BEFORE THE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH
NEW DELHI

M.A. NO. 691 of 2014

(ARISING OUT OF APPEAL NO. 4 of 2012)

In the matter of :

Nirma Ltd.
Nirma House
Ashram Road,
Ahmedabad

.....Appellant

Versus

1. Ministry of Environment & Forests
   Government of India,
   Prayavaran Bhawan,
   CGO Complex,
   Lodhi Road, New Delhi – 110 003

2. Revenue Department
   (Through Secretary)
   State of Gujarat,
   Sachivalaya, Gandhi Nagar,
   Gujarat

3. Gujarat Pollution Control Board
   Through its Member Secretary
   Sector 10-A, Parayavaran Bhawan
   Opp. Bij Nigam
   Gandhinagar – 382 010

4. Shree Mahua Bandhara Khetiwadi
   Pariyavaran Bachav Samitee
   Through its Secretary
   Bharat Shiyal, R/o Dhgneri
   At SPO Madhiya
   Tal. Mahuva, Bhavnagar,
   Gujarat

Counsel for Appellant:

Mr. Ramesh Singhal, Mr. Prashanto Chandra Sen, Ms. Anu Shruti, Advocates.

Counsel for Respondents:

Mr. Vikas Malhotra and M.P. Sahay, Advocates for Respondent No.1.
Ms. Puja Singh for Ms. Hemantika Wahi and Mr. Dhruv Pal, Advocates for Respondent No.2 and 3.
Mr. Anand Yagnik and Mr. Abhimanue Shreshta, Advocates for Respondent No. 4.

JUDGMENT

PRESENT :

Hon'ble Mr. Justice Swatanter Kumar (Chairperson)
Hon'ble Mr. Justice U.D. Salvi (Judicial Member)
Hon'ble Dr. D.K. Agrawal (Expert Member)
Hon'ble Dr.G.K. Pandey (Expert Member)

Dated : 17th November, 2014

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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)

The applicant, Respondent No. 4 has filed this application with the following prayer:

a. The Hon'ble Expert Members of this Hon'ble Tribunal (Hon'ble Dr. Gopal Krishna Pandey & Hon'ble Dr. Devendra Kumar Agrawal) hearing the aforesaid Appeal may kindly recuse themselves from hearing the Appeal; and
b. The Bench for hearing the appeal may kindly be reconstituted; and
c. Pass any such/further order(s) as this Hon'ble Tribunal may deem fit and proper in the interest of justice.

2. In furtherance to the orders of the Tribunal dated 28th May, 2013 and 23rd August, 2013, the two Ld. Expert Members of the Tribunal have visited the site in dispute during 7th to 9th June, 2013

& 7th September, 2013 and have given their report. Having received the report, the applicant has filed the present application stating that the said two Ld. Expert Members have formed an opinion in favour of the appellant, before the final hearing in the appeal has commenced and therefore, according to the settled principles of natural justice they should recuse themselves from hearing the appeal. The applicant further states that the two Ld. Expert Members have pre-judged the issue and the applicant has reasonable basis for apprehension of bias. Hence, the two Ld. Expert Members would not be in a position to apply their minds to the facts of the present case objectively. Applicant prays that the case should be decided by an unbiased mind and therefore, both the Ld. Expert Members should recuse themselves from hearing of the case and the Bench should be re-constituted.

3. This application has been vehemently opposed by all the non-applicant parties, including the Ministry of Environment and Forests (for short 'the MoEF') and the appellant in the main Appeal No. 4 of 2012. According to the appellant in the main case, the present application is an abuse of the process of law and that of this Tribunal. The applicant is a mere intervener and has been delaying the proceedings before the Tribunal on one pretext or the other. The appellant contends that the present application, in fact, makes averments which are misconceived and ill-founded and the two Ld. Expert Members of the Tribunal have not expressed any final opinion but have merely recorded facts as they exist on the site, along with submitting the points or questions that would

require determination by the Tribunal. In fact, the inspecting team has only noticed what steps are required to be taken to ensure that there is no resultant pollution caused by the appellant. In its application, the applicant had raised certain doubts in regard to the first inspection and wanted certain aspects to be further clarified and/or confirmed by conducting a second inspection.

