remaining land would get relocated with construction of canal leading to greater agricultural output.

23. The majority judgment of Kripal, J in *Narmada Bachao Andolan* however held in para 166 that each State has its own package and that the liberalisation of the packages by the three States need not be to the same extent and the States could not be faulted if the package which is offered, is more liberal than the one envisaged in the Tribunal's award. As Kripal, J., has held:

The resettlement and rehabilitation packages in the three States were different

due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project oustees in Gujarat are not even available to the project-affected people of other projects in Gujarat. It is incorrect to say that the difference in R&R packages, the packages of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own package and the oustees have an option to select the one which was most attractive to them. A project-affected family may, for instance, choose to leave its home State of Madhya Pradesh in order to avail the benefits of the more generous package of the State of Gujarat while other PAFs similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh. There is no requirement that the liberalisation of the packages try the three States should be to the same extent and at the same time. the States cannot be faulted if the package which is offered, though not identical to each other, is more liberal than the one envisages in the Tribunal's award.

Hence the rehabilitation and re-settlement package of be State of Gujarat which did not treat canal affected families at par with the oustees in the submergence area or the award of the Narmada Water Disputes Tribunal cannot be the basis for refusing rehabilitation and re-settlement of the canal affected families in the State of Madhya Pradesh. We have to examine the terms of clearances of the Indira Sagar and Omkareshwar Projects given by the Government of India, Ministry of Environment and Forests and the policy of rehabilitation and resettlement as formulated by the State of Madhya Pradesh to decide whether the canal affected persons and families of the Indira Sagar and Omkareshwar projects are to be treated at par with persons and families affected by submergence on account of the two dams.

24. The Office Memorandum dated 24.6.1987 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Indira Sagar Project stated in para 2:

On the basis of examination of details on these projects by the Environmental Appraisal Committee for River Valley Projects and discussions with the Central and State authorities the following details were sought from the Project authorities:

- i. Rehabilitation Master Plan.
- ii. Phased Catchment Area Treatment Scheme,
- iii. Compensatory Afforestation Plan.
- iv. Command Area Development.
- v. Survey of Flora and Fauna.
- vi. Carrying capacity of surrounding area.
- vii. Selomicity; and

viii. Heath Aspects.

Thus, it will appear from para 2 of the O.M. dated 24th June, 1987 quoted above that prior to the environmental clearance details with regard to Rehabilitation Master Plan had been sought from the project authorities in the course of discussion with the Central and State authorities. It is not known whether such Rehabilitation Master Plan included rehabilitation of the canal affected persons of the Indira Sagar Project, but it appears from the Rehabilitation Policy of the State of Madhya Pradesh for Narmada Valley Projects that all persons affected by submergence or otherwise on account of the Narmada River Projects were entitled to the benefits of Rehabilitation Policy.

25. In para 1.1 (a) and 1.1(b) of the Rehabilitation Policy, 1989, a "displaced person" and a "displaced family" have been defined. Paras 1.1 (a) and 1.1(b) of the Rehabilitation Policy, 1989, are extracted hereinbelow:

1.1(a) Displaced Person:

Any person who has been ordinarily residing or carrying on any trade or vocation for his livelihood for his livelihood for at least one year before the date of publication of notification u/s 4 of the Land Acquisition Act or has been cultivating land for atleast three years before the date of such notification in an area which is likely to come under submergence whether temporary or permanent because of the project or is otherwise required for the project.

1.1(b) Displaced Family:

(i) A family composed of displaced persons as defined above shall mean and include husband, wife and minor children and other persons dependent on the head of the family, e.g. Widowed mother, widowed sister, unmarried sister, unmarried daughter or old father.

(ii) Every son who has become major on or before the date of notification u/s 4 of the Land Acquisition Act, will be treated as a separate family.

