

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JULY, 2021



PRESENT

THE HON'BLE MR. ABHAY S. OKA, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

WRIT PETITION NO.1332 OF 2020 (GM-RES-PIL)

C/W

WRIT PETITION NO.2336 OF 2020 (GM-RES-PIL)

IN W.P.NO.1332 OF 2020

BETWEEN:

BAITHKOL BANDHARU NIRASHRITHARA
YANTRIKRUT DHONI MEENUGARARA
SAHAKAFIA SANGHA NIYAMITHA
BAITHKOL-581302, KARWAR TALUK
UTTARA KANNADA DISTRICT
REP. BY ITS VICE PRESIDENT
SRI YESHYA RAMA HARIKANTRA

... PETITIONER

(BY SHRI MURTHY DAYANAND NAIK, ADVOCATE FOR
M/S. MURTHY NAIK & CO., ADVOCATES)

AND:

1. THE CHIEF EXECUTIVE OFFICER
KARNATAKA MARITIME BOARD
OFFICE OF THE DIRECTOR OF PORTS
AND INLAND WATER TRANSPORT
KARWAR PORT
BAITHKOL VILLAGE – 581302
KARWAR TALUK
UTTARA KANNADA DISTRICT

2. THE DIRECTOR OF PORTS AND
INLAND WATER TRANSPORT
KARWAR PORT
BAITHKOL VILLAGE-581302
KARWAR TALUK
UTTARA KANNADA DISTRICT
3. THE STATE LEVEL ENVIRONMENT IMPACT
ASSESSMENT AUTHORITY- KARNATAKA
ROOM NO.706, 7TH FLOOR
4TH GATE, M.S.BUILDING
DR.AMBEDKAR VEEDHI
BANGALORE-560001
REP. BY ITS PRINCIPAL SECRETARY
4. THE DEPUTY COMMISSIONER
UTTARA KANNADA DISTRICT
MINI VIDHANA SOUDHA
KARWAR-581301
5. THE ENVIRONMENTAL OFFICER
KARNATAKA STATE POLLUTION
CONTROL BOARD, REGIONAL OFFICE
PARISARA BHAVAN, LIG-II, B-217
NEAR HARI OM TRUST, HABBWADA
KARWAR-581303
6. DVP INFRA PROJECTS PRIVATE LIMITED
BY ITS TECHNICAL DIRECTOR
UTTAM PATIL, MARKET CHAMBERS
NARIMAN POINT, MUMBAI-400021
7. THE SECRETARY
MINISTRY OF ENVIRONMENT AND FOREST
AND CLIMATE CHANGE
GOVERNMENT OF INDIA
INDIRA PARYAVARAN BHAVAN
JOR BAGH ROAD
NEW DELHI – 110 003

... RESPONDENTS

(BY SHRI DHYAN CHINNAPPA, ADDITIONAL ADVOCATE GENERAL
A/W SHRI C.M. POONACHA, AGA FOR R-1, R-2 & R-4;
SHRI D. NAGARAJ, ADVOCATE FOR R-3;
SHRI ARAVIND KAMATH, SENIOR COUNSEL FOR
SHRI GURURAJ JOSHI, ADVOCATE FOR

M/S.JOSHI LAW CHAMBERS, ADVOCATES FOR R-5;
SHRI S. VIJAYA SHANKAR, SENIOR COUNSEL FOR
SHRI BASAVARAJ V SABARAD, ADVOCATE FOR R-6;
SHRI PRAKASH H.C., ADVOCATE FOR R-6;
SHRI M.B. NARAGUND, ADDITIONAL SOLICITOR GENERAL
A/W SHRI B.M. KUSHALAPPA, ADVOCATE FOR R-7)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF
THE CONSTITUTION OF INDIA, PRAYING TO DIRECT
RESPONDENT NO.2 NOT TO CONTINUE WITH THE EXPANSION
OF THE SECOND STAGE DEVELOPMENT OF COMMERCIAL
KARWAR PORT AT BAITHKOL VILLAGE AND RABINDRANATH
TAGORE BEACH AT KARWAR BAY, KARWAR TALUKA, UTTARA
KANNADA DISTRICT, CARRIED OUT ON A PLOT AREA OF 17
HECTARES (42.01 ACRES) WHICH CONSTRUCTION ACTIVITY
IS UNDERTAKEN BY RESPONDENT NO.6 AND ETC.

IN W.P.NO.2336 OF 2020

BETWEEN:

UTTARA KANNADA DISTRICT
FISHERMEN ASSOCIATION FORUM
DOOR NO.708/B
RADHA KRISHNA ROAD
KARWAR, UTTARA KANNADA
KARNATAKA-581301
REP. HEREIN BY
MR. ROHIDAS GIRIYA BANAVALI

... PETITIONER

(BY SHRI SMARAN SHETTY, ADVOCATE FOR
M/S.KEYSTONE PARTNERS, ADVOCATES)

AND:

1. STATE OF KARNATAKA
REPRESENTED BY SECRETARY
ENVIRONMENT AND FORESTS
M S BUILDING
BENGALURU-560001
2. EXECUTIVE ENGINEER
PORT DIVISION, KARWAR

THE DIRECTORATE OF PORTS
AND INLAND WATER TRANSPORT
PORT DIVISION
BAITHKOL VILLAGE, KARWAR
KARNATAKA – 581301

3. STATE LEVEL ENVIRONMENT IMPACT
ASSESSMENT AUTHORITY-KARNATAKA
ROOM NO.707, 7TH FLOOR, 4TH GATE
M S BUILDING, BENGALURU - 560001
REP. BY THE PRINCIPAL SECRETARY
4. KARNATAKA STATE POLLUTION
CONTROL BOARD, PARISARA BHAVAN
NO.49, 4TH AND 5TH FLOOR
CHURCH STREET, BANGALORE 560001
REP. BY THE ENVIRONMENTAL OFFICER
5. BIO DIVERSITY BOARD, KARNATAKA
GROUND FLOOR, VANAVIKAS
18TH CROSS ROAD
KODANDARAMPURA
MALLESHWARAM
BENGALURU – 560055
REP. BY THE AUTHORIZED OFFICER
6. KARNATAKA STATE COASTAL
ZONE MANAGEMENT AUTHORITY
ROOM NO.448, 4TH FLOOR, II GATE
M S BUILDING, BANGALORE-560001
REP. BY MEMBER SECRETARY
7. DVP INFRA PROJECTS PRIVATE LIMITED
BY ITS TECHNICAL DIRECTOR
UTTAM PATIL, MARKET CHAMBERS
NARIMAN POINT
MUMBAI – 400 021

... RESPONDENTS

(BY SHRI DHYAN CHINNAPPA, ADDITIONAL ADVOCATE GENERAL
A/W SHRI C.M. POONACHA, AGA FOR R-1 AND R-2;
SHRI D. NAGARAJ, ADVOCATE FOR R-3;
SHRI ARAVIND KAMATH, SENIOR COUNSEL FOR
SHRI GURURAJ JOSHI, ADVOCATE FOR
M/S.JOSHI LAW CHAMBERS, ADVOCATES FOR R-4;

V/O DATED 06.10.2020 SMT. SHOBHA KULKARNI, ADVOCATE
TAKES NOTICE FOR R-4;
SHRI H.K. VASANTH, ADVOCATE FOR R-5 AND R-6;
SHRI S. VIJAYA SHANKAR, SENIOR COUNSEL FOR
SHRI BASAVARAJ V SABARAD, ADVOCATE FOR R-7)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DIRECT RESPONDENT NO.2 TO ENSURE STRICT COMPLIANCE WITH THE GENERAL CONDITIONS AND SPECIFIC CONDITIONS SET OUT IN ENVIRONMENTAL CLEARANCE DATED 23RD JANUARY 2019 VIDE ANNEXURE-D AND ETC.

THESE PETITIONS, HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, **THE CHIEF JUSTICE** MADE THE FOLLOWING:

ORDER

FACTUAL ASPECTS AND PLEADINGS IN WRIT PETITIONS:

These writ petitions under Article 226 of the Constitution of India have been filed for challenging the decision to expand the existing Karwar Port at Baithkol village in Karwar taluk, Uttara Kannada district. The project of expansion of existing Karwar Port has been undertaken by the State Government through the Director of Ports and Inland Water Transport. The State Level Environment Impact Assessment Authority- Karnataka (for short, 'SEIAA'), the third respondent in W.P. No. 1332/2020, has been established by the Ministry of Environment and Forest, Government of India, in exercise of its powers under sub-section (3) of Section 3 of the Environment

(Protection) Act, 1986 (for short 'the said Act of 1986'). On 23rd January 2019, the SEIAA accorded Environmental Clearance for the proposed 2nd stage Development of Commercial Karwar Port (for short, 'the 2nd stage Development'). Various conditions were incorporated in the Environmental Clearance under the headings 'specific conditions' and 'general conditions'. In the 'specific conditions', condition No.23 was incorporated for obtaining a consent to establish and/or operate from the Karnataka State Pollution Control Board (for short, 'KSPCB') both under the Air (Prevention and Control of pollution) Act, 1981 (for short, 'the Air Act') and the Water (Prevention and Control of Pollution) Act, 1974 (for short, 'the Water Act'). In the Environmental Clearance, it was recorded that the existing area of Karwar Port was 3 hectares and the capacity of the existing port was 3 million Tons/Annum. It was proposed to be increased by the 2nd stage Development to 4.5 Million Tons/Annum. The 2nd stage Development project was proposed on an area of 17 hectares (42.01 acres). The Environmental Clearance recorded that the 2nd stage Development will include the following:

- a) Construction of five additional berths providing a berthing length of 1635 meters in continuation of existing berth in the Northern Direction;
- b) Upgradation of existing lighterage wharfs for a length of 100 meters to accommodate higher draft vessel;
- c) Providing reclamation bund around 800 meters length by rubble mound and reclamation of the sea area behind the berth to make the stockyard by filling average heights of 6.5 meters;
- d) Construction of POL (Petroleum Oil) jetty, jetty head etc;
- e) Construction of additional breakwater of 238 meters in continuation of existing breakwater;
- f) Construction of a new breakwater having length of 1200 meters;
- g) Hard surfacing the wharf area of 3,39,450 square meters of the reclaimed land;
- h) Providing infrastructure facilities to comply with MARPOL (the International Convention for the Prevention of Pollution from Ships);
- i) Additional facilities like construction of warehouse measuring 200 x 50 meters, transit sheds measuring

200 x 50 meters, cold storage facility measuring 50 x 50 meters and container facility measuring 200 x 40 meters;

- j) To provide labour amenity facilities including staff quarters etc.

2. It is recorded in the Environmental Clearance that the same has been granted as per the Environment Impact Assessment Notification dated 14th September, 2006 (for short 'EIA Notification') as amended from time to time. There is a challenge to the Environmental Clearance on the ground that as the 2nd stage Development Project was 'A' category project under the EIA notification, the SEIAA had no authority to grant Environmental Clearance and it is only the Government of India which could have granted the same. The petitioner in W.P.No.1332/2020 is claiming to be an Association of fishermen in Baithkol village of Karwar district. Reliance is placed in the petition on the representation made by the Uttara Kannada District Fishermen Association Forum (the petitioner in W.P.No. 2336/2020). On 20th December, 2019, a letter was addressed by the Environmental Officer of KSPCB (5th respondent in W.P.No.1332/2020) to the Executive Engineer of

the Port Division, Karwar to stop the activities of construction of breakwater wall which is a part of the 2nd stage Development project on the ground that consent under the Air Act and the Water Act were not obtained. It is stated that CRZ clearance was issued on 20th December, 2019 and construction activities were commenced abutting Rabindranath Tagore Beach at Karwar.

