

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

.....

**M.A. NO. 1180 OF 2015 AND M.A. NO.1181 OF 2015**

**IN THE MATTER OF:**

T.N.Godavarman Thirumulpad

.....Petitioner

Verses

Union of India & Ors.

....Applicant

**IN THE MATTER OF:**

M/s Prashanti Surya Construction Co.  
Vill & PO Ghurkari,  
The & Distt. Kangra  
Himachal Pradesh.  
Through its Proprietor

....Applicant

Versus

Central Empowered Committee  
Through its Chairman  
Jawahar Lal Stadium, Lodhi road,  
New Delhi.

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Versus

1. Central Empowered Committee  
Through its Chairman  
Jawahar Lal Stadium, Lodhi road,  
New Delhi.
2. State of Himachal Pradesh  
Through the Chief Secretary

...Respondent

**Counsel for Applicant:**

Mr. Ritwick Dutta and Mr. Rahul Choudhary, Adv.

**Counsel for Respondents:**

Mr. Balendu Shekhar, Adv. With Mr. Akshay Abrol, Adv. For Respondent no. 1

Mr. Varinder Kumar Sharma, Adv. For HP for Respondent no. 2

Mr. Pinaki Misra, Sr. Adv. With Mr. Vikrant B. and Mr. Karanveer Jindal, Adv.

Mr. Maheen Pradhan, Adv. For MoEF

Mr. Sudipta Sircar and Mr. A.D.N. Rao, Adv. Amicus Curiae

**ORDER/JUDGMENT**

**PRESENT:**

**Hon'ble Mr. Justice Swatanter Kumar, (Chairperson)**

**Hon'ble Mr. Justice M.S. Nambiar (Judicial Member)**

**Hon'ble Mr. Justice Jawad Rahim (Judicial Member)**

**Hon'ble Mr. D.K Agrawal (Expert Member)**

**Hon'ble Mr. Bikram Singh Sajwan (Expert Member)**

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**Reserved on: 15<sup>th</sup> February, 2016**

**Pronounced on: 4<sup>th</sup> May, 2016**

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1. Whether the judgment is allowed to be published on the net?
2. Whether the judgment is allowed to be published in the NGT Reporter?

**JUSTICE SWATANTER KUMAR, (CHAIRPERSON)**

Before the Central Empowered Committee (for short 'CEC'), constituted by the Supreme Court of India, one Shri Atul Bhardwaj and the Bombay Environmental Action Group filed an Application being Application No. 1018, praying that the Hotel, the Shopping Complex and the Bus Stand being constructed by M/s Prashanti Surya Construction, at Mcleodganj, Distt. Kangra, Himachal

Pradesh, is in alleged violation of the Forest (Conservation) Act, 1980 (for short 'Act of 1980') and cannot be permitted to progress and the constructed path is liable to be demolished. While the matter was being considered by CEC, M/s Prashanti Surya Construction Company filed an Interim Application, being IA no. 1991 of 2007 before the Supreme Court of India praying for impleadment, grant of reasonable opportunity and recall of the orders if any, passed by the Supreme Court of India in relation to the project in question. The CEC had also directed at that time that the construction should not go on. Dealing with this matter, the Supreme Court of India vide its order dated 7<sup>th</sup> September, 2009 directed as under:

“In this Application, the applicant is seeking a direction for construction of bus stand. It is alleged that the CEC has prevented the applicant from constructing some parking area near the bus stand. We are told that the CEC is proposing to inspect the site and shall give a report. We think before giving any directions to the applicant the CEC may hear the applicant and file a report and meanwhile relating to the construction of the bus stand may continue but no other constructions shall be carried out.”

2. The CEC held hearings on 21<sup>st</sup> May, 2007, 10<sup>th</sup> July, 2007 and 31<sup>st</sup> October, 2007 and after site inspection it submitted its report to the Supreme Court of India. Taking into consideration the stand taken by the Project Proponent, State of Himachal Pradesh and the Complainants, the report made the following observations, conclusions and recommendations:

**“OBSERVATIONS AND CONCLUSIONS**

18. In the above background, the following specific observations are made by the CEC :

i) the MoEF has approved diversion of 0.093 ha. and 0.49 ha. of forest land for construction of parking place and

bus stand respectively at Mcleodganj. Instead of the above the Board of Directors of the Himachal Pradesh Bus Stand Management and Development Authority (HPBSM&DA) decided to construct a ground plus four storey shopping and hotel complex and a bus stand with shops/kiosks. This work has been entrusted on BOT basis to M/s Prashanti Surya Construction Company (M/s Prashanti Surya) after inviting tenders. The construction of shopping and hotel complex, shops/kiosks etc. involving major changes in the proposed scope of work has been planned and are being carried out in blatant violation of the provisions of the Forest (Conservation) Act, 1980. These constructions should not have been permitted/undertaken without obtaining the prior permission under the F.C. Act;

ii) the Board of Directors of M/s HPBSM&DA approved the construction of hotel and bus stand complex on 13.10.2004. During May, 2007, when most of the construction had already taken place and only after Application No. 1018 against the above construction was filed before the CEC, the State of Himachal Pradesh sought the approval of the MoEF under the F.C. Act for changing the land use from construction of parking place on 0.093 ha. of forest land and bus stand on 0.48 ha. of forest land to construction of hotel and bus stand complex on 0.573 ha. of forest land. The permission was also sought for change in name of user agency from S.D.O. (Civil) and H.P. Tourism Department to Himachal Pradesh Bus Stand Management and Development Authority. The above proposals were rejected by the MoEF on 12.6.2007. Consequently the entire construction done on the reserved forest land is in violation of the F.C. Act;

iii) as per the proposal filed under the F.C. Act, the estimated cost of the bus stand and the parking place was about Rs. 1 to 1.1 crore. For undertaking this activity on BOT basis, construction of shopping complex over 490 M<sup>2</sup> and a four storey hotel covering an area of 2289 M<sup>2</sup> by a private person has been permitted. The major expenditure on the combined activity is being incurred on construction of the hotel and shopping complex which raises serious doubts about the bona fides and public interest involved in permitting construction of shopping and hotel complex for financing the construction of bus stand complex.

iv) as per the RFP document issued at the time of inviting offers, the total area of the terminal block of bus stand was shown to be 3680 M<sup>2</sup> out of which 1100 M<sup>2</sup> at road level was for parking and the balance 2580 M<sup>2</sup> at lower level was for bus terminal. This included 359 M<sup>2</sup> for shops/kiosks, 960 M<sup>2</sup> for bus movement area, 451 M<sup>2</sup> for concourse and the balance area for pedestrian movement, sub way, stairs and lift, toilets, ramps, etc. However, subsequently the Board of Directors of the HPBSM&DA under the Chairmanship of Shri G.S. Bali, Transport, Tourism and

Civil Aviation Minister permitted construction of additional 1600 sq.mtr. area for commercial use at the ground floor. Simultaneously a tacit approval for the construction of additional four floors has been accorded by taking cognizance of the same in the minutes of the meeting of the Board of Directors. This has been done in flagrant violation of the conditions/details given in the RFP document and over ruling the objections raised by the Consultants of the HPBSM&DA. This is an extremely grave irregularity whether it be from technical, financial or administrative angle:

v) as against RFP proposal 2779 M<sup>2</sup> for the hotel and shopping complex, 3324.89 M<sup>2</sup> has been constructed — an excess area of 545.89 M<sup>2</sup>. In the terminal block for buses, as against RFP proposal of 3680 M<sup>2</sup>, an area of 9945.65 M<sup>2</sup> is being constructed - an excess area of 6265.65 M<sup>2</sup> (170.26%). This could not have been possible without the active connivance and support of the senior functionaries of the HPBSM&DA and the State and indicates blatant nepotism towards M/s Prashanti Surya,

vi) the construction of the hotel and bus stand complex has been undertaken without the mandatory approval of the building plans by the Town and Country Planning Department. The Board of Directors of M/s HPBSM&DA instead of strongly objecting to the above have quietly acquiesced in the matter;

vii) the construction being done by M/s Prashanti Surya involve violation of number of zoning regulations with respect to overall coverage, height of building block, set off, etc. The State Government has tried to justify the construction of hotel complex by stating that inadvertently an error has been committed by using the forest land for construction of commercial hotel complex rather than for a parking place and that it was an unintentional error on the part of the Consultants. This explanation is an after thought after this application was filed and cannot be accepted;

viii) it has been pointed out by the Committee constituted by the State of Himachal Pradesh that for proper use of the bus stand, additional forest land will be required to make provision for idle buses and for providing gradient for incoming and outgoing buses. There is no adequate space for the buses to turn in the area. The commercial complex on the ground floor of the bus terminal subsequently permitted by the Board of Directors, is not permissible. The gross violations and shortcomings noticed above should never have been allowed to happen;

ix) the Town and Country Planning Department issued repeated show cause notices and letters to stop the work. However, no effective steps were taken to stop the work continued full steam;

x) the CEC is unable to agree with the contention of M/s Prashanti Surya that the entire project has been

undertaken in public interest and that construction of the so called small hotel is for public service

xi) the proposal of the State to use ground floor of the hotel complex for parking instead of shopping is not physically and technically feasible;

xii) it has been stated by M/s Prashanti Surya that it has taken Rs. 8 crores as loan for which State of Himachal Pradesh stands a guarantee. If this statement is correct, it is a very serious lapse and stern action needs to be taken against the concerned persons for giving guarantee. The RFP document does not provide that the State will stand guarantee for repayment of loan taken by the successful bidder.