A reading of the underlined portion of the definition of displaced person in clause 1.1(a) of the Rehabilitation Policy 1989 quoted above would show that not only persons in an area which is likely to come under submergence, whether temporary or permanent, because of the project but also persons in any area which is otherwise required for the project came within the definition of displaced person. The expression "area otherwise required for the project" will obviously cover area sought to be acquired for the canals and the canal network. It is further clear from clause 1.1(b) of the Rehabilitation Policy 1989 quoted above that a "displaced family" is composed of displaced persons as defined in clause 1.1(a) of the Rehabilitation Policy 1989. Thus, the Rehabilitation Policy of the Government of Madhya Pradesh as it was in 1989 applied to not only persons displaced by submergence of areas by Narmada Valley Projects but also to persons displaced by canal projects of the Narmada Valley Projects.

26. Moreover, on a reading of the different provisions of the Rehabilitation Policy 1989 of the Government of Madhya Pradesh for the oustees of Narmada Projects, it appears that the entitlement of displaced persons or displaced family are linked with the extent of land that such displaced persons/families lose on account of the project. This is illustrated by clause 3 of the Rehabilitation Policy relating to allotment of agricultural land which is extracted hereinbelow in extenso:

3.0 Allotment of Agricultural Land:

3.1 Displaced families would be rehabilitated in accordance with their preferences on land at the new sites, taking as far as possible, the social groups as a unit.

3.2(a) Every displaced family from whom more than 25 percent of its land holding is acquired in revenue villages or forest villages shall be entitled to and be allotted land to the extent of land acquired from it, subject to provision in 3.2(b) below.

(b) A minimum area of 2 ha. of land would be allotted to all the families whose lands would be acquired irrespective of whether government land is offered or private land is purchased for allotment. Where more than 2 ha. of land is acquired from a family, it will be allotted equal land, subject to a ceiling of 8 ha.

(c) The government will assist displaced families in providing irrigation by well/tube-well or any other method on the land allotted, provided such land is not already irrigated. In case the allotted land cannot be irrigated (which fact would be certified by the Agriculture Department), the displaced family will be allotted a minimum of 4 hectares of land instead of 2 hectares provided at 3.2 (b) above. In other cases, where irrigation is not possible, the development of dry land would be subsidized by the State Government to the extent of 75% of the cost involved, unless higher subsidies are provided to farmers in any other scheme of the Government.

3.3 Entitlements of Encroachers for allotment of land:

Encroachers, whether on revenue land or forest land will also be entitled for the allotment of land. Where the area of the land acquired from an encroacher is up to 1 ha. he will be entitled to 1 ha. area of land. In those cases where acquisition of land from an encroacher is more than 1 ha., he will be entitled to 2 ha of land irrespective of the fact that the land acquisition from such an encroacher may be even greater than 2 ha.

A reading of clause 3.2(a) would show that only if 25% of land of displaced family is acquired, the displaced family will be entitled to allotment of agricultural land. Where a displaced family loses less than 25% of its land by acquisition on account of the project, it will not be entitled to allotment of agricultural land. Clause 3.2(b) further states that a minimum area of 2 ha. of land will be acquired but where more than 2 ha. of land is acquired from a family, it will be allotted 2 ha. of land subject to a ceiling of 8 ha. Thus, depending upon the extent of land lost by a displaced family, agricultural land was to be allotted to a

displaced family. Clause 3.3 of the rehabilitation policy quoted above would further show that encroachers, whether on revenue land or forest land, will also be entitled for agricultural land to the extent indicated therein

27. The Rehabilitation Policy of 1989 stated the broad principles for rehabilitation of displaced families in para I and one of the clauses of para I stated:

The displaced families would be rehabilitated, maintaining the existing structure of social groups as far as possible in the command area or near the periphery of the affected areas in accordance with their preferences.

It will be clear from the clause of para I of the Rehabilitation Policy quoted above that the displaced families were to be rehabilitated as far as possible in the command area or in the periphery of the affected areas in accordance with their preference. Hence, displaced families of the submerged areas were to be rehabilitated in the command area if they so preferred and were to benefit from the canals in the same way as families who are affected by the canals but who continue in their remaining land in the command area.