3. During the pendency of these writ petitions, various orders were passed by this Court. While issuing a notice in Writ Petition No. 1332/2020, on 23rd January, 2020, this Court referred to condition No.23 incorporated in the Environmental Clearance regarding obtaining consent from KSPCB to establish/operate under the Air Act and the Water Act. This Court also referred to the show cause notice issued by SEIAA on 20th December, 2019 calling upon the second respondent why the Environmental Clearance should not be cancelled. This Court also noted that the photographs produced on record which were not disputed showed that stones have been brought on the beach for filling work for making a road on the beach and activities were in progress close to a boat of

fishermen and a considerable portion of beach has been filled

in. Therefore, this Court issued the following directions:

“i) There will be interim relief as prayed in the petition;

ii) We direct the third respondent to decide the show cause notice dated 20th December 2019 after giving an opportunity of being heard to the second respondent and all the affected parties;

iii) The final order shall be passed on the show cause notice before the returnable date and the order shall be produced before the Court;

iv) We are sure that the third respondent while considering the show cause notice will take into consideration the stop-work notice issued by the Karnataka State Pollution Control Board dated 20th December 2019;

v) We direct the Pollution Control Board not to take final decision on the application dated 16th December 2019 till the returnable date;

vi) Before the returnable date, the second respondent shall take immediate steps to restore the beach to its original condition by removing all the filling work done on the beach for road and other work as can be seen from the photographs at Annexure-F onwards;

vii) The work of restoration shall be completed before the returnable date and a compliance report shall be filed before the Court on the returnable date;

viii) In the meanwhile, it will be open for all the respondents to file statement of objections;

ix) We direct the petitioner to implead the Union of India as a party respondent through the concerned Ministry and we permit consequential amendments to be carried out;

x) It will be open for the petitioner to serve notice on the learned Standing Counsel of the added respondent. We direct the petitioner to take hand summons for effecting service of notice to the third respondent. We direct the second respondent to supply the copy of this order to the third respondent.”

(underlines added)

4. Further order passed by this Court dated 26th February, 2020 records that an order was passed by the SEIAA on 24th February, 2020 directing the second respondent - the Directorate of Ports and Inland Water Transport of the State Government to obtain all required clearances and comply with

all the conditions incorporated in the Environmental Clearance before the commencement of any construction activities forming a part of the 2nd stage Development. In view of the said order, this Court modified clause (v) of the Order dated 23rd January, 2020 by permitting KSPCB to decide the application for consent. We may note here that the sixth respondent in W.P.No.1332/2020 is the contractor appointed by the State Government for carrying out the work of establishment of 2nd stage Development of the said port. The Order dated 3rd November, 2020 passed by this Court on IA-2/2020 in W.P.No. 1332/2020 is material. Paragraphs 2 to 6 of the said Order read thus:

“2. We have perused the documents annexed to the interlocutory application. Annexure-R.18 is a letter of consent issued by the said Board addressed to the applicant, which is described as Karwar Port. The subject of the said letter is “Consent for Expansion of the Unit in the existing premises under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act, 1981.” This letter shows that the consent is in respect of the expansion of a unit in the existing premises. This letter does not refer to

“Consent for development of 2nd stage Expansion of Commercial Karwar Port Activity.” Moreover, the learned counsel appearing for the petitioner pointed out that a copy of Annexure-I enclosed to Annexure-R.18, does not bear a date. However, he states that a copy of the same document produced by the said Board bears a date.

3. The consent letter dated 1st July, 2020 records that an application was made by Karwar Port. Annexure-I refers to the proceedings of the Consent Committee meeting dated 21st May, 2020. Thus, Annexure-I appears to have been issued on the basis of the proceedings of the Consent Committee. There is nothing placed on record to show that the power of the said Board to grant consent has been lawfully delegated to the Consent Committee.

4. More importantly, the subject of the consent letter dated 1st July, 2020 and the subject of Annexure-I appear to be completely different. Karwar Port authorities and the said Board are bound by the doctrine of ‘Public Trust’ and therefore, the said Board will have to satisfy this Court that the consent purportedly granted in respect of expansion of the unit of

the existing premises is, in fact, for the development of 2nd stage expansion of the commercial Karwar Port Activity. Secondly, the said Board will have to satisfy the Court that the Consent Committee can exercise the power of the said Board.

5. We direct the Chairman of the said Board to file a detailed affidavit explaining why the subject matter of the letter dated 1st July, 2020 is different from the subject matter of Annexure-I. He shall also explain why there are two sets of Annexure-i. One set bears the date and the second set is undated. The Chairman of the said Board will also take a stand whether, in order to avoid controversy, the Board is willing to make a fresh application of mind to the application for consent for development of 2nd stage expansion of commercial Karwar Port Activity. The proceedings of the Consent Committee meeting referred in Annexure-I shall also be placed on record.

6. There are several other issues which have to be explained. In the compilation of documents filed by the State Government, Form-1 which is dated 16th January, 2020, is signed by the Executive Engineer, Port

Division. The State Government must explain the authority of the said officer to apply for consent. Secondly, the letter dated 1st July, 2020 addressed by the said Board to the Executive Engineer of Karwar Port shows that there was one more consent application filed on 1st January, 2020. It is not clear which application was considered by the said Board. Even the State Government owes an explanation to the Court on all the aspects. We grant time both to the State Government and the said Board to file affidavits, till 13th November, 2020.”

(Underlines added)

5. In the order dated 19th November, 2020, this Court referred to the affidavit of the Chairman of KSPCB. Paragraphs 4 to 7 of the said order read thus:

“4. From the said affidavit it is clear that there is no decision taken by the said Board constituted in terms of Section 4 of the Water (Prevention and Control of Pollution) Act, 1974 (for short ‘the Water Act’) and Section 5 of the Air (Prevention and Control of Pollution) Act, 1981 (for short ‘the Air Act’). The consent appears to have been granted on the basis of recommendations of Consent Committee

constituted as per resolutions of the said Board (Annexures R-5 and R-6). Moreover, the consent document itself records that the same is issued as per the recommendations of the Consent Committee in its meeting held on 21st May 2020 and the recommendations have been duly approved by the Member Secretary and the Chairman of the said Board.

5. Prima facie, there is no material placed on record to show that powers of the said Board have been delegated to the Consent Committee. Secondly, the document of consent itself reveals that the Consent Committee had made only recommendations. If powers of the said Board were really delegated to the Consent Committee, the word 'recommendation' would not have been used. Further, if Consent Committee was the delegate of the said Board, there was no question of approval to the recommendations of the Consent Committee by the Member Secretary and the Chairman. We have carefully perused the affidavit filed by the Chairman. In the affidavit, he has not claimed that both under the provisions of the Air Act and Water Act, the powers of the said Board to grant consent have been delegated to the Consent Committee. It is not his case that power of the

said Board to grant consent under both the enactments has been delegated to him and to the Member Secretary. Though in paragraph-5 he has referred to constitution of the Consent Committee, he has not stated that the powers of the Board to grant consent have been delegated to the consent Committee. Moreover, in paragraph-15 of the said affidavit dated 13th November 2020, the Chairman has stated thus:

“15. However, the Annexure-I (marked as Annexure-R-5-E), the Board will review the entire matter of CFE application dated 16.1.2020 and within its powers under Section 27(2) of Water Act, 1974 will review the CFE (Expansion) and issue a revised CFE (Expansion).”

6. The statement made in paragraph-15 shows that there is no delegation as the Chairman has stated that the Board will review the whole matter. However, he has hastened to add that after the review, a revised CFE will be issued. Thus, he has given an assurance on behalf of the said Board to review the matter of grant for consent and he seems to be confident that even if the matter of grant for consent is

reviewed by the said Board, a revised consent will be issued.

7. In short, prima facie we find that the consent has not been granted by the said Board and there is no document produced on record to show that the said Board has delegated its power to grant consent either to the Consent Committee or the Secretary and the Chairman. Hence, prima facie the consent cannot be said to be a valid consent in the eyes of law.”

(underlines added)

In the same order, in paragraph 12, it is observed that in view of what is stated in paragraph 15 of the affidavit of the Chairman of KSPCB, it will be open for KSPCB to review the consent.

6. On 16th December, 2020, when both the writ petitions were listed, a copy of the proceedings of the meeting of KSPCB held on 24th November, 2020 was placed on record. The said proceedings recorded that the consent for expansion granted on 1st July, 2020 was reiterated and confirmed with certain modified conditions. In paragraphs 2 and 3 of the order dated 16th December, 2020, this Court noted the same. By the

same order, it was directed that the writ petitions will be finally heard.

7. Subsequently, an amendment to writ petition No.1332/2020 was allowed permitting the petitioner to incorporate additional challenges. By carrying out amendments to the petition, all the actions of KSPCB were challenged including the purported consent dated 1st July, 2020/11th June, 2020, the communication dated 15th December, 2020, by which the decision recorded in the meeting of KSPCB held on 24th November, 2020 was communicated and the communication dated 11th January, 2021 of KSPCB by which, the decision taken in the meeting of KSPCB dated 6th January, 2021 was communicated. The decision was to amend the consent issued on 1st July, 2020 by incorporating additional conditions. The petitioner is relying upon various documents.

8. The prayers in the writ petition No.1332/2020 are for challenging the Environmental Clearance and the consent granted by KSPCB. The challenge in the writ petition is based on violation of fundamental rights guaranteed under sub-clause (d) of clause (1) of Article 19 and sub-clause (g) of clause (1) of Article 19 as well as Article 21 of the Constitution of India.

Violations of Articles 48-A, 51-A (g) and 300A have also been alleged.

9. In Writ Petition No. 2336/2020 filed by Uttara Kannada District Fishermen Association Forum, the first prayer is for issuing writ of mandamus to the second respondent, the Directorate of Ports and Inland Water Transport, Port division, Baithkol village, to make strict compliance with the conditions incorporated in the Environmental Clearance dated 23rd January, 2019. The second prayer is for a direction not to carry on any construction activities without obtaining the consent of KSPCB. The third prayer is for a direction not to undertake any construction activities for the 2nd stage Development of the Karwar Port without obtaining a duly approved biodiversity plan from the Bio Diversity Board (5th respondent) in the said writ petition.

10. Subsequently, there were number of amendments to this writ petition. By way of amendment, additional prayers were added for challenging (i) the order bearing No.CTE-318752 dated 1st July, 2020 (Annexure-AB), (ii) the order bearing No. KaRaMaNiMam/231/Niko/2020-21/3998 dated 15th December, 2020 (Annexure-AC) of KSPCB and (iii) the order bearing No.

KaRaMaNiMam/232/Niko/2020-21/4433(B) dated 11th January, 2021 (Annexure-AD) of KSPCB.

PLEADINGS IN THE STATEMENT OF OBJECTIONS:

11. Now we come to the statement of objections filed by various parties. In W.P.No. 1332/2020, the sixth respondent-contractor has filed a detailed statement of objections. The first contention raised in the statement of objections is that the writ petition involves environmental issues and the matters covered under the National Green Tribunal Act, 2010 (for short 'the NGT Act') and, therefore, it was submitted that this Court ought not to have entertained the writ petitions. It was also urged that the order passed by the SEIAA is an appealable order under clause (h) of Section 16 of the NGT Act. The said respondent has referred to infrastructural works carried out by it under various other projects. The details of the works carried out in connection with the existing Karwar Port have been set out and even the importance and economic viability of the Karwar Port has been set out. The details have been set out in the statement of objections about the 2nd stage Development of Karwar Port which included construction of five additional berths, construction of reclamation bund, construction of

additional breakwater and other infrastructural facilities etc. The averments made in the writ petition were denied. Additional statement of objections has been filed by the sixth respondent-contractor, pointing out that all the necessary clearances have been obtained for the expansion of 2nd stage Development of Karwar Port. Reliance is placed on the consent and modified consent granted by KSPCB. Certain additional preliminary objections were raised in the additional statement of objections. It was contended that registration certificate of the petitioner association has not been placed on record. It was contended that the copies of the bye-laws, constitution, its aims, objects and other material documents relating to the petitioner association have not been placed on record. It is contended that the petitioner association has been brought into existence only for the purposes of filing the present writ petition.

12. The State Government also filed the statement of objections. It refers to a Comprehensive Report on development of coastal shipping in the country prepared by the TATA Consultancy Services. In the said report, Karwar Port was identified as having more potential for coastal cargo.

Reliance is placed on the project of the Government of India known as 'Sagarmala Project' which is a strategic and customer oriented initiative of the Government of India to modernize the Ports in India. Reliance is also placed on the 'National Perspective Plan'. Further, reliance is also placed on the DPR prepared by M/S. Price Water Coopers. Various details have been set out about grant of Environmental Clearance and CRZ clearance. It is contended that livelihood of the fishing community will not be affected by the said project. At present, the fishing community is utilizing the existing approach channel of the Karwar Port and after completion of 2nd stage Development, the fishermen community will be allowed to utilize the approach channel. It is contended that the fishing community will have better facilities and opportunity to earn for their livelihood due to development of the Karwar Port. It is submitted that there will not be any adverse impact on the drainage system on account of construction of proposed breakwater and dredging. It was contended that Shri. Yeshya Rama Harikantra, Vice President of the petitioner in WP.No. 1332 of 2020 and other members had filed a writ petition in the year 2017 challenging the acquisition proceedings for Karwar Port. This Court dismissed the petitions. It was pointed out that

some members of the petitioner had filed a writ petition in the year 2003 for the same relief which was dismissed by order dated 27th June, 2007. It is, therefore, contended that the petitioner has not come to the Court with clean hands. The State Government also filed the statement of objections dealing with the averments made in the amended writ petition. The contents of the amended writ petition were contested by filing the statement of objections.

