

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

**Appeal No. 04 of 2012**

**In the matter of:**

1. Nirma Ltd.  
Nirma House  
Ashram Road,  
Ahmedabad

..... Applicants

Versus

1. Ministry of Environment &Forests  
Government of India  
Parayavaran Bhawan,  
CGO Complex,  
Lodhi Road, New Delhi- 110003
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-382010
4. Shree Mahna Bandhara Khetiwadi  
Pariyavaran Bachav Samittee,  
Through its Secretary  
At SPO Madhiya  
District Bhavnagar,  
Gujarat

..... Respondents

**Counsel for appellant:**

Mr. Dushyant Dave, sr. advocate along with  
Mr. Ramesh Singh, Mr. Prashanto sen, Mr. Ashish  
Goel and Ms. Anushruti, Advs. for appellant

**Counsel for Respondents:**

Mr. Vikas Malhotra and Mr. M.P. Sahay Advs.

for respondent No. 1

Ms. Preeti Bhardwaj and Mr. Dhruve Pal Adv.

for Ms. Hemantika, Advs. for respondent no. 2 & 3.

Mr. Anand Yagnik and Mr. Abhimanue Shrestha,

Advs. for Respondent no. 4

**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 Mr. Dr. G.K. Pandey (Expert Member)**

**JUDGMENT**

**Per U.D. Salvi J.(Judicial Member)**

**Dated: 14<sup>th</sup> January, 2015**

1. The Present Appeal is preferred against the order dated 1<sup>st</sup> December, 2011 issued by the Respondent No. 1- Ministry of Environment and Forest (shortly referred to MoEF) under section 5 of the Environment (protection) Act, 1986 (“hereinafter referred to as the Act”) to revoke the Environment Clearance dated 8<sup>th</sup> December, 2008 to the cement plant (Cement plant 1.91MTPA, 1.50 Clinker), Coke oven plant (1.5 LTPA), and Captive Power Plant (50 MW) to be established and operated near village Padhiyarka Taluka, Mahuva, District Bhavnagar, Gujarat.

2. Briefly, speaking it is the case of the appellant that the Environment Clearance granted after detailed and

transparent enquiry in accordance with the provision of Act/Rules has been reviewed and recalled on account of extraneous and political considerations. A glance at the impugned order dated 1<sup>st</sup> December, 2011 gives paronomic view of respondent's case. It appears that the Expert Committee of five independent reputed scientists was constituted by the Hon'ble Supreme Court of India vide order dated 18<sup>th</sup> March, 2011 in special leave to appeal (civil) no. 14698/2010 from the Judgment and order dated 24<sup>th</sup> June, 2010 in 3477/2009 of the High Court of Gujarat at Ahmadabad disposing of the petition (PIL opposing setting up of the cement plant with captive electricity generation plant in question) to visit the site and answer the following issues:

- a. Whether the lands in question were wet lands/water bodies?
  - b. Whether the project could come up on such wetlands/water bodies and if so what would be its impact on Environment? Would it lead to Environmental degradation?
  - c. If at all the project could come up what steps the user agencies would take in the interest of Environment Protection;
  - d. Prescribed current situation of the project may also be indicated by the Expert body.
3. In pursuance to the report of the Expert Committee, the impugned order further reveals, the **EAC** recommended **revocation** of the **environment clearance** on the ground that it was initially accorded on **undisclosed** and

**incorrect postulates:** Acting on the order dated 9<sup>th</sup> September, 2011 of the Hon'ble Supreme Court in the said SLP, the MoEF on examination of the material on record, namely, the Expert Committee report and the record of hearings given to the project proponent and the additional documents submitted by the project proponent revoked the environment clearance granted to the project of the appellants referred to herein-above.

4. Some of the facts giving the background of the land allotted to the project proponent, admeasuring 268-86-52 Ha. of villages Vangar, Padhiyarka and Doliya for total consideration of Rs. 8,30,39,736/- by the State Government vide order dated 27<sup>th</sup> December, 2007 can hardly be disputed. Topo sheet of the year 1952 of the land in question described the terrain as a waste land. On 17<sup>th</sup> July, 1978 the Government of Gujarat appointed a High Level Committee for the purpose of chalking out programme for fixing priority of works to be undertaken to arrest salinity ingress in the coastal areas of Saurashtra and Kutch. On 2<sup>nd</sup> March, 1983 the Committee recommended the construction of Bandharas and indicated detail regulation amongst other measures to arrest salinity ingress from flooding the areas of cultivation. On 25<sup>th</sup> May, 1999 the Collector, Bhavnagar passed an order transferring Government waste land and Gaucher land totalling to the tune of 222-06-24 Ha.(58-

07-26 Ha. of village Doliya and 163-98-98 Ha. of village Padhiyarka) to Executive Engineer, Salinity Control Department, Bhavnagar for the purposes of developing Samadhiyala Bandhara. On 17<sup>th</sup> June, 1999 the collector Amreli passed an order transferring Government waste land as well as Gaaucher land totalling to the tune 178-55-03 Ha. (103-55-03 Ha. of village Samadhiyala and 75-00-00 Ha. of village Patva) of Taluka, District Amreli to the Executive Engineer Salinity Control Department, Bhavnagar. Thus, the total land transferred in favour of Executive Engineer, Salinity Control Department for the aforesaid purpose was 400-61-27 Ha. Necessary order of transfer was passed after the order of resumption was passed in respect of Gaucher land as per the provisions of 108 of Panchayats Act. The construction work of Samadhiyala Bandhara was over in the July, 2000.

5. According to the appellant an application for grant of land of Vangar, Padhiyarka and Doliya was made to the Collector on 24<sup>th</sup> April, 2002. On 5<sup>th</sup> April, 2004 the Mamladar, Mahuva gave his report in respect of demand of the land referred to above with following recommendations;

- I. The land in question is not claimed by any Government or Private Body and is also not useful for agricultural.
- II. Gram Panchayat of village Vangarhas passed resolution agreeing to allot land in question including the Gaucher land to M/s Nirma Ltd.

