

RIPARIAN RIGHTS IN INDIA

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ABSTRACT

This paper seeks to scrutinize the various dimensions of riparian rights with special reference to the Indian Position. The paper commences by unraveling the concept of riparian rights. This is followed by the history and the various rights that fall within the purview of riparian rights. The next focus of the paper is the legal framework in India pertaining to the riparian rights. Further, a mention of the ownership issues is also jotted down. An analysis of the important judicial pronouncements on riparian rights fills the next segment of the paper. The authors general conclusion on the subject winds up the paper.

INTRODUCTION

Water is one of the basic necessities to sustain life. It is becoming scarce day by day. The prediction that the third world war would be fought for water is gaining strength day by day. Fresh water today turns out to be a threatened resource today. The word riparian has as its root the Latin '*ripa*' meaning river bank. A riparian owner is one who owns property along the bank of a watercourse, including a lake, and whose boundary is the water in that course or lake. A littoral owner is one who owns land abutting a sea or ocean where the tide regularly rises and falls. Littoral is derived from the Latin '*litus*' meaning seashore or coast. In common usage the word riparian is often used instead of littoral to include seashore boundaries as well as inland water boundaries.¹ Riparian rights simply mean the rights bestowed on the people living along the banks of rivers.

Riparian Rights are natural results that occur as rights because of residence in a specific area. These are rights which belong to persons who live on a shore, bank or a river, ocean or lake because they live there. However, these rights are limited. Let us now have a glimpse at the

¹ BASIC LAW OF WATER BOUNDARIES <http://www.blm.gov/cadastral/casebook/basicwater.pdf>

rights that come under riparian rights, the history, the legal framework, the ownership concerns and the case law that revolve on these facets.

HISTORY

Riparian law or riparian rights exist in common law than in a statute. As the protection to riparian rights comes from common law, the same may be explicitly limited by legislation.² Riparian rights are traced to be recognized by common law because they are based on long-standing practices and case law rather than by statute i.e. a written Act of Parliament. Even then we can see that in certain situations the common law principle can come into conflict with specific statutes.

RIPARIAN RIGHTS

The rights which fall within the purview of riparian rights may be enlisted as follows:

- Authority to use the bank of a watercourse as well as water bed
- Access to and from water
- Protection of the property from soil erosion
- Rights of certain uses such as drinking and other domestic purposes.³
- Swimming
- Boating
- Navigation
- Fishing
- Errection of structures
- Use of water

LEGAL FRAMEWORK

World over Government is guided by three common but differentiated doctrines i.e.

² WATER RIPARIAN AND FORESHORE RIGHTS,

http://d3n8a8pro7vhmx.cloudfront.net/ubcic/legacy_url/581/CH19_Water_Riparian_and_Foreshore_Rights.pdf?1426350447

³ RAMASWAMY R. IYER , WATER AND THE LAWS IN INDIA, 97-133 (2009 Sage Publicaitons)

- i. Doctrine of Public Trust
- ii. Doctrine of Riparian Rights
- iii. Doctrine of Prior Appropriation⁴

In India, water law or the following doctrines fall within the purview of the Indian Easements Act of 1882. In the Indian Constitution, water is in the state list as Entry 17 subject to the provisions of Entry 56 of List I i.e. Union list.

Under the Easements Act, the rights of a riparian i.e. *a person who owns the land adjoining a river or a water stream* is recognized by this right. A riparian owner is bestowed with the right to use water stream which flows past his land equally with other riparian owners. A riparian shall also incur the right to have the water come to him undiminished in flow, quantity, quality and to go beyond his land without obstruction. Section 7 of the Act renders that every riparian owner has the right to continued flow of waters of a natural stream without any destruction or unreasonable pollution.⁵

It would be pertinent to note that The Easement's Act of 1882 recognizes the customary rights of riparian that are acquired under two basic rules. They are:

1. Long usage or prescription
2. Local custom

However, even these rights are not absolute. It does not render a completely independent and absolute right that is enjoyable without any external interference. To be more precise it would be significant to note that these rights are subject to the Government's right to regulate the collection, the retention and the distribution of the waters of rivers and streams flowing in natural channels.