13. KSPCB filed the statement of objections and contended that an online application was made by the Port Authority to KSPCB for grant of consent for establishment. It is stated that an inspection was carried out by the Environmental Officer and the State Level Consent Committee recommended for grant of consent for establishment which was forwarded to the Chairman of KSPCB for approval. On 1st July, 2020, the consent for establishment was issued by KSPCB. It was stated that on 13th November, 2020 an affidavit has been filed stating that the said consent granted on 1st July, 2020 will be reviewed by the Board. It is accepted that the powers of the Board have not been delegated to the Consent Committee. It was further stated that the area of the project is not declared as a Critical

Vulnerable Coastal Area (CVCA). At this stage, we may note here that the stand taken by the various respondents in the connected writ petition No. 2336/2020 is the same as in writ petition No. 1332/2020.

14. Apart from the documents produced along with the writ petitions which were amended from time to time and the statement of objections filed therein, there are other materials placed on record in the form of interlocutory applications and the documents produced along with memoranda.

CONCESSION MADE BY KSPCB:

15. After the hearing was concluded, a memo dated 15th June, 2021 was filed which is common in both the writ petitions by KSPCB signed by its Advocate. In the said memo, an undertaking has been given by KSPCB to withdraw the said consent dated 1st July, 2020 for establishment of the 2nd stage Development project of the Karwar Port stating that certain anomalies were noted in the decision making process and it will redo the exercise of inspection and consideration of the prayer for grant of consent. In the memo it is stated that KSPCB will appoint an experienced Senior Officer of the Board to consider the application dated 16th January, 2020 and to

inspect the port premises. It is further stated that the report of the officer will be placed before the Consent Committee and thereafter, the recommendations of the Consent Committee will be placed before the Chairman of KSPCB who will take the final decision on the issue of grant or refusal of the consent for establishment, as the Chairman is the delegate of KSPCB who is authorized to exercise the power of the Board for grant of consent to establish and consent to operate.

SUBMISSIONS:

16. Detailed submissions have been made by the learned counsel appearing for the petitioners in both the writ petitions. The learned Additional Advocate General for the State, the learned Senior Counsel representing KSPCB, the learned counsel appearing for KSPCB and the learned Senior Counsel appearing for the sixth respondent-contractor in Writ Petition No. 1332/2020 have also made detailed submissions. We are reproducing in brief the submissions made by the learned counsel appearing for both the parties. All of them have relied upon large number of the decisions of the Apex Court and various High Courts.

SUBMISSIONS OF THE PETITIONERS:

17. We have heard the submissions of Shri. Murthy Dayanand Naik, the learned counsel for the petitioner in support of the writ petition No. 1332/2020. His first submission is that SEIAA had no jurisdiction to grant Environmental Clearance for the project. He invited our attention to the EIA notification dated 14th September, 2006 issued by the Ministry of Environment and Forests, Government of India and submitted that even assuming that said project is a 'B' category project under the said notification, by virtue of General Condition (GC) incorporated in the said notification, as the said project will be undertaken in the notified Eco-sensitive area, it will have to be treated as a category 'A' project. He would, therefore, submit that in view of clause-3 of the said notification, the Ministry of Environment and Forests of the Central Government is the only competent authority to grant prior Environmental Clearance. He invited our attention to Coastal Regulation Zone (CRZ) notification dated 6th January, 2011 issued by the Ministry of Environment and Forests, Government of India and in particular, clause- 4 (a) which deals with Critical Vulnerable Coastal Area (CVCA) and submitted that the areas mentioned in sub-clause (b) therein are identified

as ecologically sensitive areas, as provided in clause 4 (a) and hence, they should be managed with the involvement of coastal communities including fisher folk. Karwar and Coondapur in the Karnataka State have been included in clause 4 (b). He submitted that if the contents of sub-clauses (a) and (b) of clause-4 are read together, it can be said that Karwar has been notified as an ecologically sensitive area. As per the said CRZ notification dated 6th January, 2011, Karwar has been identified as ecologically sensitive area and hence, it will have to be treated as a Notified Eco-sensitive area within the meaning of general condition (GC) as notified in the EIA notification dated 14th September, 2006. Hence, the 2nd stage Development project will fall in category 'A'. He also invited our attention to the notification dated 18th January, 2019 issued by the Ministry of Environment, Forest and Climate Change and submitted that as per clause 3.1, Karwar is recognized as CVCA and it should be managed with the involvement of coastal communities including fisher folk who depend on coastal resources for their livelihood. He submitted that as per clause 3.0 of the said notification, Karwar is a CVCA area which deserves to be accorded special consideration for the

purpose of protecting the critical coastal environment and the difficulties faced by the local communities.

18. The learned counsel appearing for the petitioner also relied upon a decision of the Apex Court in the case of ***Kapico Kerala Resorts Private Limited –vs- State of Kerala and others***¹ and in particular, what is held in paragraph-28.1 and 28.2 thereof. The submission is that as held by the Apex Court, in view of clause 3.1 of the CRZ notification dated 18th January, 2019, Karwar and Coondapur in Karnataka have been declared as CVCA and hence, the said areas become eco-sensitive areas, as defined under Section-3 of the Environment (Protection) Act, 1986 (for short, 'the said Act of 1986'). He would, therefore, submit that the said project is required to be treated as 'A' category project and hence, the jurisdiction to grant Environmental Clearance is absolutely vested only in the Central Government and not with the SEIAA. Thus, his submission is that in law, there is no Environmental Clearance for the project and, therefore, the project in question cannot proceed further. He submitted that though the Environmental Clearance granted by the SEIAA proceeds on the footing that

¹ (2020) 3 SCC 18

the capacity of the port by the said project is likely to be increased to 4.5 Million MT/annum, in fact, in the application made by the State Government for grant of Environmental Clearance, at several places, it has been mentioned that the capacity will be much more than 5 Million MT/annum. He submitted that even for this reason, the project will fall under category 'A' and hence, the Environmental Clearance granted by SEIAA stands vitiated. He submitted that in any case, the area where the project is to come up is specifically notified as CVCA. He would, therefore, submit that only on these grounds, the petition must succeed.

19. Now coming to the consent for establishment granted by KSPCB, he submitted that firstly, Annexure-1 appended to Annexure-R-5-E which is purportedly dated 11th June, 2020 granting a consent for establishment is a doubtful document. Secondly, the said consent was not granted by KSPCB but the same was issued by the Consent Committee which has no power or jurisdiction to do so. He submitted that the consent for establishment was granted without carrying out proper inspection. By referring to the affidavit of the Chairman of KSPCB, he submitted that there is a complete non-application

of mind. He submitted that the manner in which the consent for establishment was granted raises several legal and factual issues. He submitted that in the affidavit dated 13th November, 2020 filed by the Chairman of KSPCB, it is categorically stated in paragraph-15 that the Board will review the entire matter concerning CFE application dated 16th January, 2020 and thereafter, it will review the consent for establishment and issue a revised consent for establishment. He urged that there is no question of review of the decision taken by the Consent Committee, inasmuch as, at the highest, the Consent Committee can only recommend and it is for the Board to take an appropriate decision. He submitted that at no point of time, an inquiry or an inspection was held by any of the Officers of KSPCB and, therefore, the entire exercise should be done afresh by KSPCB. He submitted that from the proceedings of the meeting of the Board in which the review was considered, it can be demonstrated that there is a complete non-application of mind and the entire process is vitiated.

20. The learned counsel appearing for the petitioner further submitted that the Chairman of the Central Pollution Control Board, New Delhi addressed a letter dated 7th March, 2016 to

the Chairpersons of all the State Pollution Control Boards which contain the revised classification of industrial sectors defined under red, orange, green and white. He submitted that the Ports have been included in Red category industries with the remark that 'this category contains all sorts of pollution'.

21. He submitted that he has produced the aerial video film of the entire area of the existing Karwar Port and Rabindranath Tagore beach. He submitted that as a result of the project of the expansion of the Port, the entire Rabindranath Tagore beach will be destroyed. He submitted that this is the only beach available to the citizens of Karwar, as most of the beaches in Karwar and Ankola taluks have been taken over for the projects of naval base. He urged that carrying out of work of the 2nd stage Development of Karwar port on the said beach will amount to violation of fundamental rights under sub-clause (d) of clause (1) of Article 19 of the Constitution of India. He submits that if the work of the said project is allowed to be carried out on Karwar beach, it will violate the rights of all the citizens to move freely throughout the territory of India. He submitted that Karwar beach is being used for fishing activities by the fishermen in and around the Karwar taluk and as a

result of the proposed construction activities, the fishermen will be adversely affected in terms of their livelihood and the same will lead to violation of the fundamental right to livelihood conferred on them under Article 21 of the Constitution of India as well.

22. The learned counsel submitted that this beach has been named after Nobel laureate Shri. Rabindranath Tagore who had visited the said beach in the year 1882 when he stayed with his brother who was the then the District Judge of Karwar. He submitted that apart from historical importance of said beach, it is surrounded by the Western Ghats comprising of thick vegetation which is also depicted in CZMP (Annexure-A) duly marked in green colour. He submitted that apart from the fact that the citizens of Karwar will be deprived of use of said beach, its use during rainy season as a grazing field for cattle and for holding the annual cultural events which are regularly held on the said beach would be adversely affected. He placed reliance on the decision of the Apex Court in the case of ***Virendier Gaur and others –vs- The State of Haryana and others***². He also relied on another decision of the Apex Court

² (1995) 2 SCC 577

in the case of ***Bihar Eastern Gangetic Fishermen Co-Operative Society Ltd., -vs- Sipahi Singh and others***³. He submitted that the project of 2nd stage Development will be in violation of Article 300-A of the Constitution, as it will amount to deprivation of the rights of the fishermen to carry on their fishing activities. Placing reliance on the decision of the Apex Court in the case of ***Delhi Transport Corporation –vs- D.T.C. Mazdoor Congress and others***⁴, he would urge that Article-21 guarantees the right to livelihood and, therefore, the proposed project will violate the rights of the fishermen, as it will take away their livelihood.

23. Sri. Smaran Shetty, the learned counsel appearing for the petitioner in W.P.No. 2336/2020 also made submissions in addition to the submissions made by the learned counsel appearing for the petitioner in W.P.No. 1332/2020. He submitted that the Environmental Clearance has been obtained by making fraudulent misrepresentation. He submitted that the documents placed on record would show that after completion of 2nd stage Development project, the capacity of Karwar Port will certainly exceed 5 Million MT/Annum, but in

³ (1977) 4 SCC 145

⁴ 1991 Supp (1) SCC 600

the application made for grant of Environmental clearance, a misrepresentation has been made on this factual aspect. He submitted that in the application for grant of Environmental Clearance, the State Government had accepted that the proposed project is just 300 meters away from the Western Ghats and apart from that, the proposed project is adjacent to a notified CVCA.

24. The learned counsel invited our attention to the Environmental Clearance granted to the project and submitted that condition No.32 requires the State Government (the Executive Engineer, Port division, Karwar) to prepare a riparian and marine biodiversity plan and submit the same for approval of the Bio Diversity Board (respondent No.5 in his petition). He submitted that the said condition is not yet complied with. He submitted that as the Karwar Port is itself in a notified CVCA, there is a pressing need to prepare the marine and riparian biodiversity plan. He also submitted that as far as the members of the petitioner forum are concerned, the proposed project will definitely violate their rights under sub-clause (g) of clause (1) of Article 19 of the Constitution of India.