28. The Rehabilitation Policy 1989 also provides in Clause 9 rehabilitation benefits for landless displaced family and reads thus:

9.0 Landless Displaced Families:

9.1 Special efforts will be made for the effective rehabilitation of landless displaced families. Adequate arrangements will be made by the Narmada Valley Development Authority for the upgradation of existing skills or important of new skills so as to promote full occupational rehabilitation. In this regard, new opportunities emerging as a result of the project will be fully used for the benefit of the displaced families. Suitable provisions will be incorporated in the tender document of Local Competitive Bidding (LCB) and other forms to ensure the employment of displaced persons. The Narmada Valley Development Authority will ensure appropriate arrangement for discharge of these responsibilities within a stipulated timeframe. In the interim time, special financial assistance will be given to supplement the income of the landless agricultural labourers and the landless scheduled castes and scheduled tribe oustees families for 3 years in descending order, which shall be in addition to the grant-in-aid mentioned in para 6.1. This period of three years will be calculated from the payment year of the grant-in-aid under para 6.1. Thus, a landless oustee family will get a special income support amount of Rs. 2,250/-, Rs. 5,500/- and Rs. 2,750/- in the second, third and fourth year of displacement, respectively. In addition, a further sum of Rs. 12,500/- shall be kept in reserve for every landless oustee family and shall be made available for executing an independent viable scheme for earning livelihood or for purchase of productive assets. The above support amounts will be 75%, 50% and 25% respectively of the poverty line and the amount to be kept in reserve is also linked with the poverty line. If the scale of poverty line is revised, the amount of special support amount and the reserve shall also be proportionately increased accordingly. For other landless families special

financial assistance of Rs. 19,500/- will be given for the purchase of productive assets.

Hence, landless displaced families have also been given rehabilitation and resettlement benefits under the policy of Rehabilitation for Narmada Valley Project of the Government of Madhya Pradesh.

29. Thus, under the Rehabilitation Policy, 1989, rehabilitation and resettlement benefits to be given to displaced persons, displaced families and landless displaced families are linked with the extent to which the displaced family or displaced person was affected by a Narmada Valley Project and the displaced families if they so preferred, were to be rehabilitated in the Command Area and were to be beneficiaries of the canals in the same way as those displaced by the canals who were to continue to live in the Command Area. This kind of policy which has taken care of differences of impacts of the project on the person or the family whether on account of submergence or on account of the canal net work must apply equally to all displaced persons and displaced families of the Narmada Valley Project, irrespective whether the persons or families have been displaced because of submergence on account of the construction of the dam or because of land acquisition for construction of the canal net work. For these reasons, the definition of "displaced person in the Rehabilitation Policy as made in 1989 included a person affected by the Project otherwise than by submergence and the Rehabilitation Policy was to apply to all persons displaced by the Project, i.e. by submergence or otherwise.

30. We further find that the O.M. dated 13.10.1993 of the Government of India, Ministry of Environment and Forests granting environmental clearance to the Omkareshwar Multipurpose Project stipulated in para (vii):

The Rehabilitation Programme should be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible. A time bound programme should be submitted by December, 1993.

The language in the stipulation in para (vii) of the OM dated 13.10.1993 would show that the rehabilitation programme was to be extended to landless labourers and the people affected due to canal by identifying and allocating suitable land as permissible and was not to be confined to only people affected by submergence because of construction the dam.

31. After having declared the policy of rehabilitation and resettlement making no distinction between people affected by the submergence and people affected by the canals, the Respondent No. 2 appears to have taken a decision in 2003 to exclude persons in areas otherwise affected by a project of the Narmada River from the benefits of the Rehabilitation Policy and confining the definition of "displaced persons" to only persons in areas affected by submergence, temporary or permanent on account of the project. In 2003 Respondent No. 2 has classified displaced persons in two groups, one affected by submergence, permanent or temporary, and the other not affected by submergence and has

