BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI
.....

Appeal No. 68/2013

In the matter of:

1. Karam Chand
   S/o Late Kirpa Ram,
   Village Bringti, Post Deol,
   Sub-Tehsil Holi, District Chamba,
   Himachal Pradesh

2. Rajesh Kumar
   S/o Sh. Rumi Ram,
   Village Gharoh, Post Nayagraon,
   Sub-Tehsil Holi, District Chamba,
   Himachal Pradesh

..... Appellants

Versus

1. Union of India
   Through its Secretary
   Ministry of Environment and Forests,
   Government of India,
   Paryavaran Bhawan, C.G.O. Complex,
   Lodhi Road, New Delhi – 110 003

2. State of Himachal Pradesh
   Through its Principal Secretary (Forests)
   H.P. Govt. Secretariat, Shimla – 171 002
   Himachal Pradesh

3. GMR Bajoli Holi Hydropower Limited
   Old Udaan Bhavan,
   2nd Floor, Terminal 1,
   IGI Airport, Palam,
   New Delhi – 110 037

..... Respondents

Counsel for Appellant:

Mr. Rahul Choudhary, Advocate.

Counsel for Respondents :

Mr. Vivek Chib, Advocate for Respondent No.1
Mr. Aditya Dhawan, Advocate for Respondent No.2.
Mr. A.D. N Rao and Mr. A. Venkatesh, Advocates for Respondent No. 3.

ORDER/JUDGMENT

PRESENT :

Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi, Judicial Member
Hon'ble Mr. Dr. D.K. Agrawal, Expert Member
Hon'ble Mr. B.S. Sajwan, Expert Member
Hon'ble Dr. R.C. Trivedi, Expert Member

Dated: April 24, 2014

JUSTICE SWATANTER KUMAR (CHAIRPERSON):

The appellants are residents of the remote Holi Sub-Tehsil of Chamba district in Himachal Pradesh. In the present appeal they are challenging the grant of forest clearance granted by the respondent authorities to the GMR Bajoli Holi Hydropower Limited Respondent No. 3, for setting up of 180 MW Bajoli-Holi Hydroelectric project on the basin of river Ravi in between Bajoli and Holi. This clearance was conveyed to the project proponent, vide letter no. Ft.42-164/2013 (FCA) dated Nil. However, during the course of arguments, it was conceded that the said letter is dated 28th January, 2013 and was passed under Section 2 of the Forest (Conservation) Act, 1980 (for short the "Conservation Act"). The challenge to the impugned forest

clearance dated 28th January, 2013 is *inter alia*, but primarily, on the following grounds;

i) The change from the Tail Race Tunnel along the right bank of the river to the left bank of the river is a material change and no proper EIA study or report was prepared in that regard.

ii) As per the EIA notification of 2006, the terms of reference were prepared with reference to the Tail Race Tunnel being along the left bank of the river. This change has been allowed without any application of mind.

iii) The right bank area of the river is uninhabited with barren-rocky landscape, whereas, the left bank area is inhabited and a number of villages are located in that area with agriculture and horticulture as major activities.

iv) No permission from the National Board for Wildlife has been obtained. The dam site of the project is within 10 Kms. radius of Dhauladhar Wildlife Sanctuary and as such is in violation of the directions passed by the Supreme Court of India in the matter of *Goa Foundation v. Union of India.*

v) The Forest Advisory Committee (for short the 'FAC') had desired that a study to assess the cumulative environmental impact of various hydroelectric projects particularly on the riverain eco system and its land and aquatic biodiversity, should be done by the State. This condition had been waived without any basis.

vi) Settlement of forest rights has not taken place prior to grant of forest clearance.

vii) The order granting forest clearance to the project is arbitrary and will adversely affect the ecology of the area.

2. The challenge is based on the factual matrix that the project proponent has proposed for construction of 180 MW Bajoli-Holi Hydroelectric project on the river basin of Ravi between Bajoli and Holi villages in district Chamba of Himachal Pradesh. It is proposed that the water of the river will be diverted near Nayagram village through a 15.5 Kms long Head Race Tunnel and the power house is proposed to be established near Batola village upstream of confluence of Kee Nalah with Ravi river, which is about 2 kms downstream of Holi village. Stage II Forest Clearance was granted for the project by the Ministry of Environment and Forests (for short the "MoEF") on 20th December, 2012, in furtherance to which construction of the project was started by the project proponent sometime in December, 2012. At that stage, no order had been passed under Section 2 of the Conservation Act by the State Government and as such Stage II Forest Clearance was not complete.

3. The appellant had approached the Tribunal without raising any specific challenge to that order and praying to stop the work on the site in question. This application was filed before the Tribunal as Application No. 06/2013. Vide its order dated 23rd

January, 2013 in the case titled as *Karam Chand & Anr. v. Union of India & Ors.* a bench of this Tribunal directed the State Government to pass a speaking order in terms of Section 2 of the Conservation Act and directed the parties to maintain the *status quo* till then. In furtherance to the order of the Tribunal, the State of Himachal Pradesh passed an order under Section 2 of the Conservation Act, which is impugned in the present appeal.

4. At this stage, we may notice that a bench of this Tribunal in the case of *Vimal Bhai v. Union of India & Ors.* (Appeal No. 7/2012) dated 7th November, 2012 had pronounced that Section 2 of the Conservation Act obliges the State Government to pass an order giving forest clearance in terms of that Act. Taking an interpretation that it was only an order of the State Government passed under Section 2 of the Conservation Act that was appealable under Section 16(e) of the National Green Tribunal Act (for short the "NGT Act"), this view was followed with approval by another five member bench of this Tribunal in the case of *Prafulla Samantra v. Union of India*, (O.A. No. 123 of 2013) on 24th January, 2014. Thus as the law stands, it is only an order of the State Government passed under Section 2 of the Conservation Act which is appealable to the Tribunal in terms of the NGT Act and not a mere approval of the Central Government as had been done in this case at the time of institution of Application No. 06/2013.