THE SUBMISSIONS OF THE RESPONDENTS:

25. Shri. Dhyan Chinnappa, the learned Additional Advocate General pointed out that the capacity of the Port, after the 2nd stage Development work will be 4.5 Million MT/Annum. He clarified that as per the Environmental Clearance granted, the construction of railway line or a road are not a part of the works now permitted to be carried out and he assured the Court that it will not be undertaken as the same is not yet permitted. The learned Additional Advocate General also pointed out that EIA Notification dated 14th September, 2006 has been amended in the year 2009 by which G.C has undergone a change. He submitted that the effect of the amended notification will have to be considered. He submitted that the effect of the amended notification is that the proposed project will fall under category-B and, therefore, the argument of the petitioner that the project falls under category-A and that the SEIAA had no jurisdiction to grant Environmental Clearance deserves to be rejected. He pointed out that there is absolutely no material placed on record to show that fishing activities of the fishermen community will be adversely affected on account of the proposed project. He pointed out the photographs and assured the Court that jetty presently used by the fishermen community

will remain unaffected and the entry of boats of the fishermen will be allowed through approach channel even after the 2nd stage Development of Karwar Port is completed. He submitted that CRZ notification dated 18th January, 2019 is not at all applicable. He invited our attention to sub-clause (i) of clause (6) of the CRZ notification dated 18th January, 2019 and pointed out that it specifically provides that unless the Coastal Zone Management Plan (for short 'CZMP) made under CRZ notification dated 6th January, 2011 is revised and updated, none of the provisions contained in the CRZ notification dated 18th January, 2019 will apply and the provisions of CRZ notification dated 6th January, 2011 will continue to operate. He also invited our attention to CZMP prepared as per the CRZ notification dated 6th January, 2011 which is Annexure-A to the writ petition No. 1332 of 2020. He submitted that the location of CVCA is clearly shown on the said CZMP which is duly approved by the National Coastal Zone Management Authority (NCZMA). He submitted that as could be seen from CZMP, the CVCA is located far away from the site of Karwar Port. He submitted that said CZMP shows that no part of the area where the 2nd stage Development is to take place is a part of the notified CVCA. He submitted that CZMP which is prepared on

the basis of the CRZ notification dated 6th January, 2011 reveals the said position even as on today and, therefore, the argument of the petitioner based on the CVCA needs to be completely discarded.

26. He submitted that there is no material placed on record to show as to how the livelihood of the fishermen community will be affected by the proposed expansion. He submitted that by no stretch of imagination, there will be any violation of fundamental rights guaranteed under sub-clause (d) of clause (1) of Article 19 of the Constitution of India. He submitted that the project has already been delayed. Relying upon the principle of sustainable development, he submitted that in the present case, there is no violation of any law relating to environment.

27. Shri. S. Vijaya Shankar, the learned Senior Counsel representing the sixth respondent-contractor appointed to carry out the work of 2nd stage Development firstly raised an objection to the maintainability of both the writ petitions and in particular, W.P.No. 1332/2020. He submitted that the Vice Chairman of the petitioner association in W.P.No. 1332/2020 along with other villagers had challenged the acquisition of the

land made for the original Karwar Port by filing a writ petition and the said writ petition was dismissed. He pointed out that this vital fact has not been brought to the notice of the Court by the petitioner and the same has been suppressed. He would, therefore, submit that the Vice Chairman of the petitioner association has personal interest in the subject matter of the writ petition. He submitted that neither a copy of the registration certificate of the petitioner nor its bye-laws, its constitution, its aims and objects have been placed on record. He submitted that even the petitioner in W.P.No. 2336 of 2020 is an unregistered society/association.

28. He submitted that the project is a part of Sagarmala project of the Government of India which is an initiative of the Government of India to modernize the Ports in India. He submitted that detailed studies were undertaken before taking a decision to take up the project. He submitted that a DPR was prepared by M/S. Price Water Coopers. Moreover, a detailed study was conducted by the Central Water and Power Research Station (CWPRS), Pune which is a Central Government organization. He submitted that the said study revealed that there will be no possibility of erosion of the

Karwar beach but there will be a further growth. He submitted that this is not a case where the project of 2nd stage Development of Karwar Port was cleared overnight. He submitted that after the DPR was prepared by M/S. Price Water Coopers, during March, 2016, a study was conducted by the CWPRS. Thereafter, in February/March, 2017, an application both online and in physical form was submitted for grant of Environmental Clearance. He submitted that SEIAA had recommended for issuance of standard Terms of Reference and additional standard Terms of Reference. Accordingly, on 12th April, 2017, Terms of Reference were issued. On 9th February, 2018, a public hearing was conducted and after making compliances and dealing with the objections and doubts raised during the public hearing, on 4th December, 2018, the State Environmental Appraisal Committee (SEAC) recommended for approval of the project to SEIAA. Ultimately, SEIAA took a decision on 26th December, 2019 to grant Environmental Clearance. He submitted that Hubert Enviro Care Systems (Pvt) Limited had conducted Environment Impact Assessment (EIA) study. He submitted that there is no notified Eco Sensitive Area within five kilometer radius of the project area. He submitted that the total length of the beach

from Konenala to Kali creek is 4.10 Kms and around 3.60 Kms from north side of the proposed breakwater will not be disturbed. He submitted that fishermen will not at all be affected as the project is being executed on the vacant sea shore land.

29. He submitted that the documents filed on record will show that sixth respondent has so far incurred huge expenditure to the tune of Rs.16,82,38,240/- (Rupees sixteen crores eighty two lakhs thirty eight thousand two hundred forty) on the project. He submitted that the petitioner in W.P.No. 2336/2020 is also not a registered association. He submitted that no interference is called for in writ jurisdiction with the 2nd stage Development project. He reiterated that the proposed expansion project will contribute to India's economic growth, considering the strategic location of Karwar Port.

30. Sri. Aravind Kamath, the learned Senior Counsel representing KSPCB-fifth respondent in W.P.No. 1332/2020 has made detailed submissions and pointed out the various processes followed by KSPCB. He pointed out that the Consent Committee had a power to make a recommendation and that the recommendation of the said Committee was

approved by the Chairman of the Board in whose favour the powers of the Board to grant consent have been delegated. The learned Senior Counsel pointed out the provisions of the Rules framed under both the Water Act and Air Act. He submitted that after a due inquiry was made by the jurisdictional environmental officer and in pursuance of the recommendation made by the Consent Committee to grant of consent, not only that it has been approved by the Chairman, but subsequently, the same has been ratified by the Board itself. He submitted that merely because at the time of ratifying the decision of the Consent Committee, certain conditions were not specifically incorporated, the entire decision making process will not be vitiated. He submitted that in the subsequent meeting of the Board, additional conditions have been discussed and decided. He submitted that even assuming that the decision making process adopted by the Board of KSPCB may not be to the satisfaction of this Court, it cannot be said that there is no application of mind by the Consent Committee which consists of experts in the field and the Chairman of KSPCB who is also an expert in the field. He submitted that the process followed by KSPCB cannot be faulted, inasmuch as, on two occasions, the Board had applied

its mind. He submitted that KSPCB is willing to redo the process of grant of consent for establishment of 2nd stage Development project. We may note here that a memo dated 15th June, 2021 to that effect has already been filed by KSPCB.

31. Sri. Gururaj Joshi, the learned counsel appearing for KSPCB in W.P.No. 2336/2020 has made additional submissions. He submitted that there is a statutory power vested in KSPCB to constitute Committees. Accordingly, the Consent Committee was constituted and he pointed out that the power of delegation always vested in the Board and the same has been exercised by delegating the power of the Board to grant consent for establishment/operation of the projects to the Chairman of KSPCB. Apart from submitting that the present writ petitions are in fact personal interest litigations, he urged that in view of clause (h) of Section 16 of the NGT Act, the jurisdiction to decide the issues raised in these writ petition vests in the NGT. He submitted that the petitioners in these writ petitions are required to be relegated to the remedy before the NGT. He would, therefore, submit that this Court ought not to have entertained the writ petitions.

32. Sri. D. Nagaraj, the learned counsel appearing for SEIAA also reiterated the submissions made by the learned Additional Advocate General representing State Government by contending that as the proposed project is falling under category-B, the SEIAA had jurisdiction to grant Environmental Clearance which has been granted after following the due process of law and, therefore, no interference is called for by this Court.

REJOINDER OF THE PETITIONERS:

33. By pointing out that the registration certificate of the petitioner has been produced along with the memo dated 19th April, 2021, the learned counsel appearing for the petitioner in W.P.No. 1332/2020 urged that the earlier writ petition filed by the Vice Chairman of the petitioner challenging the acquisition proceedings has nothing to do with the proposed 2nd stage Development of Karwar Port, inasmuch as, it related to a challenge to the acquisition of the land for setting up of original Karwar Port. He submitted that there are several members of the petitioner association and there is no allegation of suppression of any facts on the part of the other members of the petitioner association. He also refuted various other

submissions made by the learned counsel appearing for the various respondents.

34. Sri. Smaran Shetty, the learned counsel appearing for the petitioner in W.P.No. 2336/2020 has pointed out that the writ petition cannot be thrown out solely on the ground that the petitioner association is not registered.

CONSIDERATION OF SUBMISSIONS:

35. We have given careful consideration to the submissions made across the Bar. We have perused the pleadings and the documents placed on record. We have also carefully perused large number of decisions relied on by the parties. But, we are referring only to the relevant decisions.

36. In view of the submissions made as above, the following main issues are required to be decided in these writ petitions:

- (i) Whether in view of the availability of efficacious remedy under the provisions of sub-section (1) of Section-14 and clause (h) of Section-16 of the NGT Act, 2010, the present petitions under Article 226 of the Constitution of India should not be entertained?

- (ii) Whether the petitioners have locus to maintain the petitions?
- (iii) Whether the consent for establishment granted by Karnataka State Pollution Control Board (KSPCB) is bad in law?
- (iv) (a) Whether the proposed project of 2nd stage expansion of Karwar Port is falling under category-A project, as defined in the schedule to the Environment Impact Assessment (EIA) Notification dated 14th September, 2006 and whether State Level Environment Impact Assessment Authority-Karnataka (for short, 'SEIAA') had jurisdiction to grant the Environmental Clearance for the project?
- (iv) (b) Whether the proposed project of 2nd stage Development exceeds the capacity of 5 Million MT/Annum?
- (v) Whether the 2nd stage Development will violate any law relating to environment?
- (vi) Whether the project will lead to violation of fundamental rights guaranteed to the citizens of Karwar under sub-clause (d) of clause (1) of Article 19 of the Constitution of India?
- (vii) (a) Whether the proposed project will infringe the fundamental rights of the fishermen guaranteed under sub-clause (g) of clause (1) of Article 19 and Article 21 of the Constitution of India?
- (vii) (b) Whether rights of the fishermen under Article 300A will be infringed?

AVAILABILITY OF EFFICACIOUS REMEDY:

37. The submission of the learned counsel appearing for the KSPCB is that both the Water Act and Air Act, have been included in Schedule-I to the NGT Act and, therefore, if any substantial question arises out of the consent granted under the Water Act and Air Act, the National Green Tribunal (for short, 'the NGT') will have the jurisdiction to entertain the dispute. He submitted that, moreover, Environmental Clearance can be challenged by way of an appeal to the NGT, as provided in clause (h) of Section-16 of the NGT Act. He relied upon the law laid down in paragraph-36 of the decision of the Apex Court in the case of ***Union of India and others –vs- Major General Shrikant Sharma and another***⁵. He submitted that when a statutory forum is created by law for redressal of the grievances, a writ petition should not be entertained by ignoring the statutory dispensation. In short, the submission of KSPCB is that NGT Act contains a mechanism for redressal of grievances raised in these petitions.

38. It is true that if a challenge was only to the Environmental Clearance, an argument of availability of efficacious remedy

⁵ (2015) 6 SCC 773

under clause (h) of Section-16 of the NGT Act would have been certainly available. However, in this case, the challenge is also to the legality and validity of consent for establishment granted under Section-21 of the Air Act and consent for establishment granted under Section-25 of the Water Act. There is a challenge to the project on the ground of infringement of fundamental rights guaranteed under Articles-19 and 21 of the Constitution of India and in particular under sub-clause (d) of clause (1) of Article 19 of the Constitution of India. Under Section-31 of the Air Act, there is a provision of an appeal against the orders passed by the KSPCB, to an Appellate Authority constituted by the State Government. Moreover, under Section-28 of the Water Act, a remedy of appeal is available to prefer an appeal against an order of consent issued under Section-25 thereof to an Appellate Authority established by the State Government. In the present case, the issues of legality and validity of the Environmental Clearance as well as the consent granted under both the Water Act and Air Act are interlinked. If the argument of availability of efficacious remedies is accepted, the petitioners will be driven to prefer an appeal before the separate and distinct Appellate Authorities. Moreover, there is a challenge to the

entire project on the ground of violation of fundamental rights guaranteed under Articles-19 and 21 of the Constitution of India. The challenge to the project is on the ground of loss of livelihood of the members of the petitioners. Therefore, in the facts of the case, it cannot be said that an efficacious statutory remedy is available to the petitioners in this case. Hence, this Court is of the considered view that the said preliminary objection raised by the learned counsel appearing for KSPCB deserves to be rejected.

