

(2002) 01 KAR CK 0036
In the Karnataka High Court
Case No : Writ Petition No. 23341 of 2001

Vijayanagar Educational Trust (Regd.), Bangalore	APPELLANT
Vs	
The Karnataka State Pollution Control Board, Bangalore	RESPONDENT

Date of Decision : 04-01-2002

Acts Referred:

Constitution of India, 1950 — Article 47, 48A, 51A (g)
Water (Prevention and Control of Pollution) Act, 1974 — Section 25, 25 (7)

Citation : AIR 2002 Kar 123 : (2002) ILR (Kar) 1231 : (2002) 2 KarLJ 296

Hon'ble Judges : A.V. Srinivasa Reddy, J

Bench : Single Bench

Advocate : K. Suman, for the Appellant; D. Nagaraj, for the Respondent

Judgement

A.V. Srinivasa Reddy, J.—In this writ petition the petitioner-Trust calls in question the correctness and validity of the order dated 9-6-2000 (produced at Annexure-P), passed by the respondent-Board and also the order passed by the Appellate Authority (Department of Forest, Ecology and Environment), Government of Karnataka, in Appeal No. 5 of 2000, dated 11-5-2000 (produced as Annexure-Z).

2. The facts leading to the prayers sought for in the writ petition in brief are these:

The petitioner claims that it is a registered Trust constituted with the object of imparting education by setting up schools, colleges, technical institutions etc., and it is recognised as a minority educational institution by the Government of Karnataka vide letter dated 13/16-8-1990 bearing No. ED 13 SMC 88 issued by the Education Department, produced as Annexure-A to the writ petition. The petitioner with a view to establish a medical college under the name and style of M/s. Infant Jesus Medical College and Hospital at Lingenahalli Village, Nelamangala Taluk, Bangalore Rural District, approached the State Government for issuance of essentiality certificate. The essentiality certificate was granted by the State in its proceedings held on 4-9-1998. Pursuant to the obtaining of the essentiality certificate the petitioner has also purchased the land measuring 21

acres and 19 guntas in Lingenahalli Village, Kasaba Hobli, Nelamangala Taluk, Bangalore Rural District after obtaining the requisite permission as contemplated u/s 109 of the Karnataka Land Reforms Act, 1961 vide order dated 29-4-1999 (Annexure-C) On purchase, the petitioner also made an application to the Deputy Commissioner, Bangalore Rural District u/s 95 of the Karnataka Land Revenue Act, 1964 for conversion of the land from agriculture to non-agriculture use. After holding an enquiry as contemplated u/s 95 of the Karnataka Land Revenue Act, 1964 the conversion sought for by the petitioner, was granted to it by the Deputy Commissioner on 6-8-1999 by his Order No. AALS(N)SR 36:99-2000, Annexure-E. Consequent to obtaining the aforesaid permission for conversion a plan was submitted to the Bangalore Metropolitan Regional Development Authority ("BMKDA" for short) on 10-11-1999 for sanctioning the project. The BMRDA accorded sanction to the plan by its order bearing No. BMRDA/LAO/04/99-2000, dated 28-12-1999, produced as Annexure-F, subject to obtaining the environmental clearance from the Karnataka State Pollution Control Board ("the Board" for short) before commencement of the actual production. However, the petitioner being aware of the fact that a clearance from the Pollution Control Board is mandatory, had already made an application dated 27-11-1999 to the Board. Only on 9-2-2000 for the first time a letter was received from the Board stating that the officials of the Board had inspected the premises twice and that no responsible person was available and that the location could not be identified correctly and requested the petitioner to co-ordinate with their office and organise for a site inspection. It was further stated in the said letter that till then the application of the petitioner for consent would be kept pending. In reply to the said letter from the Board, the petitioner informed by its letter dated 26-2-2000 that they would certainly accompany the officials of the respondent-Board to the spot whenever they desire to have an inspection. But, nothing was heard from the respondent-Board thereafter for quite some time.