19. The CEC is of the view that the five storey hotel structure with 40 rooms and shopping complex constructed on the forest land is totally unauthorised and illegal. The ex-post-facto approval sought under the F.C. Act has already been rejected by the MoEF. This massive structure has been constructed without obtaining the requisite permission from the Town and Country Planning Department. This hotel structure abuts the main road to Mcleodganj from Dharamshala. The structure has thus knowingly and brazenly been allowed to come up in a location which is already facing serious parking problems and acute traffic bottlenecks. Further no parking facility is available in this hotel complex to cater for the clients and as a result parking and traffic related problems will only worsen. It also appears that the so called provision for parking in the hotel complex, first on the ground floor and then on another floor was meant to be only on paper. M/s Prashanti Surya instead has from his point of view visualized a very convenient arrangement whereby his clients staying in the hotel complex would use the car park at the adjacent bus stand complex across the main road. While this would solve M/s Prashanti Surya's parking problem in the hotel complex, there would in effect be no net increase in car parking place in Mcleodganj because whatever new parking area is created or will be created at the bus stand complex would be used by the travellers staying at the hotel complex.

20. The Bus Stand Complex on the 0.48 ha. forest land is also unauthorized and illegal. The Town and Country Planning Department is yet to give its approval to the same. Even the Consultants as early as in July, 2006 had observed that in the Bus Stand Complex M/s Prashanti Surya has proposed major deviations in the commercial area from those in the conceptual drawings and such major deviations are not permitted as per the contract. While the RFP/BOD had initially prescribed/approved construction of only two floor levels at Bus Stand (which also the Town and Country Planning Department is yet to approve) four additional floors namely Basement II, Basement III,

Basement IV and Basement V have been constructed and which explains why the constructed area is 170.86% in excess. Further, these basements (II, III, IV & V) have been constructed for commercial use and there is no possibility of using them for parking. Even the Road level and Basement I have serious limitation with regard to their use as car park and bus stand and as seen earlier would need major structural modifications for the movement of cars and buses. It is clear that M/s Prashanti Surya all through did not have any public interest whatsoever in mind and instead his focus all along has been as to how to extract the maximum benefit/profit for himself through the commercial use of the unauthorized and illegal structures/buildings constructed by him.

21. The Board of Directors of the HPBSM&DA under the Chairmanship of the then Transport, Tourism and Civil Aviation Minister, Government of Himachal Pradesh has openly favoured M/s Prashanti Surya by:

- a) approving construction of 1600 sq.mtr. of commercial area at the ground floor of the bus stand complex and which was not provided in the RFP document;
- b) giving tacit approval for the construction of four additional floors in the bus stand complex and which was not provided in the RFP document;
- c) deliberately overlooking the valid objections raised by the Consultants of HPBSM&DA with regard to the additional area being constructed by M/s Prashanti Surya;
- d) permitting the construction of the hotel and the bus stand complexes without first obtaining the mandatory approval of the plan from the Town and Country Planning Department,
- e) knowingly ignoring the stop work notices issued by the Town and Country Planning Department and allowing continuance of construction work: and
- f) permitting excess construction of area over and above the plans prepared by M/s Prashanti Surya and filed with the Town and Country Planning Department.

#### RECOMMENDATIONS

22. The above clearly highlights that there has been absolute anarchy in the matter of construction of the parking place and Bus Stand. At the same time there is a very real need at Mcleodganj for both the Parking place and the Bus Stand Complex on the two pieces of forest land. With a view to finding a way out of this terrible muddle created by the deep vested interests and at the same time ensuring that those who have connived in the serious lapse are not allowed to go scot free the following is recommended:

- a) the hotel complex structure should be pulled down immediately and the 0.093 ha. of forest land should be cleared of debris. This should be done within three months. Thereafter a Parking place may be constructed as was

originally visualized when the project was approved under the Forest (Conservation) Act, 1980. Prior to that approval of the Town and Country Planning Department may be taken as required under the law. This will send a clear signal to the building mafia and their supporters that such brazen acts of illegal and unauthorized construction will not be tolerated;

b) the serious shortcomings noted in the construction of Bus Stand Complex would need to be rectified with the approval of the Town and Country Planning Department. Towards this end it is proposed that the State Government may constitute a Committee with the Chief Secretary as Chairman with the Principal Chief Conservator of Forests, senior most Engineer in the State PWD and a representative of MoEF as Members. The Director, Town and Country Planning Department, Himachal Pradesh, could be the Member Secretary. The Committee may immediately go into the entire matter and may in a time bound manner within two months propose to this Hon'ble Court how best the Bus Stand Complex can be salvaged from the present mess so that the State Government is able to:

i) ensure best and most efficient use of the Bus Stand so that the maximum number of buses are able to ply from there. While providing for commercial shops, public toilets, restaurants, telephone booths and the like at the Bus Stand the only consideration should be the actual requirements of the travelling public:

ii) ensure maximum parking place for vehicles.

c) there has been a collective failure and serious lapses on the part of the officials and others of the State Government connected with the unauthorized and illegal construction of the twin project on the two pieces of forest land and reflects on the pathetic state of affairs in the matter of governance. In this background the State Government of Himachal Pradesh has to take the blame and may be directed to deposit an amount of Rupees one crore in a special fund for the conservation and protection of the forest and wildlife;

d) the State Government may also be directed to simultaneously identify and initiate stringent and deterrent action in a time bound manner against all the concerned persons and officials for complete abdication of their responsibility and accountability in the matter of governance and who are responsible for blatantly allowing the unauthorized and illegal building structures to come up on the two pieces of forest land in flagrant violation of the Forest (Conservation) Act, 1980, the H.P. Town and Country Planning Act, 1977 and other relevant local laws; and

e) the services of M/s Prashanti Surya Construction Company should be dispensed with and M/s Prashanti Surya should be blacklisted and should also be penalized suitably for the grave illegalities and irregularities knowingly committed to promote his private interests.”



3. It is clear from the above report of the CEC that there are serious violations of law. It is a project coming up in the forest area without Forest Clearance, and even the consent to establish and/or operate has not been granted by the concerned Board. Moreover, this project is bound to have an adverse impact on environment and ecology. The recommendations of the CEC clearly state that the whole complex should be pulled down and only a parking place must be constructed as was originally visualized, for which the Forest Clearance under the Act of 1980 has been granted. The CEC also blames the concerned authorities by suggesting that there has been collective failure and serious lapses on part of the State Government and its officials connected with the unauthorized and illegal construction of the project, which was constructed on the two pieces of land. The report also observed that the State Government should be directed to deposit Rs. 1 Crore in a special fund and the project proponent should be blacklisted and penalized suitably for the grave illegalities and irregularities committed by him.

4. The project proponent in the application before the Supreme Court for setting aside the CEC report dated 18<sup>th</sup> September, 2008 has taken up a stand that the project proponent was permitted to continue the work relating to construction of bus stand which has been completed. The project proponent was given a hearing by the CEC and the Chief Secretary of the State was also allowed to file an affidavit in which he took a complete somersault and put the entire burden on the project proponent. According to the project

proponent, he has not been given fair hearing and had a right to file a detailed reply. It has been further stated by the respondent that the construction of bus stand, parking lot cum hotel in Mcleodganj was stopped. The counsel was not permitted to intervene by the CEC.