5. The appellants are living very close to the area of the project and are dependent on the forest and the surrounding natural resources for their livelihood which includes rearing animals, agriculture and horticulture. The terms of reference for EIA studies in relation to the project were prepared by MoEF on 11th February, 2008, as already noticed, on the basis that the project was expected to be located at the right bank of the river. This location was argued to have been shifted at a subsequent stage. The MoEF vide their letter dated 2nd December, 2008 gave a No Objection Certificate for shifting the location of the project from the right to the left bank of the river. The relevant paragraph of the said letter is reproduced as under:

> "It has been noted that your consultant during investigation and survey has found locating Power Intake, Head Race Tunnel, Power House and Tail Race Tunnel on the left bank of river is advantageous instead of right bank which was proposed at the time of obtaining TOR."

6. The main grievance of the appellants is with regard to the shifting of the location of the project from right to left bank of the river. In the fact sheet dated 1st April, 2011, it has been stated that "the area is not part of National Park, Sanctuary, Biosphere Reserve. Tiger reserve, elephant corridor etc." According to the appellants, even this information was not correct and the area is located within 10 Kms of the Sanctuary. It is the grievance of the appellants that as a result of construction of project and diversion of the water stream, no water is released downstream of Madhopur Barrage, and as such, practically a river stretch of about 80 Km within the Indian territory and about 500 Km downstream in Pakistan territory is dry except

during high floods. This aspect should have been very seriously considered while conducting the cumulative impact studies on the project in question. Moreover, condition 5 in regard to cumulative study had been arbitrarily waived by MoEF and has seriously prejudiced the interest of the appellants.

7. The project proponent, State of Himachal Pradesh and MoEF have practically taken a common defence to these allegations of the appellants. It is stated that the project had due environmental clearance from the State Government and MoEF. The said respondents rely upon a letter dated 2nd December, 2008 vide which the MoEF had issued a No Objection Certificate for the proposal of locating the project proponent on left bank of the river instead of right bank. According to the respondents, shifting of banks is more beneficial as the families living on the left bank are much less in number than that on the right bank. It is also their case that fewer trees would have to be felled/cut if the project is permitted to come up on the left bank of the river Ravi. A certificate from the Divisional Forest Officer has been placed on record to say that no part of Bajoli-Holi Hydroelectric Power Project in District Chamba falls within 10 Km boundaries of nearest Wildlife Sanctuaries of Chamba Wildlife Division. According to the project proponent vide letter of 20th June, 2011, an obligation had been put by the Department of Irrigation & Public Health on the project proponent to ensure rehabilitation, repair, compensation for the IPH assets, water resources, private kuhls, irrigation schemes, water supply schemes in case they were

damaged or adversely affected due to construction of the Hydroelectric project. Thus, according to the respondents, the project would not cause any irreparable damage to the environment and ecology but would add to the power production as well as to the development of the State and particularly in the area of location of the project.

8. Besides justifying the project on the factual matrix and merits, a preliminary objection has been raised on behalf of the respondents to the very maintainability of this appeal. The contention is that all the issues raised by the appellants were raised by other residents of the same village before the High Court of Himachal Pradesh at Shimla in Writ Petitions No. 9980/2012 and 2083/2012. Both these Writ Petitions have been disposed of on merits by a detailed judgment of High Court dated 22nd May, 2013 in the case of *Mangni Ram and Ors. v. Union of India & Ors.* and two other connected matters. The High Court after discussing the merits/demerits of the contentions raised at some length, vide its order dated 22nd May, 2013, concluded as follows:

> "44). In view of the above, we pass the following order: -
>
> i) Writ petition No. 2083 of 2012 and Writ Petition No. 9980 of 2012 are dismissed with costs quantified at Rs. 25,000/- to be paid by each of the petitioners in the respective petitions to the abovenamed contesting respondents, within four weeks from today, failing which, the Collector, Chamba is directed to recover the aggregate amount of Rs. 1.25 lakhs (Rupees One Lack Twenty Five Thousand) jointly and severally from the four petitioners in the first petition and/or sole petitioner in the second petition, within eight weeks from today as arrears of land revenue

and deposit that amount in the Registry of this Court to be made over to (i) Ministry of Environment and Forest, Government of India, (ii) H.P. State Pollution Control Board, (iii) H.P. State Electricity Board Limited, (iv) H.P. State Forest Department and (v) the Project Proponent, GMR Bajoli-Holi Hydro Power Pvt. Ltd. equally i.e. Rs. 25,000/-each.

ii) Writ Petition No. 349 of 2013 is disposed of with liberty to the petitioner to pursue remedy against the concerned persons in accordance with law and including without expressing any opinion on the criminal case already registered against them. Withdrawal of writ petition should not be construed as petitioners having diluted or withdrawn the allegations against the concerned accused in the criminal case, in any manner. In other words, the petitioners are free to pursue other remedies as may be permissible in law.

iii) Ordered accordingly.

9. The appellants not being satisfied with the judgment, had filed a review petition which also came to be dismissed by High Court vide its order dated 13th November, 2013. The relevant portion of the judgment dated 13th November, 2013 reads as follows:

> "3. We are not impressed by any of these grievances of the petitioners. These are not only ill-advised but completely in ignorance of the discussion contained in paragraphs 15, 16, 17 and 21 of the judgment under review, in particular. All these aspects have been answered on the finding that the CEA is the only competent Authority and it has given permission/approval for shifting of the Project on the left bank. The communication at page 137, issued under the signature of Director (Civil), dated 30.7.2012, is after the permission was already granted by the competent Authority. There is presumption in law that all the documents which were placed before the Authority were duly considered by the Authority before grant of permission unless proved to the contrary. No document has been brought to our notice which would suggest that the factual position stated therein was misleading or incorrect and was the basis of decision taken by the competent Authority. Relying on some subsequent

documents after the sanction was already accorded by the CEA, will be of no avail. Similarly, in our opinion, the grievance of the petitioners that the matter had become fait accompli when it was considered by the Appraisal Committee is untenable.