The petitioner, in pursuance of the sanction from the BMRDA had entrusted the work to M/s. Larsen and Tubro Company which began construction of the hospital and college and the hospital building had reached the level of fourth floor and the college had come up to the ground floor level. An amount of rupees five crores had been spent till that stage.

3. When things were afoot as aforesaid, a news item was published in Indian Express Newspaper dated 28-5-2000 stating that the construction is likely to pollute the Kumudavathi river which is located near the proposed construction and that Kumudavathi flows into the Thippagon-danahalli Reservoir and there is every likelihood of pollution of Thippagon danahalli Reservoir which is one of the major sources of drinking water to Bangalore City. A public interest writ petition also came to be filed before this Court on 30-5-2000 on the basis of the said newspaper report by one Mr. B. Krishna Bhat in W.P. No. 18657 of 2000.

4. The Board which was hitherto silent on the aspect of environmental pollution,

suddenly woke up after publication of the news item in the newspaper and the subsequent filing of the writ petition had issued an order dated 9-6-2000 refusing to grant permission to establish a medical college and hospital. Simultaneously, on 29-5-2000 the BMRDA sent a letter to the petitioner wherein the petitioner was informed that the condition mentioned at Sl. No. 7 in the earlier sanction to the effect, "the environmental clearance shall be obtained from Karnataka State Pollution Control Board, Bangalore before commencing the actual production", be read as "the environmental clearance shall be obtained from the Karnataka State Pollution Control Board, Bangalore before commencing the actual construction".

5. In the meanwhile, the writ petition came up before a Division Bench of this Court on 21-6-2000 for orders and this Court ordered stoppage of further construction. The petitioner on 3-7-2000 filed an appeal before the Appellate Authority against the order of the Board dated 9-6-2000 refusing permission to establish the hospital. The petitioner also filed I.A. No. I. in the writ petition for vacating the order of stoppage of further construction. As the petitioner had already approached the Appellate Authority in the matter, this Court declined to entertain the I.A. filed by it and rejected it by its order dated 7-7-2000. The petitioner preferred a SLP before the Supreme Court in SLP (Civil) Nos. 11484 and 11485 of 2000 which also came to be dismissed by the Apex Court on 25-9-2000.

6. The appeal that was pending before the Appellate Authority could not be proceeded with as the Appellate Authority expressed its inability to dispose of the appeal in the light of the fact that the writ petition relating to the same subject-matter was pending in this Court. The Division Bench of this Court taking note of the fact that the matter is pending at two forums, disposed of the writ petition on 1-2-2001 with a direction to the Appellate Authority to consider all the aspects involved in the appeal. The Appellate Authority thereafter took up the appeal for hearing and by its order dated 11-5-2001 (Annexure-Z) dismissed the appeal. Being aggrieved by the said order of dismissal of the appeal by the Appellate Authority, the petitioner has presented this writ petition praying for setting aside orders impugned, as aforesaid.

7. The respondent-Board has filed statement of objections inter alia contending that the medical college would spell danger to the environment and would affect inflow of water into the Thippagon danahalli Reservoir thereby exposing the citizens of Bangalore to scarcity of water. The petitioner ought not to have started construction of the medical college building without obtaining prior consent from the respondent. The matter was argued extensively by the petitioner before the Apex Court on the question of deemed consent and after hearing the petitioner the Apex Court rejected it. Deemed consent even though provided for by Section 25(7) of the Act would not enure to the benefit of the petitioner when the issue is examined from the point view of the larger question of environmental protection. The right to clear water guaranteed to every citizen

of the country necessitates preserving the precious water source intact for sake of posterity. On these, among other grounds, the Board sought the dismissal of the writ petition.

8. I have heard the arguments of Mr. K. Suman, learned Counsel for the petitioner and Mr. D. Nagaraj, learned Standing Counsel for the respondent.