5. In June, 2007 a reply was filed on behalf of the State supported by an affidavit of Managing Director, Himachal Pradesh Road Transport Corporation and Chief Executive Himachal Pradesh Bus Stand Management and Development Authority, Shimla (for short 'HPBSM&DA') before the CEC. The CEC after giving notice to parties, including the project proponent, inspected the site on 27<sup>th</sup> September, 2007. The project proponent as well as the entire government staff was present at the time of inspection. However, report of the said inspection was filed by CEC on 18<sup>th</sup> September, 2008 before the Supreme Court. It has been submitted by the project proponent that the CEC has relied in its report mainly on the affidavit of the Chief Secretary dated 18<sup>th</sup> August, 2008. Dealing with the report of the CEC dated 18<sup>th</sup> September, 2008, the project proponent submitted that the CEC has been misled by the affidavit of the Chief Secretary which is actually based on incorrect facts and is politically motivated. The entire project was conceived, planned and offered to the bidders on Build, Operate and Transfer (for short 'BOT') basis by the State and its agencies. The bus stand was completed in view of the order of the Supreme Court dated 7<sup>th</sup> September, 2007. It has also been stated that the project proponent had filed an application before the CEC but the same

has not been dealt with till date. In view of the policy decision taken by the State Government and its agencies, some forest land in Mcleodganj was allowed to be used for non-forest purposes. Since the State was not having any funds, to save it from hassles of constructing and running a bus stand and parking, it was decided by the government to construct a hotel along with the parking area to make it economically viable and for bids were invited and the project was offered to successful bidders on BOT basis. Many bidders had applied and the contract was awarded to the project proponent on BOT basis for a concession period of 16 years 7 months and 15 days, which would expire in 2022. It has been submitted that the CEC exceeded its jurisdiction in dealing with the BOT contract, as it had to deal with environment matters only. The conceptual plan prepared by the State agencies has offered a commercial complex including a budget hotel with restaurant and food plazas on the parking side of Dharamshala- Mcleodganj road. There is another road from Mcleodganj to Naddi just behind the hotel and it runs parallel to the earlier stated road. The project proponent has submitted that he cannot be blamed for any lapses as he has not encroached upon any extra bit of forest land beyond the land provided. The estimated cost given in the tender itself was Rs. 9.50 crores. Thus, it has been stated that the blame if any, has to be on the State and not on project proponent. According to the project proponent, all required sanctions were represented to have been obtained by the State and its agencies to complete the project. The project proponent was neither entitled nor supposed to get any

such clearances. The CEC has erroneously failed not only to apply its mind and discuss the merits of submissions filed by the project proponent, but the CEC has also not considered the reply affidavit filed by the contesting respondent, i.e. Managing Director, Himachal Road Transport Corporation.

6. In view of the policy decision of the State for making the project economically viable, the project proponent has taken up construction of the project and has already spent Rs. 19 crores on the composite project of Kangra bus stand and Mcleodganj parking cum hotel. Out of this amount, Rs. 6.5 crores was spent on Kangra bus stand project. Out of the remaining Rs. 12.5 crores, Rs. 9.5 crores were spent on Mcleodganj bus stand only and an amount of Rs. 3 crores were spent on commercial complex including the hotel in question. Rs.10 crores has been spent by the project proponent himself and Rs. 9.5 crores are secured loans from the banks. It has been further submitted that the approval for non-forest activity for the bus stand has been taken and 70 per cent of the revenue cost is to be recovered from the hotel, while 30 per cent is to be recovered from the bus stand. The project proponent submitted that he would suffer serious financial and other losses if the recommendations of the CEC are accepted. Thus, the project proponent prays that the report of the CEC dated 18<sup>th</sup> September, 2008 should be quashed and the project proponent should be permitted to complete the project and run it on BOT basis as per the contract.

7. Reply had been filed by the HPBSM&DA before the CEC. It is stated that the authority was constituted in 2000. The Government of India, Ministry of Environment, Forest & Climate Change (for short 'MoEF&CC') vide its letter dated 12<sup>th</sup> November, 1997 had accorded approval for diversion of 0.093 ha of forest land for construction of parking place at Mcleodganj, District Kangra. This approval was accorded on the proposal submitted by the S.D.O. (C), Dharamshala and another approval for diversion of 0.48 ha of forest land was issued by the Government of India on 1<sup>st</sup> March, 2001 in favour of Tourism Department, Himachal Pradesh for construction of bus stand at Mcleodganj. This land is located at Dharamshala-Mcleodganj main road. One piece of land is above the main road while the other is below the main road, facing each other. It has been submitted by the answering respondent that NOC for construction of the bus stand was obtained from the Director, Tourism and for this purpose, the BOT tenders were invited. It was finally awarded in favour of the project proponent. Later, it was felt that the BOT is viable only if it has sufficient commercial space and as per the design adopted for the bus stand at Mcleodganj, there is a provision of parking in the ground floor on the piece of land measuring 0.093 ha and commercial hotel at the top. At the same time, there is a provision of parking in two floors for bus stand on the land measuring 0.048 ha. There will also be a provision for 3800 sq. mtrs. of parking on the land and 652 sq. mtrs. in the ground floor, on the respective pieces of land. The permission for removal of the total trees in both the pieces of land has not been

exceeded as per this reply. No violation regarding the area and removal of number of trees has been committed and in future, no additional forest land will be utilized. The bus stand and car parking at Mcleodganj with all required facilities was constructed for convenience of the general public. The concession period as claimed by the project proponent has not been disputed by the answering respondent. It has been submitted that the area is sufficient for construction of bus stand complex and car parking required for convenience of general public and passengers. There is no misuse of land diverted for the construction of bus stand and car parking. 0.093 ha of land has been diverted as per the order of the Government of India dated 12<sup>th</sup> November, 1997 for the construction of car parking. The plan for construction of the bus stand at Mcleodganj has already been submitted to the Town and Country Planning Department, after completing all formalities and the concerned departments have been consulted during the construction work of the bus stand at Mcleodganj. The respondent submitted that the BSM&DA has assigned construction work to the project proponent on BOT basis for limited period and the averments with regard to approval of hazardous construction being in fashion have been denied by this authority.

It has also been stated by the respondent that the hotel-cum-parking being constructed on the 0.093 ha of land is an integral component of the comprehensive bus stand project under BOT and is intended to cross-subsidize the bus stand component which, by itself, is not financially viable.

8. The State of Himachal Pradesh has also filed a reply to the application of the project proponent before the Supreme Court. They also filed their response to the report of the CEC submitted before the Court. According to the State, it had also filed the reply dated 29<sup>th</sup> June, 2007 supported by the affidavit of the Chief Secretary of the State of Himachal Pradesh. Referring to the permission granted by the MoEF&CC, it had been stated by the State that according to them, no illegality had been committed either on the level of Board or State Government and if any mistake has been committed, the State had decided to revisit the issue by taking up the matter with the MoEF&CC. It has been submitted by this respondent that since large numbers of tourists come to Mcleodganj, the proposal of new bus stand site was taken up and it was decided to construct a bus stand. As per proposal, the conceptual plan envisaged a multi-level commercial complex towards the hill side with shops at road level, dormitory and a budget hotel at the first, second and third floor level and dining/restaurant and food plazas at the top level with access from the adjoining Mall road. As per the proposal, the valley side was to have surface parking for 50 cars at the road level. This request for proposal was issued in July, 2004. No person challenged the said request for proposal. The suitable concessionaire through bidding took place in which different parties had participated and the project was awarded to the project proponent upon execution of concession agreement dated 23<sup>rd</sup> December, 2004. The decision to bid on the land on which permission from Government of India for

non-forest use of forest land had already been obtained was taken in April, 2002. The first tender for the work was opened in 2004 and was rejected as concession period sought by the single tenderer was of 75 years. Seeing the situation, it was decided to club the work with that of bus stand at Kangra and fresh offer after clubbing the project of Kangra & Mcleodganj was issued in August, 2004 and finally the work was awarded to the project proponent. The findings of the CEC or suggestions made therein that BoD (Board of Directors) of HPBMS&DA in its meeting during 2004-06 have gone against the recommendation of the consultants may not be entirely true. The consultant was the entity which formulated the RFP in the first place, wherein it was stated that M/s. EPC (M/s. Engineering and Planning Consultants) did not recommend increase in the commercial area in the terminal block of the bus stand on the valley side. This part of recommendation by M/s. EPC was duly considered by the Board in its meeting and the decision was taken to provide parking space and construct the commercial complex in view of increase in the cost due to increase in number of floors in the bus stop block. While so deciding, the board had commercial viability of the project in its mind. Yet, the board did take the necessary caution of subjecting its decision to the scrutiny of Town and Country Planning Department. The board in its meeting dated 25<sup>th</sup> July, 2006, which was attended by various authorities, decided that floors and the area at the bus stop block has increased due to the site condition and there is an absolute need and requirement of the town to have more parking space.