4. Regarding the objections of locals, that aspect has been considered by the Authorities and including by this Court, which records that the grievance of the locals stood redressed and that the Authorities have proceeded on that basis. Neither the communication dated 23rd March, 2009 at page 186 nor the letter dated 18th August, 2010 at page 155 will be of any avail.

5. Counsel for the petitioners has also invited our attention to the averments contained in the reply-affidavit of Central Electricity Authority- respondent No. 10, in particular paragraphs 3 to 7 at pages 301 to 302 of the Writ Petition , which read thus:

> " 3.Government of Himachal Pradesh, vide its letter No. MPP-F(2)-14/2007-II dated 07.03.2011 confirmed shifting of project components from right to left bank of river Ravi.
> 4. CEA accords concurrence to hydro electric schemes based on the information provided in the Detailed Project Report. In case of Bajoli Holi HE Project, after it was concluded by the project developer and Government of Himachal Pradesh, for locating the project components of left side of the river Ravi, the detailed investigations had been carried for project components on the left side of the river and incorporated in the DPR.
>
> Earlier, Special Secretary (Power), Department of MPP & Power, Government of Himachal Pradesh vide letter dated 09.04.2009 {Ref. (i)} addressed to M/S. GMR Energy Ltd. (Developer), allowed to shift the project components of Bajoli Holi HE Project from right to left bank of the river Ravi due to greater techno-economic feasibility. M/s. GMR Energy Limited submitted the Detailed Project Report (DPR) for concurrence of CEA proposing water conductor system and power house works of the project on left bank of the river and the DPR of the project was taken up for examination in CEA/CWC/GSI in January, 2010.
>
> Joint Secretary (Power), Department of Power, Government of Himachal Pradesh vide letter dated 09.09.2010 [Ref.(ii)] has intimated that it would not

be possible to accede to the request of M/s. GMR Energy Limited to shift the project components to left bank of river Ravi. Further, it was intimated that their earlier letter dated 09.04.2009 [Ref. (i)] may be considered withdrawn till such time the M/s. GMR Energy Limited the Developer demonstrates that local opposition based on environmental and land consideration have been amicably resolved.

In the meanwhile, Chief Engineer (Energy), Directorate of Energy, Government of Himachal Pradesh, vide letter dated 13.10.2010 [Ref. (iii)] have intimated that the company M/S GMR Energy Ltd. has already been allowed to shift the project components of Bajoli Holi (180 MW) from right to left bank due to greater techno-economic feasibility vide this department letter No. MPP-F(2)-14/2007 dated 09.04.2009 [Ref. (i)] with FRL-2018.25 M and TWL – 1706.75 M. The Company has obtained all the requisite No Objection Certificates (NOCs) from all concerned Gram Panchayats also. Therefore, the location of project components on left bank is hereby confirmed for further necessary action.

5. CEA, after examining the DPR submitted by the project developer for the left bank and considering views/observations of Central Water Commission and Geological Survey of India and Government of Himachal Pradesh accorded concurrence to Bajoli Holi HE Project vide its letter No. /HP/34/CEA/09-PAC/690-720 dated 30th December, 2011.

6. It is, however, given in the DPR that right bank alternative was also studied by HPSEB in 2007 and the same was not favoured by them due to various reasons such as rugged topography, difficult accessibility etc.

7. As such, shifting of project components from right bank to left bank is sole responsibility/ choice of Government of Himachal Pradesh/project developer and concurrence has been accorded only on the basis of detailed submission made for left bank."

6. We fail to understand as to how the averments contained in this reply-affidavit are of any avail to the petitioners. The reply-affidavit reiterates the position that CEA is the only Authority to accord concurrence to hydro electric schemes; and in the present case, it had granted

necessary approvals. That factual position is not assailed by the petitioners even in the present review petitions. What is argued is that the matter had become fait accompli before the Appraisal Committee which met on 20th/21st December, 2010 in Jaipur to consider the proposal and which position is manifest from the observation that the proposed site is already shifted from right bank to left bank. This is distorted reading of the minutes of the Appraisal Committee meeting, referred to above. What the Committee has then observed is that considering the geological formation and less infrastructure work, the Committee accepts the clarification. Thus, it is not a case of non-application of mind by the competent Authority in according approval.

7. The petitioners, in our opinion, have made unsuccessful attempt in assailing the approval in respect of the Project under consideration granted by the competent Authority. The criticism of the petitioners about observations made in paragraph 15 of the judgment that the MoEF, Government of India has approved the proposal is also without any merits. What has been observed in paragraph 15 is that the proposal was submitted to the appropriate Authority and which was approved right up to MoEF vide communication dated 2.12.2008, grant of NOC by MoEF vide that communication is not disputed by the petitioners.

8. The petitioners have attempted to assail the judgment under review on grounds which, in our opinion, are untenable, flimsy and without any substance.

9. The review petitions are, therefore, dismissed. Interim protection granted in these review petitions stand vacated forthwith.

Thus, all the contentions, controversies and issues raised between the parties stood conclusively decided by the High Court vide its above judgments. The matters substantially and materially in issue in the present appeal were also in issue in the Writ Petition before the High Court. The High Court passed a judgment *in rem*. Thus, the present appeal is hit by the principle of *res judicata* and is not maintainable and in fact is an abuse of the process of law.