9. Learned Counsel Mr. Suman submitted that there was deemed consent by the Board u/s 25(7) of the Act. In view of the deemed consent the impugned order is void as being without jurisdiction. The impugned order is one made overlooking the ground reality. The petitioner had no occasion to make known his stand before the Board as the notice contemplated u/s 25 of the Act in terms of Rule 33 of the Rules was not issued to him. The finding recorded by the Appellate Authority in its order that the application of the petitioner was not complete in all respects is totally unfounded. Referring to the observations made by the Appellate Authority in its order regarding the situation of the premises in a sensitive area, it is submitted by him that sensitive area is not defined under the Act. Referring to the refusal by the Board it is argued that the approach of the Board was not pragmatic but pedantic and such refusal cannot be sustained when no notification was issued under Rule 5 of the Environmental Protection Rules, 1986.

10. Mr. D. Nagaraj, learned Counsel for the Board, argued that the petitioner has no right of construction over a plot which is environmentally sensitive in nature. When the very right to construct itself is not available to the petitioner, the question of deemed consent in his favour would not arise at all. Even assuming, for the sake of argument, that it should be presumed that the petitioner had deemed consent, by operation of the statutory provision, hospital being a red category industry the statutory benefit that would accrue to the petitioner would have to yield to the larger interest of the citizens' right to clean water which is a right guaranteed under the Constitution. Taking an overall view of the matter it is submitted, that the application of the petitioner deserved to be rejected and the Board having done that there is no need for interference with the said order.

11. On the basis of the averments made in the writ petition and the annexures and also the statement of objections filed on behalf of the Board, the following points would arise for my consideration:

(i) Whether there was a "deemed consent" as contended by the petitioner?

(ii) Whether the Board even in the face of deemed consent could still refuse the grant of permission u/s 25 of the Act?

(iii) What order?

Point No. (i):

12. The claim of the petitioner that in the present case there was "deemed consent" is based on the provision contained in Sub-section (7) of Section 25 of

the Act. Sub-section (7) which deals with deemed consent, reads:

"(7) The consent referred to in Sub-section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of the period of four months of the making of an application in this behalf complete in all respects to the Board".

Thus, under Sub-section (7) of Section 25, an applicant has to only satisfy that the three factors which would enable him to claim the benefit under the said provision exist in his case. The three conditions being, (i) the consent referred to in Sub-section (1) shall not have been given or refused earlier, (ii) a period of four months ought to have expired after making of the application, and (iii) his application should be complete in all respects. On an applicant establishing that these three factors do exist in his favour, it would have to be deemed, without much ado, that the permission was given unconditionally immediately on the expiry of the four months period,

13. Now examined in this perspective, admittedly, in the present case, the petitioner presented an application on 27-11-1999. The Board sat on it till 9-2-2000 on which date the Board wrote to the petitioner to co-ordinate with it and organise a site inspection. This letter was responded to by the petitioner on 26-2-2000 expressing readiness to go along with the officers of the Board to the spot for inspection of the premises. Nothing transpired after that and the Board took no steps in the matter to either grant or refuse the required permission. It is only after the publication of the news item in Indian Express on 28-5-2000 and the subsequent filing of the public interest litigation, the Board passed an order vide Annexure-P, dated 9-6-2000, refusing to grant the consent for establishment. Thus, the order has been passed after six months, much after the deadline prescribed under Sub-section (7) of Section 25 of the Act.

14. The answer to the question would depend on the legal consequence which follows such refusal by the Board after the lapse of the time prescribed under the statute. Whilst it was contended by Mr. Suman that it would automatically amount to "deemed permission" as prescribed under Sub-section (7), learned Counsel Mr. D. Nagaraj placing reliance on the phrase "an application in this behalf complete in all respects" argued that the application not being complete as found by the Appellate Authority the section would not come into play at all and for that reason it cannot be construed that there was "deemed consent" in the present case.