OWNERSHIP ISSUES

⁴ National Academy of Agricultural Sciences, 'EMERGING ISSUES IN WATER MANAGEMENT – THE QUESTION OF OWNERSHIP' (POLICY PAPER 2005)

⁵ Ruchi Pant, *From Communities' Hands to MNCs' BOOTS: A Case Study from India on Right to Water*, (Rights and Humanity, UK 2003) <http://www.ircwash.org/sites/default/files/Pant-2003-Communities.pdf>

Who is the owner of water is a very common question that is raised these days. The more the water becomes scarce the more the tendency to bring a centralized system to control water laws. However, these days, countries also prefer to decentralize ownership rights.⁶ In this regard, we can see that the ownership questions arise on the following aspects:

- i. Individual Private Property (ground water)
- ii. State or Public Property (surface water resources)
- iii. Common Property (Tanks with PRIs or communities)
- iv. Common Pool Resource – access to identified group but none has a right (village tanks)
- v. No man's property (open access bodies)⁷

The rights and privileges conferred upon owners of land bounded by water take many forms and have given rise to the use of special terms to describe various legal aspects of water boundaries.

A GLIMPSE AT THE JUDICIAL PRONOUNCEMENTS IN INDIA

In *M. C. Mehta v. Union Of India*⁸ popularly known as the *Ganga River Pollution Case*, the Hon'ble Supreme Court of India recognized and revived the doctrine of riparian rights. The petitioner in the instant case, claimed to have a *locus standi* as he was a riparian owner and his riparian rights were violated by the nuisance caused by the pollution of river Ganga. The Court admitted the Writ Petition as a Public Interest Litigation. The Apex Court accepted that the petitioner was a riparian and on the other side he was also a person who was ardent in protecting the lives of the people who make use of the water flowing in river Ganga. The Court while accepting the locus of the Petitioner maintained that the same shall not be disputed. The Court was convinced that the nuisance caused by the pollution of river Ganga was a public nuisance and that the same was wide spread in range. The Court came to a conclusion that the said

⁶ National Academy of Agricultural Sciences, 'EMERGING ISSUES IN WATER MANAGEMENT – THE QUESTION OF OWNERSHIP' (POLICY PAPER 2005)

⁷ *id*

⁸ AIR 1988 SC 1115

nuisance was indiscriminate in its effect and it would not be reasonable to expect any reasonable person to take proceedings to stop it as distinct from the community at large.

Next is another decision rendered by the Madras High Court in *Vippalapati v. Raja Of Vizianagram*⁹. The case was a predecessor of the Ganga Water Pollution case. The reinforcement of riparian rights are evident in this case wherein it was a dam that was obstructing the riparian rights. The Court held that the riparian rights are encompassed of a right to access free flowing water without any obstruction even if the obstruction is by a dam.

There was another verdict rendered by the Madras High Court pertaining to riparian rights which was captioned *Sethramanamalingam v. Anada Padyach*¹⁰. The conflict was between the upper riparian rights and the lower riparian rights. Another issue was with regard to the exercise of riparian rights in artificial water bodies. The Court held in this case that there should be no material decrease in the water for lower riparian. However, riparian rights are accrued only over natural streams or rivers and the same shall not be made so elastic to cover any sort of artificial water bodies as well.¹¹

In *Malipat Madhatil v. Neelamance*,¹² another decision of the Madras High Court the conflict between the upper riparian owners and lower riparian owner is depicted. Hence, the Court in clear and cogent terms held that the judicious use of water by the upper riparian owners should not be in such a manner that it injures the rights of the lower riparian owners.

Let us now examine the verdict of Patna High Court in *Ram Sewak Kaz v. Ramgir Choudhary*.¹³ Adhering to a long line of it preceding decisions, the Court held in this case that the riparian right is a natural right. The right is automatically conferred on a person by the very reason of him or her being a riparian owner whether upper riparian or lower riparian.