Therefore, design proposed by the project proponent for the hotel block was also approved. The memorandum containing the drawings were sent to M/s. EPC on 14<sup>th</sup> July, 2006, which made the observations amongst others that the concessionaire has proposed major deviation in the commercial areas from those in conceptual drawings. In the proposal, project proponent has added approximately 3700 sq. mtrs. of commercial area in the terminal block over the areas as per conceptual tender proposal. They also noticed that there were no substantial changes in the areas and uses in the hotel block. They also observed that major deviation from conceptual plan and the total areas at this stage are not permitted as per contract and the bidders were permitted to submit the alternative plans at the time of bidding only. Despite this decision, the project proponent was permitted to carry on the work later.

9. The Board had considered the matter and detailed deliberations were held on the design submitted by the project proponent. Increase of the area at the bus stand was stated to be done due to site condition and need of the public. The Board decided that:

- i. on the top floor of the bus stop block an area measuring 1100 sq. ft. for the parking and 1600 sq. ft. for commercial complex be allowed in view of the increase in the cost due to increase in the cost due to increase in number of floors in the bus stop block.
- ii. the construction of the car parking on the ground floor of the hotel building and commercial area on the top floor of the bus stop block shall be subject to the approval of Town Country Planning Department.
- iii. M/s. Prashanti Surya Construction Company be asked to submit a proposal indicating increase in the

cost of construction and net benefit likely to be accrued to him in view of increase in the commercial area and benefit he will pass on to the Authority. The proposal of the party after scrutiny be brought before the Board in its next meeting.”

According to this respondent, the decisions were taken not by any individual, but collectively by the members of the Board and other officials.

10. It was thus prayed that the recommendations given by the CEC for pulling down the hotel complex structure constructed on 0.093 ha of forest land may kindly not be executed in the larger public interest as the project is completely owned by the State Government and in case the recommendations of the CEC were accepted, then this will, besides causing financial loss to State Exchequer, also not serve any public cause, because the complex which has been constructed at the site is required keeping in view the flow of tourists to the town. It was further submitted that the recommendations of the CEC are bad in law as no opportunity was given to the State of Himachal Pradesh to put forth its stand after the site visit. It has been alleged by the answering respondent that the application by the private applicant has been filed after three years of execution of the agreement to construct the commercial structure and as such the same should not be entertained. It is the case of the respondent authority that they have not committed any illegality in the construction of the bus stand complex and there has not been any collective failure nor any serious lapses on the part of the officials and others connected with construction of the twin project. The agreement between the project proponent and the

authorities contained the clause for modification of the proposal which has been modified in accordance with law. It was averred that the construction activity carried out on both pieces of forest land cannot be termed to be illegal or unauthorised, because there already existed an approval from the MoEF&CC under the provisions of the Act of 1980. With these averments, it has been prayed by the respondent that the recommendation of the CEC should not be allowed.

11. As all the parties concerned and even the CEC has referred to and relied upon the affidavit dated 18<sup>th</sup> August, 2008 filed by the Chief Secretary, we would discuss the averments made therein in some detail at this stage. In this affidavit, reference has been made to some facts based on records which have already been referred above. After noticing that the Forest Clearance/permission for diversion of the forest land for non-forest activity was granted by MoEF&CC in relation to 0.093 ha for construction of parking place at Mcleodganj on 12<sup>th</sup> November, 1997 and 0.48 ha for construction of bus stand at Mcleodganj on 1<sup>st</sup> March, 2001, it has been stated that the BoD of HPBSM&DA with reference to the design prepared for the bus stand invited tenders on BOT basis. Initially, single tender was received and the BoD in its 15<sup>th</sup> meeting held on 13<sup>th</sup> October, 2004 has approved the construction of bus stand on BOT basis. This bus terminal was to be constitutive of two levels with a total built up area of 3680 sq. mtrs., out of which level-1 was to be of 2580 sq. mtrs. comprising of the bus terminal facilities and the level-2, i.e., surface parking was to have an area of 1100 sq. mtrs.

for parking of 50 cars. It has also been submitted that the commercial complex (North Block) was to have four levels, with shops at the first level and hotel at the other three levels in a total area of 2779 sq. mtrs. The inspection was conducted by the Chairman, CEC and the matter was discussed by the BoD on 28<sup>th</sup> June, 2008. At this stage, in order to assess the factual position of this case, the BoD, HPBSM&DA with other officers from different departments of the State of Himachal Pradesh constituted a committee to look into the matter. Certain questions were considered by this committee which submitted its report on 7<sup>th</sup> July, 2008. The main findings of the report are as under:

- i) The Committee observed that the construction being carried out by the H.P.BSM, & DA is not as per the drawings submitted to the Town & Country Planning Department which have been further submitted to the Govt. for necessary relaxation.
- ii) The plans have been approved by the Board of Directors only and not by the Town and Country Planning Department.
- iii) The Committee verified the parking area made available as per maps submitted to the Govt. in the parking floor and top floor and observed that the space proposed for parking is being used for other purpose. However, the enforcement of the columns has been extended above the slab level which is required to be removed to slab level in the open parking area at road level in the open parking area at road level floor. Town & Country Planner (HQ) apprised the committee that as per Govt. notification dated 27.09.2002 and provision of the Development Plan, no construction shall be permissible above vision line (1.50m) on valley side of highways/major roads, in view of above, the Committee is of the opinion that the proposal of commercial floor be revoked at road level and entire space be kept for parking.
- iv) The Committee observed after analyzing the space available that the space is not adequate. The buses in the bus bays and observed that the space is not adequate. The area beyond the RCC columns is required to be kept free exclusively for the above

purpose. Moreover, the row of RCC columns in front of the bus bays is creating hindrances for the turning, maneuvering of the buses, as such in front of RCC columns be used for movement of buses. At present, no provision is made at site for idle parking of buses which otherwise is essential for the smooth functioning of bus stand.

- v) The bus bays has been constructed at right angle to the building, which require excessive amount of space for bus movements. Buses usually will have to wait until first bus exist. The turning radius for long body buses, which are being generally plied, is about 15 m against the 11.15 m of space available at site.
- vi) The Committee is of the opinion that instead of bus bays constructed at 90 degree i.e. at right angle, the possibility be explored for the contraction of diagonaj bus bays so that the space required for tuning and maneuvering shall be comparatively less.
- vii) In addition to above, the Committee observed that entry to the bus stand is neither adequate nor of required grade. The ramp gradient as shown in the plan i.e. 1.12 is not feasible/available at site. The report of the committee is annexed as Annexure-II.”