15. Right from the time of its presentation up-till its refusal by the Board, nowhere there was any reference either by the Board or by any other authority with regard to the application being not complete in any respect. In fact in its letter dated 9-2-2000 (Annexure-G) the Board draws attention of the petitioner to the fact that when the Environmental Officer of the Board inspected the premises there was no one from the petitioner's side to co-ordinate with him. It

proceeded to state that until such co-ordination by the petitioner, the application will be kept pending. This letter, it is admitted by learned Counsel for the Board, is not in the form prescribed under Rule 33 of the Rules. A notice under Rule 33 of the Rules has to be in Form XIV and it should be signed by the Member-Secretary under the orders of Board. The letter dated 9-2-2000 is merely a letter asking the petitioner to coordinate with the Board and organise a site inspection and is signed by the Deputy Environmental Officer. This being a mere letter, it cannot be equated to a notice under Rule 33(2) as sought to be contended by learned Counsel for the Board. Even in the letter dated 9-6-2000 by which the permission was refused by the Board, the reasons given thereunder do not mention the incomplete application as one of the grounds for rejection of the application. Curiously, the Appellate Authority goes on in its order on the footing that there was no application complete in all respects pending before the Board for its permission and that the application became complete for all purposes on 6-3-2000 when, according to the Appellate Authority, the site was inspected. The date 6-3-2000 shown in the impugned order as the date of inspection also appears to be wrong. The order of the Board dated 9-6-2000 refers to the inspection date as 16-5-2000. There was only one inspection done in the present case. The Appellate Authority has proceeded on the wrong assumption that the relevant date for calculating the statutory period of four months is from the date of inspection and not from the date of presentation of the application. This wrong assumption coupled with the circumstance that the Appellate Authority appears to have made out a totally new case for itself when it was not urged by any of the parties before it renders its finding on this point bad both in law and on facts.

16. Now, let me examine with reference to some of the case-laws on the point as to whether in the present case it could be said there was deemed consent by virtue of Sub-section (7) of Section 25 of the Act.

17. Learned Counsel for petitioner Mr. K. Suman relied on the decision on *Ameya Presence Marketing, Bangalore v. The Bangalore City Corporation and Anr.* In the said case the Division Bench of this Court was dealing with Section 443 of the Karnataka Municipal Corporations Act, 1976 which provided that if no order is communicated by the authority to applicant within forty-five days after receipt of the application by the authority, application is deemed to have been allowed. Interpreting the said provision, their Lordships observed:

"Sub-section (10) of Section 443 appears to have been enacted with the object of putting the authorities under the Act on the alert, casting a statutory obligation upon them to pass appropriate orders within the specified time. On their failure to take appropriate action, the Legislature in its wisdom, has conferred a concession upon the person approaching the authorities for the grant of licence or permission or registration. For inaction of the statutory authorities, no citizen can be deprived of the licence, permission or registration intended to be granted or conferred upon him subject to the provisions of the Act, the rules, the bye-laws, regulations and on conditions ordinarily imposed. The sub-section

has been incorporated apparently with the object of providing speedy remedy keeping in view the nature of the matter requiring licence, permission or registration and the consequential adverse effect on the applicant, of the inaction of the statutory authorities".

Interpreting the provision further the point of view of the purpose behind such legislation, their Lordships observed:

"The Legislature in its wisdom has the power to provide for deemed permission or deemed rejection on the happening or the non-happening of a particular event or contingency. The Legislature in the instant case had thought it proper to make provision for deemed permission which if interpreted otherwise would defeat the purpose intended to be achieved by incorporation of subsection (10) of Section 443 of the Act".