In the case of *Robert Fischer v. Secretary Of State*¹⁴, by the Madras High Court, it was ruled that the Government did not incur any power to regulate in public interest, the collection,

⁹ AIR 1937 Mad 310

¹⁰ AIR 1934 Mad 583

¹¹ *Sethramanamalingam v Anada Padyach*, AIR 1934 Mad 583

¹² AIR 1938 Mad 649

¹³ AIR 1954 Pat 320; *Secy. of State v Sannidhiraju*, AIR 1932 PC 46

¹⁴ (1908) 2 Ind Cas 325

retention and distribution of water provided that it did not inflict any injury on any other riparian owner and diminish the water supply that they have traditionally enjoyed.¹⁵

Recognizing the riparian right as a natural right is again evincible in the case of *The Secretary Of State For India v. Sannidhiraju Subbarayudu*¹⁶. The decision in *Kandukuri Balasurya Row v. Secretary of State for India*¹⁷ was applied in order to establish the same. The relevant paragraph runs as follows:

A riparian right is a natural right and is not acquired by immemorial user. It exists by law, it may be lost by the adverse enjoyment of another but it has not gob to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river and stream. I therefore think in this case the plaintiff is entitled to draw water from the Addarapu kalva in exercise of his rights as a riparian owner and so long as he does not exceed those rights he is not liable to water-cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt.

The verdict of *Tata Iron And Steel Company Ltd. v. State Of Bihar*¹⁸ is another landmark case one can hardly spare to omit while discussing riparian rights within the Indian spectrum. The verdict was given by the Bombay High Court. In simple terms, the facts are such that the Tata Iron And Steel Company Ltd. was rendered rights over the use of water from Swarnarekha river for their industrial purposes. On account of a scarcity issue that struck the state, the Government brought in certain restrictions that whittled down the rights of the said company. At this the Company objected and claimed riparian rights. However, this claim was ousted by the Court on the ground that an absolute right cannot be claimed. Everyone enjoy equal privileges over the resources and the Government is empowered under law to make restrictions in the interest of the larger public.

¹⁵ Ruchi Pant, *From Communities' Hands to MNCs' BOOTS: A Case Study from India on Right to Water*, (Rights and Humanity, UK 2003) <http://www.ircwash.org/sites/default/files/Pant-2003-Communities.pdf>

¹⁶ MANU/MH/0198/1931

¹⁷ (1917) 33 L.R. 44 I.A. 166

¹⁸ 2004 (3) BLJR 1948

CONCLUSION

Riparian Right is a natural right. It cannot be taken away nor can it be granted. It is a right that automatically joins a riparian owner by virtue of his residence along the river bank. Even if it is an upper riparian or a lower riparian, they shall enjoy equal privileges. Though custom or long term use is accepted to be the building blocks of riparian rights of a person it is not restricted to the said reason. Even if it was a novel commencement of the use of water by the person along the river bank, the same shall be recognized as a riparian right. More than the period, it is the residence, uses of water and the need for use of water by the riparian that confers on him the status of a riparian tinted with riparian rights. In India, the Courts have always inclined to accept and uphold the rights of the riparian rights.

CONCLUSION

A riparian incurs a right by the very reason of being a riparian and living of the banks of a river, lake or similar water body. These rights are to be protected. The rights cover various rights including the use of water for drinking, domestic purposes, fishing, navigation etc. However, it would be pertinent to note that this right is not an absolute and an unfettered right. This right is also subject to any reasonable restriction by the State. In short, '*riparian rights*' are a new and different dimension of rights that rest in the wide spectrum of environmental law.

Environmental Injustice: Insights from Civil Society’s initiative over encroachment in Lawsohtun, Shillong

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The Greater Laban Community Development Society (GLCDS) on 12 April 2017 filed a petition before National Green Tribunal (NGT) over encroachment and pollution in a catchment area in Shillong, Meghalaya by the defence authorities¹. The application was before NGT, East Zone (Bench) and the same has been registered as “Original Application No: 64 of 2017 / EZ”. The petition was regarding the rampant cutting of trees and unauthorized construction of boundary wall around Lawsohtun area.