10. To this preliminary objection raised on behalf of the respondents, the appellant has submitted that the present appeal is maintainable and is not hit by the principles of constructive *res judicata* or any other legal principle for the following reasons:

a) Parties to the present Appeal are different than the parties in the petitions before the High Court.

b) The cause of action of the present appeal is distinct and different, being the order by the authorities date the 28th January, 2013 which was never placed before the High Court.

c) There are subsequent events to the institution of the petition before the High Court, particularly in relation to grant of forest clearance, including communications between the authorities, and the report dated 18th July, 2012, which were not commented upon by the High Court.

11. We can proceed to discuss all these contentions raised on behalf of the appellants together. What is first and foremost is that we must deliberate upon the 'cause of action' which is the very foundation of invoking the principles of *res judicata* or constructive *res judicata* enshrined under Section 11 of the Code of Civil Procedure, 1908. It is the cause of action which sets into motion the process of law. A party chooses to claim relief or judgment before the Court or Tribunal by invoking its jurisdiction on the basis of the cause of action which is available to such a party. The cause of action is not a singular fact but is a bundle of facts, which when taken together, gives a right to a person to claim relief or judgment from the Court. It is a complete

chain of events, which, from the very initiation or institution of proceedings, is seen in a composite form to determine what the cause of action for a party to approach the judicial system for redressal of its grievance is. Under the environmental jurisprudence, cause of action must have a nexus with the provisions of the NGT Act to invoke the jurisdiction of the Tribunal under that Act. To put it simply, it will be a bundle of facts raising a substantial question in relation to environment that would give jurisdiction to the Tribunal and remedy to a party to invoke the jurisdiction of the Tribunal.

12. At this stage, we may refer to a recent judgment dated 12th September, 2013 of the Tribunal in the case of *Kehar Singh v. State of Haryana* [2013(1) Part 7-All India NGT Reporter page 556], where, after discussing the law in relation to the expression 'cause of action' and its application *vis-à-vis* the NGT Act, the Tribunal held as under:

> "15. To further examine the question of limitation, we must deliberate upon what does the expression 'cause of action' mean. Furthermore, such cause of action has to relate to 'such dispute', as stated in Section 14 of the NGT Act. The period of six months shall be computed from the date on which the cause of action first arose in relation to such dispute. Both the expressions – 'cause of action' and 'such dispute' – have to be read together. One of the settled rules of construction is *noscitur a sociis* i.e. the meaning of a word or an expression is to be judged by the company it keeps. Deliberating upon the application of this rule of interpretation, Justice G.P. Singh, in his book *"Principles of Statutory Interpretation"*, 13th ed. 2012, while referring to a decision by Privy Council, *inter alia*, has stated:
>
> > "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them.

It is a rule wider than the rule of *ejusdem generis;* rather the latter rule is only an application of the former." The rule has been lucidly explained by GAJENDRAGADKAR, J. in the following words: "This rule, according to MAXWELL, means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in Words and Phrases. Associated words take their meaning from one another under the doctrine of *noscitur a sociis*, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *ejusdem generis."*

16. 'Cause of action', therefore, must be read in conjunction with and should take colour from the expression 'such dispute'. Such dispute will in turn draw its meaning from Section 14(2) and consequently Section 14(1) of the NGT Act. These are inter-connected and inter-dependent. 'Such dispute' has to be considered as a dispute which is relating to environment. The NGT Act is a specific Act with a specific purpose and object, and therefore, the cause of action which is specific to other laws or other objects and does not directly relate to environmental issues would not be 'such dispute' as contemplated under the provisions of the NGT Act. The dispute must essentially be an environmental dispute and must relate to either of the Acts stated in Schedule I to the NGT Act and the 'cause of action' referred to under Sub-section (3) of Section 14 should be the cause of action for 'such dispute' and not alien or foreign to the substantial question of environment. The cause of action must have a nexus to such dispute which relates to the issue of environment/substantial question relating to environment, or any such proceeding, to trigger the prescribed period of limitation. A cause of action, which in its true spirit and substance, does not relate to the issue of environment/substantial question relating to environment arising out of the specified legislations, thus, in law cannot trigger the prescribed period of limitation under Section 14(3) of the NGT Act. The term 'cause of action' has to be understood in distinction to the nature or form of the suit. A cause of action means every fact which is necessary to establish

to support the right to obtain a judgment. It is a bundle of facts which are to be pleaded and proved for the purpose of obtaining the relief claimed in the suit. It is what a plaintiff must plead and then prove for obtaining the relief. It is the factual situation, the existence of which entitles one person to obtain from the court remedy against another. A cause of action means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. It does not comprise evidence necessary to prove such facts but every fact necessary for the plaintiff to prove to enable him to obtain a decree. The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense, cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In wider sense, it means the necessary conditions for the maintenance of the suit including not only the infraction coupled with the right itself. To put it more clearly, the material facts which are imperative for the suitor to allege and prove constitute the cause of action. (Refer: *Rajasthan High Court Advocates Asson. V. Union of India* [(2001) 2 SCC 294]; *Sri Nasiruddin v. State Transport Appellate Tribunal* and *Ramai v. State of Uttar Pradesh* [(1975) 2 SCC 671]; *A.B.C. Laminart Pvt. Ltd. and Anr. v. A.P. Agencies, Salem* [(1989) 2 SCC 163]; *Bloom Dekor Limited v. Sujbhash Himatlal Desai and Ors.* with *Bloom Dekor Limited and Anr. v. Arvind B. Sheth and Ors.* [(1994) 6 SCC 322]; *Kunjan Nair Sivaraman Nair v. Narayanan Nair and Ors.* [(2004) 3 SCC 277]; *Y. Abraham Ajith and Ors. v. Inspector of Police, Chennai and Anr. [(2004) 8 SCC 100]; Liverpool and London S.P. and I. Asson Ltd. v. M.V. Sea Success I and Anr.*[(2004) 9 SCC 512]; *Prem Chand Vijay Kumar v. Yashpal Singh and Anr.* [(2005) 4 SCC 417]; *Mayar (H.K.) Ltd. and Ors. v. Owners and Parties, Vessel M.V. Fortune Express and Ors.* [(2006) 3 SCC 100])