12. Further, in the affidavit of the Chief Secretary, it is submitted that the matter regarding approval of concerned authorities was discussed by the BoD in the meeting held on 21<sup>st</sup> June, 2006 and in subsequent meetings. It was felt that the matter should be placed before the Council of Ministers, which was so placed on 28<sup>th</sup> April, 2007 by the Town and Country Planning Department and the item was withdrawn in defence of the fact that this case was already under consideration before the CEC. The matter was again placed before the BoD on 25<sup>th</sup> July, 2006 and it was also informed that the project proponent was allowed to start construction in anticipation of transfer of land and approval of drawings and design by the Town and Country Planning Department with a view to expedite the construction of bus stand. It was also proposed that the concession

period will be fixed from 15<sup>th</sup> December, 2005, the date of commencement of construction. The project proponent was also required to submit a proposal indicating increase in the cost of construction and net benefit likely to be accrued to him in view of increase in commercial area and the benefit which will be passed on to the HPBSM&DA. Revised case was sent to MoEF&CC on 8<sup>th</sup> May, 2007 seeking permission for change of user agency from SDO (Civil) and Tourism Department to HPBSM&DA and to permit construction of commercial area on a piece of land measuring 0.093 ha treating both the buildings, i.e., bus stand and hotel block as part of the bus stand complex. The case was rejected by the Conservator of Forest (Central) vide letter dated 12<sup>th</sup> June, 2007. The deviation from the Request for Proposal (RFP) as reported by Chief Executive Officer, HPBSM&DA vide its letter dated 5<sup>th</sup> August, 2008 after the visit of the Committee constituted by the board on 28<sup>th</sup> June, 2008 were as under:

- “1) Comparison of area as per RFP Document and Actual Construction done
- i) Total area as per RFP document  
= 6459.00 Sq.mtrs.
  - ii) Total area actually constructed as on 7.7.2008  
= 11341.00Sq.mtrs.
  - iii) Addl. Floors constructed = Four Floors
  - iv) Total deviation as on 7.7.2008 from RFP proposal  
=4882 Sq. mtrs.
- II) Comparison of area approved by the BOD and Actual Construction
- i) Total area as approved by BOD=8059 Sq. mtrs.
  - ii) Total area constructed as on 07.07.2008=11341 Sq.mtrs.
  - iii) Addl. Floors constructed by the =Four Floors party in comparison of the approval of BOD
  - iv) Total deviation as on 7.7.2008=4694.34 Sq.mtrs. i.e. 58.25%

The copy of letter dated 5.8.2008 as mentioned in para-15 has been added as Annexure-IV to this Affidavit.

The approval of Board of Director over and above the RFP document area of 6459 square meters was subject to approval of Town and Country Planning Department Para-13(ii).

The above factual position is submitted for the consideration by the Hon'ble Central Empowered Committee

Deponent”

13. Above is the case pleaded by parties and the factual matrix that emerges from the records produced before the Tribunal, it is undisputed that the entire project whether as initially envisaged or as modified entirely falls in the forest area. The provisions of the Act of 1980 will govern the projects. Needless to notice that the settled position of law is that the provisions of Section 2 of the said Act of 1980 are mandatory and thus would rule out the application of substantial compliance of these provisions. The Government of India vide its letter dated 12<sup>th</sup> November, 1997 had accorded approval for diversion of 0.093 hectare of forest land for construction of a parking place at Mcleodganj in the forest division, Dharamshala subject to the conditions stated therein. Again the Government of India, after a lapse of more than 3 years accorded approval in favour of the Tourism Department of Himachal Pradesh for construction of Bus Stand at Mcleodganj subject to certain conditions and for conversion of an area of 0.48 hectare of forest land vide its order dated 1<sup>st</sup> March, 2001. In the year 2002, the HPBSM&DA decided to construct the Bus Stand at Mcleodganj by clubbing both the pieces of land, namely the Bus Stand and the Parking Place as one composite proposal. This was probably

suggested keeping in view the location of the two pieces of land and the fact that No Objection Certificate was obtained from the Director of Tourism for this purpose. The concerned departments of the State of Himachal Pradesh because of financial constraints felt that the project should be constructed on Build Operate Transfer Basis (BOT) having private participation. This decision was taken on 7<sup>th</sup> November, 2003. Proposals from the private enterprises were invited. In 2004 since there was a single tenderer the same was rejected and tenders were re-invited. Thereafter, fresh tenders were invited for Bus Stand at Mcleodganj and Kangra in July, 2004. On 13<sup>th</sup> July, 2004 when the fresh tenders were being invited by the HPBSM & DA, the tenders were called for construction of inter State Bus Stand for Kangra and Mcleodganj which were clubbed under the same project. It was at that time that the RFP provided for Multilevel Commercial Complex towards the hill side. Valley side shall be surface parking for 50 cars at the road level while bus boarding/allied activities shall be at the lower level with provision for shops and kiosks and hotel on the above floor. On 13<sup>th</sup> October, 2004, four companies applied for the project and the project proponent in this case was called and consequently awarded the project on 8<sup>th</sup> November, 2004 for a period of 16 years 7 months and 15 days. A concession agreement was entered into and as per the agreement the project proponent had to raise construction in accordance with the plans provided by HPBSM&DA. It is evident from the record that the construction of the composite project was permitted to be started by some department of the State of



Himachal Pradesh in anticipation of transfer of land and without approval of drawings by Town and Country Planning. It is unquestionable before the Tribunal that no authorised clearances or No Objection Certificates were obtained including the approval of the Central Government under Section 2 of the Act of 1980.

14. Vide letter dated 25<sup>th</sup> May, 2005, CEO, HPBSM&DA, had stated that the factors taken up by the project proponent in the letter will drastically change the cost of the project and hence need change in the concession period as per the agreement.

15. As late as 28<sup>th</sup> September, 2005 the land needed for the Bus Stand which belonged to Department of Tourism had not been transferred to the Director of Transport. It was only anticipated that the Tourism Department had given NOC and therefore steps should be taken to get the land transferred and permission for felling trees in favour of the Tourism department would be sought. The SDM, Dharamshala has raised objection in regard to getting of NOC in favour of the Tourism Department.

16. On 17<sup>th</sup> July, 2006 the Engineers and Planning Consultants had written to the Chief Executive Officer HPBSM&DA stating that major deviation has been proposed from the conceptual drawing and an area of 3700 sq. mtrs. of commercial area in the terminal block over the area as per Conceptual tender proposal has been added. The Consultant recommended that the concessionaire may be asked to follow the conceptual proposal with minor corrections. The Chief Executive Officer has also required the project proponent

to submit the revised proposal of construction and net benefit likely to be incurred in view of the letter by CEO dated 28<sup>th</sup> August, 2006.

17. Vide letter dated 4<sup>th</sup> January, 2007 the project proponent submitted revised drawings for BOT. No specific rates were given as far as total benefit was concerned. It was stated that total benefits likely to accrue was also calculated on the present rental value in the area, which is again upon the final rates. The answers were vague and the project proponent asked for enhanced concession period. Vide letter dated 21<sup>st</sup> February, 2007 DFO, Dharamshala had written to the Chief Conservator, Dharamshala that MoEF had permitted transfer of the forest land in Mcleodganj on 12<sup>th</sup> November, 1997 for the purpose of construction of parking place. While enclosing the copy of the permission, the further stated CEO of HPBSM & DA had requested for change of land use for the same land for construction of Bus Stand in place of the parking. This shows that even as of 2007 there was no clarity as to the project as well as with regard to the permission sought from the concerned authority. The Town and Country Planning Department of the State on 8<sup>th</sup> March, 2007 had written to the Divisional Magistrate cum Officer on Special Duty of the HPBSM&DA that despite repeated correspondence related to the proposed Bus Stand/Bus Terminal made by the office no, compliance has been made by them till date. The clearance of the Forest Department for construction on land classified as reserve forest and anomaly regarding site plan not as per revenue boundary is still awaited. It is also stated in the letter that no 'No Objection Certificate' for installation of service

connection shall be released without mandatory approval. Vide letter dated 17<sup>th</sup> March, 2007, the CEO of HPBSM&DA had informed the Principal Chief Conservator of Forests that after referring to the previous correspondence and the fact of grant of clearance from Government of India, he requested him to take up the matter with the Government of India for revision of change of land use ad-measuring 0.93 Hectares for construction of Bus Stand Complex in place of Parking only.

In the Assembly of the State, a question had been raised regarding the land use permission which was taken on 27<sup>th</sup> December, 2006 to which the Chief Minister had given an assurance on the floor of the House that the matter would be enquired into.

18. This approval never came but the project continued without proper sanction, authority and on adhoc basis. From the correspondence on record it appears that the Chief Minister of Madhya Pradesh had laid the foundation stone of the proposed Bus Stand at Mcleodganj. The commercial complex was neither the part of the project at the initial stages nor was ever sanctioned or granted appropriate clearance at any stage. Twenty Four trees of bard lean and Deodar were on the Bus stand which according to the Project Proponent were required to be removed as well as the total floor has to be made to bring it to the road level.

While submitting reply to a start question of the State Assembly as on 17<sup>th</sup> March, 2007 the Conservator of Forest, Wildlife Circle had written to the Principal Chief Conservator of Forest

expressing doubts about this project with regard to how the Department of Tourism has become the user agency. Thus, there were inter departmental conflicts in relation to all the activities of this project. The project was not only excess in coverage area but even in height of the parking floor, building block, setbacks and violative of the zonal regulation. Vide letter dated 13<sup>th</sup> April, 2007 it was proposed that relaxation should be provided for all these factors including the change of land use as the Government Agency was involved.