The Guwahati High Court in 2005 directed to declare and notify Lawsohtun and surrounding places as catchment area under Meghalaya Protection of Catchment Area Act, 1990 within two months from then passed order, however nothing has been done so far².



Graphical representation of Lawsohtun area

¹ Civil society moves NGT over pollution in Lawsohtun area, THE SHILLONG TIMES, <http://www.theshillongtimes.com/2017/04/17/civil-society-moves-ngt-over-pollution-in-lawsohtun-area/> (last visited Apr 17, 2017).

² PIL No: 06 (SH) of 2005.

This above represented area, along the Shillong district has a rich forest cover with many valuable plant species and streams (source of drinking water for the local inhabitants) coming from the Shillong peak. The rapid construction activities and felling of trees at an exponential rate has been adversely affecting the ecosystem and thus substantial dilemma relating to protection of environment and critical catchment area arises in which public at large is affected by the environmental consequences.

Such encroachments' are not merely illegal construction but also represents a form of control that not only restricts the local communities from responding to such incidents but also prevent them from accessing their own basic rights. Community based actions have traditionally been used for ages for regulating conflicts and providing justice. Such mechanisms however are not able to stand tall before the authorities, environmental degradation, intensity and violence of conflicts, displacement of communities and thus such traditional mechanisms at times need legitimate backing. It is often seen that the local communities mistrust the state apparatus because of past abuses.

GLCDS's General Secretary Anthony Marwein in the petition observed that Lawsohtun forest area belongs to the locals and military administration has no right and title over it. Unless immediate action is taken, the failure of the State machinery to fulfil its legal and constitutional duties could adversely affect the people of Lawsohtun and Shillong. The petition further seeks the tribunal to enforce the High Court order to the earliest and declare Lawsohtun as a catchment area and direct the military authorities to stop all the construction activities with immediate effect.

The effort of the GLCDS rooted in global consciousness is to address the negative impacts of globalisation. This encounter reflects the extent to which globalisation has been unfolding in the recent years at the cost of the consent of the affected parties, rule of law in the arenas of decision, human rights, transparency and accountability, and support for public goods to address basic needs. Hence there has been a downward pressure on social and legal agendas of the government and other international institutions.

AN INFLUENSIVE ROLE OF ENVIRONMENTALISM IN INDIAN JUDICIARY

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INTRODUCTION

Lifting up the curtains of 21st century, one cannot avert the human influence in the remote reaches of biosphere, from sea to tiny tropical islands, deep below earth's surface in ancient aquifers and up to thin air high above Antarctica. Fortuitously no place remains untouched by mankind. But this achievement unwillingly splashes the misery over the earth's life support system. The scathe by human beings can be traced from ancient time to present era. PLATO expressing the fate of nature holds, "*What now remains of the formerly rich land is like the skeleton of a sick man with all the fat and soft earth washed away and only the bare framework remaining*"¹. According to the official report released by the UN Framework Conventions (30-10-2009), developed countries continue to pollute more than ever viz., evident from the greenhouse gas emission figures.² Further the outcome of the DURBAN SUMMIT suggests, it is already too late to prevent temperature rise.

According to mythology when malefic reach its extreme; the almighty comes forward in one or the other form for the refinement. Relying on the same footing, it cannot be denied that environmentalism has emerged to save the earth from the claws of exploitation. The engagement by environmentalism has taken the virtual shape in the form of legislations, conferences, environmental summits, influential writings and a long list of intrinsically webbed network of various committees and organisations. The outcome has reached the stage, what it is today in the present scenario, inhibiting the sole reason that it is and has been, influencing the judicial verdicts, in India as well as the other parts of the world since