17. Upon analysis of the above judgments of the Supreme Court, it is clear that the factual situation that existed, the facts which are imperative for the applicant to state and prove that give him a right to obtain an order of the Tribunal, are the bundle of facts which will constitute 'cause of action'. This obviously means that those material facts and situations must have relevancy to the essentials or pre-requisites

> provided under the Act to claim the relief. Under the NGT Act, in order to establish the cause of action, pre-requisites are that the question must relate to environment or it should be a substantial question relating to environment or enforcement of any legal right relating to environment. If this is not satisfied, then the provisions of Section 14 of the NGT Act cannot be called in aid by the applicant to claim relief from the Tribunal. Such question must fall within the ambit of jurisdiction of the Tribunal i.e. it must arise from one of the legislations in Schedule I to the NGT Act or any other relevant provision of the NGT Act. For instance, the Tribunal would have no jurisdiction to determine any question relating to acquisition of land or compensation payable in that regard. However, it would have jurisdiction to award compensation for environmental degradation and for restoration of the property damaged. Thus, the cause of action has to have relevancy to the dispute sought to be raised, right to raise such dispute and the jurisdiction of the forum before which such dispute is sought to be raised."

13. The two distinct principles that emerge from the above discussion are firstly, that the cause of action means every fact, which if traversed, would be necessary for the persons invoking the jurisdiction to prove, in order to claim his right to a judgment; and secondly, it must be read in conjunction with and should take colour from the expression 'such disputes' used under Section 14 of the NGT Act. Cause of action, in the present case, thus, would be all facts and circumstances on the basis of which the appellants had invoked the jurisdiction of the High Court at the first instance and now of this Tribunal. The basic cause of action in the present case, relates to the grant of forest clearance to the Hydro Project at the site in question on different grounds. Each fact or ground would not be the cause of action but it is the cumulative reading of the petition filed by the appellants that has to be taken into consideration for the purpose of

determining the cause of action in favour of the appellants. The appellants had, of course, on varied different grounds, intended to challenge, and in fact, had challenged, the construction of the project at the site in question and its impact on the environment, ecology and life of the people living around the site. Thus, the cause of action is broad-based and *ex facie* appears to be common in both the cases.

14. The principal argument advanced on behalf of the appellants is that passing of the order dated 28th January, 2013 by the State Government under Section 2 of the Conservation Act gives a fresh cause of action in favour of the appellants, against the respondent. This argument appears to be impressive at the first blush, but when examined in some depth and on merits, is without substance. The order dated 28th January, 2013 is nothing but a substantial reproduction of the order dated 20th October, 2012 passed by MoEF. If one examines both these orders, they are verbatim the same, and almost identical clauses have been used in these letters except the preface and the concluding paragraphs.

15. The legality and correctness of the order dated 20th October, 2012 was challenged before the High Court. The writ petitioners before the High Court invited the judgment of the Court without placing on record the order dated 28th January, 2013 passed by the State of Himachal Pradesh. This is despite the fact that the High Court had dismissed the Writ Petitions vide its order dated 22nd May, 2013 and the Review Petitions vide order dated 13th November, 2013.

In other words, the petitioners before the High Court, of their own record and choice and being fully in knowledge of the order dated 28th January, 2013, did not place the same before the High Court. For what reasons the order dated 28th January, 2013 was not placed before the High Court is best known to the petitioners in the Writ Petition. The fact of the matter is that the High Court had applied its mind to various aspects of the case and by detailed judgments dismissed the Writ Petitions as well as the Review Petitions. Such judgments being judgments *in rem*. In these circumstances it can hardly be accepted that the order dated 28th January, 2013 in substance could have given the petitioners in the Writ Petitions before the High Court and any person including the appellants before the Tribunal, a fresh cause of action. Once a party invites a judgment from the Court then that party or any other persons covered by the said judgment cannot be heard to argue that a particular order which was available during the course of hearing before the Court was not placed before the Court.

16. The order dated 28th January, 2013 could, technically, give a fresh cause of action to the petitioners in the Writ Petition but then it was equally obligatory upon those petitioners to place the order dated 28th January, 2013 for consideration of the High Court before the Court pronounced its judgment. They ought not to have argued the matter before the High Court and invited the judgments in May, 2013 and November, 2013, much after passing of the order impugned in

the present appeal. This conduct of the petitioners before the High Court cannot ensue any benefit to the appellants in the present case.

17. From the discussion hereafter, it would be obvious that even the present appellants would not be able to take advantage of this fact and would still have to face the consequences of the High Court's judgment.

18. The other contention raised on behalf of the appellants is that the parties to the Writ Petition before the High Court and in the present appeal are distinct and different, and therefore, the principles of *res judicata* or constructive *res judicata* cannot be applied in the present case. No doubt, the appellants in the present appeal are different from the petitioners in the Writ Petition before the High Court but the fact of the matter is that both the appellants and the petitioners are residents and members of the same Gram Panchayat. The grounds, the facts and the pleadings taken and the challenge raised in the Writ Petition and/or this appeal are similar.

19. At the cost of repetition, we may notice that the High Court had rejected the Writ Petition filed by those petitioners on merits and had even imposed costs. Thereafter, the petitioners before the High Court, under the garb of additional facts, including the report dated 18th July, 2012 and other factors, claiming that the judgment had errors at the face of the record filed the Review Petition, which also came to be dismissed by the High Court vide its orders dated 13th November, 2013. In other words, the High Court had very

comprehensively, at both these stages, dealt with various aspects of environment and ecology as well as the impact-assessment of the project and concluded that the permission granted to the project, including the order dated 20th October, 2012 did not suffer from any infirmity.