4. According to the appellant, the conduct of the applicant not only in the present proceedings, but all through, has been that of a litigant who has not come to the Court/Tribunal with clean hands and has abused the process of Courts/Tribunal and the law.

5. The Ld. Counsel appearing for respondents no. 1, 2 & 3 respectively, submitted that the present application is an abuse of the process of the Tribunal, is mala fide and is intended to delay the proceedings before the Tribunal. They commonly contend that the same bench including the two Ld. Expert Members who conducted the inspection of the site and prepared the inspection note, should continue to hear the matter and also for the reason that the case has already been substantially heard by that Bench. Thus, there was no occasion for filing of such an application, much less for accepting the prayer of the applicant for re-constitution of the Bench. Therefore, they submitted that the application should be dismissed with exemplary costs since it lacks *bona fide.*

6. Let us first and foremost examine the contention of the non-applicants in relation to conduct of the applicant, its intention to

delay the proceedings and its lack of *bona fides* in the present application.

7. Keeping in view the contradiction and ambiguities emerging from the affidavits filed by the respective parties, including the MoEF as well as the reports of the experts placed on record by the parties, the Bench felt the necessity for a spot inspection by the Expert Members. Thus, vide its order dated 28th May, 2013, Tribunal directed a spot inspection.

However, even before the order dated 28th May, 2013 could be complied with, the present applicant filed an application being M.A. No. 497/2013 praying for stay of the operation of the order of the Tribunal dated 28th May, 2013. Respondent no. 1 had also filed an application being M.A. No. 504/2013 praying that the operation of the order dated 28th May, 2013 be stayed for a period of four weeks, as they had preferred a Civil Appeal before the Supreme Court, which was soon to come up for hearing. In both these applications, the present applicant had raised various grounds, particularly, in M.A. No. 497/2013, in support of its plea for stay of the said order.

8. A different Bench of the Tribunal vide a very detailed order dated 6th June, 2013, considered all the pleas and objections taken by the applicant. A specific ground was taken in that application by the applicant that if Expert Members visited the site and formed an opinion, it would frustrate the entire issue before the Tribunal. The said Bench, by a detailed order rejected these pleas and also specifically noted the scope of inspection in that order. Finding that

the application was frivolous, the Bench dismissed it with cost of Rupees One Lakh on the applicant.

9. Against the order dated 6th June, 2013 of this Tribunal, the applicant preferred a Civil Appeal No. 8781-83/2013 before the Supreme Court of India, which came to be dismissed vide order dated 4th August, 2014. It will be appropriate to reproduce the order of the Supreme Court dismissing the appeal. The order reads as under:

> "The primary challenge appears to be in respect of the determination of the National Green Tribunal (hereinafter referred to as 'the Tribunal') requiring two of its technical members to visit the site, and make a report after carrying out a personal inspection thereof. We find nothing wrong with the above procedure adopted by the Tribunal. The aforesaid procedure is well-known to law and is also contemplated under Order XVIII Rule 18 of the CPC.
>
> In view of the above, we decline to interfere with the impugned orders passed by the Tribunal save to the extent that while dismissing the applications, the Tribunal vide its order dated 06.06.2013 had imposed cost of Rs. 1 lakh, which was to be deposited by both the applicants. We are satisfied that the aforesaid costs should be waived. Ordered accordingly.
>
> The appeals are disposed of in the manner indicated above."

10. Consequently, the two Ld. Expert Members visited the site and prepared an inspection note of their visit during 7th – 9th June, 2013. After the dismissal of the Civil Appeal No. 8781-83/2013 and site visit by the two Expert Members on 7-9th June, 2013, the applicant again filed a Miscellaneous Application bearing No. 608/2013 praying that the Tribunal should direct a fresh site inspection by the Ld. Expert Members. The ground taken was that

the Samadhiyala Bandhara was a seasonal water body and after arrival of the monsoon, the Bandhara is filled to its full reservoir level. Thus, to know the true nature of the water body, it is appropriate that a fresh inspection be conducted. It was submitted that it is only post-monsoon that the Bandhara gets to its highest level. The applicant also submitted that since the Bandhara is a manmade water body, it gets full only during post-monsoon period and it was submitted that the Expert Members finding on opinion has to be framed in light of the above facts.