¹ Rik Leemans, ECOLOGICAL SYSTEMS, Google Books (Pg 86), https://books.google.co.in/books?id=wi6-qFkGXQwC&pg=PA86&lpg=PA86&dq=%E2%80%9CWhat+now+remains+of+the+formerly+rich+land+is+like+the+skeleton+of+a+sick+man+with+all+the+fat+and+soft+earth+washed+away+and+only+the+bare+frame+work+remaining&source=bl&ots=1Y57cti2Vs&sig=2Vec8gFiVe0Pywp6WHvOukWazUc&hl=en&sa=X&ved=0ahUKEwjlu9rGit_OAhXLrY8KHZnJDxIQ6AEIHjAA#v=onepage&q=%E2%80%9CWhat%20now%20remains%20of%20the%20formerly%20rich%20land%20is%20like%20the%20skeleton%20of%20a%20sick%20man%20with%20all%20the%20fat%20and%20soft%20earth%20washed%20away%20and%20only%20the%20bare%20framework%20remaining&f=false

² "Developed countries emitted 12-8% more GHGe in 2007 than in 1990, the base year for calculating emissions according to the Kyoto Protocol, despite many of them agreeing to cut back emissions under the protocol's mandate."

past. The impact on the judicial verdicts is so wide and intense that it cannot be summed in some square bracket discussions.

CONCEPT & DEFENITION

Earlier courts were completely ignorant of environmental aspect, thus hardly any consideration was given to rights having nexus with the environment. But with the advent of environmentalism, a way is paved for the judiciary to consider the environmental aspect in judicial verdicts. SIR EDMUND HILLARY submits- "*Environmental problems are really social problems. They begin with people as the cause, and end with the people as victim*"³ Therefore, judiciary has to make laws and implement the existing ones in the light of environment whether the case has been brought before the court in the nature of showing concern for environment or not. The most accepted explanation for environmentalism from the sources available is, "*It is a broad philosophy, ideology of social movements regarding concerns for environmental protection and improvement of the health of the environment.*"⁴ The expressed social movements are group actions, whether large or small, sometimes even informal, that tends to focus on environmental issues. They, being the most influential source, have oscillated the outlook of judiciary from zero interest to hundred percent interests in environmental issues.

SOME LANDMARK INSTANCES OF ENVIRONMENTALISM

Speaking of Indian scenario, one cannot forget the CHIPKO MOVEMENT of 1974 that went on to become a rallying point for many future, environmental contrast and movements all over the world. It projected out the *Conservation Principle* which emerged as a lightning lamp in the field of *environmentalism* and acted as milestone further in various cases. SAVE SILENT VALLEY, 1973 was another movement that aimed at protecting Silent Valley, an evergreen tropical forest in the Palakkad district of Kerala. A writ petition⁵ was filed that resulted in complete ban on clear cutting of forests and in December 1980 the area was declared as a national park. Further NARMADA BACHAO ANDOLAN, 1985 took shape of

³ Edmund Hillary, AZQuotes.com, <http://www.azquotes.com/quote/613499>

⁴ Environmentalism, Wikipedia, <https://en.wikipedia.org/wiki/Environmentalism>

⁵ Society for Protection of Silent Valley v. Union of India and others, 1980 Kerala HC

petition⁶ in which the Court considered the splendid principles of the movement while delivering verdicts, thus showing concern for environment.

Influencing from the two landmark conferences in environmental history: STOCKHOLM CONFERENCE, 1972 and RIO DE JANEIRO CONFERENCE, 1992 and also other international agreements⁷, the Indian judiciary has become pro-environment. The provisions relating to the environmental laws are given pro-environmental interpretation so that verdicts are in the best interest of our earth, our home. The Supreme Court in *Sariska case*⁸ held in strong words that, *“This litigation concerns environment. A great American Judge emphasising the imperative issue of environment said that he placed Government above big business, individual liberty above Government and environment above all”*.