III. Part of the land in question was transferred to the Salinity Control Department, but the said Department does not require the land anymore and so the same may be transferred to M/s Nirma Ltd.

IV. Mahuva Taluka it is not a developed area having no industry and hence the proposed plants will provide job opportunities to local villagers who may not have to migrate to other places seeking jobs which will also help for overall development of the area.

6. The Gujarat Pollution Control Board (**GPCB**), the respondent no. 3, opined on 30<sup>th</sup> April, 2004 that the Board has **no objections** for the allotment of proposed land to the project proponent, **provided**, it shall **obtain environment clearance** from MoEF, New Delhi as per the EIA Notification dated 27<sup>th</sup> January, 1994. The Executive Engineer, Salinity Control Department, Bhavnagar gave his report on 22<sup>nd</sup> April, 2004 favouring the proposed transfer of land of Samadhiyala Bandhara to the company. The Salinity Control Department on 13<sup>th</sup> December, 2005 gave a report in the matter of releasing some of the Bandhara land for industrial purposes subject to certain terms and conditions. Following a public hearing held the Executive Engineer, Salinity Control Department, Bhavnagar gave a positive report for allocation of the land in question to the project on 16<sup>th</sup> May, 2006.

7. It is an undisputed fact that the policy regarding the Conservation of wet land was issued by MoEF on 2<sup>nd</sup> February, 2007; and an application for grant of

Environmental Clearance to the project was made by the appellants to MoEF on 5<sup>th</sup> September, 2007.

8. On this backdrop, admittedly, the Government of Gujarat passed resolution approving the grant of land ad measure 268-52-5 Ha. of the said villages to the Company on some material terms and conditions. Which are reproduced herein below:

*"iv) For equalizing the storage of rainwater, the company would undertake necessary digging of the lands of S.Nos. 27 and 179 of Samadhiyala village, which is Government waste/gaucher land at its own expense as suggested by the Superintending Engineer, Central Design Organisation Gandhi Nagar.*

*v) Three channels i.e. two approach channels with one connecting channel, will have to be made as suggested by the NWRWS&K Department to draw the rain water in Samadhiyala Bandhara and the repairs and maintenance of these channels will have to be made by the company at its own expenses. Further, in case of any damage caused due to rainy water, the company will be solely responsible to carry out the works in that regard at its own expense.*

*vi) The company will have to make separate arrangement for necessary quantity of water required for drinking and industrial use and that it would not make use of the bandhara water, directly or indirectly.*

*vii) The company will have to carry out the additional work as suggested by the Central Design Organisation, Gandhi Nagar by making reverse small channels, i.e. reverse gradient channels for conveying water at the field locations.*

*Viii) The company will have to carry out all the above works under Control of NWRWS&K Department.*

9. The Collector Bhavnagar passed consequential order allotting the aforesaid land to the company for setting up the said project on 16<sup>th</sup> April, 2008.

10. Chronology of events leading to the grant of environment clearance in question is as under:

1. On 5<sup>th</sup> September, 2007 an application for environment clearance was made to MoEF.
2. On 27<sup>th</sup> February, 2008 terms of Reference (TOR) was issued by the MoEF.
3. On 14<sup>th</sup> July, 2008 draft EIA report was submitted to GPCB.
4. On 1<sup>st</sup> August, 2008 Notice of Public Hearing was given by the GPCB in Gujarati as well as English newspaper.
5. On 9<sup>th</sup> September, 2008 the GPCB conducted public hearing in the matter of Environment Clearance to the project and the minutes are sent to MoEF.
6. On 6<sup>th</sup> October, 2008 the final EIA report submitted to MoEF.
7. On 8-11<sup>th</sup> December, 2008 the MoEF granted environment clearance to the appellants.
8. On 17<sup>th</sup> December, 2008 a newspaper advertisement regarding the grant of environment clearance appears in Indian Express and Aaj Kal.
9. On 17<sup>th</sup> December, 2008 Collector Bhavnagar conducted a public hearing in respect to the land allotted to the Nirma Ltd.

11. The Respondent No. 4 Shree Mahuva Bandhara Khetiwadi Pariyavaran Bachav Samittee filed PIL-SCA 3477/2009 opposing the said project before the Hon'ble Gujarat High Court on 25<sup>th</sup> March, 2009. This was followed by grant of consent to establish the said cement and captive power plant by the GPCB on 25<sup>th</sup> May, 2009. On the representation made by Dr. Kanubhai Kalsariyad, the State Government appointed an expert committee headed by Shri S.K Shelat,

then learned Advisor to Hon'ble Chief Minister and other experts in the field to visit the site, hear representations of the affected persons, consider the suggestions and objections, obtain reports/opinions source from various experts in the field and to report to the Government on the issue, on 29<sup>th</sup> May, 2009. The Hon'ble High Court directed the appellants to place their grievances before the said Committee and the Committee was directed to take note of the same including the note of other aspects in the matter and to take proper decisions accordingly, vide order dated 26<sup>th</sup> June, 2009. The Shelat Committee accordingly gave its report on 4<sup>th</sup> August, 2009. The State Government formed a sub-committee of the ministers to consider the said report and the said sub-committee gave its report and made following recommendations on 19<sup>th</sup> November, 2009:

- (i) Out of the initial allotment of 268 hectares of land to the company for its proposed cement project, 54 hectares of land from the south should be returned back to the State Government and that the company should give consent in writing about the same.
- (ii) Out of the aforesaid 54 hectares of land, after leaving periphery area, the company should deepen 40 hectares of land so as to increase the water capacity to the extent of 22.7 %.
- (iii) As per the expert opinion of the Government of India undertaking called WAPCOS, the company should deepen about 62 hectares of land out of the available area of 75 hectares, so as to increase the

capacity of Bandhara water by 21.23 mcft (million cubic feet). The company shall have to undertake the said activity under the guidance of the Irrigation Department.