11. In view of the fact that the two Ld. Expert Members had already inspected the site and placed on record the inspection note, with the consent of the Learned Counsel appearing for the parties, vide order dated 8th July, 2013, the matter was listed for final hearing on 13th – 14th August, 2013. Dealing with the application of the applicant, viz. M.A. No. 608/2013, the Tribunal vide order dated 23rd August, 2013, accepted the request and directed the visit of the two Ld. Expert Members post-monsoon to assess the complete and comprehensive situation with regard to the wetland and the likely damage to the water body. Consequently, the two Ld. Expert Members visited the site again on 7th September, 2013 and placed their inspection note on record.

12. The matter had to be adjourned on different dates in view of the fact that the applicant informed the Tribunal that they had filed an appeal before the Supreme Court against the orders dated 28th May, 2013 and 6th June, 2013. In view of the above facts, the

applicant sought adjournment on different dates, which was granted. After the dismissal of the appeal by the Supreme Court, the Tribunal vide its order dated 6th August, 2014 directed that the matter be listed for hearing on 15th – 16th September, 2014 for final hearing.

13. Before the matter could be heard by the Tribunal on the dates afore-stated, the present applicant again filed two applications, being M.A. No.572/2014 and 573/2014; the first being an application for supply of the Inspection Report conducted by the two Ld. Experts Members and the second for transfer of the main appeal to the Western Zone Bench of the Tribunal at Pune. M.A. No. 573/2014 was disposed of by order of the Tribunal dated 9th September, 2014 directing the Registry of NGT to allow inspection of the reports submitted by the two Ld. Expert Members. Notice on M.A. No. 573/2014 was issued to the non-applicants. The non-applicants, including the appellant in the main appeal vehemently opposed the prayer for transfer of the case from the Principal Bench to the Western Zonal Bench at Pune.

14. Arguments were heard on the application and by a detailed order dated 16th September, 2014, the said application was dismissed. It needs to be noticed at this stage that the application for transfer was filed despite the fact that the presiding Judicial Member at the Western Bench, Pune, had already recused himself from the present case vide an order dated 21st November, 2012 passed in the present appeal, nearly an year prior to the filing of

M.A. No. 573/2014. The applicant preferred a Civil Appeal before the Supreme Court not only against the order dated 16th September, 2014, but also against the order dated 9th September, 2014 permitting inspection of the reports. When the matter came up before the Tribunal for final hearing, the Counsel for the applicant informed the Tribunal about the filing of the appeal before the Supreme Court and prayed for adjournment, which was granted. When the matter came up for hearing on 10th October, 2014, the Tribunal was informed that the Supreme Court vide its order dated 26th September, 2014 had disposed off the appeal finally, while only issuing directions that copies of the reports may be furnished to the applicant. However, the Supreme Court did not grant any relief to the applicant in relation to the transfer of the case from the Principal Bench of the NGT to the Western Zonal Bench at Pune.

15. On 10th October, 2014, the Tribunal directed that the complete reports which are part of the judicial records of the Tribunal, be furnished to the counsel of the applicant immediately. Arguments on the appeal were heard partly on that date and the matter was adjourned to 16th – 17th October, 2014 for remaining arguments. The applicant had been furnished with the complete copy of the inspection report of the Ld. Expert Members, as was available on the file of the Tribunal. Before the matter could be taken up for remaining arguments on 18th October, 2014 by the Tribunal, the applicant again filed another application, being M.A. No. 691/2014, praying that the two Ld. Expert Members on the Bench hearing the

matter should recuse themselves from hearing the appeal on merits, for the reasons which we have already noticed above. This application is seriously contested by the appellant in the main matter and all other material respondents. The present applicant is an intervener, whose application for impleadment was allowed by this Tribunal, vide its order dated 1st May, 2012. The Bench that passed the order allowing the application for impleadment as a respondent party had specifically noticed "the matter being very urgent, we direct the same to be listed for hearing on 30th May, 2012....."