19. As late as on 21<sup>st</sup> April, 2007, Director, Tourism and Country Planning Department had written to the Principal Secretary, Pollution Control Board as under:-

“It is further submitted that as per jamabandi the classification of land bearing kh. No. 90/1, 139, 140/1 & 141/1 is shown as reserved forest, wherein no construction is permissible. The ownership of land is in the name of H.P. Government and possession is in the name of Transport Department of H.P. However, the copies of approval for diversion of 0.093 hectare forest land for construction of parking place under section 2 of Forest Conservation Act by the Conservator of Forest (Central), Regional Office, Chandigarh vide F.No. 9-373/97-ROC dated 12.11.1997 and 0.48 hectare forest land for construction of Bus Stand vide no. 9-559/98-ROC-295 dated 1.3.2001 in favour of Tourism Department were submitted on 9.3.2007, but it is not clear from which Khasra number the approval for diversion of forest land for construction of parking and Bus Stand were given. No Objection Certificate of Tourism Department has also not been given with the case

Keeping in view the above facts the planning permission case alongwith drawing revenue papers & other documents are sent herewith for taking further necessary action, please.”

20. From the bare reading of the above paragraph it is clear that this project not only raised unauthorised and illegal construction,

but the project of hotel was in violation of all laws, regulations and had no permission for change of land use. It is also indicated in these letters that even the Khasra Nos. on which the project was approved and for which Khasra No. approval for diversion of the various area for non forest activity was granted was not clear. It was only on 19<sup>th</sup> May, 2007 that NOC was issued by the Conservator of Forest for use of land measuring 0.48 Hectare for construction of Bus Stand. At that time the project had already commenced.

21. Despite the fact that all the authorities concerned were fully aware of the legal requirements, they still preferred to carry on with the project contrary to law, without satisfying the legal requirements in that behalf. MoEF & CC vide its letter dated 12<sup>th</sup> June, 2007 rejected the permission for changing the land use from construction of parking, Bus Stand Complex and hotel on entire 0.973 Hectare of forest land on non forest land as well as the change in the name of the user agency, i.e, SDO Civil and Himachal Pradesh Tourism Department. The same reads as under.

“Diversion of 0.573 hectare of forest land out of which 0.093 hectare of forestland in favour of SDO (Civil) Dharamshala for construction of Parking place at MCleod and 0.48 hectoare of forest land in favour of Tourism Department for construction of Bus Stand at Mecleod Ganj within the jurisdiction of Dharamshala Forest Division and District Kangra, Himachal Pradesh.  
Sir,

Please refer to your letter No FFE-B-F (2)-87/97 dated 8<sup>th</sup> May, 2007 on the above mentioned subject seeking approval of Government of India for changing of land use from construction of parking on 0.093 hectare of forest land and Bus Stand Complex and Hotel on entire 0.573 hectare of forest land for non-forestry propose under Forest (Conservation) Act, 1980 and change in the name of user agency from SDO (Civil) and HP

Tourism Department to HP Bus Stand Management and Development Authority.

The request of the State Government has been examined and the competent authority conveys its inability to consider the same and it is therefore, rejected.”

22. HPBSM & DA vide letter dated 26<sup>th</sup> June, 2007 in furtherance to the letters received by it, informed the applicant to stop the construction work. It is on that stage that CEC interfered and also already noticed that the CEC has pointed out very serious irregularities, illegalities and possibility that the environment and ecology of the eco sensitive area is exposed to degradation and damage.

23. Despite such definite refusal, the project proponent in collusion with the authorities concerned proceeded with the construction. Not only this, the authorities even consented to continuation of project activity on temporary and *ad hoc* basis. However, vide letter dated 28<sup>th</sup> June, 2007, the Conservator of Forest had written to the Principal Secretary that the work of the project should be stopped immediately and responsibility should be fixed. Vide the same letter, it reiterated the Government of India's inability to accept the proposal. The matter was placed before the Cabinet at the State and as already noticed, no final decision had been taken as at that time the CEC had already stepped in. The four storey structure had been raised. The attempts were to regularise the entire project and taking it over by the State Government. However, the same did not materialise.

24. The report of the CEC is self explanatory as already noticed and points out the serious damage that has been done to nature, environment and ecology of that area. The forest area has been damaged. Vide letter dated 24<sup>th</sup> December, 2008 the Transport Department had also notified that even if the CEC's recommendations are accepted the structure may have to be demolished and the State should not take over the project.

25. From the above discussion, the following undisputable facts emerge.

- A. At no point of time there was any permission, sanction or approval granted by the Competent Authority in the State Government and/or Central Government under the Act of 1980 and even other relevant laws for the hotel and shopping complex.
- B. Right from the initial stages, the hotel and shopping complex were never a part of the project for which the Government departments and/or the project proponent even submitted applications for grant of approval/sanction from the Competent Authority. MoEF&CC vide its letter dated 12<sup>th</sup> June, 2007 had specifically declined the permission for conversion of the forest land for any other non forest activity. Once such permission for hotel and shopping complex was declined, the project proponent could not have been taken up and commenced any activity.

C. The project proponent not only started the construction without obtaining appropriate approval and sanction from the concerned State and the Central Government, but had also worked in collusion with some of the authorities who consented the commencement of construction temporarily which was entirely uncalled for and in fact was illegal.

26. The Government of India had accorded approval on 12<sup>th</sup> November, 1997 only for construction of Parking Place at Mcleodganj in favour of the Tourism Department. On 1<sup>st</sup> March, 2001 approval was accorded for construction of Bus Stand at Mcleodganj. These two were independent permissions and nobody in the State Government had the authority to permit construction of the Hotel and Commercial Block. The entire construction is unauthorised, illegal and unsustainable. There were serious doubts expressed by different departments even in relation to user agency, land being transferred in favour of the authority from Department of Tourism as well as that the project should not be taken over by the State Government. The CEC in its report observed that the construction of the hotel and bus stand complex has been undertaken without mandatory approval of the building plans by the Town and Country Planning Department and the Board of Directors of M/s Prashanti Surya. HPBSM&DA, instead of strongly objecting to the above have quietly acquiesced in the matter. The CEC further observed that the construction being done by M/s Prashanti Surya involves violation of a number of zoning



regulations with respect to overall coverage, height of building block, set off, etc. The CEC was unable to agree with the contention of M/s Prashanti Surya that the entire project has been undertaken in public interest and that construction of the so called small hotel is for public service. The CEC also observed that proposal of the State to use ground floor of the hotel complex for parking instead of shopping is not physically and technically feasible. The CEC was of the view that the five storey hotel structure with 40 rooms and shopping complex constructed on the forest land is totally unauthorised and illegal; the ex-post-facto approval sought under the Act of 1980 has already been rejected by the MoEF and this massive structure has been constructed without obtaining the requisite permission from the Town and Country Planning Department. The CEC also observed that the Bus Stand Complex on the 0.48 ha. forest land is also unauthorized and illegal and the Town and Country Planning Department is yet to give its approval to the same.

The findings of the CEC clearly show that this commercial project besides being an eye sore in the lap of the nature, is illegal, unauthorised and contrary to law. It has serious adverse impacts on environment and ecology of the area in question. The trees have been felled unauthorisedly and without any provisions for reforestation. No adequate measures were taken to avoid the adverse impacts of tree cutting on environment and ecology by raising constructions in eco-sensitive area. The Precautionary Principle has been given a complete go by. There is no reason why

the recommendations of the CEC with some modifications be not accepted by the Tribunal.

27. The fact that the project has substantively completed would be of no consequence. Violator of law can neither plead ignorance of law nor can take advantage of *fait accompli*. Violation of law simpliciter would have different consequences but violation of law coupled with serious adverse impacts on environment and ecology of the eco sensitive area would have totally different consequences in law. In the facts of the present case it is evident that it was an intentional violation on the part of the project proponent as well as the officers of the State Government. To a large extent the ill design of the project proponent was supported by the State Authorities who even permitted the construction on temporary basis or tentatively. The damage that was being caused to the environment and ecology was obviously irreversible. The trees have been felled and unauthorised and illegal construction has been raised. The State Government and the project proponent both did not pay any heed to the specific rejection of the approval from the MoEF&CC. From the records produced before us it is evident that all possible efforts were made by the project proponent and some of the Government Departments, particularly, the Bus Stand Authority and the Department of Tourism to overreach the process of law as well as the declining of approval by the Central Government, a specific effort was made to ignore that for some material benefits.