12. According to the appellant there occurred heavy monsoon in the year 2005 resulting in temporary submergence of Bandhara land for a few months; and the sub-committee had taken into considerations the record figures in respect of submergence of land in the said year into consideration as benchmark for calculating the rain water conservation capacity of Bhandhara land for the purposes of making the aforesaid recommendations. The State Government issued a GR dated in terms of the recommendations made by the sub-committee in its report dated 19<sup>th</sup> November, 2009. The appellants gave a written consent to surrender admeasuring 54 Ha. as per the GR 8<sup>th</sup> December, 2009 on 9<sup>th</sup> December, 2009.
13. The Hon'ble Gujarat High Court vide order dated 16<sup>th</sup> December, 2009 directed the appellants to demarcate 54 Ha. of land; and accordingly on the 54 ha. of land of village Doliya was demarcated and surrendered by the appellant on 23<sup>rd</sup> December, 2009.
14. After hearing the parties and considering the facts and material on record, particularly, the Government order dated 16<sup>th</sup> April, 2008 allotting 268.86.56 Ha. of land on certain conditions, detailed report of the salinity division on the

impact of construction of factory on the Bhandara reservoir, Shelat Committee report GR- 8<sup>th</sup> December, 2009. Shailesh R Shah's Case, various pronouncement of the Apex court and appellants willingness to surrender additional 46 Ha.of land, the Hon'ble High Court of Gujarat disposed off the PIL-SCA3477/09 with the following directions:

*26. Under the circumstances, this petition is disposed of with following directions:*

- 1) Respondent No. 4 Company shall, in addition to 54 hectares of land ordered to be surrendered by the Government in its order dated 8<sup>th</sup> December 2009, surrender further 46 hectares of land indicated in the map at Annexure I to the affidavit dated 16<sup>th</sup> April 2010, copy of which map is attached to this Judgment at Exh. A and shall include any land to be occupied by canals which company is obliged to construct;
- 2) Respondent No. 4 Company shall strictly adhere to its obligation to construct canals A,B and C shown in the official maps and maintain the same as directed by the Government and further ensure that it is desilted periodically, so that the flow of rain water from the surrounding areas to the Reservoir is not obstructed;
- 3) Respondent No. 4 Company shall excavate and deepen 75 hectares of Government waste land as directed by the Government;
- 4) Respondent No. 4 shall excavate and deepen part of 54 hectares of land returned by it under the Government order dated 8<sup>th</sup> December, 2009;
- 5) Respondent No. 4 shall excavate and deepen any part of the additional 46 hectares of land as may be suggested by the Government. For this purpose, the Government shall have a survey carried out and make suggestions for

*excavation of the land as per the topography of the area to ensure that this additionally surrendered land also forms part of Samadiyala Bandhara and increase the water carrying capacity of the Reservoir.*

- 6) *Respondent No. 4 Company shall not use any water from reservoir for its activities.*
- 7) *Respondent No. 4 Company shall ensure that its activities shall not pollute or contaminate the Reservoir water in any manner.*
- 8) *It will be open for the respondent no. 4 Company to recommence its construction of the factory on condition that within four weeks from today, the company after proper measurements by the DILR surrenders further 46 hectares of land as already directed herein above;*
- 9) *The Government shall ensure that respondent no. 4 Company has complied with all the above directions before issuing certificate of completion of construction or before granting permission to start the factory;*
- 10) *The Government shall, on the basis of the records of rainfall in the region and the total amount of water collected in the Reservoir immediately after the monsoon, judge whether on account of setting up of the factory there has been any significant reduction in income of the fresh water in the Reservoir. If so, the Government shall require respondent No.4 Company to take such remedial measures as may be found necessary.*

15. Order disposing of SCA No. 3477/2009 was challenged by the respondent no. 4 and one Khimja Bhai Barariya by preferring a two separate SLP's into (SLP No. 1501/10 and SLP No. 14698/10 respectively) before the Hon'ble Apex Court in the Month of May, 2010. A Review Petition seeking review of the Judgment and order dated 26.04.2010 being MCA No. 1473 of

2010 was also filed by the same parties initiating the SLP on 14.06.2010. On the orders of the Hon'ble Apex Court the Review Petition was expeditiously heard and dismissed on 27.09.2010.

16. During pendency of the SLP's before the Hon'ble Apex Court the respondent no. 1 MoEF issued a notification regarding Wetland (Conservation and Management) Rules 2010 on 04.12.2010. However, the MoEF filed an affidavit supporting the project pursuant to the directions of the Hon'ble Apex Court in the said SLP on 08.01.2011.

17. According to the appellants the MoEF took U-turn as to the validity of the project and the environmental clearance granted to it at the instance of one Ms. Sunita Narayan who addressed an email to the then Hon'ble Minister of Environment and Forest Mr. Jairam Ramesh to have a re-look into the project. The MoEF sought adjournment, when the aforesaid petitions came up before the Hon'ble Supreme Court for hearing on 17.05.2011, in order to buy time to start the process of reversing the environmental clearance granted to the project previously. The MoEF appointed an Expert Committee of 7 Members headed by Prof. C K Varshney to check the ground situation on 21.01.2011. Even before the Committee has visited the project site the Hon'ble Minister of MoEF Mr. Jairam Ramesh publicly declared that the appellants plant was situated on the wetland on 03.02.2011. Varshney Committee reported that Samadhiyala Bandhara

possessed all the characteristics features of wetland ecosystem. The report was considered by the EAC in its meeting held on 22<sup>nd</sup>/23<sup>rd</sup>.02.2011. On 11.03.2011 a show cause notice was issued to the appellants under section 5 of environment (Protection) Act 1986 to show cause as to why environmental clearance accorded to the project should not be revoked. This notice was challenged by the appellants before the Gujarat High Court in writ petition being SCA No. 3542 of 2011. The Hon'ble High Court issued the notice but refused to grant stay in the said writ petition. The appellants therefore moved the Hon'ble Apex Court by preferring an SLP bearing no. 559 of 2011 against the refusal to grant stay by the Hon'ble High court of Gujarat.