16. From the above facts and despite a specific order of the Tribunal that the matter be heard urgently, the conduct of the applicant clearly demonstrates that he has been filing application after application, which lack *bona fides*, as and when the matter was listed for final hearing. In fact, the applicant has made every possible attempt to delay the hearing of the appeal on one pretext or the other. The grounds which the applicant has taken now ought to have been taken at the very first instance. For example, in filing M.A. No. 497/2013, grounds were taken repeatedly in the garb of different prayers, despite the fact that the Supreme Court had been pleased to dismiss the Civil Appeal against the orders of the Tribunal dated 6th June, 2013 passed in M.A. No. 497/2013. Therefore, the present application is certainly an abuse of both, the process of the Tribunal and law. The averments made in the application under consideration ought not to be made by a responsible litigant, who is acting in a *bona fide* manner.

17. We may also notice here that it is not the first round of litigation between the parties. The present applicant had filed a Writ Petition before the Gujarat High Court being SCA No. 3477 of 2009, wherein the High Court had issued certain directions to the project proponent for compliance. The applicant filed a review application before the High Court which came to be dismissed vide order dated 27th September, 2010. The matter was taken up by the applicant as an appeal before the Supreme Court. It was during the pendency of the appeal before the Supreme Court that, vide its order dated 1st December, 2011, MoEF cancelled the order of Environmental Clearance (for short 'EC') that had been granted to the project proponent. The Supreme Court granted liberty to the project proponent to challenge the said order before this Tribunal. That is how the present appeal no. 04 of 2012 came to be filed. Therefore, there can hardly be any doubt that the above conduct of the applicant and the records of the Tribunal demonstrate a concerted effort on the part of the applicant to delay the conclusion or final determination of the appeal.

18. Having observed the conduct of the applicant as above, now we would turn to the most important issue raised in the present application as to "whether the two inspection reports submitted by the Expert Committee, constitute forming of a final opinion in fact and in law?"

19. As already noticed, the two Ld. Expert Members of the Tribunal, forming part of this Bench, had visited the site in question first on 7th-9th June, 2013 in furtherance to the order dated 28th May, 2013 and again on 7th September, 2013 when the application of the applicant was allowed by the Tribunal vide its order dated 23rd August, 2013. The first inspection note runs into 7 pages while the second one is only a one page note. On both these occasions, when inspection was conducted, not only the parties to this *lis,* but even the villagers were present. The two Ld. Expert Members in their first note noticed the background, presentation made by the Project Proponent, issues raised by MoEF, the panoramic photographical evidence of the site from selected angles as presented on behalf of the local villagers, with reference to the Bandhara having good water storage capacity and spreading of water etc. After noticing this, the Ld. Expert Members recorded their "Observations during visit to Project Area and Samadhiyala Bandhara". There, they recorded only the factual aspects which they observed during the inspection. Under this head of the report they mentioned "thus the Bandhara is an artificial temporary rainfed reservoir with large water spread and lesser depth and not a natural water body". We may notice here that this observation is completely supported by common case pleaded by the parties, particularly, the applicant who in paragraph 14 and 15 of M.A. No. 680 of 2013 specifically stated it and even reiterated it in paragraph 4 of M.A. No. 573 of 2014. Having observed so, the Ld. Expert Members recorded "Points for Consideration". They specifically

stated that as a result of interaction with all parties and persons present as well as the observations made during the visit, points 'a' to 'd' arise for consideration of the Bench.