28. The project proponent on the one hand started illegal construction and on the other immediately put up a stand for extension of the statutory period. Thus, taking upon all its own wrongs for material gain. Mere economic viability cannot be the basis for violating the environmental laws and causing irreversible damage to the environment and ecology. Admittedly, it is an eco sensitive area. Thus, the intent of the project proponent and Government Officers both are clearly suggestive of irresponsible, disobedient behaviour and attempts to make material gains which is clearly demonstrated over the long period right from 2001-2007. This is a case where the respondents, including the official respondents have clearly violated the Precautionary Principle coupled with completely ignoring the orders passed under Section 2 of the Act of 1980 as well as violating the provisions of the Environment (Protection) Act, 1986. The Principle of Absolute Liability gets attracted automatically in the facts and circumstances of the present case. Absolute Liability can be invoked, and the project proponent can be held responsible for the intention of negligence. So far damage is caused in the present case, both intention and negligence exists on the part of the project proponent and some of the official respondents. There was an absolute duty on the part of the official respondents and the project proponent particularly to adhere to all preventive steps, obtain requisite approvals and sanctions and to raise the construction strictly in accordance with law thereafter.

29. The Environmental Clearance is a condition precedent to commencement of the construction. It is not a formality which can be invoked at any time including post construction. The Notification of 2006 has the force of law and is mandatory and even an Office Memorandum cannot amend this Notification of 2006. This view has been taken by a larger bench of the Tribunal in the case of *S.P. Muthuraman V. Union of India 2015 All India NGT Reporter II Delhi 170*. Applying this principle to the present case, the Forest Clearance to be obtained under Section 2 of the Act of 1980 is a condition precedent upon the commencement of the project and both the State of Himachal Pradesh and the project proponent were obliged to take the same prior to construction of the project. The project proponent is a person who has not only polluted the environment but has caused irreparable damage to the environment and ecology by an unauthorised and illegal activity. This fact duly finds support even from the report of the CEC. As such, the liability of the project proponent would also arise on Polluter Pays Principle. Even the case where Polluter Pays Principle is invoked does not in any way grant legitimacy to an illegal or unauthorised act merely because the polluter is directed to pay compensation. In cases where pollution is caused or environment or ecology is damaged, the *status co-ante* must be restored and all efforts should be made simultaneously to re establish the environment and ecology to its original pristine form. This would be besides the fact that the polluter is held liable to pay the compensation.

30. On this stage now, we may refer to some of the cases on the subject. The Supreme Court of India in the Case of *Indian Council for Enviro-Legal Action and Ors. V. Union of India (UOI) and Ors. (1996) 3 SCC 212* held as under:

“65. On a consideration of the two lines of thought [one adopted by the English Courts and the other by the Australian High Court], we are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. We are convinced that the law stated by this Court in *Oleum Gas Leak Case* is by far the more appropriate one - apart from the fact that it is binding upon us. [We have disagreed with the view that the law stated in the said decision is obiter.] According to this rule, once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on. In the words of the Constitution Bench, such an activity "can be tolerated only on the condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not." The Constitution Bench has also assigned the reason for stating the law in the said terms. It is that the enterprise [carrying on the hazardous or inherently dangerous activity] alone has the resource to discover and guard against hazards or dangers - and not the person affected and the practical difficulty [on the part of the affected person] in establishing the absence of reasonable care or that the damage to him was foreseeable by the enterprise.”

31. The Polluter Pays Principle takes in its ambit absolute liability for harm to the environment which extends not only to compensate the victim of the pollution but also cost of recovering the degradation of environment. The polluter will be the person responsible who has to bear the cost of preventing or dealing with any pollution that such process has caused. The polluter does not

get a right to pollute and pay. Reference can be made in this regard to the case of *Deepak Nitrite V. State of Gujarat*, (2004) 6 SCC 402 and *Research Foundation of Science Technology and Natural Resources Policy v. Union of India JT* (2005) 11 SC 135

32. The Courts have normally invoked the Principle of Sustainable Development. The development may go on but without irreparable and irreversible damage caused to the environment and ecology. The basic tenets of the Precautionary Principle make it obligatory for the Court to draw a balance between development on the one hand and protection of environment on the other. But, this Doctrine of Balancing comes into play only when the acts are done in accordance with law and in obedience to law. Unauthorised and illegal activities contrary to law cannot squarely fall within the framework of Sustainable Development. It is a settled principle of law that nobody can be permitted to take advantage of his intentional wrongs or intentional flouting of law. Having held that there is specific violation by the project proponent and department of the State of Himachal Pradesh, we also have no hesitation in coming to the conclusion that there is wilful disobedience of law on the part of these agencies. There is a clear line of distinction between the case of wilful disobedience and acts done in excess but in accordance with law. The unauthorised and illegal acts of the respondents have led to definite alterations in the topography of the area on the one hand while on the other it has its adverse impacts on the environment of the area. It is an area with a very limited space and is covered with the protected forests. The embargo on

carrying on activity and raising construction in these areas is well known and it is evident on sound principle on protection of environment “the one who flouts the law must face the consequences thereof.” The report of the CEC clearly indicts both the project proponent and the State of Himachal Pradesh. We have no hesitation in holding that the CEC’s recommendations are liable to be accepted as even from the record before the Tribunal one would arrive at more or less on the same conclusions.

33. The provision of malicious intent cannot be ruled out on the side of the wrong doers. It is a case where even punitive damage can be awarded keeping in view the fact that the conduct of these respondents was very deceitful. In the case of *M.C Mehta V. Kamal Nath* (2002) 3 SCC 653 the Supreme Court held as under:

“Even in the judgment of this Court, since reported in *Kamal Nath vs Kamal Nath and Ors.* (2000) 6 SCC 213, while accepting the claim of the Motels that the sine qua non for punishment of imprisonment and fine is a fair trial in a competent Court and that such punishment of imprisonment or fine can be imposed only after the person is found guilty by the competent Court, a general and passing reference has also been made to the earlier findings and as a consequence of which only it has been again held that though no fine as such can be imposed and the notice issued by this Court earlier be withdrawn, a fresh notice was directed to be issued to Span Motel Pvt. Ltd. as to why in addition to damages as directed in the main judgment, exemplary damages cannot be awarded against them “for having committed the acts set out and detailed in the main judgment”. Equally, **the Object and purpose of such levy of exemplary damages was also indicated as to serve a deterrent for others not to cause pollution in any manner.** Having regard to what has been stated supra, the question as to the imposition of exemplary damages and the liability of Span Motel Pvt. Ltd. in this regard has to necessarily depend upon the earlier findings of this Court that the Motel by constructing walls and bunds on the river banks and in the river bed as detailed in the judgment has interfered with the flow of the river and their liability to pay the damages on the principle of “Polluter pays” as an inevitable consequence thereof. .... The basis for their

liability to be saddled with the exemplary costs has been firmly and irreversibly already laid down in the main judgment itself and there is no escape for the Span Motels Pvt. Ltd. in this regard. We have to necessarily of law, found and declared.

The question remaining for further consideration relating to the award of exemplary damages is only as the quantum. The various laws in force to prevent, control pollution and protect environment and ecology provide for different categories of punishment in the nature of imposition of fine as well as or imprisonment or either of them, depending upon the nature and extent of violation. The fine that may be imposed alone may extend even to one lakh of rupees. Keeping in view all these and **the very object underlying the imposition of imprisonment and fine under the relevant laws to be not only punish the individual concerned but also to serve as a deterrent to others to desist from indulging in such wrongs which we consider to be almost similar to the purpose and aim of awarding exemplary damages**, it would be both in public interest as well as in the interests of justice to fix the quantum of exemplary damages payable by Span Motels Pvt. Ltd. at Rupees Ten Lakhs only. This amount we are fixing keeping in view the undertaking given by them to bear a fair share of the project cost of ecological restoration which would be quite separate and apart from their liability for the exemplary damages. The question relating to the said quantum of liability for damages on the principle of "polluter pays", as held by this Court against the Span Motels Pvt. Ltd. and undertaken by them, will be determined separately and left open for the time being. The amount, of special damages of Ten Lakhs of rupees, shall be remitted to the State Government in the Department of Irrigation and Public Health to the Commissioner/Secretary for being utilized only for the flood protection works in the area of Beas River affected by the action of Span Motel Pvt. Ltd."