Environmentalism is something which cannot be given a concrete shape in their execution. Recent trends have shown that in the past decade people with environmental orientation have revolutionised the environmentalism globally through modern technologies, the most significant being the use of internet. There have been various environmental campaigns through social media, which is the unequivocal voice of today's environment conscious people, in the form of 'SWACHACHA BHARAT ABHIYAN'⁹, 'POLY-FREE ENVIRONMENT CAMPAIGN'¹⁰, 'SAVE ENVIRONMENT-SAVE SOIL'¹¹, 'JAL HI JIVAN HAI'¹² and many more. Though they do not possess any systematic arrangement or co-ordination to be counted on mathematical scale, they are practically modest initiative steps on the part of general public; but in this era of social media they play a very tremendous role in influencing intellect of judges in giving verdicts considering these golden emerging trends for conserving environment.

APPLICATION OF ENVIRONMENTALISM BY INDIAN JUDICIARY

Though it is accepted truth that movements, in real sense, exert pressure to bring reform but with the change in every corner of life and with it the change in the philosophical outlook of

⁶ Narmada Bachao Andolan v. Union of India, Writ Petition (civil) No. 382 of 2002

⁷ List Of International Environmental Agreements, Wikipedia, https://en.wikipedia.org/wiki/List_of_international_environmental_agreements

⁸ Tarun Bharat Sangh, Alwar v. Union of India, Writ petition (civil) No. 509 of 1991

⁹ Social movement through social media against loitering

¹⁰ Social movement through social media against the use of polythene

¹¹ Social movement through social media encouraging afforestation and conservation

¹² Social movement through social media promoting preservation and optimum utilisation of water

people, it will not be odd to rely that every time mass movement is not required rather the determinative step by an individual may have the force of many or sometimes more than of the many. The classical example of such influence is the suits by public spirited citizens wrapping within themselves the disastrous repercussions on the environment and the extreme need for its elimination and protection thereof. The only notable thing is that the concern showed by such individuals must be such as to really exert pressure on the system to consider their saying and this is what exactly done by environmentalists every now and then. Its remarkable effect can be seen in case of M.C. Mehta v. Union of India¹³ where Court interpreted Article 21 in the light of environmental aspect weighing the dignified life on the scale of clean and healthy environment. Another PIL¹⁴ by the same environmentalist¹⁵ was for saving the Taj Mahal from extreme air pollution in Agra caused by nearby industries. The ‘Polluter Pay Principle’, recognised in Indian Council for Enviro-legal Action v. Union Of India¹⁶, was applied in TTZ case¹⁷ and was greatly emphasized and guided for future cases. In 2010 there was another PIL projecting marvellous effect, viz. Wasim Ahmed Saeed v. Union of India¹⁸, in which the Supreme Court issued the order for the protection of monuments and religious shrines that were being damaged due to environmental degradation. There have been innumerable PILs in the last two decades on environmental issues and the courts have delivered the verdicts in favour of protection of our environment thereby showing positive impact of environmentalism.

Moreover it is to be emphasized here that judiciary, in order to protect the environment, is working on the principle “*prevention is better than cure*”. M.C. Mehta(2) v. Union of India¹⁹ supports this statement, where Court held that under Article 51(1)(g)²⁰ it is the duty of the central government to introduce free and compulsory teaching lessons in all the educational institutions so that students on their part recognize the importance and take necessary steps to prevent further degradation of environment. Further the ‘*public trust doctrine*’ being followed in USA besides England, Canada and Australia has been incorporated in Indian law and

¹³ 1987 SCR (1) 819

¹⁴ M.C.Mehta v. Union of India, AIR 1997 SC 735 (Taj Trapezium case)

¹⁵ MAHESH CHANDRA MEHTA, Born- October 12, 1946

¹⁶ (1996) 5 SCC 281

¹⁷ M.C.Mehta v. Union of India, AIR 1997 SC 735

¹⁸ (2010)15 SCC 278

¹⁹ (1983) 1 SCC 471

²⁰ The Constitution of India Art.51(1)(g)

“It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”.

became the part of the law of the land²¹ with the objective that government should act as the trustee of the environment and utilise natural resources in the best interest of the beneficiary viz. us, without causing any harm to the already sick environment.