Thus, they have only suggested the questions that require determination by the Tribunal and stated them comprehensively in their report. The Learned Counsel appearing for the applicant had strongly contended that these observations amount to pre-determination or pre-judging the issue in hand. This contention is misconceived and is found on misreading of the inspection note. For instance, if a unit becomes a 'zero discharge unit', then possibly there can be no pollution with regard to underground water or other water bodies around the unit. This is not a conclusion. This is merely an observation which is contingent upon the happening of an event i.e. providing of such equipments that would make the unit a 'no discharge unit'. This observation has to be examined in its correct perspective, that too, if the occasion so arises and conditions are to be imposed by the Tribunal or the expert body as the case may be. It may be noticed here that a perusal of the original EIA Report and Environmental Clearance Order reveals that a condition was stipulated on the unit that it should be a 'zero water effluent discharge' unit. All these aspects are wide open and are still to be examined by the Tribunal. With regard to the observations made in paragraph 4(a) that the Bandhara is an artificial temporary/seasonal water body, we have said that it is an observation which was duly accepted by the parties concerned, including the applicant. Still to be extra cautious, the two Ld.

Expert Members visiting the site, at the end of their note, observed the following:

> "Under the above circumstances, it is felt that another site visit during peak monsoon season may help in reconfirming the spot assessment of the related issues including spread of water and additional environmental safeguard measures necessary for sustainable development"

20. It can be usefully stated here that while praying for the second visit by the two Ld. Expert Members, the applicant raised no other ground or objection in that application. On the contrary, the applicant raised specific issues with regard to the Bandhara, its existence, capacity to store water and utilization thereof, which were examined by the Ld. Expert Members during their second visit on 7th September, 2013.

21. In their inspection note of 7th September, 2013 the Ld. Expert Members noticed that "the Bandhara was almost at the full level, with shallow water depth spread all over in the submergence zone and growth of aquatic vegetation and few water/migratory birds." In this note, they also noticed that "no part of the proposed plant was under submergence; however adjoining area beyond the boundaries of the proposed cement plant was having shallow water accumulation." During their travel from Ahmadabad to the site and from the surrounding areas, they also noticed that "vast stretches along highway are under submergence owing to water logging on account of topographical features." The one page report note ended

with the Ld. Expert Members seeking information from the authorities on the following:

1. Monthly salinity level of surface water of bhandara and adjoining wells.
2. Soil testing of agricultural land and its classification with respect to irrigated land using bhandara water and non-irrigated land.
3. Village boundary map with respect to bhandara & its submergence, proposed cement plant boundary and superimposed with adjoin irrigated land using bandhara water.
4. Report on flora and fauna by independent agency.

22. The above information was furnished by the concerned authorities by way of an affidavit which was filed before the Tribunal after serving the copy of the same to all concerned, including the applicant. The above factual aspects, examined from any point of view, only lead to one conclusion; that the observations, points for determination and facts as on site, described in the notes either of 6th-7th June, 2013 or 7th September, 2013 do not, in fact and/or in law, constitute formation of any final opinion. Firstly, these are tentative observations subject to final determination by the complete Bench of the Tribunal after hearing the learned counsel appearing for the parties. Secondly, there is nothing on record of the Tribunal that could substantiate the plea of pre-judging or pre-determination of the matter in issue before the Tribunal by the Expert Members during inspection. On the contrary, the two Ld. Expert Members very cautiously worded their inspection report including stating of points for determination by the Tribunal. They expressed no determinative opinion in favor or

against any party. To our mind, such an application is uncalled for and in any case is ill-founded.

23. The function of the court in exercising the powers specifically granted under the Code of Civil Procedure is for the purpose of understanding the evidence and for correct and legal appreciation of the controversies involved in the case. It was in view of the contradictory stands and reports filed by the respective parties that the Tribunal considered it necessary to have the local inspection. It was otherwise not possible to appreciate the evidence in its true sense. Even the Appeal Courts attach due weightage to the observations made by the Court in its inspection, as the purpose of local inspection is not to make it a substitute for the evidence but to assist in its appreciation**.** Reference may be made to the cases of *S. J. Raman Photo Studio v. A. K. M. Noore*, (1986) 1 MLJ 473, *Abdul Baqi v. Fakhrul Islam* A.I.R. 1937 Pat. 333 and *Raj Chandra v. Ishwar Chandra*, A.I.R 1925 Cal. 170. The visits of the two Ld. Expert Members was in furtherance to the orders dated 28th May, 2013 and 23rd August, 2013 and was primarily to place on record a factual report that would help the Bench in finally determining the controversial issues raised by the parties. The order directing site inspection has already been upheld by the Supreme Court of India. The inspection note contains mere observations relating to the site status of the water body and the points that required determination. No way can it be termed as a conclusion; much less a final conclusion arrived at by the two Ld. Expert Members.