18. When the bunch of said SLPs preferred by the respondent no. 4 and another came up for the hearing before the Hon'ble Supreme Court on 18.03.2011 the Learned Solicitor General submitted that he would like to revisit the environment clearance granted to the project and there upon the Hon'ble Apex Court directed the Expert Appraisal Committee of the MoEF to call for the report of an Expert Body consisting of 5 independent reputed scientist who were to visit the site and answer the following issues:

- (a) Whether the lands in question were wet lands/ water bodies;
- (b) Whether the project could come up on such wet land/water bodies and if so, what would be its impact on

environment? Would it lead to environmental degradation?

(c) If at all the project could come up, what steps the user agency should take in the interest of environment protection; and

(d) The precise current status of the project may also be indicated by the Expert Body,

and further directed the MoEF to take decision upon the report of the Expert Body. The Expert Body was directed to give hearing to the project proponents and the objectors to the project. Learned Counsel appearing on behalf of the appellants the project proponents there upon made a statement before the Hon'ble Apex Court that the writ petition filed by them in the Hon'ble High Court would be withdrawn.

19. Accordingly, 5 Member Expert Body comprising of Independent Reputed Scientists headed by Prof. C. R. Babu was appointed to go into the fact situation and answer the aforesaid questions raised by the Hon'ble Apex Court. Later on one Mr. Paritosh Tyagi, Ex-Chairman of the Central Pollution Control Board was included in the body of experts at the instance of the Project Proponent. This Expert Body gave its findings upon making certain inquiries. According to the Expert Body headed by Prof. Babu (for short herein after referred to as Prof. Babu Committee)the Project site lies within the water spread of catchment, and the water run-off

terrain of Samadhiyala Bandhara; and what earlier was a costal saline natural eco system was converted into fresh water man-made eco system providing assistance of lift irrigation. According to the Prof. Babu Committee, the site may be classified only as a wet land and water body and the existence of the plant at the site is incompatible with ecology and the Project may not be proceeded with.

20. Prof. Babu Committee Report was placed before the Hon'ble Apex Court. The Hon'ble Apex Court while passing the order dated 9<sup>th</sup> September, 2011, observed that the narrow issue which arose for determination in a said Special Leave Petitions was whether the EC has been obtained by suppressing the material fact. The Hon'ble Apex Court noticed that the EAC in its Report dated 5<sup>th</sup> May, 2011 had concurred with the view expressed by the eminent scientist saying that the site has been appropriately re-classified as water bodies, and a Show Cause notice was issued by MoEF on 11<sup>th</sup> May, 2011 to Nirma Ltd accordingly, and therefore MoEF was obliged to the decide whether clearance dated 8<sup>th</sup> December, 2008 should or should not be revoked. The Hon'ble Apex Court directed the Appellant's Nirma Ltd., to give its objection / reply to the report dated 5<sup>th</sup> May, 2011 of EAC as also to the Show Cause Notice dated 11<sup>th</sup> May, 2013. The MoEF was directed to take its decision on revocation of the clearance dated 8<sup>th</sup> December, 2008 on the said of the objection / reply as aforesaid within 3 months from the date

of the order dated 9<sup>th</sup> September, 2011. The Hon'ble Apex Court also drew the attention of the MoEF to the directions passed in Lafarge Umiam Mining Private Ltd. v. Union of India, case (2011 (7) SCC 338) requiring framing of questions in appropriate cases wherever MoEF deemed fit and refer those questions to the experts (institutions) from its panel.

21. According to the Appellants, they undertook study on the issue of waste land through Department of Environmental Science and Engineering **GJU Institute of Science and Technology**, Hisar, Haryana, and as the study undertaken was not completed, it could not submit its additional / supplementary reply to the Respondent No. 1 (MoEF) and explain its position vide letter dated 23.11.2011 addressed to the MoEF. The Appellants also informed the MoEF that they would be seeking appropriate directions from the Hon'ble Apex Court in that regard on 9.12.2011. The Appellant submits that the Respondent No. 1 (MoEF) without giving any heed to their request for granting one more opportunity for final hearing on critical issue proceeded to pass impugned order / direction dated 1.12.2011 with **undue haste**.

22. On 9.12.2011 the Hon'ble Apex Court was apprised of the impugned order, whereupon the Hon'ble Apex Court disposed of the aforesaid SLPS accepting the request of the Appellants to proceed against the impugned order in accordance with law.

23. It is on this back drop the present appeal has come up for hearing before us. Suffice it to state that the Respondent No. 1 (MoEF) has refuted the case of the Appellant and on the other hand the Respondent No. 2 and 3, the State of Gujarat and **Gujarat Pollution Control Board** maintain that the land in question was waste land / gauchar land/ intwado land and not a wet land / water body and the relevant revenue record makes a reference accordingly. According to the Respondent No. 3 (**Gujarat State Pollution Control Board**) a reference to Bandhara was made in the public hearing conducted for the grant of environmental clearance and there is no adverse environment impact of the Project on the land / Bandhara in question. The Respondent No. 4 is the most vociferous contending parties amongst the array of Respondents and has vehemently refuted the case of the Appellants and urged for the revocation of the environment clearance to be maintained both on the points of law and facts.

24. During the pendency of this Appeal, the Expert Members of the Bench inspected the Project site in question twice in order to have clear perspective with the reference to the waste land / water bodies Bandharas and adverse effect of the Project on the environment. First visit to this site in question of the Expert Members was during June 7-9, 2013. However, the Respondent No. 1 and Respondent No. 4 filed applications (M.A No. 504/2013 and 497/2013 respectively) for staying the