34. Another very important aspect of the present case is that the conduct of the private and official respondents is sufficiently outrageous to invite award of environmental compensation on the Principle of Liability and even exemplary damages. The conduct of the respondents is on relevant consideration and here it is evident that the respondents have completely intrigued the law and ignored the letter of non approval of the Central Government. They even attempted to circumvent the law and continue with the construction of the project. All the respondents have capacity to pay



as the project proponent intended to gain from the unauthorised and illegal construction which was given effect to in clear collusion with the official respondents. The records produced by the respondents fully support this finding.

35. Having recorded the above findings on merits of responsibility of the respondents on the Principle of Absolute Liability, Precautionary Principle and Polluter Pays Principle, now we have to assess the damages/environmental compensation payable by the respondents in terms of Section 15, 17 and 20 of the National Green Tribunal Act, 2010. Exact calculation of damages in this case is not possible. It has been settled that in such cases some guess work can be applied. According to the project proponent the cost of the project has risen tremendously because of introduction of commercial complex and hotel construction.

36. Initially the estimated cost of the project was Rs. 7.5 Crores which later on was described as Rs. 9.5 crores. The project proponent has stated in his application praying for setting aside of the CEC report that a total expenditure of Rs. 19 crore has been incurred out of which Rs. 12 crore is stated to have been incurred for the bus stand project. It appears that the total estimated cost of the project would thereafter will enhance to Rs. 16 crores and the project proponent incurred Rs. 15 crores. The project proponent already claims to have spent Rs. 9.5 crore from loan resources. On this basis, the revenue of 70 per cent is expected from the hotel, restaurant and 30 per cent from running of the Bus Stand. This

would obviously mean that the main source of income was the hotel and restaurant and that this is why the project proponent flouted the law in collusion with the public authorities and raised the construction of this part of the project in violation of law, contrary to the directions issued by the Central Government. There is a clear intention to circumvent the law and act prejudicially to the environment and ecology. This would render the project proponent liable both for payment of environmental compensation as well as for demolition of the property and restoration of the environment and ecology. The damage to the environment and ecology has been established on record. The meagre sum of Rs. 14, 900 has been deposited on account of afforestation which is indicative of the concern of the authorities and the project proponent for environment and ecology. It is a settled practice and in fact a well accepted rule that at least 10 times of the trees which are felled or removed for the project needs to be planted in the same area.

37. The project proponent and the authorities are expected to ensure that such plants and trees grow properly and will be taken care of atleast for a period of 5 to 7 years. All this is conspicuous by its very absence in the present case. Environmental Compensation or environmental damage are to be forgiven for injuries suffered by an individual as well as damage to the environment and ecology. In general, such loss, damage or injury more often than not cannot be measured in exact terms of money. It may be difficult to suggest arithmetical calculation for establishing the amount of compensation by exactitude, for instance environmental loss

resulting from cutting and removing of trees per se cannot be strictly calculated. The law divides damages on account of loss or injury into pecuniary and non pecuniary damages. While the first is capable of being arithmetically worked out, the latter cannot be so calculated. Non pecuniary is calculated in term of money not as a substantive replacement for money but as a substantive way. It is generally more important than money and it is the best that a Court can do in the facts and circumstances of a case. Twin objects of awarding damages/compensation is firstly to pay to the plaintiff for the harm done to him and secondly to inflict punitive consequences upon the defendant. The secondary object can also be achieved by awarding exemplary damages which are co-termed as punitive damages, vindictive damages or retributory damages. They, as already noticed, are awarded where the respondents' conduct discloses malice or the like. In determining such damages or compensation the Tribunal has to apply a kind of limited guess work, of course based on the records and facts of the given case. It may not be possible to determine such compensation with complete accuracy. Reference can be made to *Cassell and CO. Ltd v. Broome* (1972) 1 All ER 801 (HL) and *Huckle V. Money* 95 ER 768, *John Wilkes V. Wood* 98 ER 489, *Krishan Kant Singh v. M/s. Triveni Engg. Industries Ltd.*, Original Application No. 317 of 2014 decided on 10<sup>th</sup> December, 2015 and *Krishan Kant Singh v. National Ganga River Basin Authority*, 2014 ALL (I) NGT REPORTER (3) (DELHI) 1.

38. In the present case, the structure relating to hotel and restaurant has been raised without proper sanction of law and

without even moving an application for obtaining the Forest Clearance in terms of the provisions of Section 2 of Act of 1980. In fact, the construction continued despite a definite refusal of the approval by the MoEF&CC its letter dated 12<sup>th</sup> June, 2007. This structure besides being an eye sore to the natural beauty of the area is prejudicial to the environment and ecology. The trees have been removed without taking preventive and precautionary steps, merely, to make profit and with a malice and ill intent and the construction was carried on nearly to the stretch of finishing.

39. It is bound to cost serious traffic hazard and undue congestion. There is no sanction for disposal of the waste that would be generated as a result of this unauthorised and illegal activity, its consequences on environment and ecology including the air pollution which is bound to be very severe. This project cannot be completed on facts and in law. Permitting the existing structure to remain would be a persistent damage to environment and ecology. It is bound to cause traffic congestion resulting in air and noise pollution on the one hand while on the other, it would be a continuous source of ecological and environmental degradation.

40. Thus, for the reasons afore-recorded, we pass the following directions.

1. The project proponent shall be liable to pay Environmental Compensation in terms of Section 15 and 17 of the National Green Tribunal Act, 2010 to the sum of Rs. 15 lac. This amount would be paid to the Himachal

Pradesh Pollution Control Board which shall utilise the amount only for restoration and rejuvenation of the environment and ecology in the said area. The Pollution Control Board shall work in coordination with the Forest Department for carrying on the directions contained in this order.

2. The State of Himachal Pradesh and Department of Tourism has failed to perform their functions in accordance with law and have permitted the project to come up, which *ex facie* was in violation of law and that seriously prejudiced to environment. The HPBSM&DA is primarily responsible for conceiving a project which was in violation to the Act of 1980 and the Environment (Protection) Act, 1986 with open eyes permitting the project in an eco-sensitive area which ought not to have been permitted without proper sanction of law. The acts and deeds of this Authority have to be viewed very seriously in order to ensure that such events are not repeated by public authorities. Thus, we impose environmental compensation of Rs.10 lacs against this HPBSM&DA. We also impose Environmental Compensation on State of Himachal Pradesh and Department of Tourism of Rs. 5 lac each. This compensation shall also be utilized in the same manner as stated under Direction No.1.

Further, we direct the Chief Secretary, State of Himachal Pradesh, to hold an enquiry against the erring officers of HPBSM&DA and fix responsibility. The competent authority should take appropriate disciplinary action against the erring officers in accordance with law.

3. The entire structure of the hotel-cum-restaurant shall be demolished forthwith by the project proponent within 2 weeks from today. In the event of default, the Chief Conservator of Forest along with the administration of district Dharamshala shall demolish the structure and recover the cost as land revenue from the Project Proponent.
4. The State of Himachal Pradesh and the Project Proponent for that matter can utilise the parking space and the bus stand only for the purposes specified in the agreement and as per the terms and conditions stated therein and approval granted by the Central Government. The structure of the bus stand and the parking space shall not be used for any purpose other than parking of cars and buses as the case may be.
5. We hereby issue prohibitory directions that no car would be parked on roads between the two sides, so as to avoid traffic congestion. No private cars, taxis or buses will be parked on that road in order to maintain free flow of traffic.

6. The Forest Department and the Pollution Control Board shall plant 118 trees in the same vicinity at the same height near the bus stand and the parking area. The trees so planted shall be taken due care of by the Forest Department and the Pollution Control Board at least for the period of 5 years initially and the amount spent for this purpose shall be adjusted from the Environmental Compensation paid by the project proponent as afore directed.

41. With the above directions all the 3 applications stand disposed of without any order as to cost.

**Swatanter Kumar**  
**Chairperson**

**M.S. Nambiar**  
**Judicial Member**

**Jawad Rahim**  
**Judicial Member**

**D.K. Agrawal**  
**Expert Member**

**B.S. Sajwan**  
**Expert Member**

New Delhi  
4<sup>th</sup> May, 2016