Alleged bias in pre-disposition or pre-determination of issues. Applicability of *Nemo Debet Esse Judex In Propria Sua Causa* and its Principles

24. Now, we proceed to discuss the last contention raised on behalf of the applicant and application of the above principle to the application in hand.

25. Supreme Court in the case of *Delhi Administration v. Gurdip Singh Uban and Ors.,* (2000) 7 SCC 296 stated that "the words 'justice' and 'injustice', in our view, are sometimes loosely used and have different meanings to different persons particularly to those arrayed on opposite sides. "*One man's justice is another's injustice*"." The Court, with approval, noticed the following observation of Justice Cardozo:

> "The web is tangled and obscure, shot through with a multitude of shades and colours, the skeins irregular and broken. Many hues that seem to be simple, are found, when analysed, to be a complex and uncertain blend. Justice itself, which we are wont to appeal to as a test as well as an ideal, may mean different things to different minds and at different times. Attempts to objectify its standards or even to describe them, have never wholly succeeded."

26. The Court also observed that the appeal for "justice", based on personalized and subjective approach, if accepted, would take us nowhere. A party against whom an order is made is prone to think that injustice has been inflicted upon him. 'Justice' by Courts/Tribunals has to be done equally to both the parties. Proper administration of justice contemplates fairness in delivery of justice by Courts and unequivocally consists of an obligation on the part of the parties to a *lis* to act fairly and *bonafidely*. Parties who

make concerted efforts to unduly prolong the final determination of proceedings before the Court and whose action lacks *bona fide*, can hardly be heard to justifiably raise the plea of justice and fairness in judicial trials. It is a settled rule of law that parties cannot take advantage of their own wrong. They have the obligation to approach the Courts with clean hands and to act fairly and *bonafidely,* as opposed to *malafidely* and abusing the process of Court. The Supreme Court in the case of *K.K. Modi v. K.N. Modi & Ors,* (1998) 3 SCC 573, held that the process of the Court must be used *bonafidely* and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. Such approach would be in consonance with public policy and interest of justice. We have already returned a finding that there has been a concerted effort on the part of this applicant to inordinately delay the final proceedings of this case by filing frivolous applications and even by abusing the process of the Tribunal.

27. The *bona fides* of a litigant can also be examined in light of his conduct relating to filing of frivolous applications persistently. The Court time is a public time and due regard is to be given to that aspect. It is difficult to visualize prolonged hearing of a case without it affecting the expeditious disposal of other cases. Every litigant before the Court or a Tribunal has an implied obligation not to embark upon the time of the court unlimitedly. The Supreme Court

in the case of *Dr. Budhi Kota Subbarao v. K. Parasaran and Ors.*, AIR 1996 SC 2687, held as under:

> "No litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes. However, access to justice should not be misused as a licence to file misconceived and frivolous petitions."

28. This view has been reiterated in the cases of *K. K. Modi v. K.N. Modi and Ors.* (supra) as well as *Rajkumar Soni v. State of U.P.*, (2007) 10 SCC 635. The Supreme Court has also extended the dimensions of this principle by citing that it can even affect the purity of administration of law and salutary and healthy practise.

29. We have held above that there is no pre-determination or formation of any final opinion by the Ld. Expert Members in their inspection notes. It being so, the question of any bias in law would not even arise. There are cases where allegation of bias or prejudice may be made against Judges or Members of the Tribunal at any stage of proceedings and there may be some substance in it or it may be made to avoid the Bench of the Tribunal or delay the disposal of case. It is a settled law that unless a prior policy statement shows a final and irrevocable decision and foreclosing of the mind of the authority as to the merits of the case before it, it would not operate as a disqualification and there cannot be a case of 'malice' or 'bias'. In case such statements are to disable an official from acting as an adjudicatory authority on the ground of bias, then it will be disastrous to the system as a whole, for the reason that the judge has no interest personally in the outcome of the

controversy and is still willing to hear arguments and reconsider the point of law even it had already been settled. Thus, so long as the adjudicator's mind is not irrevocably closed and the opinion expressed by him is free from any extraneous consideration, there is no question of entertaining the apprehension of a party, even though his predisposition to certain issues is known to the parties [Ref. *K. Srinivas v. The Secretary, Orissa Legislative Assembly and Anr.*, (2009) 107 CALLT 375 (NULL))].