Appreciating the long backlog of works and achievements by environmentalism, the most recent and landmark influence on judiciary needs to be mentioned as they answered the most wanting needs of the present depleting environment. The very first is the change of nature of fuel to be consumed by commercial vehicles from diesel to CNG. This plausible transformation is the outcome of verdict by the Supreme Court issuing the order to run all buses in Delhi consuming CNG fuel.²² Another major achievement in this field is the application of '*absolute liability principle*'²³ on the polluter who continues to be liable till the ecological damage caused by him is restored.²⁴ The most recent verdict which is in limelight is the complete ban on the usage of certain commercial plastic bags in State of Uttar Pradesh.²⁵

CONCLUSION

In the long run, the need of the state of things is not just to save the environment but also to maintain the development in such a way that neither of them overrides the other. We have had to grapple with serious environmental degradation. One of the ways that is trying to meet the challenge is the environmentalism that has really strong impact on judicial verdicts. The verdicts by the judicial authorities are a good platform to flag off the toil of environmentalism. The past decade unveils that environmentalism has acted as catalyst for the judiciary in showing its concern for environment and therefore the verdicts attribute to the protection and preservation of our environment. The Supreme Court of India has shown respectful and considerable concern to bring environmental awareness in the people and propelled governmental machinery to implement and develop protective measures in the field of

²¹ M.C. Mehta v. Kamal Nath and ors., (1997)1 SCC 388

²² M.C.Mehta v. Union of India, AIR 1998 SC 2963

²³ Yashu Bansal, No Fault Liability, Lawctopus (April 4, 2015), <http://www.lawctopus.com/academike/no-fault-liability/>, "The rule of absolute liability was evolved in the case of M.C.Mehta v Union of India. This was a very important landmark judgment that brought in a new rule in the history of the Indian Law. The rule held that where an enterprise is engaged in a hazardous or inherently dangerous activity and it harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, the enterprise is strictly and absolutely liable to compensate to all those who are affected by the accident."

²⁴ All India Skin and Hide Tamers and Merchant Association v. The Loss Of Ecology (Prevention and Payment of Compensation) Authority and others, 2010 Writ L.R. 183 (D.B.) (Mad)

²⁵ (PIL) No. - 67235 of 2014.

ecological balance.²⁶ The persistent impact on Indian judiciary has carved out the better place for India among others in an official report which stated: India, with its track record of comparatively less pollution, is a target for rich countries.

Lastly it would not be wrong to say by analyzing the aforementioned data that the approach of judiciary has now changed towards rendering judgments. With the consideration of social and economic factors, it is nowadays also considering and relying on environmental factors in each and every case. It could not have been possible but without environmentalism.

“Public does what it can for environment viz. environmentalism, judiciary needs to consider it and interpret law in this direction viz. judicial environmentalism”

-According to the Authors

²⁶NATIONAL GREEN TRIBUNAL ACT, Wikipedia,
https://en.wikipedia.org/wiki/National_Green_Tribunal_Act

ANALYZING CLEAN ENVIRONMENT CESS UNDER GST

Clean Environment Cess in India is levied on goods like Coal (briquettes and ovoids), Lignite and Peat where they are mechanized through channels of imports and production. This cess is essentially in the form of a 'carbon tax' that envisages the reduction of carbon emissions by directly taxing entities and industries that employ the usage of fossil fuels.

Typically, Clean Environment Cess is levied on the list of goods enunciated under the Tenth Schedule to the Finance Act, 2010 under the chapeau of Section 83, Chapter VII. In February this year, Indian finance minister Arun Jaitley announced that the now renamed Clean Environment Cess will be levied at an enhanced rate of Rs.400/- per tonne, thereby amending Act 14 of 2010.¹ He declared this clause of the Finance Bill, 2016 under Section 3 of the Provisional Collection of Taxes Act, 1932 which means that the enhanced rate has come into force w.e.f. 1.3.2016.