Every provision of a statute is brought into being by Legislature with a particular object in mind and when a provision requires a thing to be done in a particular manner and charges the executive with the task of getting it done in that fashion alone, the power under the provision has to be exercised responsibly to ensure proper governance of matters which have a direct bearing on the welfare of each and every citizen individually and the society as a whole. In the present case the Board having acted contrary to the provision contained in Sub-section (7) of Section 25, in that it had neither refused nor granted the permission within the time prescribed under the statute it cannot be allowed to impregnate the impugned order with fresh reasons which did not form part of its order when it was originally made. In *Mohinder Singh Gill and Anr. v. The Chief Election Commissioner, New Delhi and Ors.*, the Apex Court while judging the validity of an order passed by a statutory authority, observed:

"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out".

18. I am constrained to remark on this aspect because learned Counsel for the Board sought to justify the impugned order of the Appellate Authority on the ground that the petitioner cannot stake claim to the benefit available under Sub-section (7) of Section 25 of the Act because its application was not complete in all respects. When the Board itself in its order refusing the permission did not mention this aspect it is not open, in the light of the decision in *Mohinder Singh Gill's case*, *supra*, for the Board or even for the Appellate Authority sitting in judgment over the order of the Board to now turnaround and make out a new case altogether and reinforce the order with any fresh reason which originally was not made a ground for deciding the issue.

19. Thus examined from the point view of facts as also on the question of law, I am convinced that there was deemed consent in the present case.

Point No. (ii):

20. That takes me to the next issue viz., whether the Board even in the face of deemed consent in favour of the petitioner could still refuse the grant of permission u/s 25 of the Act.

21. This issue involves several questions involving environmental protection and the changing environmental concepts which have given rise to "the precautionary principle" as explained in *A.P. Pollution Control Board v. Prof. M.V. Nayudu (Retd.) and Ors.* and the "polluter pays principle" as interpreted in *Vellore Citizens Welfare Forum v. Union of India and Ors.*, In *Vellore Citizens Welfare Forum's* case, the Apex Court also had referred to the concept of "sustainable development" which, it was observed, provides a via-media to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems.

22. The case does not so much involve the "polluter pays principle" as the hospital is still in the stage of inception. The hospital not having commenced operations this issue can be gone into and determined only with reference to the "precautionary principle" which as a legal concept has evolved from various international conferences on environment and has now emerged as the law governing matters of environment and finds expression in Articles 47, 48-A and 51-A(g) of our Constitution. This concept has now come to be recognised as part of our domestic law. The new concept places the burden of proof on the developer to show that establishment of an industry would not expose the environment to serious or irreversible damage. This concept has been dealt with in detail by the Apex Court in *A.P. Pollution Control Board's* case, *supra*, where their Lordships held that if an industry poses "uncertain but non-negligible" risks, then regulatory action is justified. The Apex Court has also enunciated how the principle operates in law, in the following terms:

"It is also explained that if the environmental risks being run by regulatory inaction are in some way "uncertain but non-negligible", then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a "reasonable ecological or medical concern". That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection".

23. The question in this case would be whether the petitioner had the opportunity to discharge the burden and present evidence to alleviate the concern about the level of uncertainty. The answer becomes quite clear if we allude to the sequel of events that transpired between presentation of the application and its ultimate refusal by the Board. The petitioner presented an application on 27-11-1999. The Board sat on it till 9-2-2000 on which date the

Board wrote to the petitioner to co-ordinate with it and organise a site inspection. This letter was responded to by the petitioner on 26-2-2000 expressing readiness to go along with the officers of the Board to the spot for inspection of the premises. Nothing transpired after that and the Board took no steps in the matter to either grant or refuse the required permission. It is only after the publication of the news item in Indian Express on 28-5-2000 and the subsequent filing of the public interest litigation, the Board issued an order refusing to grant the consent for establishment. Therefore, there can be no doubt at all in the circumstances of the present case that the petitioner was never called upon nor was he provided the opportunity to dispel any reasonable apprehension that the Board may have had about the potential danger that the industry would have caused.