extended the benefits of rehabilitation and re-settlement only to the group, which is affected by submergence. Though there is an intelligible differentia in making this classification, in our considered opinion, such differentia has no rational nexus with the object sought to be achieved by the rehabilitation policy. The object of the rehabilitation policy is to ensure that persons displaced by Narmada Valley Projects are better off and their right to livelihood guaranteed under Article 21 of the Constitution is not violated. As we have seen, the Rehabilitation Policy of the Government of Madhya Pradesh itself contains provisions which grants rehabilitation benefits to displaced persons and displaced families depending on the extent of impact suffered by the person or family displaced by the project and the displaced families are to be rehabilitated in the Command Area or in the periphery of the Command Area as per their preference. In our considered opinion, the stand taken by the Respondents No. 1 and 2 in the return that the impacts on people affected by submergence and the people affected by the canal network are different justifying different treatment to submergence affected persons and canal affected persons has no rational basis. The rationale of the policy of the State of Gujarat in not treating canal affected persons on par with the submergence affected persons discussed in para 129 of the majority judgment of Kripal, J. in Narmada Bachao Andolan is not available to the State of Madhya Pradesh on account of the peculiar features of its policy of rehabilitation as discussed above. The order of the Respondent No. 1 made in the year 2003 excluding persons in areas otherwise affected by the project, in our view, does not satisfy the test of intelligible differentia having rational nexus with the object sought to be achieved by the Rehabilitation Policy and is therefore discriminatory and violative of Article 14 of the Constitution of India and the order of Respondent No. 1 made in the year 2003 in so far as it excludes canal affected persons from the definition of "displaced family" is therefore ultra vires the Constitution.

32. We are conscious that if rehabilitation and re-settlement benefits are to be provided to all the canal affected persons in accordance with the rehabilitation policy for oustees of Narmada Project of the Government of Madhya Pradesh, Respondents No. 1 and 2 will have to incur heavy costs for the canal projects of Indira Sagar and Omkareshwar. But according to us; as rehabilitation and resettlement are part of the constitutional obligation of the State Government under Article 21 of the Constitution to the displaced persons, particularly those belonging to the tribes, the Respondent No. 1 has to find the resources for rehabilitation and re-settlement of the canal affected persons and cannot circumvent this constitutional obligation by issuing an order that the Rehabilitation Policy will not apply to the canal affected persons. This constitutional obligation under Article 21 of the Constitution towards persons displaced by the canal project will also ensure that the displacement of persons by the project is minimised and areas which are already irrigated and which do not need better means of irrigation are not unnecessarily covered in the Command Area Development Plan and there is no unwarranted burden on the

public exchequer due to higher costs of the project. Moreover, in recent times, there has been growing resistance of the local inhabitants to acquisitions of land by Governments for development projects because they have lost confidence in public authorities and are not quite sure whether they will be true to their public commitments and assurances to rehabilitate and resettle them once the development project comes through and is commissioned. Considering all these aspects, we are inclined to direct the Respondents No. 1 and 2 to provide rehabilitation and re-settlement benefits of the Rehabilitation Policy of the Government of Madhya Pradesh to the canal affected persons of the Indira Sagar and Omkareshwar Projects.

Issue relating to land acquisition and compensation:

33. Ms. Patkar submitted that the land acquisition for the canal work has been done by invoking the urgency clause u/s 17 of the Land Acquisition Act, 1894 and even the inquiry u/s 5-A of the Land Acquisition Act, 1894 has been dispensed with. She submitted that the invocation of the urgency clause u/s 17 and the dispensing with the inquiry u/s 5-A have violated the right of the oustees whose land has been acquired is as much as they cannot raise any objection to the land acquisition and are denied a hearing in accordance with Section 5-A of the Land Acquisition Act, 1894. She submitted that the Indira Sagar and the Omkareshwar dam projects were conceived several decades back and the environmental clearances were given for the two projects in 1987 and 1993 respectively and there were no emergency circumstances warranting invocation of the urgency clause in Section 17 of the Land Acquisition Act, 1894 and requiring dispensing with the inquiry u/s 5-A of the Land Acquisition Act, 1894. She submitted that in Union of India (UOI) and Others Vs. Krishan Lal Arneja and Others, , the Supreme Court has taken a view that Section 17 of the Land Acquisition Act, 1894 confers extraordinary powers on the authorities to dispense with the normal procedure laid down u/s 5-A of the Act in exceptional case of urgency and such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take possession of the land proposed to be acquired for public purpose. In the aforesaid decision, she submitted, the Supreme Court has further held that a public purpose however laudable it may be by itself is not sufficient for the authorities to take the aid of Section 17 to use the extra-ordinary power as use of such power deprives the land owner of his right to file objections to the proposed acquisition of his property and it also dispenses with the inquiry u/s 5-A of the Act. She also relied upon Union of India (UOI) and Others Vs. Mukesh Hans etc., , in which the Supreme Court has also held that existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4) of the Land Acquisition Act, 1894, that by itself is not sufficient to direct dispensing with the inquiry u/s 5-A of the Act and it requires an opinion to be formed by the Government concerned that alongwith the existence of such urgency or unforeseen emergency there is also a need for dispensing with Section 5-A inquiry. Ms. Patkar vehemently submitted that the proceedings for acquisition of land for the Indira Sagar and Omkareshshwar