20. Now the material question that arises for consideration of the Tribunal is whether the judgment dated 22nd May, 2013 passed by the High Court is a judgment in *rem*; if so, what is its effect? A judgment *in personam* is a judgment which deals with issues strictly between the parties to the *lis* and determines those issues by its judgment, affecting only the parties to the *lis*. On the other hand, a judgment *in rem* deals with larger issues of greater public importance which are not individual-oriented. An applicant may be an individual in such cases but he raises the issues or challenges them before the Court or Tribunal not for his own benefit but for the benefit of the public at large. The issues and challenges raised in such matters are of wide magnitude and effect. One of the most often repeated examples of such cases is the Public Interest Litigation.

21. In the case of *State of Karnataka v. All India Manufacturers Association* [(2006) 4 SCC 683], the Supreme Court stated that in a public interest litigation the petitioner is not agitating his individual rights but represents the public at large. As long as the litigation is *bona fide,* a judgment in a previous public interest litigation would be a judgment *in rem*. It binds the public at large and bars any member

of the public from coming forward before the Court and raising any connected issues or an issue which had been raised/should have been raised on an earlier occasion by way of a public interest litigation. A judgment *in rem* may be defined as a judgment of a court of competent jurisdiction determining the status or the disposition of the things as distinct from the particular person interested in it from the parties to the litigation (Halsburys Laws of England, 14th Edition, Volume 26, Paragraph 523). In *Corpus Juris* Secu*ndum*, Volume 50 paragraph 907 also describes, a judgment *in rem* as distinguished from a judgment *in personam* as an adjudication pronounced on and affecting the status of some particular things or subject matter which is the subject matter of the controversy by a competent tribunal and having the effect of binding all persons having interest, whether or not joined as parties to the proceedings in so far as their interest in the *res* is concerned. For instance, where a process itself has been upheld by the Courts having jurisdiction, then it will bind all persons subject to that process.

22. The Courts have also taken the view that the judicial decision *in rem* is one which declares, defines or otherwise determines the status of a person or of a thing, that is to say, the jural relation of the person or the thing to the world generally and, therefore, is conclusive for or against everybody.

Applying this test to the circumstances of the present case, it is clear that the petitioners before the High Court were individuals from the same Gram Panchayat and residents of the same area as that of

the Appellants herein and had raised a larger issue, not affecting them personally. The challenge to the environmental clearance and the order dated 20th October, 2012 had been raised in public interest, in contradistinction to private interest. It was neither anyone's case before the High Court nor is it before the Tribunal that the litigation before the High Court lacked *bona fides.* There were genuine contentions raised by the petitioners in both cases which were considered and decided upon by the High Court. It may also be noticed at this stage that the judgments dated 25th May, 2013 and 13th November, 2013 of the High Court have not been assailed before the Supreme Court by any of the petitioners. Thus, they have attained finality.

23. The result of the above discussion is that the judgment of the High Court is a judgment *in rem* and it affects the public at large and is not limited to the parties alone in the Writ Petition *simpliciter.*

24. Once it is held that the judgment of the High Court is a judgment *in rem*, the natural corollary thereof would be that none can escape the liability and impact of the judgment. The present appellants are the residents of the same village, members of the same Gram Panchayat and have challenged the impugned orders on similar grounds except the additional facts noticed above, which for all intents and purposes are immaterial.

25. A judgment *in rem* attains different dimensions and significance when one examines it in regard to the provisions of the NGT Act.

Section 14 of the NGT Act gives jurisdiction to the Tribunal to deal with all civil cases where a substantial question relating to environment including enforcement of any legal right relating to environment is involved and such question arises out of the implementation of the enactments specified in Schedule I to the NGT Act. The NGT Act gives a right to 'any person aggrieved' to challenge the orders specified under sub-clauses (a) to (j) of Section 16 within the prescribed period of limitation. In terms of Section 16(e) of the NGT Act, any person aggrieved has the right to challenge the order passed by the State Government under Section 2 of the Conservation Act. A person aggrieved does not have to show any personal injury or loss essentially. The grievances could relate to a cause which is generic in nature in contradistinction to individualistic. The provisions and scheme of the NGT Act also contemplate such generic action in public interest on issues of environment or ecology rather than just personal injury or damage and once the applications raising such generic issues are decided by the Court or the Tribunal, they would clearly and undoubtedly operate in the public domain. It cannot be equated to determination of issues strictly between the named parties to the *lis* but would cover a wide theme of aspects squarely raised in the application. Courts have also taken the view that the doctrine of *res judicata* would apply to public interest litigation also, and such an objection in a subsequent PIL or even in ordinary cases would be tenable. It is the repetitive litigation on the very same issue put up before the Court again and again in the garb

of public interest litigation that would be hit by the application of these principles.

26. Section 11 of the Code of Civil Procedure deals with two different concepts in law. One raises the principle of *res judicata* and the other the constructive *res judicata* principle. The former comes from the plain reading of Section 11 while the latter has reference to the Explanation IV to Section 11. Section 11 provides that the matters directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court between the same parties. Explanation IV to Section 11 raises a legal presumption as to what might or ought to have been made the ground of attack or defence in a former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.