24. The case is governed by the provisions contained in Section 25 of the Act which deals with the restrictions on new outlets and new discharges. Sub-sections (1), (4)(b) and (5) of Section 25 of the Act are relevant for our purposes. They read:

"25. Restrictions on new outlets and new discharges.--(1)

Subject to the provisions of this section, no person shall, without the previous consent of the State Board.--

(a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as "discharge of sewage");

(b) bring into use any new or altered outlet for the discharge of sewage ; or

(c) begin to make any new discharge of sewage: Provided.....

XXXXX (4) The State Board may--

(a) grant its consent referred to in Sub-section (1), subject to such conditions as it may impose, being--

xxxxx (b) refuse such consent for reasons to be recorded in writing.

(5) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the outlet, or making the discharge, as the case may be, a notice imposing any such conditions as it might have imposed on an application for its consent in respect of such establishment, such outlet or discharge".

(emphasis supplied)

25, The Board acting u/s 4(b) refused consent for the following reasons:

1. The above site is located on the banks of Kumudavathi River. This location is sensitive as the Kumudavathi river joins the Thippagondanahalli Reservoir, which is a major drinking water source to Bangalore City;
2. The direct and indirect discharges from the activities of the hospital and the public attending the hospital is likely to join Kumudavathi river and finally affect the water quality of Thippagondanahalli Reservoir; and
3. You have started the construction of Medical College and Hospital without obtaining clear permission of this Board as per the provisions of Water (Prevention and Control of Pollution) Act, 1974.

26. The restriction imposed under Sub-section (1) of Section 25 is subject to the provisions contained in Section 25. Sub-section (5) of Section 25 also being one of the provisions contained in Section 25, the third reason given by the Board is not tenable as Sub-section (5) provides for grant of permission even in a case where steps have been taken for establishment of a new industry. Probably the Legislature in its wisdom had visualised a situation where an industry may be set up without obtaining the prior consent of the Board and without providing an adequate disposal or treatment system for the potential pollutants. In order to cater to such a situation and to ensure that environment is not exposed to any danger by such industries going into operation without prior consent from the Board, Sub-section (5) is enacted so as to invest the Board with the same powers as under Sub-section (3) in the case of an industry seeking prior permission before establishment. Thus, it cannot be said that the Board is totally helpless in the case of industries established without prior consent of the Board. The statute having provided for a situation which specifically applies to the case on hand, it is but appropriate that the Board ought to have followed the procedure contemplated under Sub-section (5) of Section 25. The Board which is charged with the solemn duty of protecting the environment has done precious little in discharge of its duty and has displayed an indolent attitude in examining the request of the petitioner for grant of consent-It appears to have woken up from its bureaucratic slumber only after the filing of the public interest litigation. The vociferous display of opposition for the grant of relief sought in this writ petition is totally belied by the manner in which the matter was processed by the Board when it was under Board's consideration. This being a case where steps had already been taken to establish a new industry it would be covered by Sub-section (5) of Section 25 of the Act only.

27. The second reason also has to fail the test of legal scrutiny because the petitioner was never heard nor was an opportunity given to it, as discussed in the earlier part of this order, to alleviate the reasonable apprehension that the Board may have entertained in the matter of environmental pollution.

28. Insofar as the first reason given in the order of refusal by the Board viz., that the area in which the industry has come up is a sensitive area, it is an admitted fact that notification as prescribed under Rule 5 of the Environment (Protection) Rules, 1986 has not been published either by the State Government or the Central Government. The learned Counsel for the respondent-Board relies on the executive summary produced as Annexure-R6 which is a report on the study carried out by ISRO to understand the reasons for reduced inflow. This report is no answer to a notification as is required under Rule 5 of the Environment (Protection). Declaring an area as a sensitive one does not lie within the subjective satisfaction of the Board and the Board cannot arrogate to itself the right to declare an area as sensitive one. Unless this has been done by the authority empowered under the statute by a process known to law, the Board cannot make out a ground on the said basis to reject an application validly made to it.