30. 'Judicial bias' has to be understood in its correct perspective and connotation. If the plea of judicial bias is permitted to be raised by every party even on unfounded apprehensions and misconceived notions, then there can hardly be any case of proper adjudication. Here statement made by Frank J. of the United States in respect of 'judicial bias' is worth quoting:

> "If, however, 'bias' and 'partially' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial paper. We are born with predispositions.....Much harm is done by the myth that, merely by.....Taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." [In re Linahan 138 F, 2nd 650 (1943)]

31. A full Bench of Allahabad High Court, in the case of *W.S. Day, Vakil, Agra*, 1924 (25) Cr.L.J. 1113, while dealing with a matter where contempt proceedings were initiated against a lawyer as he made an allegation that the judge, during the course of arguments was pre-judging the case, observed that, after considering the facts and legal issues the court may express its tentative opinion and

may ask certain questions, but that does not mean that the court is biased or prejudiced and any observation made by the court must not give an impression to the party that court has made up its mind or has pre-judged the case. Accepting the regret of the counsel for making such comments, the Court left the case at that by issuing a warning. Another Full Bench of Allahabad High Court in the matter of *Babu Dwarka Prasad Mithai, Vakil Muzaffarnagar*, AIR 1924 All 253, held that a legal practitioner cannot become a mouthpiece of his client and make allegations against the Court. Members of the legal profession are responsible for fair and honest conduct of a case and they cannot be allowed to make personal attacks or reckless or unfounded charges of impropriety or inattention against a Tribunal when a party might have lost a case.

32. It is true that a decision-maker should not have an interest and should not pre-judge or pre-determine issues with finality. Issues in the normal course of administration of justice are adjudged finally with the pronouncement of judgment. Some tentative observations made during the course of the trial do not tantamount to pre-judging the issues.

33. It is also a settled canon of procedural law that a self-opined plea of bias by the applicant before the Court, devoid of any substantial and admissible material in support thereof, would be unworthy of acceptance by the Court. The Courts have adhered to the application of the principle 'real likelihood of bias' while dealing with such objections.

"Bias", whether in fact and in law, has been not only conceptualized by the judgments, but the principle applicable thereto have come to be clearly stated. It is undisputable that 'bias' is the second limb of natural justice and *prima facie* no one should be a Judge in what is to be recorded as *sua causa*. The plea of bias has to be well-founded and must have a direct bearing on determination of the issues before the Court or a Tribunal. In the famous judgment of *Bhajan Lal, Chief Minister, Haryana v. M/s. Jindal Strips Ltd. & Ors.,* (1994) 7 SCC 19, where serious allegations of bias were made against the Judge, that the Judge was interested in deciding the case and had therefore directed the matter to be listed before him when he was the Acting Chief Justice, the Court repelled the widespread arguments of bias and while citing the principles stated by Justice Devlin L.J. in *R. v. Barnsley Licensing Justices, ex p Barnsley and District Licensed Victuallers' Assn.,* 1960 Vol. 2 All England Reports 703, cited with approval, the following principle in relation to the examination of allegations of bias:

> "We have to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias, and not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term 'real likelihood of bias' is not used, in my opinion, to import the principle in R. *v. Sussex Justices* (1924) 1 KB 256 to which Salmon, J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary and, indeed, might be most undesirable to investigate the state of mind of each individual justice. 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The

> court might come to the conclusion that there was such a likelihood without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined on the probabilities to be inferred from the circumstances in which the justices sit."