27. The rule of *res judicata* is limited to a matter actually in issue, alleged by one party and either denied or admitted by the other party expressly or impliedly. But the rule of constructive *res judicata* in Section 11 of the Code of Civil Procedure is an artificial form of *res judicata.* Repeatedly raising the same issues which were actually decided or deemed to have been taken and decided by the Court should not be permitted again and again against the same party and with reference to the same subject matter. This is clearly an abuse of

the public policy on which the doctrine of *res judicata* is based and implies harassment and hardship to the opposing party. If such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by Courts would also be materially affected. Thus, it helps in raising the bar of *res judicata* by suitably construing the general principles of subduing a cantankerous litigant. Constructive *res judicata* in reality is an aspect of amplification of the general principles of *res judicata.* Another way to examine constructive *res judicata* is if a party had an opportunity to raise the matter in a suit, it would be considered to have been raised and decided. The underlying object is to cut short litigation between the parties so that a person may not be vexed again with regard to the same matter. It would be an abuse of the process of the Court to allow a new proceeding to be started in respect of the same issue.

28. The law in regard to *res judicata* and constructive *res judicata* has been the subject of judicial scrutiny now for long. With the passage of time, various principles have been enunciated in regard to the application of these doctrines. The Indian law codifies both these doctrines where they do form part of the procedural law while in other countries it is covered even under the common law. To aptly apply the various principles that have emerged with the passage of time, it is necessary for us to recapitulate the stated principles, which are as follows:

(i) Constructive *res judicata* is a special, technical and artificial form of *res judicata* enacted by Section 11.

(ii) Explanation IV to Section 11 obliges the plaintiff or the defendant to take all the grounds of attack or defence by putting forward his whole case in the former suit.

(iii) No distinction can be made between the claim that was actually made and the claim that *might* and *ought* to have been made a ground of attack or defence.

(iv) A matter which "might and ought" to have been made a ground of attack or defence shall be deemed to be a matter directly and substantially in issue constructively.

(v) The words "directly and substantially in issue" apply to both the "suit" as well as the "issue".

(vi) The terms "might" and "ought" are of wide amplitude and hence all the grounds of attack or defence even if they could be taken in alternative, should be taken in the former suit.

(vii) A plea which was not in existence, or was not within the knowledge of the party or could not be raised or was so dissimilar which might lead to confusion, cannot be said to be one which "might and ought" to have been raised.

(viii) The word "and" between the words "might" and "ought" must be read as conjunctive and not disjunctive.

(ix) The word "might" conveys knowledge on the part of the party affected about the existence of ground of attack or

defence. Whether or not the party has such knowledge is a question of fact.

(x) Whether a particular might "ought" to have been made a ground of attack or defence depends upon the facts and circumstances of each case.

(xi) The doctrine of constructive *res judicata* applies to writ petitions filed under Article 32 or Article 226 of the Constitution. It, however, does not apply to a writ of habeas corpus.

(Ref.: Thakker C.K., *Code of Civil Procedure*, Vol. I, Pg. 168)

29. From the analysis of the above principles, it is clear that the rule of *res judicata* is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the Court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of *res judicata* is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:

(1) *nemo debet bis vexari pro una et eadem causa:* no man should be vexed twice for the same cause.

(2) i*nterest republicae ut sit finis litium:* it is in the interest of the State that there should be an end to a litigation; and

(3) *res judicata pro veritate occipitur:* a judicial decision must be accepted as correct.

30. As discussed, the principle of *res judicata* or constructive *res judicata* found in Section 11 and Explanation IV to Section 11 of the Code of Civil Procedure is applicable to judgment in *rem*. The principle of res judicata applies even to public interest litigation initiated under Article 226 of the Constitution of India even though such proceedings are not governed by the Code of Civil Procedure. If a specific question was not raised and ought not to have been decided in an earlier proceedings by the Court in given circumstances, it may not debar a party to agitate the same at an appropriate stage but certainly subject to the applicability of the principles of *res judicata* or constructive *res judicata* (Refer : *State of Haryana and Ors. v. M.P. Mohla*, (2007) 1 SCC 457). The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience. The rule of conclusiveness of judgments equally supports application of the principle of *res judicata.* Once its ingredients are satisfied, then it must apply with its rigours, object being that a litigation must come to an end (Refer: *Swami Atmandanda v. Sri Ramakrishna Tapovanam* (2005) 10 SCC 51). In *Daryao v. State of Uttar Pradesh* AIR 1961 SC 1457, the Supreme Court while placing the doctrine of *res judicata* on a high pedestal, treating it as a part of the rule of law, held:

> "The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis."

31. In terms of the provisions of Section 19 of the NGT Act, the Tribunal is not bound by the procedure of Civil Procedure Code but shall be guided by the principles of natural justice. The restriction further contemplated under Section 19(2) is that subject to the provisions of the Act, the Tribunal shall have power to regulate its own procedure. The application of the Civil Procedure Code in its definite terms is controlled by Section 19(4). The Tribunal, thus, has to regulate its own procedure and the same has to be in consonance with the principles of natural justice. Another obvious precept to regulation of procedure by the Tribunal is that it should not be opposed to the basic rule of law and public policy, *res judicata* or constructive *res judicata*

32. In light of the above principles and the afore-stated maxims, we shall now revert to the facts of the present case. As already noticed, the petitioners before the High Court had challenged all aspects including the environmental clearance and the recommendations in relation to the establishment and operationalisation of the Bajoli Holi Hydro Project at River Ravi in district Chamba. They had taken up various grounds including location of the project and its change from right bank to left bank of River Ravi.

33. The High Court had dealt with all the issues and found that such change was appropriate and did not call for any interference. The questions in relation to the public hearing, ecological impacts, the NOCs issued by the Gram Panchayat, rights of the local people and rehabilitation and resettlement scheme were discussed in great elaboration by the High Court. Despite such detailed discussions, the appellants have filed the present appeal on the ground that there are certain factual errors in the judgment of the High Court, complete documents had not been placed before the Court and there was suppression of relevant material by the project proponent. We have already referred to the relevant portion of the order dated 13th November, 2013 vide which the application for review was dismissed as untenable, flimsy and without any substance. These judgments, as already held by us above, are the judgments *in rem* and would apply to the public at large and would not be restricted to the specific petitioners named in the Writ Petitions. On that analogy, the appellants in the present appeal would also be covered; would be debarred from re-agitating the issue directly and substantially raised before the High Court or even which ought to have been raised and deemed to be impliedly and constructively decided by the High Court. So, the appeal would hardly lie before the Tribunal. Therefore, the contention that they were not party to the Writ Petition before the High Court and that the letter dated 28th January, 2013 gives the appellants an entirely fresh cause of action *de hors* the issue raised in

the Writ Petition, does not appeal to the Tribunal and is liable to be rejected.