Canal Projects in which urgency clause in Section 17 of the Land Acquisition Act, 1894 and in which the inquiry u/s 5-A of the Act has been dispensed with be set aside by the Court. She further submitted that the compensation for acquisition of land paid to the oustees is thoroughly inadequate and this Court should direct the Respondents to pay reasonable compensation in accordance with the Rehabilitation Policy of the State Government for Narmada Valley Project.

34. Mr. Ravish Agrawal, on the other hand, relying on para 9 of the Additional Return filed on 28.10.2009 on behalf of the Respondents, submitted that till 28.10.2009 the records of cases of acquisition of land for the canals of Indira Sagar and Omkareshwar projects show that in 355 cases awards have been passed and compensation has been disbursed to the land owners and Section 17 of the Land Acquisition Act, 1894 has been invoked in 302 cases. He further submitted relying on the Additional Return filed on 28.10.2009 that 336 land acquisition cases are in process out of which in 100 cases the urgency clause in Section 17 has been invoked. Relying on para 10 of the Additional Return filed on 28.10.2009, he further submitted that the Petitioners No. 2 and 3 have not suffered any acquisition of land and in the case of Petitioner No. 4 his land has been acquired and award has been passed and the Petitioners No. 5, 6 and 7 have also accepted the award amount for the land required from- them. Mr. Agrawal submitted that most of the awards in land acquisition cases were passed during 2003 to 2006 and the writ Petitioner which has been filed in 2009 should be dismissed for delay and laches on the part of the Petitioner to approach this Court against the land acquisition proceedings. He cited *Swaika Properties Pvt. Ltd. and Another Vs. State of Rajasthan and Others*, , in which the Supreme Court considering its earlier decisions in *Municipal Corporation of Greater Bombay Vs. The Industrial Development Investment Co. Pvt Ltd.*, and others, , *State of Rajasthan and Others Vs. D.R. Laxmi and Others*, , *The Municipal Council, Ahmednagar and Another Vs. Shah Hyder Beig and Others*, and *C. Padma and Others Vs. Dy. Secretary to the Govt. of T.N. and Others*, , has taken a view that where a writ petition is filed after possession has been taken over and after the award has become final, it deserves to be dismissed on the ground of delay and laches. Mr. Agrawal further submitted that the reasonableness of compensation paid for land acquisition under an award is a matter for the Civil Court to decide u/s 18 of the Land Acquisition Act, 1894 and the High Court should not decide this question in this writ petition.

35. Considering the consistent view of the Supreme Court in the cases cited by Mr. Agrawal that the Court should not entertain a writ petition challenging acquisition of land after possession of the land has been taken over and awards have become final, we are not inclined to examine the issue with regard to the validity of the land acquisition proceedings in this public interest litigation in which the facts of the individual cases of acquisition as to when possession was taken and awards became final are not on record. In case the oustee whose land is acquired for canal projects approaches this Court in a separate and independent writ petition, the challenge may be considered on its own merits.