Issue of Locus-standi of the petitioners:

39. The issue of *locus standi* of the petitioner has been mainly raised in W.P.No. 1332/2020. In the said writ petition, the first objection is that there is nothing placed on record to show that the petitioner society is duly registered. It is also pointed out that the petitioner has not disclosed who are the Office Bearers of the society and what are the aims and objects of the society. More importantly, an objection is raised that one Sri. Yeshya Rama Harikantra who claims to be the Vice President of the petitioner association and who has affirmed an affidavit in support of the petition has suppressed the material fact that along with several other persons, he had filed writ

petitions for challenging the acquisition of the land for establishment of Karwar Port and that the said writ petitions were dismissed. It is pointed out that the Vice President of the petitioner in W.P.No. 1332/2020 was the petitioner No.6 in the writ petition Nos. 102160-102183/2017 in the batch of writ petitions which were dismissed by the learned Single Judge of this Court by the Judgment and order dated. 11th April, 2019. It was pointed out that those writ petitions were filed for challenging the preliminary notification of acquisition issued in the year 1962 and the awards made in the year 1971. Moreover, he also preferred a writ appeal being writ appeal No. 100276/2019 which was dismissed by a Division Bench of this Court by the judgment dated 30th September, 2020. The submission is that he has a personal interest in the subject matter of the present writ petition.

40. As regards the registration, the petitioner has produced a copy of the Registration Certificate dated 26th February, 2002 issued by Assistant Registrar of Co-Operative Society, Karwar showing the registration of the petitioner under the Karnataka Co-Operative Societies Act. The copy has been produced along with a memo dated 19th April, 2021. We have perused

the copies of the Judgments produced by the sixth respondent-contractor passed by this Court in W.P.Nos. 110545-110549/2017 dated 11th April 2019 and Writ Appeal No. 100276/2019 dated 30th September, 2019. From the Judgment in Writ Appeal No. 100276/2019 dated 30th September, 2020, it is clear that the Vice President of the petitioner who has sworn the verifying affidavit in the present petition was one of the petitioners in a batch of W.P. Nos. 110545-110549/2017 filed for challenging the land acquisition proceedings commenced in the year 1962 for setting up of Karwar Port. The said writ petitions as well as the writ appeals were dismissed on the ground that the principles analogous to *res judicata* will apply, inasmuch as, 59 persons had earlier filed writ petition No. 41376/2003 and connected cases in the year 2003 for challenging the same acquisition and those writ petitions were dismissed which have attained finality. Moreover, the Vice President of the petitioner also filed writ appeal No. 100276/2019 for challenging the order dated 11th April, 2019 passed by the learned Single Judge. Even the said appeal was dismissed by a Division Bench of this Court.

41. It is true that challenge to land acquisition proceedings initiated in the year 1962 for setting up of Karwar Port may not have any direct relevance to the merits of the present writ petition. However, the Vice President of the petitioner claims to be one of the owners of the land acquired for the purposes of setting up the original Karwar Port. Therefore, as a person who has affirmed verifying affidavit in this writ petition (W.P.No. 1332/2020), it was his duty to bring the fact of filing of the earlier proceedings to the notice of this Court. To that extent, the learned Senior Counsel appearing for the sixth respondent-contractor in W.P.No. 1332/2020 is justified in making a grievance regarding suppression of material facts. Hence, the preliminary objection will have to be upheld only in W.P.No. 1332 of 2020. But in any case, W.P.No. 2336 of 2020 raises the same contentions which are raised in Writ Petition No. 1332 of 2020, which will have to be considered.

42. In writ petition No. 2336/2020, the objection is that the petition is filed by an un-registered association or a society. A perusal of the averments made in paragraph-3 of the writ petition No. 2336/2020 shows that the petitioner is an association of the fishermen who are living and earning their

livelihood in Uttara Kannada district. It is also pleaded that the members of the petitioner have been engaged as fishermen for several generations. As far as the writ petition in the nature of a public interest litigation filed by an un-registered association is concerned, it will be necessary to make a reference to a decision of the Apex Court in the case of ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Association – vs- The Union of India***⁶. In paragraph 62 of the said decision, the Apex Court has dealt with a similar objection regarding un-registered association filing a petition in the nature of a public interest litigation. In paragraph 62, the Apex Court held thus:

“62. A technical point is taken in the counter-affidavit that Petitioner 1 is an unrecognised association and that, therefore, the petition to that extent, is not sustainable. It has to be overruled. Whether the petitioners belong to a recognised union or not, the fact remains that a large body of persons with a common grievance exists and they have approached this Court under Article 32. Our current procession jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-

⁶ (1981) 1 SCC 246

oriented, and envisions *access to justice* through “class actions”, “public interest litigation” and “representative proceedings”. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of “cause of action” and “person aggrieved” and individual litigation is becoming obsolescent in some jurisdictions. It must fairly be stated that the learned Attorney-General has taken no objection to a non-recognized association maintaining the writ petitions”.

(underlines supplied)

43. In view of the law laid down by the Apex Court, this petition cannot be thrown out on the ground of non-registration of the petitioner. In Writ Petition No. 2336 of 2020, one of the grounds of challenge is that the right of livelihood of large number of small fishermen operating in the area will be adversely affected. We must note here that it may not be possible for the small fishermen whose rights have been allegedly affected to approach the writ Court. In any event, in this petition, the basic allegation is regarding violation of laws

relating to environment. The first Court has been constituted as the only Green Bench in this Court. Therefore, even if Writ Petition No. 2336/2020 is not treated as a public interest litigation in view of the fact that some of the members of the petitioner may be personally affected on account of 2nd stage Development project, this Court is of the considered view that this petition (WP.No. 2336/2020) can always be entertained by the Green Bench, as a writ petition filed under Article 226 of the Constitution of India.

LEGALITY AND VALIDITY OF THE CONSENT FOR ESTABLISHMENT:

44. Now we turn to the issue of legality and validity of the consent granted by KSPCB for establishment to 2nd stage Development project. While dealing with the issue of legality of the consent, a writ Court is concerned with decision making process rather than the merits of the decision itself. The Environmental Clearance was granted by SEIAA on 23rd January, 2019. Condition No. 23 in the said clearance incorporates a requirement of obtaining consent to establish/ operate from KSPCB both under the Water Act as well as the Air Act.

45. A show cause notice was issued by SEIAA on 20th December, 2019 (Annexure-D) calling upon the Executive

Engineer, Port Division, Karwar and Port Officer of the State Government calling upon him to show cause why the Environmental Clearance granted vide letter dated 23rd January, 2019 should not be revoked. Therefore, on 23rd January, 2020, this Court directed SEIAA to decide the show cause notice dated 20th December, 2019. This Court also noted that stop work notice dated 20th December, 2019 (Annexure-E) was issued by KSPCB to the Executive Engineer, Port Division. We must note here that an order was passed by SEIAA in the meeting held on 3rd February, 2020 on the said show cause notice noting that an application has been made to KSPCB for grant of consent for establishment and the same is pending for consideration. Therefore, it was directed that before starting construction activities, all the conditions contained in the Environmental Clearance must be complied with. We may note here that an application was made by the Port Officer to KSPCB for grant of consent for establishment on 16th January, 2020.

46. Before we deal with the process adopted for dealing with the application for grant of consent, it is necessary for this Court to refer to the relevant provisions of the Water Act. We

must note here that KSPCB was constituted under Section-4 of the Water Act. Sub-section (2) of Section-4 lays down the constitution of the State Boards which consists of the Chairman and various categories of Members nominated by the State Government, as provided in clauses (a) to (e) of sub-section (2) of Section-4 of the Water Act. Under Section-9 of the Water Act, the Board has been conferred with the power to constitute various Committees. Section-11A permits the Board to delegate some of its powers to the Chairman. Section-25 of the Water Act is material which reads thus:

“25. Restrictions on new outlets and new discharges.— (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board,—

- (a) establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land (such discharge being hereafter in this section referred to as discharge of sewage);
or

- (b) bring into use any new or altered outlet for the discharge of sewage; or
- (c) begin to make any new discharge of sewage:

Provided that a person in the process of taking any steps to establish any industry, operation or process immediately before the commencement of the Water (Prevention and Control of Pollution) Amendment Act, 1988, for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent, within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be made in such form, contain such particulars and shall be accompanied by such fees as may be prescribed.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry shall follow such procedure as may be prescribed.

(4) The State Board may—

(a) grant its consent referred to in sub-section (1), subject to such conditions as it may impose, being—

- (i) in cases referred to in clauses (a) and (b) of sub-section (1) of section 25, conditions as to the point of discharge of sewage or as to the use of that outlet or any other outlet for discharge of sewage;
 - (ii) in the case of a new discharge, conditions as to the nature and composition, temperature, volume or rate of discharge of the effluent from the land or premises from which the discharge or new discharge is to be made; and
 - (iii) that the consent will be valid only for such period as may be specified in the order, and any such conditions imposed shall be binding on any person establishing or taking any steps to establish any industry, operation or process, or treatment and disposal system of extension or addition thereto, or using the new or altered outlet, or discharging the effluent from the land or premises aforesaid; or
- (b) refuse such consent for reasons to be recorded in writing.

(5) Where, without the consent of the State Board, any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, is established, or any steps for such establishment have been taken or a new or altered outlet is brought into use for the discharge of sewage or a new discharge of sewage is made, the State Board may serve on the person who has established or taken steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the outlet, or making the discharge, as the case may be, a notice imposing any such conditions as it might have imposed on an application for its consent in respect of such establishment, such outlet or discharge.

(6) Every State Board shall maintain a register containing particulars of the conditions imposed under this section and so much of the register as relates to any outlet, or to any effluent, from any land or premises shall be open to inspection at all reasonable hours by any person interested in, or affected by such outlet, land or premises, as the case may be, or by any person authorised by him in this behalf and the conditions so contained in such register shall be conclusive proof that the consent was granted subject to such conditions.

(7) The consent referred to in sub-section (1) shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Board.

(8) For the purposes of this section and sections 27 and 30,—

- (a) the expression “new or altered outlet” means any outlet which is wholly or partly constructed on or after the commencement of this Act or which (whether so constructed or not) is substantially altered after such commencement;
- (b) the expression “new discharge” means a discharge which is not, as respects the nature and composition, temperature, volume, and rate of discharge of the effluent substantially a continuation of a discharge made within the preceding twelve months (whether by the same or a different outlet), so however that a discharge which is in other respects a continuation of previous discharge made as aforesaid shall not be deemed to be a new discharge by reason of any reduction of the temperature or volume or rate of

discharge of the effluent as compared with the previous discharge”.

(underlines supplied)

47. Under the provisions of the Air Act, Section-11 empowers the Board to constitute the Committees. Section-15 empowers the Board to delegate its powers to the Chairman and/or the Member Secretary. Section-21 of the Air Act is material which reads thus:

21. Restrictions on use of certain industrial plants.— (1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area:

Provided that a person operating any industrial plant in any air pollution control area immediately before the commencement of section 9 of the Air (Prevention and Control of Pollution) Amendment Act, 1987 (47 of 1987), for which no consent was necessary prior to such commencement, may continue to do so for a period of three months from such commencement or, if he has made an application for such consent within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be accompanied by such fees as may be prescribed and shall be made in the prescribed form and shall contain the particulars of the industrial plant and such other particulars as may be prescribed:

Provided that where any person, immediately before the declaration of any area as an air pollution control area, operates in such area any industrial plant, such person shall make the application under this sub-section within such period (being not less than three months from the date of such declaration) as may be prescribed and where such person makes such application, he shall be deemed to be operating such industrial plant with the consent of the State Board until the consent applied for has been refused.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry, shall follow such procedure as may be prescribed.

(4) Within a period of four months after the receipt of the application for consent referred to in sub-section (1), the State Board shall, by order in writing, and for reasons to be recorded in the

order, grant the consent applied for subject to such conditions and for such period as may be specified in the order, or refuse such consent:

Provided that it shall be open to the State Board to cancel such consent before the expiry of the period for which it is granted or refuse further consent after such expiry if the conditions subject to which such consent has been granted are not fulfilled:

Provided further that before cancelling consent or refusing a further consent under the first proviso, a reasonable opportunity of being heard shall be given to the person concerned.