operation of the order of the Tribunal for site inspection by the Expert Members passed on 20<sup>th</sup> May, 2013. Parties were heard and these applications were duly dismissed on the same day. Inspection of this site by the Expert Members was conducted as ordered vide order dated 20<sup>th</sup> May, 2013. Interestingly on 23<sup>rd</sup> August, 2013 a common prayer was made by the Learned Counsel appearing for the parties asking for second visit to the site in monsoon season for assessing complete and **comprehensive** situation with regard to wet land and likely damage to the water body. The request for second visit was acceded to by us and accordingly a second inspection of the site in question was conducted by Expert Members on 7<sup>th</sup> September, 2013. Pertinently the Expert Members during their first visit in June 2013 observed that the Bandhara was totally dry despite good over short period (75 mm rainfall recorded at Bhavnagar on 7<sup>th</sup> June, 2013). On the second visit in September, 2013 the Expert Members observed that the Bandhara was almost at full level with shallow level depth all over in submergence and growth of aquatic vegetation and presence of few water/migratory birds. They further observed that no part of the Proposed plant was under submergence and the joint areas beyond the boundaries of the proposed cement plant were having a shallow water accumulation. Though there have been misgivings about the inspection done by the Expert Members of the Bench, we may like to clarify that the concept of inspection of any property or

thing by the adjudicatory authority – the court is not alien to the judicial process and the procedure adopted by the courts. Order XXVIII Rule 18 of the Code of Civil Procedure provides for the local inspection by the court. Local inspection of any property or thing is undertaken by the Judge or adjudicating authority for the purpose of understanding appreciating and better following of the evidence adduced by the parties and to bring acuity to the judicial view in relation to the evidence placed before it. Material placed before us by the parties including various Committees / Expert Body Reports can therefore be better appreciated by us in light of the observations made by the Expert Members for dispensation of Justice.

25. Before we appreciate the factual matrix of the case it is necessary to determine the scope of the Appeal in light of the Judgments passed by the Gujarat High Court and the Hon'ble Apex Court in the matters inter se parties. Admittedly, the environmental clearance dated 11-12-2008 accorded to the cement plant, Coke Oven plant and the captive power plant in question did not find any challenge in the manner prescribed under the law in force then from any quarters except the PIL (SCA3477/2009) preferred before Gujarat High Court by the respondent no. 4 herein. From the perusal of the Judgment dated 26-4-2010 passed by the Hon'ble High Court of Gujarat in the said petition, it appears that the main grievance of the petitioners therein was in respect of the allotment of land by

the Government of Gujarat for setting up of such plant in the middle of sweet water reservoir created by the construction of 250 meters long waste weir called Samadhiyala Bandhara; and the proposed site of the plant also occupied the land falling in catchment area of reservoir; and construction of the cement plant in such circumstances would destroy the entire reservoir. The respondents therein dismissed this application as ill-founded and contended that the capacity of the reservoir upon implementation of the recommendation of the Expert Committee as directed by the Government would increase and setting up of cement plant would generate local employment. The Hon'ble High Court of Gujarat took into account the facts, which prompted construction of Samadhiyala Bandhara and its dual purpose arresting - ingress of sea water with consequent resolution of salinity problem and creation of sweet water reservoir with an estimated capacity of 62.31 million cubic feet. A fact that the land going in the submergence due to said Samadhiyala Bandhara mainly came from Government waste land as well as part of Gaucher land from surrounding villages, which the village panchayats agreed to surrender to the Government was also taken into account by the High Court. It was also taken into consideration that nearly 100 Ha. Of land out of total land allotted i.e. 268.86.52 Ha. was part of Bandhara reservoir and there could be reduction in capacity of the reservoir to the extent of 21.18 million cubic feet of water. It appears that the

Hon'ble High court had in its view while passing the said judgment a report from the salinity division recommending certain measures for meeting the challenge posed by reduction of capacity of the reservoir due to the proposed allotment of land as well as the recommendations made by the High Level Committee headed by Shri Shelat, Advisor to the Chief Minister and the State Government's action on the said report to pass directions to the company Nirma Ltd. to return 54 Ha. of land which formed part of Samadhiyala Bandhara and to deepen 40 Ha. of the said land for increasing the water carrying capacity of the reservoir by 22.7 per cent. M/s Nirma Ltd. bowed down to the recommendations made by the Shelat Committee and agreed to carry out the directions passed by the state government to deepen the land in addition to 75 per cent of government waste land to be deepened and to provide for 3 different channels after measuring 13 meter in width following 3 sides of the factory to ensure free flow of water from surrounding areas into the reservoir on this back drop Learned Counsel for petitioners therein Vehemently contended that the land allotted to the Nirma Ltd. was part of the water body and in view of the Judgement passed by the Division Bench in case of Shailesh R. Shah's case no part of such land can be alienated much less granted to the private companies. He also point out from the satellite imagery of the area in question that water gets collected during monsoon where the land has been allotted to the company and

measures suggested to compensate the loss of land and in flow of water are not adequate he further contended that the state government had not even notified Samadhiyala Bandhara as the water body despite the directions issued by the Division Bench of the Gujarat High Court in the case of Shailesh R Shah (Supra). Besides laying stress on the decision of the Division Bench of the High Court of Gujarat in relation to the water bodies in the case of Salesh R Shah (Supra) the petitioner therein cited several decision of the Hon'ble Apex Court-Countering these submissions, several judgments of the Apex Court were also cited by the contending respondent M/s Nirma Ltd. we need not detain ourselves much on the submissions of the rival parties in light of the judgments cited by them as we do not propose to sit in Judgement over the decision of the Hon'ble High Court of Gujarat. Suffice it to say that the Hon'ble High Court of Gujarat did consider these judgments and the rival submissions and took into account respondent no. 4 M/s Nirma Ltd's willingness to surrender further 46 Ha. of land excluding area comprising of canals to be constructed by the company in addition to surrender of 54 Ha. of land pursuant to the Government order and proceeded to answer the pertinent question as to whether all the measures provided by the Government coupled with surrender of additional 46 Ha. of land was sufficient to safeguard, protect and preserve the Samadhiyala Bandhara reservoir so as to

permit the respondent no. 8 company to carry on with the further construction of the cement factory.

26. The Hon'ble High Court of Gujarat was of the view that with certain minor fine tuning conditions to surrender the land by the company was sufficient to safeguard, protect and preserve Samadhiyala Bandhara reservoir and with further surrender of 46 Ha. of land the company would have surrendered equal area of land going under submergence. It appears from the reading of the said judgment that the principle of sustainable development was at the back of the mind of the Hon'ble High Court of Gujarat while delivering the said judgment. This could be perceived from the para 24 of the Judgment.