For the same reasons, we are also not inclined to go into the question whether reasonable compensation has been determined in the awards as these are matters to be decided by the Civil Court u/s 18 of the Land Acquisition Act, 1894.

Authority to ensure implementation of environmental and rehabilitation measures:

36. Before we part with this case, we would like to decide the authority which will ensure implementation of environmental safeguards and rehabilitation-re-settlement measures as directed in this order. In exercise of powers conferred by Section 6-A of the Inter-State Water Disputes Act, 1956, the Central Government has framed a scheme by notification dated 10th September, 1980 inter alia constituting the Narmada Control Authority. Sub-clause (1) of clause 9 of the Scheme as amended by the notification dated 3rd June, 1987 and Sub-clause (2) of clause 9 of the Scheme read as follows:

9(1) The role of the authority will mainly comprise of overall coordination and direction of the implementation of the projects including the engineering works, the environmental protection measures and the rehabilitation programmes and to ensure faithful compliance of the terms and conditions stipulated by the Central Government at the time of clearance of the projects.

(2) The authority shall be charged with the power and shall be under a duty to do any or all things necessary, sufficient and expedient for the implementation of the orders with respect to-

- (i) the storages, apportionment, regulation and control of the Narmada waters;
- (ii) sharing of power benefits from Sardar Sarovar project;
- (iii) regulated releases by Madhya Pradesh;
- (iv) acquisition by the concerned State for Sardar Sarovar project of lands and properties likely to be submerged under Sardar Sarovar;
- (v) compensation and rehabilitation and settlement of outstees; and
- (vi) sharing of costs.

It is thus clear from a reading of Sub-clause (1) of clause 9 of the Scheme as amended by the notification dated 3rd June, 1987 that the Narmada Control Authority (NCA) has been statutorily vested with the role of overall coordination and direction of the implementation of the environmental protection measures and the rehabilitation programmes and also to ensure faithful compliance of the terms and conditions stipulated by the Central Government at the time of the clearance of the projects. It is also clear from Sub-clause (2) of clause 9 of the Scheme quoted above that the Narmada Control Authority (NSA) is charged with the power and is under a duty to do any or all things necessary, sufficient and expedient for the implementation of the orders with regard to acquisition of land by the concerned State for the project and compensation, rehabilitation and

settlement of oustees. The Narmada Control Authority has been impleaded as Respondent No. 4 in this writ petition. We are of the considered opinion that the Respondent No. 4 through its agencies or otherwise, should monitor the environmental protection measures, the acquisition of land, compensation and the rehabilitation and settlement of the oustees in accordance with the observations and directions in this order.

37. In the result, we direct that:

(i) no further acquisition of land, excavation or construction of the canal network for the Command Area of the Indira Sagar and Omkareshwar projects will be undertaken, until the Command Area Development Plans submitted to the Government of India, Ministry of Environment and Forests, are scrutinised by the Committee of Experts constituted for the Sardar Sarovar, Indira Sagar and Omkareshwar Projects by the Notifications dated 2.9.2008 and 17.9.2009 and until this Committee of Experts communicates its clearance in respect of the particular work to the Respondents No. 1 and 2;

(ii) the Respondents No. 1 and 2 will provide rehabilitation and re-settlement benefits of the Rehabilitation Policy of the Government of Madhya Pradesh for Narmada Valley Project to the displaced persons and displaced families of the Indira Sagar and Omkareshwar Canal Projects and will constitute a Grievance Redressal Authority which will decide the complaints of such displaced persons and displaced families regarding rehabilitation and resettlement;

(iii) the Respondent No. 4 will ensure that the two directions in (i) and (ii) above are implemented by the Respondents No. 1 and 2 and that the environmental safeguards and rehabilitation measures are planned and implemented pari-passu with the works of the Indira Sagar and Omkareshwar Canal Projects;

(iv) the Respondent No. 4 will submit a report once every three months to this Court on whether the Respondents No. 1 and 2 are implementing the directions in this order.

The writ petition is disposed of with the aforesaid directions. The interim order of status quo is vacated. The parties will bear their own costs.