(5) Every person to whom consent has been granted by the State Board under sub-section (4), shall comply with the following conditions, namely:--

- (i) the control equipment of such specifications as the State Board may approve in this behalf shall be installed and operated in the premises where the industry is carried on or proposed to be carried on;
- (ii) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;

- (iii) the control equipment referred to in clause (i) or clause (ii) shall be kept at all times in good running condition;
- (iv) chimney, wherever necessary, of such specifications as the State Board may approve in this behalf shall be erected or re-erected in such premises;
- (v) such other conditions as the State Board may specify in this behalf; and
- (vi) the conditions referred to in clauses (i), (ii) and (iv) shall be complied with within such period as the State Board may specify in this behalf:

Provided that in the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months:

Provided further that—

- (a) after the installation of any control equipment in accordance with the specifications under clause (i), or
- (b) after the alteration or replacement of any control equipment in accordance with the directions of the State Board under clause (ii), or

(c) after the erection or re-erection of any chimney under clause (iv), no control equipment or chimney shall be altered or replaced or, as the case may be, erected or re-erected except with the previous approval of the State Board.

(6) If due to any technological improvement or otherwise the State Board is of opinion that all or any of the conditions referred in to sub-section (5) require or requires variation (including the change of any control equipment, either in whole or in part), the State Board shall, after giving the person to whom consent has been granted an opportunity of being heard, vary all or any of such conditions and thereupon such person shall be bound to comply with the conditions as so varied.

(7) Where a person to whom consent has been granted by the State Board under sub-section (4) transfers his interest in the industry to any other person, such consent shall be deemed to have been granted to such other person and he shall be bound to comply with all the conditions subject to which it was granted as if the consent was granted to him originally”.

(underlines supplied)

48. Thus, the provisions of sub-section (3) of Section-25 of the Water Act and sub-section (3) of Section-21 of the Air Act specifically provide for making an inquiry on the applications made for grant of consent, as per the procedure prescribed. Therefore, we have to see whether any procedure has been prescribed by the Rules.

49. Sri. Aravind Kamath, the learned Senior Counsel appearing for KSPCB has placed on record the copies of the relevant Rules framed both under the Air and the Water Act. It will be necessary for this Court to make a reference to the said Rules, inasmuch as, the same lay down procedure for holding of an inquiry by KSPCB before grant of consent for establishment/operate. The Karnataka State Board for the Prevention and Control of Water Pollution Rules, 1976, have been framed under the Water Act. Rule-33 deals with the procedure to be followed for making an inquiry on the application made for grant of consent. Rule-33 is material which reads thus:

“33. Procedure for making inquiry into application for consent – (1) On receipt of an application for consent under Section 25 or Section

26, the State Board may depute any of its officers accompanied by as many assistants as may be necessary, to visit the premises of the applicant, to which such application relates, for the purpose of verifying the correctness or otherwise of the particulars furnished in the application or of obtaining such further particulars or information as such officer may, consider necessary. Such officer may, for that purpose, inspect any place where water or sewage or trade effluent is discharged by the applicant, or treatment plants, purification works or disposal systems of the applicant and may require the applicant to furnish to him any plans, specifications and other data relating to such treatment plants, purification works or disposal systems or any part thereof that he considers necessary.

(2) Such officer shall before visiting any premises of the applicant for the purposes of inspection under sub-rule (1) above, give notice to the applicant of his intention to do so in Form XIV. The applicant shall furnish to such officer all facilities that such officer may legitimately require for the purpose.

(3) An officer of the State Board may, before or after carrying out an inspection under sub-rule (1), require the applicant to furnish to him orally or in writing such additional information or clarification, or

to produce before him such documents, as he may consider necessary for the purpose of investigation of the application and may for that purpose summon the applicant or his authorized agent to the office of the State Board.”

(underlines supplied)

50. Similarly, the Karnataka Air (prevention and Control of Pollution) Rules, 1983 have been framed under the Air Act. Sub-Rule 20 deals with the inquiry to be made on the application. Sub-Rule (2) of Rule-20 is material which reads thus:

“**20. Application** – (2) On receipt of an application for consent under Section 21, the Board may depute any of its officers accompanied by as many Assistants as may be necessary to visit and inspect any place or premises under the control of the applicant or the occupier to which such application violates for the purpose of verifying the correctness or otherwise of the particulars furnished in the application or for obtaining such further particulars or information as such officer may consider necessary. Such Officer may, for that purpose, inspect any place where emission from the chimney or fugitive emissions from any location within the premises of the industry as also any control devices installed in the said premises.

Such officer may, for that purpose, inspect any place or premises under the control of the applicant or occupier, and may require the applicant to furnish to him any plan, specification or other data relating to control equipment or systems or any part thereof that he considers necessary.”

(underlines added)

51. Thus, the Officer who is deputed by KSPCB in terms of the above Rules is required to make an inquiry on the following aspects:

- (i) Verification about the correctness or otherwise of the particulars furnished in the application;
- (ii) Inspection of any place where the water or sewage or trade effluent will be discharged by the applicant; and
- (iii) Inspection of treatment plants, purification works or disposal systems of the applicant.

The Officer so deputed for inspection or to make an inquiry has a power to direct the applicants to furnish the plan, specifications and other data relating to such treatment plants, purification works or disposal systems. He is empowered to call for additional information from the applicant.

52. The learned counsel appearing for KSPCB in W.P.No. 2336/2020 has produced a copy of the inspection report dated nil, submitted by the Inquiry Officer of the Regional Office at Karwar with a memo dated 9th June, 2021. The inspection report refers to the objections raised by the petitioner in W.P.No. 1332/2020 by addressing a letter dated 16th July, 2019 to the Deputy Commissioner. It refers to the existing STP for the existing Karwar Port. It only mentions that there is a proposal to establish another STP of capacity of 10 KLD. It also refers to the fact that the D.G set having capacity of 125 KVA will be required for the proposed project. It further notes that on the date of his visit, there was no stock of hazardous waste. A perusal of the report shows that there is no inquiry made by the Environmental Officer to ascertain the extent of Water and Air pollution that may be caused on account of the proposed expansion of Karwar Port. There is nothing in the report to show that any Detailed Project Report (DPR) was shown to him at the time of inquiry about the proposed STP. He did not even call upon the project proponents to submit any such DPR.

53. The environmental Officer has referred to an authorization obtained under the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2016 for waste oil quantity of 300 MT/Annum which is valid up to 30th June, 2020. This authorization is only in respect of the existing Karwar Port, as it was valid only up to 30th June, 2020. He has made no inquiry to ascertain whether there is any proposal to deal with the Hazardous Waste oil and sludge received from the Ships after the expansion of the Port becomes operational. He has made no inquiry about the manner in which the Port Authorities propose to deal with the waste oil and sludge received from the Ships after expansion project is completed, as five additional berths are proposed to be provided in the project. The object of the inquiry under the Rules framed under both Air Act and Water Act is to inquire into the extent of possible air and water pollution which may be caused by the project in respect of which consent for establishment was sought and in what manner, the project proponent is going to deal with the pollution and control the same. This part of the inquiry is very vital in the decision making process. Thus, the Environmental Officer has made no inquiry and investigation which he was under an obligation to

make as per the Rules framed both under the Water and the Air Act. Thus, the first step which was required to be taken in the decision making process was completely flawed.

54. Now we deal with the manner in which the application for consent was dealt with by KSPCB. An affidavit of Shri. Vijayakumar Gogi, the then Chairman of KSPCB has been filed on 13th November, 2020. It records that two separate applications were filed on 16th January, 2020 by the Port Officer for grant of consent for establishment of 2nd stage Development of Commercial Karwar Port under the Air Act and the Water Act. Reliance is placed on the proceedings of the meeting of the Board held on 8th March, 2002 and on 14th February, 2002 and in particular, the resolution passed on the subject of the constitution of Consent Committee for issue of consent for establishment and consent for operation. The Consent Committee meeting was convened on 21st May, 2020 in which, the applications made by the Port Officer were considered. The agenda SI.No.22, CFE:181:09 was in respect of the said applications. The Consent Committee, by a resolution, recommended to issue consent for establishment (CFE) for development of 2nd stage Development of

commercial Karwar Port activity and for expanding existing capacity from three Million MT to 4.5 MT as well as for establishment of a sewage treatment plant (STP) having capacity of 10 KLD. There is no dispute that the Consent Committee can only make a recommendation. Moreover, neither under Section 11A of the Water Act nor under Section 15 of the Air Act there is a power to delegate the powers of the Board to grant consent for operation or consent for establishment to the Consent Committee. Admittedly, the power of delegation under both the Acts has been exercised under the Official Memorandum dated 24th June, 2019 by which, the power to grant consent to establish, expand and to operate in respect of large industries falling under Red category has been delegated only to the Chairman of the Board who can exercise the same based on the recommendations of the Consent Committee. There is no dispute that the Port will fall under the category of large industries which is in the Red category. A consent for establishment was issued on 1st July, 2020 (Annexure-R5-F to the affidavit of the Chairman). There are two Annexures to the consent i.e., Annexure-I and II. Annexure-I bears the date of 11th June, 2020. In the consent order dated 1st July, 2020, it is

stated that the same was issued as per the recommendation made by the Consent Committee in its meeting held on 21st May, 2020 and which was duly approved by the Member Secretary and the Chairman. However, there is nothing placed on record to show that the Chairman, after examination of record and after consideration of relevant factors, approved the recommendation of the Consent Committee. No such order passed by the Chairman or proceedings before the Chairman have been placed before the Court. Even in his affidavit dated 13th November, 2020, the Chairman has not claimed that after considering all the relevant factors, he has approved the recommendation of the Consent Committee. While exercising the delegated power to grant consent, the Chairman is expected to apply his mind. He cannot simply put his stamp of approval on the recommendation without any independent application of mind. In the same affidavit, in paragraph-15, he has stated that the Board will review the entire matter of CFE application dated 16th January, 2020 and will review the CFE (expansion) issued to the Port Authority by exercising the power conferred under sub-section (2) of Section 27 of the Water Act. We may note here that admittedly, there is neither a decision of the Board nor a well considered decision of the

Chairman to approve the recommendation of the Consent Committee. Moreover, on a plain reading of clauses (a) and (b) of sub-section (2) of Section-27 of the Water Act, the review can be made only by way of modification of the conditions incorporated in the consent or by rectification of the conditions.

55. Thereafter, a meeting of the Board was convened on 24th November, 2020. Certain discussion was made under item No.231:27.1 under the heading 'Review of Consent for Expansion (CFexp) in respect of development of 2nd stage Commercial Karwar Port Activity of capacity of 3 Million MT/month to 4.5 million MT/month'. In the minutes of the meeting held on 24th November, 2020 (Annexure-AC to the writ petition No.1332/2020), the Board expressed its dissatisfaction over the way in which the case was presented by the Law Officer of the Board and the learned counsel representing the Board before this Court. Ultimately, in the minutes of the meeting, it was recorded as under:

"After detailed deliberations, the Consent Committee
"Recommended to issue Consent for expansion for
development of 2nd stage expansion of Commercial
Karwar port activity of existing capacity from 3 Million
MT/annum to 4.5 Million MT/annum & to establish 10

KLD Sewage Treatment Plant (STP) with a specific condition that, issue of this Consent for expansion is without prejudice to any pending court cases on the matter along with the other applicable conditions”.

As per the recommendation of the Consent Committee meeting held on 21/05/2020 vide proceedings dated 10/06/2020, the Chairman approved the Karwar Port CF Expansion with the conditions. The important conditions stipulated in the CF Expansion order are as under:

1. The Sewage generated from the Port activity shall be treated in 10 KLD Sewage Treatment Plant. The treated sewage shall conform to the standards stipulated and utilize for landscaping gardening, toilet flushing, fire fighting and Air conditioning.
2. The applicant shall provide acoustic enclosures to the 125 KAV DG set with 3m height chimney.
3. The applicant shall provide all necessary health care facility to workers with personal protection measures to avoid spreading of COVID-19 like virus outbreak and shall carry out routine health survey among workers.

The Board discussed the matter at length and examined all the documents relevant to the present issue. The Board unanimously resolved that given

the nature of the activities proposed by the project proponent and having given due regard to all facts, the application made for CFE expansion on 16.1.2020 and which has been issued with the approval of Chairman on 1.7.2020 is found to be proper and justified. The CFE Expansion granted on 1.7.2020 is hereby reiterated and confirmed with certain modified conditions.”