27. Pertinently, the Hon'ble High Court of Gujarat after hearing the parties dismissed the Review Application preferred by the petitioners in special 3477/2009, on merits and the petition for special leave to appeal (civil) (14698/2010) preferred against the Judgment and order dated 26-04-2010 passed by the Hon'ble High Court of Gujarat in SA 3477/2009, was disposed of following the statement made on behalf of M/s Nirma Ltd that the competent authority under Environment (Protection) Act, 1986 had passed an order against Nirma on 1st December, 2011 and the company would proceed in appeal before us vide order dated 9th December, 2011. Thus the entire controversy over the project being established on the land in question came to an end except the narrow issue whether environmental clearance dated 8<sup>th</sup>December, 2008 had been

obtained by suppressing the material facts. This could be read from the prelude to the order dated 9th December, 2011 disposing of the said petition.

28. On 18th March, 2011 the Hon'ble Apex Court without expressing any opinion on merits of the case sought answers to certain pertinent questions as regards the nature of the land in question and its impact on environment as well as the current states of the project from the expert body consisting of 5 independent reputed scientists and directed the MoEF to take its decision uninfluenced by any observations made in the pending proceedings. In light of the answers given by the expert body. The Hon'ble Apex Court On 9<sup>th</sup> September, 2014 observed that the narrow issue before the MoEF was whether his decision of granting environmental clearance should be recalled being based on the footing that the cement plant would be constructed on the waste land and the MoEF was required to decide whether environmental clearance should or should not be revoked. The Hon'ble Apex Court set the calendar for taking appropriate decision in the matter by the MoEF and directed the MoEF to complete the exercise of decision making within 3 months from the date of the said order. It is pursuant to these directions that the impugned decision was taken and the Hon'ble Apex Court having found nothing more to consider on merits disposed of the said petitions by order dated 9th December, 2011. Thus, we have only to examine in the present appeal whether the action of

revocation of the environmental clearance on the ground of material suppression of fact was justified or not. No other issues by virtue of the Judgments passed by the Hon'ble High Court of Gujarat and the Hon'ble Apex Court, therefore, survive for our consideration.

29. Learned Counsel for the appellant at the outset submitted that the Central Government could not have done or revoked the environment clearance granted to the project by due process of law in directly by invoking the provisions of Section 5 on the specious premise of the land being "*wetland as per Ramsar Convention*" which otherwise could have been directly done by duly declaring the same land as wetland-an ecologically sensitive area. He pointed out from the revenue record and Wet land At-las that the land in question allotted to the project was not identified as a wetland/ water body but were shown in the revenue record as wetland /Gauchar land/Intwado land. He further submitted that public hearing was conducted for transfer of the same land in question from salt department to the revenue department before it was allotted to the project. He further pointed out that the process as prescribed under EIA Notification, 2006 for grant of EC was duly gone through including second public hearing for EC purposes was conducted wherein reference to Bandhara was made; and it is only after the due process of law being followed the EC was granted. He further submitted that the grant of EC found no challenge except the aforesaid writ petition

preferred to the Hon'ble High Court of Gujarat; and the Hon'ble High Court of Gujarat had duly disposed of the said petition after taking into consideration all aspects in relation to the artificial water body created on construction of Bandhara. The Hon'ble Apex Court having dismissed the petitions preferred against the Judgment of the Hon'ble High Court of Gujarat, he argued no issue regarding the water body artificially created by the Bandhara and possible adverse environmental impact of the project on the water body survived for judicial consideration. According to him invoking of the provisions of Section 5 for revoking the EC duly granted at the instance of one Sunita Narayan vide email dated 14.01.2011 was inappropriate and demonstrated malice in law, and as such the impugned order of revocation deserved to be set aside. He invited our attention to the Judgment delivered by the Hon'ble Apex Court in Smt. Venkataraman Case-(1979) 2 SCC Cases 491: Smt. S.R. Venkataraman Vs Union of India and Another:

30. Answering these submission learned Counsel for the Respondent No. 4 submitted that the plea of malice in law cannot be raised for the first time in the appeal when this issue was not raised before the Hon'ble Apex Court in reply to the notice issued on the SLP. He further submitted that neither Sunita Narayan the author of the email dated 14.01.2011, nor the then Hon'ble Minister of Environment and Forest Mr. Jai Ram Ramesh have been made parties to the

present appeal and, therefore, the real facts regarding the episode of email have remained shrouded for want of authentic material on record; and as such the plea of malice in law must fail. He further pointed out that there existed enough material on record to suggest the existence of water body/wetland as defined under Ramsar convention and therefore it cannot be said that the action taken by the Central Government for revocation of EC was without just cause or excuse, reasonable or probable cause. It is for this reason he argued that the plea of malice in law must fail. To buttress his submissions and to further enrich our understanding regarding malice or jurisprudence of power he placed reliance on the several judgments of the Hon'ble Apex Court, more particularly,

1. (1979) 3 SCC 229: State of U.P. and Ors. Vs Hindustan Aluminium Corporation & Ors.
2. (1985) 3 SCC 1: Raja Ram Jaiswal Vs Collector Allahabad & Anr.
3. (1980) 2 SCC 471: State of Punjab Vs Gurdial Singh & Anr.

He particularly laid emphasis on para no. 9 of the Judgment delivered by the Hon'ble Apex Court in State of Punjab and Anr. Vs Gurdial Singh & Anrs case in order to make a submission that if the power is used for a legitimate object no malice can be attributed to such use.