29. There can be no doubt at all in the circumstances of the present case that the petitioner was never called upon nor was he provided the opportunity to dispel any reasonable concern that the Board may have had about the potential danger that the industry would have caused. When it can be reasonably said that the establishment of the hospital does pose an "uncertain" risk to environment, it cannot be said applying the same yardstick of "reasonableness" that the potential risk is "negligible" or "non-negligible". In the case of A.P. Pollution Control Board, supra, the Apex Court had every reason to believe that the potential danger to the environment was "non-negligible". In the present case it cannot be said even with a modicum of certainty that the risk involved is "non-negligible".

30. In A.P. Pollution Control Board's case, supra, the Apex Court despite being satisfied about the existence of some danger to the environment had still thought it fit to obtain scientific inputs from the specialists in the field to have a clear idea of the quantum and nature of pollutants before adjudicating the issue of pollution to environment. The ultimate order refusing the permission was based entirely on the reports of the expert bodies. But, in the present case, I find that the refusal by the Board was not based on consideration of any such potential danger to environment because the order does not make any reference to the pollutants that may be emitted by the hospital and whether such pollutants would fall in the category of "negligible" or "non-negligible" environmental risk which consideration was absolutely essential when the issue had to be determined on the basis of precautionary principle".

31. The order of the Appellate Authority also fares no better because even the Appellate Authority does not refer to any pollutants and the nature of the potential risk to environment. In this context it would be useful to refer to the decision in D.L.F. Universal Limited v. Prof. A. Lakshmi Sugar and Ors. In that case the Apex Court was seized of the challenge to the conversion of land for non-agricultural purposes. The land was situated near Arkavati river and the

Thippagon danahalli Reservoir and the objection to its conversion was based on the ground of possibility of pollution of waters of river Arkavati and Thippagon danahalli Water Reservoir and the depletion in the availability of water for supply to the city of Bangalore. Referring to the permission granted by the State, the Apex Court observed:

"We are unable to hold that on the basis of material on record the State Government could not reasonably take the view that the proposed scheme would not affect the availability of water for supply to the city of Bangalore and would not result in pollution of waters of river Arkavati and Thippagon danahalli Water Reservoir".

32. After holding so, the Apex Court permitted the establishment of an entire township near river Arkavati. What emerges from all these pronouncements of the Apex Court is that there should be some "non-negligible" potential danger to environment if the permission sought could be refused. Where it is not possible to draw a reasonable inference from the records of such "non-negligible" danger to environment, I am of the considered view that the principle of "sustained development" would come into play. Hospital being an institution that is essential to improve the quality of human life, its establishment subject to ensuring the carrying capacity of the supporting ecosystems, I feel, is the right answer to the question in issue. There are good reasons to hold so, in this case, because the area concerned is not declared as a sensitive area by publication of the required notification, the petitioner has the benefit of deemed consent and it is not possible to ascertain any potential non-negligible danger to environment which would call for adopting the "precautionary principle" and lastly the Board is not powerless in the matter in that it could always resort to Sub-section (5) of Section 25 to ensure that no "non-negligible" danger is caused to the environment by the establishment of the college and hospital.

33. Learned Counsel Mr. D. Nagaraj submitted that the Supreme Court having dismissed the SLP preferred by the petitioner after hearing on the point of deemed consent, this Court cannot again go into that aspect and pronounce on it. The need to examine this point is obviated by the admission of the respondent in its statement of objections to the following effect:

"In fact the Hon"ble Supreme Court in the said SLP has restricted its scope only to the extent of considering the question of deemed consent as can be seen from the notice issued by the Hon"ble Supreme Court, though the dismissal of SLP may not operate as res judicata but the fact remains that on the question of deemed consent for which notice was issued and after hearing at considerable length the Hon"ble Supreme Court was pleased to dismiss the SLP".