(underline supplied)

56. Thus, it is clear that the Board purported to resolve that the consent granted with the approval of the Chairman on 1st July, 2020 was found to be proper. As noted earlier, a copy of the proceedings or an order of approval of the Chairman, granting approval is not placed on record. Moreover, what is important is that it is specifically mentioned that the consent for expansion granted on 1st July, 2020 was reiterated and confirmed with “certain modified conditions”. Shockingly, there is no discussion in the minutes of the meeting held on 24th November, 2010 about what are the modified conditions to be imposed. Even the modified conditions do not form a part of the minutes. Neither any discussion was held on the nature of the modified conditions nor the modified conditions have been recorded therein. Moreover, the Board did not notice that a

proper inquiry as contemplated by the Rules framed under the Water Act and Air Act was not made by the Environmental Officer. Thus, this Court has no hesitation to hold that the entire decision making process, by which a decision was taken to reiterate and confirm the earlier consent dated 1st July, 2020 with “certain modified conditions” was completely vitiated due to non-application of mind and non consideration of the relevant factors. Moreover, the consent was reiterated subject to “certain modified conditions” without even considering what could be the modified conditions.

57. The proceedings of the meeting held on 24th November, 2020 were brought to the notice of this Court on 16th December, 2020. Paragraphs 2 and 3 of the said order dated 16th December, 2020 read thus:

“2. Apart from the fact that the minutes do not reflect a detailed consideration of issues, the minutes do not record what are the modified conditions. The learned counsel appearing for the Pollution Control Board states that he will produce the modified conditions. We have reservations for this statement. As the minutes of the meeting do not incorporate any modified conditions, we fail to understand how the learned counsel is going to

produce the modified conditions which do not exist. The modified conditions ought to have been decided by the Board. Secondly, the minutes, prima facie, do not show any application of mind. Considering the fact that the sixth respondent's claim is that the project subject matter of this petition is a public project, it will be appropriate if these two petitions are finally disposed of.

3. At this stage, the learned counseil appearing for the sixth respondent in W.P. No. 1332 of 2020 states that now all the conditions have been complied with and therefore, the said respondent may be permitted to commence the work. As recorded earlier, the Pollution Control Board has reiterated the consent granted earlier with modified conditions, though the modified conditions are not known to anybody. The same are not even served upon the sixth respondent. Without knowing what are the modified conditions, it is not possible to accede to the request of the second respondent".

(underline supplied)

It is relevant to note here that though there was no decision recorded in the minutes of the meeting held on 24th November, 2020 about what should be the modified conditions, a bold statement was made by the learned counsel appearing for

KSPCB that he would produce the modified conditions, though the same were not in existence on that day. Thus, KSPCB was even willing to produce non-existing conditions. This raises a serious question mark about the functioning of KSPCB. Perhaps with a view to overcome what was observed in the above said order, again the subject was placed before the Board meeting convened on 6th January, 2021. The relevant part of the minutes of the meeting dated 6th January, 2021 (Annexure-AD) read thus:

“The Member Secretary presented the subject and brought to the notice of the Board that the resolution on the subject made during the previous meeting held on 24.11.2020 has been submitted to the Honourable High Court of Karnataka. The Honourable High Court order dated 16.12.2020 is available on record for perusal of the Board. The proposal of issue of amendment to the CFExp dated 1.7.2020 due to modification of the existing conditions and based on the CPCB communication to SPCB's on environmental management of sea ports dated 11.8.2020 was placed before the Board at the last meeting. However, the same does not find place in the earlier minutes. Though this was discussed in the earlier meeting, the same is being deliberated again and the conditions which are relevant and applicable to Karwar Port Project are

being placed before the Board for further discussions.

The Board regretted that, the modified conditions were not part of the submissions made to the Hon'ble High Court and earlier minutes indeed appear to be incomplete.

The Board Members again deliberate on the proposed modifications to the CFExp conditions and additional conditions proposed to Karwar Port Project based on CPCB communication.”

(Underlines supplied)

58. Thereafter, in the same minutes dated 6th January, 2021, about eleven (11) additional conditions were stipulated. It is pertinent to note that the minutes of the meeting dated 6th January, 2021 record that the conditions were discussed in the earlier meeting. However, on perusal of the minutes of the earlier meeting dated 24th November, 2020 it is crystal clear that the same do not contain any such discussion. We are shocked to note that it is mentioned in the minutes that the Board regretted that the modified conditions were not a part of the submissions made to this Court. When the modified conditions were not even determined, we wonder how it could have been placed before this Court. Instead of discussing the

entire issue afresh in the meeting held on 6th January, 2021, deliberations were purportedly held only on the question of imposing additional conditions. From this, an inference could be easily drawn that there was no discussion or deliberation in the meeting held on 24th November, 2020 about the nature of the additional conditions. When the decision of the Chairman to grant consent was reiterated in the meeting held on 24th November, 2010, subject to “certain modified conditions”, the said conditions were not even discussed. Without even knowing what could be the additional/modified conditions, the learned members of the Board who were supposed to be experts have decided to reiterate the consent subject to “certain modified conditions”.

59. At this stage, it will be necessary to make a reference to the preamble of the Water Act. The relevant portion of the preamble reads thus:

“An Act to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution, for conferring on and

assigning to such Boards powers and functions relating thereto and for matters connected therewith.

Whereas it is expedient to provide for the prevention and control of water pollution and the maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid of boards for the prevention and the control of water pollution and for conferring on and assigning to such Boards powers and functions relating thereto”.

There is a similar preamble to the Air Act as well. Thus, the very object of enacting the Water Act and the Air Act was prevention and control of Water and Air pollution respectively. The very purpose of establishment of the State Pollution Control Board was to achieve the object of prevention and control of Water and Air pollution. Thus, KSPCB is required to act as a watch dog against pollution of both Air and Water. But in facts of the present case, we are constrained to observe that KSPCB has acted in a very casual manner by ignoring the very object of the Water and the Air Act. KSPCB is supposed to be a body of experts. But, it has acted in such a manner that the very object of the setting up of the Board is frustrated. Apart from the shocking manner in which KSPCB dealt with the

applications made by the Port Officer for grant of consent for establishment, the entire process is vitiated due to non-application of mind, non-consideration of the relevant factors and the illegality in the decision making process.

Therefore, we summarize our conclusions on the aspects of the illegality in the decision making process of KSPCB as hereunder:

- (a) The consent for establishment was issued on 1st July, 2020 solely on the basis of the recommendations made by the Consent Committee;
- (b) Though the consent issued on 1st July, 2020, records that it was issued with the approval of the Chairman of the Board, neither the proceedings before the Chairman nor an Order made by him is placed on record to show that after considering the relevant factors and after application of mind, the Chairman had approved the recommendation of the Consent Committee. When the Chairman exercised delegated power of the Board to grant consent, before granting consent, there has to be

an application of mind by him which is completely absent in this case;

- (c) We have perused the inspection report of the environmental officer of Karwar Regional Office, who appears to have carried out inspection on 17th January, 2020. As noted earlier, no inquiry or investigation was made by the said Officer as contemplated by the Rules framed both under the Water Act and the Air Act. Without there being a proper inquiry as contemplated by the Rules, the application for grant of consent could not have been considered;
- (d) Though there was no valid consent granted by the Board or by the Chairman in exercise of the delegated powers, the Board purported to review the consent under the non-existing power under sub-section (2) of Section 27 of the Water Act;
- (e) In the meeting held on 24th November, 2020, though it was resolved to reiterate and confirm the consent with "certain modified conditions", there was no decision taken on what could be the additional/modified conditions. As the decision

was taken only to reiterate and confirm the consent subject to "certain modified conditions" and as the said conditions were not even discussed, the decision to reiterate and confirm the consent cannot be termed as legal and valid;

- (f) Only after the aforesaid lacuna was pointed by this Court in paragraphs 2 and 3 of the order passed on 16th December, 2020 in W.P.No. 1332/2020, to overcome the same, the Board again convened its meeting on 6th January, 2021 and purportedly took a decision as regards what should be the modified conditions; and
- (g) It is pertinent to note here that neither in the minutes of the earlier meeting dated 24th November, 2020 nor in the minutes of the subsequent meeting dated 6th January, 2021, the fact that proper inspection and inquiry was not conducted by the environmental officer in terms of the Rules is not at all noted.

60. Thus, the purported grant of consent dated 1st July, 2020 and the subsequent act of the Board of confirmation of the

earlier consent in the minutes of the meeting held on 24th November, 2020 as well as the further act of the Board of determining the additional conditions for the first time in the subsequent meeting held on 6th January, 2021 are illegal as the entire decision making process of the Board has been completely vitiated.

61. At this juncture, we may note that after conclusion of the arguments, a memo dated 15th June, 2021 signed by Shri. Gururaj Joshi, the learned counsel appearing for KSPCB has been filed in the Court giving an undertaking on behalf of KSPCB to withdraw the consent granted on 1st July, 2020 and to redo the entire exercise afresh right from the stage of inspection, in accordance with law. It is stated in the said memo of undertaking that an experienced senior officer of the Board will be appointed to carry out the inspection and to submit a detailed report on the application made for grant of consent on 16th January, 2020. It is further stated that as the proposed project falls in the category of "Red/Large" industries, the delegated power of the Board can be exercised only by the Chairman of the Board. It is stated that the report of the officer appointed to carry out the inspection will be placed before the

Consent Committee and after considering the recommendations of the Consent Committee, the Chairman, in exercise of the delegated powers of the Board, will take a decision on the issue of grant or refusal of the consent by passing a speaking order. It is further stated in the said memo of undertaking that from the date of acceptance of the memo of undertaking by this Court, the entire process would be re-done within a period of four weeks. In view of the findings recorded in earlier paragraph, we accept and take on record the undertaking of KSPCB.

62. In view of the findings which we have recorded above as regards the manner in which the application for grant of consent for establishment has been dealt with and in view of the memo of undertaking dated 15th June, 2021 filed in the Court by KSPCB, we have no hesitation in accepting the undertaking given by the learned counsel for KSPCB. However, considering the nature of the controversy and the importance of the project, we leave it to the discretion of the Chairman of the Board to decide whether he desires to exercise the delegated power himself or the recommendations of the Consent Committee could be placed before the Board

for taking a decision in accordance with law. We propose to direct that the entire exercise shall be re-done within a period of one month from the date of pronouncement of the Judgment and thereafter, the decision taken by the Board should be communicated to both the parties to the petition within a period of six weeks from the date of pronouncement of the Judgment.

VALIDITY OF ENVIRONMENTAL CLEARANCE:

63. Now we come to the issue of power of SEIAA to grant Environmental Clearance for 2nd stage Development project. The argument canvassed is firstly that the said authority has no jurisdiction to grant Environmental Clearance inasmuch as, the said project falls under category-A. For dealing with the said argument, it is necessary to make a reference to EIA notification dated 14th September, 2006 (Annexure-G). We may note here that the said notification underwent modifications by a subsequent notification dated 1st December, 2009. In the original EIA notification dated 14th September, 2006, under clause-4, the projects and activities have been categorized into two categories i.e., category-A and category-B. It is provided that all the projects and activities including expansion and modernization of existing projects included in

category-A require prior Environmental Clearance from the Central Government in the Ministry of Environment and forests (MoEF). As regards the projects and activities falling in category-B, the jurisdiction to grant clearance vests in SEIAA which is supposed to act on the recommendation of the State Expert Appraisal Committee (SEAC). The procedure for screening of the applications for Environmental Clearance is also laid down.

64. It was urged by the learned counsel for the petitioners that the annual handling capacity of the port after its expansion will be more than 5 Million M.T. However, we may note here that in Form No.1 of application made for grant of Environmental Clearance, it is specifically mentioned that the proposed capacity will be 4.5 million MT/Annum. Hence, on the basis of the application, it cannot be said that the proposed capacity exceeded 5 million MT/Annum and therefore, as per clause 7 (f) of the schedule to the EIA notification, the project was 'A' category project.

65. The emphasis by the learned counsel for the petitioner was on General Conditions (GC) appended at the end of the EIA notification dated 14th September, 2006 which read thus:

“General Condition (GC):

Any project or activity specified in Category ‘B’ will be treated as Category-A, if located in whole or in part within 10 Km from the boundary of: (i) Protected Areas notified under the Wild Life (Protection) Act, 1972, (ii) Critically Polluted areas as notified by the Central Pollution Control Board from time to time, (iii) Notified Eco-sensitive areas, (iv) inter-State boundaries and international boundaries.”