34. The Court even deprecated the effort on the part of the appellant in that case to seek information as to what transpired within the judicial fortress among the judicial brethren. The test applicable in all cases of apparent bias is, whether, having regard to the relevant circumstances, there is a 'real possibility' of bias on part of the relevant Member of the Tribunal in question, in the sense that he might unfairly record with favour or disfavour the case of a party to an issue in consideration before him. The entire material available has to be examined and only then it can be concluded whether there is a real possibility of bias or not. The concept of 'real bias' is not to be equated with an allegation of bias. It will be so convenient for a litigant to make allegations of bias with an intent to avoid a Bench or seek deferments of cases resulting in prolonged pendency of cases. The ends of justice would demand that either of them ought to be deprecated by the Court or the Tribunal.

35. When we examine the facts of the present case in light of the above enunciated principles, it is clear that there is no possibility of a 'real bias'. The two Ld. Expert Members have merely made observations or stated the questions that would call for

determination by the Regular Bench. The mere fact that the Expert Members have visited the site and made these observations would, in our considered opinion, not disentitle them from hearing the matter, particularly when they themselves recommended a second visit to the site and have made observations which, in fact, are commonly supported by the pleaded case of the parties, including that of the applicant. The apprehension expressed by the applicant is misconceived and ill-founded. It is only a plea raised for the sake of raising a plea. Even if we take the argument on its face value, it is a mere technical objection and, thus, cannot be permitted to frustrate substantial justice in the case. It is a well-settled law that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred (Rf.: *Collector, Land Acquisition, Anant Nag v. Musammat Katiji,* AIR 1987 SC 1353)

36. Filing application for recusal has, in the recent times, become more often than not, a practise which certainly is an unhealthy development in the field of administration of justice. It is expected of a litigant to file an application for recusal when it is imperative and is supported by material having an evidentiary value or value in law otherwise. An application for recusal, which is ill-founded, misconceived and is intended to prolong the decision of the case, would squarely fall within the class of cases which the courts should be most reluctant to entertain and least allow.

A recusal based on bias or prejudice must show a "deep-seated favouritism or antagonism that would make fair judgement

impossible" [Ref. *Liteky v. United States*, 510 U.S. 540 (1994)]. Therefore, unless such favouritism or bias is unequivocally clear, an application for recusal of a judge may not be entertained.

37. Having considered the various averments made in the application, it is clear that they are not only insignificant but are *ex facie* irresponsible. The two Ld. Expert Members of the Bench would have no interest in the case. They obviously would decide the case objectively along with other Members of the Bench. Therefore, the grounds taken in the application under consideration are misconceived and untenable.

38. At this stage, we may refer to the dictum of the Supreme Court in the case of *R.K. Anand v. Delhi High Court*, (2009) 8 SCC 106:

> "We are constrained to pause here for a moment and to express grave concern over the fact that lately such tendencies and practices are on the increase. We have come across instances where one would simply throw a stone on a Judge (who is quite defenceless in such matters!) and later on cite the gratuitous attack as a ground to ask the Judge to recuse himself from hearing a case in which he would be appearing. Such conduct is bound to cause deep hurt to the Judge concerned but what is of far greater importance is that it defies the very fundamental of administration of justice. A motivated application for recusal, therefore, needs to be dealt with sternly and should be viewed ordinarily as interference in the due course of justice leading to penal consequences."

39. In view of the above discussion, we find the application for recusal motivated, misconceived and fallible on facts and circumstances of the case, as well as in law. The attempt to delay the hearing and final disposal of this appeal has been a concerted

effort on the part of the applicant. So far, he has successfully frustrated the order of the Tribunal dated 1st May, 2012, by which he was impleaded as a party and the Bench had directed that the matter is very urgent and should be heard at the earliest.

40. We find the present application not only without substance and merit but frivolous and an abuse of the process of law. Thus, we dismiss the application with costs of Rs. 25,000/-, payable to the Environmental Relief Fund constituted under The Public Liability Insurance Act, 1991.

Justice Swatanter Kumar
Chairperson

Justice U.D. Salvi
Judicial Member

Dr. D.K. Agrawal
Expert Member

Dr. G.K. Pandey
Expert Member

New Delhi
17th November, 2014