Having thus conceded in the statement of objections it is not now open to the respondent to argue outside the record. The order passed by the Supreme Court merely rejecting the SLP without pronouncing on the question in issue is no impediment for determining that question.

34. Before I part with the case it is useful to refer to the facts in Vellore Citizens Welfare Forum's case, *supra*, to know the yardstick employed by the Apex Court in tilting the scale in favour of "sustained development". In the said case, a report was called for indicating the extent of pollution caused by the tanneries. The relevant part of the report submitted by the Legal Aid and Advisory Board of Tamil Nadu is as under:

"As per the Technical Report dated 28-5-1983 of the hydrological investigations carried out in Solur Village near Ambur it was noticed that 176 chemicals including acids were contained in tannery effluents. If 40 litres of water with chemicals are required for one kilo of leather, with the production of 200 tons of leather per day at present and likely to be increased multifold in the next four to five years with the springing up of more tanneries like mushrooms in and around Ambur Town, the magnitude of the effluent water used with chemicals and acids let out daily can be shockingly imagined... The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The subsoil water is polluted ultimately affecting not only arable lands, wells used for agriculture but also drinking water wells".

In the face of such grave fact situation, the Apex Court after referring to various reports of the expert bodies, ultimately gave the following direction:

"We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. We direct all the tanneries in the above five districts to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETPs shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries who are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith".

If this be the approach adopted by the Apex Court in a case where the pollutants were directly being let into the stream, it would be totally unjustified to deny permission to establish an hospital merely on the ground of potential hazard to environment when there was nothing on record either before the Board or before the Appellate Authority to show that the uncertain danger to environment was "non-negligible". In the present case the Board is sufficiently empowered by the provisions of the Act to give directions to the hospital to protect the environmental quality. A simple direction not to let the pollutants into the stream and clear by treating the pollutants chemically or otherwise could ensure that no pollution takes place. The Board has the power under the Act and Rules to lay down standards for emission or discharge of environmental pollutants. The rules even permit the Board to specify more stringent standards from those provided under the rules. Thus, in my considered opinion, the potential danger, if any, could be overcome in the present case by directing the petitioner to take all

precautions required to be taken so that there will not be any direct or indirect entry of sewerage effluents to the river. The question of the pollutants entering the reservoir directly does not arise at all because it is an admitted fact that the reservoir is situated 6 kms. away from the spot.

35. That takes me to LA. No. III filed by the Board to direct the National Environmental Appellate Authority to investigate the matter. There is no need to direct the National Environmental Appellate Authority to investigate the matter because unlike in the case of the Appellate Authority in Andhra Pradesh which is headed only by a judicial member, the Appellate Authority in Karnataka consists of a judicial member as also members who are environmental experts. A reference to the Appellate Authority for reporting on the matter would arise only when the hospital comes up and the amount and the nature of pollutants are identified. Any rejection of a request for establishment of an industry when the risk is certain but what is not certain is whether the risk is "negligible" or "non-negligible" could be made only after proper identification of the amount and the nature of pollutants and the danger to which the environment is exposed by such pollution. Herein, one can also reasonably doubt the very certainty of the risk because the petitioner had also produced before the Appellate Authority the technical specification by in serve Consultants which the Appellate Authority refused to look into because it doubted its genuineness. Thus, I find no ground to allow I.A. No. III and it is, accordingly, dismissed.

Point No. (iii):

36. Thus, on an overall consideration of the various factors involved in the case, I allow this writ petition and quash the impugned orders dated 11-5-2000 (Annexure-Z) and 9-6-2000 (Annexure-P) respectively passed by the Appellate Authority as well as the Board. It is, however, open to the Board to make a detailed study of all the potential pollutants and direct the petitioner as provided u/s 25(5) of the water (Prevention and Control of Pollution) Act, 1974 and the Rules made thereunder to take all precautionary measures to offset any danger that may be caused by establishment of the college and hospital.