31. On going through the Judgment passed in Venkataraman case we come across the meaning of “malice in law” as expounded by the Hon’ble Apex Court in the following words:

*“para 5 ..... Thus malice in its legal sense means malice made by such as may be assumed from the doing of wrongful Act intentionally but without just cause or excuse or for want of reasonable or probable cause”.*

32. In instant case the Central Government invoked Section 5 of the Environment Protection Act 1986-the Act to revoke environmental clearance which was granted by following the process stipulated in Environment Clearance Regulation 2006 framed in exercise of powers conferred by sub section 1 and clause (V) of sub section 2 of section 3 of the Act read with clause (b) of sub rule 3 of Rule 5 of the Environment (Protection) Rules 1986. Pertinently as observed herein above the said EC had attained finality for the reason of it not being challenged as per the provisions of the Act and or the challenge to it by way of the writ petition coming to an end as aforesaid. Section 5 of the Environment Protection Act 1986 permits the Central Government, subject to the provisions of the said Act, to issue directions in writing to any person in exercise of its powers and performance of its functions under the said Act. The Central Government therefore could not have invoked the provisions of Section 5 for revoking the EC which had attained finality particularly when there existed a specific provision under the Environment Clearance

Regulation, 2006 for revocation under sub para (vi) of para 8 of the Regulation.

33. This takes us to further enquiry as to whether the action initiated purportedly under Section 5 of the Environment Protection was without any probable cause or legitimate object. Such enquiry is necessitated not only in light of the meaning expounded by the Hon'ble Apex Court in Venkataraman case but also para 9 of the Judgement in Gurdial Singh case which is quoted herein below:

*"The question, then, is what mala fides in the jurisprudence of power is? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidated the exercise of power-sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions – is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the cue for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated: "I repeat. that all power is a trust- that we are accountable for its exercise- that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel*

*the action, mala fides or fraud on power vitiates the acquisition or other official act".*

34. Assuming that Ms. Sunita Narayan addressed the email to the then Hon'ble Minister Jai Ram Ramesh of the MoEF pointing out that there were sufficient grounds to hold existence of water body which called for revocation of the EC, then it would be prudent to examine whether Ms. Sunita Narayan was prompted to address this email for some legitimate object. We have before us the reports of Shelath Committee, Prof. Varshney Committee and Prof. Babu Committee. All have pointed out unanimously that there existed a Bandhara which laid to the creation of water body due to accumulation of rain water. Prof. Babu Committee recommended classification of the land in question as 'wetland' and 'water body' and observed that it had manifold ecological utility besides helping recharge of ground water, sustain rich biodiversity, provide pastures and support settlements and as such common property resource. It appears that accepting the findings and recommendations of the Babu Committee and in its wake the MoEF was prompted to invoke the provisions of Section 5 of the Environment Protection Act. It is therefore difficult to hold that there was no probable cause or the legitimate object for initiation of such action. We are, therefore, of the considered opinion that the actuation or catalysation of such action by the email purportedly addressed by Ms. Sunita Narayan was not legicidal and, therefore, the plea of there being malice in law in

actuation of the proceedings under Section 5 as raised by the appellant must fail.

35. However, the revocation of EC granted as per EIA Notification 2006 ought to have been done in the manner provided under para 8 sub-para (vi) of the Regulation, 2006 which reads as under:

“(vi) Deliberate concealment and/or submission of false or misleading information or data which is material to screening or scoping or appraisal or decision on the application shall make the application liable for rejection, and cancellation of prior environmental clearance granted on that basis. Rejection of an application or cancellation of a prior environmental clearance already granted, on such ground, shall be decided by the regulatory authority, after giving a personal hearing to the applicant, and following the principles of natural justice”.

36. Reading of this provision makes it abundantly clear that the prior environmental clearance granted following deliberate concealment and/or submission of false or misleading information or data, which is material to any of the stages leading to the grant of environmental clearance qualifies for cancellation of such clearance. Act of concealment and or submission of false or misleading information or data, however, should be a deliberate one.

37. Revocation of the environmental clearance mainly proceeded on the premise that the environmental clearance accorded was founded on undisclosed and incorrect postulates mainly as regards the character of the land in question recognised by the Prof. Babu Committee as a “Wetland”. It is true that the

appellant described it as “Wasteland” when the proposal for the grant of EC was initiated and not as a wetland. Explanation offered for this aberration is that the land in question was not identified as a wetland by the authorities concerned and was shown in the revenue records throughout by the State of Gujarat as a wasteland and the confusion in understanding of its nature led to such aberration which cannot be termed as an act of deliberate concealment and/or submission of false or misleading information or data to the authorities under the Environment Clearance Regulations 2006. According to the appellants the existence of the Bandhara and formation of water body as a result of accumulation of rain water during monsoons surfaced in the public hearing and the decision of grant of EC was taken in light of such revelations. We find from the records that there was disclosure regarding Bandhara during the public hearing conducted by GPCB in the process leading to the EC in question; and following such disclosure the project proponent had clarified the issues specifically relating to salinity control Samdiyala Bandhara, school crematorium and road at the time of its presentation in 86<sup>th</sup> meeting of the EAC held at MoEF New Delhi on 22<sup>nd</sup> October, 2008 vide presentation slide no. 58 and 59. The decision recommending the grant of EC was thus consequentially taken and the grant was recommended by EAC to the MoEF. Fact of the existence of the water body and the effect of the project there upon was

also taken into account in the proceedings before the Hon'ble High Court of Gujarat while passing the verdict which had attained finality.

38. Issue of conservation of wetlands worldwide vis. a vis. development was taken cognisance of by the international community in Ramsar Convention in the following words:

Wetland should be conserved by ensuring their **wise use**. Wise use is defined as “Sustainable utilisation for the benefit of mankind in a way compatible that the maintenance of the natural properties of the ecosystem” – Sustainable utilisation is understood as “Human use of wetland so that it may yield the continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. “*Wise use*” may also require strict protection.