Originally, Clean Environment Cess was called the Clean Energy Cess, and was introduced in 2010 by the then finance minister Pranab Mukherjee. At the time, the introductory rate for Clean Energy Cess was fixed at Rs.100/ per tonne.²

Subsequent to this change, a reported 80% hike in government allocation to 'Project Tiger' was discussed, which is said to bring in an allocation of Rs 300 crore in 2016-17. This allocation is a contrast to the 13% slash of funding to the project last year and bears disposition on the funding acquired from the cess that is levied on the goods contemplated under the Tenth Schedule.

The huge increase in funds for 2016-17, however, comes with a catch. The finance ministry has stuck to the condition, introduced last year, that the respective states contribute 40% of the non-recurring expenditure on tiger reserves.

As per the earlier funding pattern, the Centre provided 100% of non-recurring expenses to the Project Tiger- which includes compensation for villagers relocated from tiger habitats, equipment for the special tiger protection force etc. while the recurring costs were shared equally by the Union government and the state where the tiger reserve is located.

¹Notification No.1/2016 –Clean Energy Cess, dated 1.3.2016

² Notification No. 07/2010-Clean Energy Cess Dated 08.09.2010

Further, the National Clean Environment Fund, a fund dedicated to promulgating projects for creation and promotion of clean energy initiatives, funding research in the area of clean energy or for any other purpose relating thereto, shall be the official depository of the cess thus collected.

The government has founded this cess on the functionary **‘Polluter Pays Principle’** (PPP) which obliges the polluter or owner of the polluting agent to bear the cost of pollution caused to the societies as well as provide compensation to the tune of damages exceeding the legal limit for permissible pollution.³ With India being a consistently evolving machinery that administers jurisprudence on environmental law and having a history of landmark cases that have upheld the PPP principle, this cess has been received as a welcome change.

However, a controversy that arose in the first week of November this year was that of the Odisha government opposing the Clean Environment Cess. The state government contends that massive tax distortions will be enkindled within the GST structure if the purported cess was to be levied. It has consequently appealed to the GST Council that it increase the *royalties* on Coal instead of Odisha having to take part in the state shared compensation from the center for the introduction of GST.

The state of Odisha’s distortionary contention is based on the argument that a tax structure that enables multiple rates is not in line with the characteristic spirit of the GST structure, since the fundamental object of a GST like structure is a single goods tax that enables seamless credit throughout the chain of taxation. The same argument can be extended to cess’ being enabled within the Indian tax system and a Clean Environment Cess is no exception to it.

Exemptions’ (area and end use based), levies, exceptions, cascading effects and cess’ have a way of enabling an *imbalanced favorability amongst* princes of goods and services. The distortionary effect is further fuelled in terms of individual behavior that follows income expenditure meaning that it isn’t an individual consumer’s demand or need for a product that fuels his expenditure on it, but the finance minister’s decided tax rates that determine dissipation of income by way of direct impact on prices.

A huge segment of debate on GST pertains to its potential to actually *shift* such distortionary consumption taxes while simultaneously levying cess in the form of CEC. Much of it would depend

³ <http://stats.oecd.org/glossary/detail.asp?ID=2074>

upon how far the GST positively impacts India's international competitiveness and production efficiency.

Conclusively, the carrying forward of the elements like cess, exemptions and exceptions responsible for major distortions and cascading effect to the GST structure; albeit in contained amounts and what seems like lowered rates that will have a beneficial long term impact on the country, may still mean that GST may not steamroll its way into state administration and industrial effectuation. Features like location based tax incentives, no CENVAT credit to services rendered under works Contract, etc. evidence that argument.

As of 2016, Odisha ranks as the third largest coal producing state in India, with the town of Talcher which is strategically a key coal producing region having contributed an approximately 63.973 Million tons of coal in the last financial year. Overall, Odisha has conclusively produced an annual 112.917 Million tons of coal in the last financial year, making the state a manufacturer of more than 19% of India's total coal production.⁴

Thus, the Central Government's response to Odisha's disinclination to levy central Environment tax is urgently awaited.

⁴ <http://www.orissaminerals.gov.in/website/Coal.aspx?GL=indst&PL=4>