34. The last contention raised in that regard is that there are subsequent events to the decision of the High Court on the institution of the Writ Petition which vest a right in the appellants to institute the present appeal despite the decision of the High Court.

35. Under this head the first event is stated to be the passing of the order dated 28th January, 2013 by the State Government of Himachal Pradesh under Section 2 of the Conservation Act. Though we have already dealt with this aspect, but it may be reiterated here that this order is in terms identical to the order passed by the MoEF granting its approval for forest clearance vide letter dated 20th October, 2012. It appears that the petitioners intentionally did not place this order before the High Court and now the appellants before the Tribunal are trying to take undue advantage thereof. We had already noticed that the contents of order dated 20th October, 2012 and 28th January, 2013 are materially similar. Even otherwise, the conditions imposed in the letter provide due safeguards. Condition 16 of the letter dated 28th January, 2013 has specifically provided that minimum number of trees will be removed as are unavoidable but in any case not exceeding 4195 and whenever the forest land is not required for the project, the same has to revert to the State. Conditions with regard to compensatory afforestation had also been imposed. The second issue relates absence of permission from the National Board for Wildlife for

the project, being within the ten kilometers radius of the wildlife sanctuary. Firstly, though this submission appears to have been raised before the High Court in Writ Petition No. 2083/2012 and was also disputed by the project proponent on the ground that there is a certificate to this effect dated 16th June, 2009. Secondly, as noticed by the High Court in paragraph 7 of its effect, the challenge to the impugned order/action was confined to the three grounds stated therein. This ground would, thus, be deemed to have been considered and decided by the High Court. Even if we examine this contention *de hors* the decision of the High Court, the DFO vide his letter dated 16th June, 2009 had stated that the project area does not fall within 10 kilometers of the sanctuary in District Chamba. This statement appears to be simple but has been sought to be confronted by the appellant, who has placed a copy of the map of the study area of the said project showing that the project falls within 10 kms radial distance of the sanctuary. The project proponent has also referred to the letter dated 29th February, 2009 from the Chief Wildlife Warden of the State wherein approval to the wildlife component of the CAT Plan has been communicated. Nothing to the contrary was pointed out by the Chief Wildlife Officer. It is pertinent to note here that the project has been cleared by expert bodies, i.e. EAC and FAC. Here, we may also notice that the study area map of Bajoli-Holi Hydro Electric Project which was part of the EIA report shows that the tip of the reservoir falls within 10 kilometers of the sanctuary while the tip of the dam falls beyond that distance. The reservoir is stated to be

nearly 3.5 kilometers long. It is a settled technical principle that such distance should be measured from the tip of the reservoir or barrage, as the case may be. Examined from this point of view and in terms of the documents afore-referred, we have no hesitation in coming to the conclusion that the tip of the reservoir falls within 10 kilometers of the sanctuary, irrespective of administrative boundaries. Therefore, the project proponent is obliged to take clearance from the National Board for Wildlife in accordance with law. We direct accordingly.

While referring to the contents of the fact sheet dated 1st April, 2011, inspection report by the Director (Civil), H.P. State Electricity Board Limited dated July, 2012, wherein shifting of river bank were establishment of the project was not recommended, it is contended that these matters were not raised before the High Court and are being raised before the Tribunal for the first time as contended by the appellants. It may be noticed that these aspect are factually not correct. The said inspection report of July 2012 was placed before the High Court in the review application filed by the petitioner's attorney which, as already noticed, was rejected. Secondly, the principle controversy in relation to the project being constructed on the left or the right bank of river Ravi was discussed in great detail and threadbare by the High Court in its judgment in paragraph 21. Similarly, the factual aspect of the fact sheet were also raised before the High Court and considered. If they were not specifically contended before the High Court, the answer thereto would be that

they ought to have been and would be deemed to have been contended and rejected. These aspects would bring into play the principles of constructive *res judicata*, the original judgment of the High Court being a judgment *in rem*.

36. Having found no substance in the plea of subsequent events we may also notice that the various contentions raised by the appellants do not have any merit. We would respectfully adopt the reasoning of the High Court as given in its judgment to reject all these contentions, besides, the specific reasons stated by us hereinabove. The principle of sustainable development pre-supposes some injury to the environment. Of course, such injury must not be irretrievable or irreversible. In the present case, the project sought to be established and operationalised on the river Ravi is an attempt to generate electricity, better the economy of the area, provide service opportunities and also to implement and restoration and rehabilitation scheme for the benefit of the people in the area. If one balances the advantages of the project as opposed to the disadvantages, the scale would certainly tilt in favour of establishment of the project.

We hardly find any merit in the various contentions raised by the appellant except to the limited observations afore recorded. Thus, the present appeal is dismissed, however, with the direction to the project proponent to seek clearance from the National Board for Wildlife in accordance with law.

37. Accordingly the appeal is disposed of without any order as to costs.

Hon'ble Mr. Justice Swatanter Kumar
Chairperson

Hon'ble Mr. Justice U.D. Salvi
Judicial Member

Hon'ble Mr. Dr. D.K. Agrawal
Expert Member

Hon'ble Mr. B.S. Sajwan
Expert Member

Hon'ble Dr. R.C. Trivedi
Expert Member

New Delhi
April 24, 2014