39. The Ramsar Convention defined wetlands as below:

*“Wetlands are area of Marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static are flowing, fresh, brackish or salt, including areas of marine water, the depth was at low tide does not exceed six metres”.*

40. Following the Ramsar Convention the Central Government made the wetlands (Conservation and Management) Rules 2010 for conservation and management of wetlands in exercise of the powers conferred by Section 25, read with sub section (1) and clause (V) of sub section (2) and sub section (3) of section 3 of the Environment (Protection) Act, 1986. Definition of wetland is available at Rule 2 (g) of the wetlands

(Conservation and Management) Rules 2010 in the following words:

2(g) "Wetland" means an area of Marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water, the depth at low tide does not exceed six metres and includes all inland waters such as lakes, reservoir, tanks, backwaters, lagoon, creeks, estuaries and manmade wetland and the zone of direct influence on wetlands that is to say the drainage area or catchment region of the wetlands as determined by the authority but does not include main river channels, paddy fields and the coastal wetland covered under the notification of the Government of India in the Ministry of Environment and Forest, S.O. Number 114(E), dated the 19<sup>th</sup> February, 1991 published in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (II) of dated the 20<sup>th</sup> February, 1991.

41. Rule 3 therein speaks about the **Protected Wetlands** in the following words:

"3. Protected wetlands-Based on the significance of the functions performed by the wetlands for overall well being of the people and for determining the extent and level of regulation, the following wetlands shall be regulated under these rules, namely-

- (i) Wetlands categorised as Ramsar Wetlands of International Importance under the Ramsar convention as specified in the Schedule.
- (ii) wetlands in areas that are ecologically sensitive and important, such as, national parks, marine parks, sanctuaries, reserved forests, wildlife habitats, mangroves, corals, coral reefs, areas of outstanding natural beauty or historical or heritage areas and the areas rich in genetic diversity;
- (iii) wetlands recognised as or lying within a UNESCO World Heritage Site;
- (iv) high altitude wetlands or high altitude wetland complexes at or above an elevation of two thousand five hundred metres with an area equal to or greater than five hectares;
- (v) wetlands or wetland complexes below an elevation of two thousand five hundred metres with

*an area equal to or greater than five hundred hectares;*

*(vi) any other wetland as so identified by the Authority and thereafter notified by the Central Government under the provisions of the Act for purposes of these rules.*

It has been pointed out to us that the land in question is not a

**Protected Wetland** falling in any of the categories of Protected Wetlands spoken of in Rule 3 of the said Rules and there is no blanket moratorium on its development except a regulatory regime prescribed under Rule 4 of the said rules.

42. Visit of the Expert Members twice to the project site, firstly in the first week of June 2013 and secondly in the month of September 2013 brought to light some material facts concerning the water body. On the first visit of the Expert Members it was noticed that the Bandhara was totally dry despite good rains over short period (“75 mm false” recorded at Bhavnagar) and on second visit it was noticed that the Bandhara was almost at full level with shallow water depth all over in submergence and no part of the proposed project land was under submergence and the adjoining areas beyond the boundaries of the proposed project land was having shallow water accumulation. Expert Members also noticed during their second visit that there was growth of aquatic vegetation and the presence of few migratory birds around the water body. One wonders how Prof. Babu Committee could document exhaustive list of birds, presence of endangered vulture and Asiatic lions and could give soil type extra in two hours of field visit without any backing of any specific

scientific study in relation to the project site. On visits to site in question the Expert Member had made pointed enquiry and asked for data/information as regards month wise rainfall pattern over the years, month wise water levels in the Bandhara, month wise irrigation area provided from the reservoir, soil type and its characteristics in the project area and adjoining area, lay out maps of the area in question along with superimposition of project boundaries from the parties to the Appeal. This information/data was made available to us and was exchanged between the parties. Having gone through the entire information/data thus made available we are of the considered opinion that the Samdiyala Bandhara serves as a temporary storage of water, which gets used by farmers or gets evaporated due to its large spread or gets percolated due to fairly high porosity of soil and as such cannot be called as a productive wetland having all perennial features of a wetland.

43. As noted above, the revenue records described the area in question as a ‘waste Land’ and it was never, even till today, identified as wet land by the Central Wetlands Regulatory Authority and so notified by the Central Government under the provisions of the Act for the purposes of Wetland (Conservation & Management) Rules, 2010. The Hon’ble High Court of Gujarat, however, considered the issue of water body thus created by Samadhiyala Bhandhara on such Waste Land, particularly in light of the concerns of the local persons whom the respondent no. 4 professes to represent.

44. In the given circumstances it is difficult to hold that there was any deliberate concealment and or submission of false or misleading information or data to the authorities according environmental clearance. Moreover, the Hon'ble High Court of Gujarat, whose verdict has attained finality as aforesaid, had taken into account the recompense the appellants have made by foregoing 100 hectares of land, 80 per cent of which was under submergence, and by deepening certain portion of the land and channelizing the storm water towards the water body. We have also noticed that the project proponent have given up Captive Power Plant and Coke Oven Plant and the project is designed not to discharge any effluent or any material in the water body created by Samdiyala Bandhara. These aspects of the matter were not fully taken into account either by Prof. Babu Committee or MoEF during the process leading to the revocation of the environmental clearance granted to the project proponent.

45. In our considered opinion, therefore, this Appeal needs to be allowed and is accordingly allowed. The Impugned Order dated 1<sup>st</sup> December, 2011 issued by respondent no. 1- MoEF is set aside.

46. With a view to enrich our understanding regarding the wise use of such sites we feel that the effect of the project on the water bodies of such nature thus created by the Samdiyala Bandhara need to be monitored and study undertaken in that regard for a period of 2 years on the commencement of the

project. We, therefore, direct the respondent no. 3-State Pollution Control Board to monitor and undertake study of the effects of running of the project on the water body of such nature created by Samdiyala Bandhara in conjunction with CPCB Zonal Office at Baroda from the date of the commencement of the project. The applicant- project proponent shall bear the expenses incurred by the State Pollution Control Board and CPCB for monitoring and conducting such study. Liberty is granted to the State Pollution Control Board and CPCB to take assistance of such expert body/institution in the field of Environmental Monitoring of water bodies as they deem fit. Parties shall bear their own cost. At the end of the study the report shall be tendered before us.

....., CP  
(Swatanter Kumar)

....., JM  
(U.D. Salvi)

....., EM  
(Dr. D.K. Agrawal)

....., EM  
(Dr. G.K. Pandey)