(underline supplied)

66. A submission made was that though the notified Eco sensitive areas are not defined either in the Environment (Protection) Act, 1986 (for short ‘the said Act of 1986’) or in the said EIA notification, under the CRZ notification dated 6th January, 2011 (Annexure-H), the entire Karwar port area was declared as Critical Vulnerable Coastal Area (CVCA), as provided in sub-clause (a) of clause (4) of the said CRZ notification. The submission is that thus, the entire Karwar port area has been notified as Eco-sensitive area. Reliance was also placed on subsequent CRZ notification dated 18th January, 2020 (Annexure-N) under which, the entire Karwar port area has been declared as CVCA.

67. The General Condition (GC) which we have reproduced above in the original EIA notification dated 14th September, 2006 underwent a change by a notification dated 1st December, 2009 issued by the Central Government, in which, the GC was modified and the modified General Condition (GC) reads thus:

“General Condition (GC):

Any project or activity specified in Category ‘B’ will be treated as Category ‘A’ if located in whole or in part within 10 km from the boundary of: (i) Protected areas notified under the Wildlife (Protection) Act, 1972; (ii) Critically polluted areas as identified by the Central Pollution Control Board from time to time; (iii) Eco-sensitive areas as notified under section 3 of the Environment (Protection) Act, 1986, such as, Mahabaleshwar Panchgani, Matheran, Pachmarhi, Dahanu, Doon Valley, and (iv) inter-State boundaries and international boundaries:

Provided that the requirement regarding distance of 10 km of the inter-State boundaries can be reduced or completely done away with by an agreement between the respective States or U.Ts sharing the common boundary in case the activity

does not fall within 10 kilometers of the areas mentioned at item (i), (ii) and (iii) above.”

(underline supplied)

68. Therefore, when the application was made by the Port Officer for grant of Environmental Clearance, the General Condition (GC) contained in the original EIA notification dated 14th September, 2006 stood modified. As per the modification, the projects and activities specified in category-B, if located in or within 10 Km from the eco-sensitive area as notified under Section-3 of the said Act of 1986, were to be treated as category-A projects. In view of the amendment to the original EIA notification, the projects and activities in category-B which come under the Eco-sensitive area shall be treated as category-A, provided the area is notified under Section-3 of the said Act of 1986, as an Eco-sensitive area. In the present case, there are no documents placed on record to show that in exercise of the power under Section 3 of the said Act of 1986, Karwar has been declared as an Eco-sensitive area or that 2nd stage Development project will come up within the distance of 10 Kms from eco-sensitive area notified under Section 3 of the said Act of 1986. Hence, on the basis of modified GC, it

cannot be held that the project of 2nd stage Development will fall in category 'A'.

69. On the basis of the information furnished in a part of the application for grant of Environmental Clearance, it was contended that the cargo handling capacity, after expansion of the port will be more than 5 Million MT/annum. However, as pointed out earlier, the application was specifically made by disclosing the capacity as 4.5 Million MT/annum. As the Environmental Clearance has been granted for capacity of 4.5 Million MT/annum, it is obvious that the said capacity can never be exceeded by the Port Authority. Therefore, for both the reasons, it is not possible for this Court to accept the contention of the learned counsel for the petitioner that 2nd stage Development project will fall under category-A.

70. As regards the CRZ notification dated 18th January, 2019, it must be stated here that clause 6 (i) thereof specifically provides that unless and until CZMPs prepared under CRZ Notification dated 6th January, 2011 are revised or updated, the provisions of the CRZ notification dated 18th January, 2019 will not apply and the CZMP as per the provisions of CRZ notification dated 6th January, 2011 shall continue to be

followed for appraisal and CRZ clearance. Admittedly, the CZMP has not yet been revised or updated in terms of the CRZ notification dated 18th January, 2019 and, therefore, the CRZ notification of 6th January, 2011 will continue to operate and apply. We may also note here that in the CZMP of 2011 which is duly approved by the National Coastal Zone Management Authority, Ministry of Environment, Forest and Climate Change, Government of India which has been annexed to the writ petition No.1332 of 2020 as Annexure-A, CVCA area has been shown far away from Karwar beach. The decision of the Apex Court in the case of ***Kapico Kerala Resorts Private Limited*** (supra), on its plain reading, could have been applied to the facts of the present case provided that CRZ notification dated 18th January, 2019 is applicable. However, as held above, in view of sub-clause (i) of clause-6 of the said notification, the same is not yet made applicable. Therefore, the said decision of the Apex Court has no relevance in the present case.

71. A show cause notice was issued by SEIAA on 20th December, 2019 (Annexure-D) calling upon the Executive Engineer, Port Division, Karwar and Port Officer of the State Government to show cause why the Environmental Clearance

granted vide letter dated 23rd January, 2019 should not be cancelled. The said show cause notice, in terms of the directions issued by this Court on 21st January, 2020, was decided by SEIAA in the meeting held on 3rd February, 2020. A contention is raised that while deciding the show cause notice, the SEIAA has not taken into consideration the issue of jurisdiction to grant Environmental Clearance which was specifically raised. However, in view of the fact that we are now deciding the issue of jurisdiction of the SEIAA, it is not necessary for this Court to deal with the said contention.

72. We may note here that there are no grounds urged on merits as to how the Environmental Clearance is illegal. The challenge to grant of Environmental Clearance is mainly on the ground that SEIAA having no jurisdiction. Therefore, we hold that there is no merit in the challenge to the jurisdiction of SEIAA to grant Environmental Clearance to the project. However, we must clarify that after the 2nd stage Development project becomes operational, its capacity shall not exceed 4.5 Million MT/annum. Moreover, all the terms and conditions in the Environmental Clearance must be complied with in its true letter and spirit.

VIOLATION OF LAWS RELATING TO ENVIRONMENT:

73. As regards the violation of the laws relating to Environment, the Environmental Clearance has already been granted to the said project by the SEIAA, as required by EIA notification dated 14th September, 2006. As directed by the SEIAA, each and every conditions stipulated therein subject to which the Environmental Clearance has been granted will have to be mandatorily complied with. For example, condition No.23 requires the authorities to obtain consent for establishment/ operate from KSPCB. In view of our finding recorded above to the effect that the consent granted in this case has been vitiated due to non-application of mind and other reasons, the work of the project cannot be undertaken unless and until there is an appropriate consent granted by KSPCB. As and when the consent for establishment is granted, the Port Authority will have to strictly adhere to the conditions subject to which the consent is granted. The project can be made operational only after consent to operate is granted by KSPCB. Therefore, it cannot be said that the project subject matter of these petition is bad in law due to violation of the laws relating to environment.

VIOLATION OF FUNDAMENTAL RIGHTS:

74. Another challenge is on the ground of violation of fundamental rights guaranteed under clause (d) of sub-clause (1) of Article 19 and sub-clause (g) of clause (1) of Article 19 as well as Article 21 of the Constitution of India. The petitioners in both the writ petitions claim to be representing the Fishermen. A perusal of the averments made in both the petitions will show that except for bald assertions, no particulars are pleaded how the right of the members of the petitioner association to carry their traditional occupation as fishermen will be adversely affected by the implementation of 2nd stage Development of Karwar Port. There is no specific pleading stating in what manner the right of individual fishermen will be affected by the project. Merely because of few boats of fishermen were seen lying on the Karwar beach in the photographs produced by the petitioner, it cannot be said that right of an individual fishermen to enter into the sea for fishing activity will be adversely affected. The burden is on the petitioner in both the petitions to prove violation of the fundamental rights under sub-clause (g) of clause (1) of Article 19 of the Constitution and consequently, the violation of Article 21 of the Constitution. The said burden

is not discharged. Mere *ipse dixit* is not sufficient to prove the violation of the said fundamental rights.

75. Another argument is of violation of the right guaranteed under clause (d) of sub-clause (1) of Article 19 of the Constitution to move freely throughout the territory of India. We fail to understand how, by expansion of the existing port, the right guaranteed under clause (d) of sub-clause (1) of Article 19 will be affected. There is no material forthcoming to substantiate that any restrictions have been imposed on inter-State or intra State movement or travelling of any individual. Merely because a part of the beach will be converted into a port, the fundamental right of an individual guaranteed under clause (d) of sub-clause (1) of Article 19 will not be affected at all. The right to move freely throughout the territory of India does not amount to right to enter each and every part of the territory forming a part of the territory of India. Therefore, the challenge based on violation of fundamental rights guaranteed either under sub-clause (d) of clause (1) of Article 19 or under sub-clause (g) of clause (1) of Article 19 or Article 21 of the Constitution of India cannot be upheld. As the loss of

livelihood of Fishermen is not established, even violation of Article 300-A is not established.

OTHER ASPECTS:

76. Reliance was placed by the petitioner in Writ Petition No.1332 of 2020 on the draft notification published by the Ministry of Environment, Forest and Climate Change dated 3rd October, 2018. It is only a draft notification issued in exercise of the powers conferred under Section-3 of the said Act of 1986 read with sub-rule (3) of Rule 5 the Environment (Protection) Rules, 1986 for declaring the identified area of 56,825 square kilometer which is spread across six States which includes certain villages in Karwar taluk as Ecologically Sensitive Area. However, the said notification is only a draft notification issued for inviting the objections and suggestions. Final notification has not yet been issued till date. Therefore, the argument based on the said notification has no merit.

77. In writ petition No. 2336 of 2020, the learned counsel appearing for the petitioner relied upon condition No.32 under Specific Conditions incorporated in the Environmental Clearance dated 23rd January, 2019. He relied upon Biodiversity Report dated 15th October, 2020 obtained by the

petitioner in the said petition from the Department of Studies in Marine Biology of Karnataka University, Dharwad. For that purpose, it is necessary to consider the aforesaid condition No.32 incorporated in the Environmental Clearance. The said condition No.32 in the Environmental Clearance forms a part of specific conditions. The said condition No.32 reads thus:

“32. A copy of the Marine and riparian biodiversity management plan duly validated by the State Biodiversity Board shall be submitted before commencement of implementation.”

78. In view of the said specific condition, there cannot be any dispute that unless the Marine and Riparian Biodiversity Management Plan duly validated by the State Bio-Diversity Board established under Biological Diversity Act, 2000 is submitted by the State Government to SEIAA, the work of 2nd stage Development cannot commence. Therefore, we propose to issue a specific direction in this behalf.

SUSTAINABLE DEVELOPMENT:

79. The principle of sustainable development requires that development goals should be achieved while sustaining the ability of the nature to provide natural resources and eco-systems. Therefore, while achieving the goal of development,

it is necessary for every statutory authority of the Government to ensure that while carrying out development work, natural resources and eco-systems are protected. In the present case, the Environmental Clearance has been granted subject to several conditions including the condition of obtaining consent for establishment/operate from KSPCB both under the Water Act and Air Act. The conditions incorporated in the Environmental Clearance dated 23rd January, 2019 are essential for protecting the natural resources and eco-systems. Therefore, it is the obligation of all the concerned to ensure that all the conditions specified in the Environmental Clearance and all other terms and conditions on which consent for establishment/operation, if any, granted are scrupulously implemented. Therefore, it is the statutory obligation on the part of the State Government to ensure that all the aforesaid terms and conditions are scrupulously followed and implemented. SEIAA and KSPCB being statutory authorities will have to keep a strict vigil in that behalf.

IA-1/2020:

80. The petitioner in Writ Petition No. 1332 of 2020 has filed an interlocutory application (IA-I/2020) under Section 195 read

with Section 340 of the Code of Criminal Procedure, 1973 (for short, 'the Cr.P.C') in which, an action is prayed for as against Captain C. Swamy – second respondent, the Director of Ports and Inland Water, Karwar Port filed an affidavit dated 23rd January, 2020. In the said affidavit, Sri. C. Swamy had stated that no construction activity has been commenced. It is contended that in fact, this Court found that the activity had commenced. The learned counsel for the petitioner pointed out the order dated 23rd January, 2020 passed by this Court in which, the contents of the aforesaid affidavit of Sri. C. Swamy were noted and it was *prima facie* found by this Court that without applying for and obtaining consent of KSPCB, steps were taken to commence and carry out the preliminary work of expansion of the 2nd stage Development of the Karwar Port. In fact, it is submitted that this Court, in paragraph-18, recorded that considerable damage has already been caused to Karwar beach by carrying out the filling work on the beach. Therefore, a direction was issued to the second respondent (the Director of Ports and Inland Water, Karwar Port) to take immediate steps to restore the beach to its original condition. Therefore, the petitioner has urged that an action be initiated for prosecuting Capt. C. Swamy by invoking Section-340 of Cr.P.C

for the offences punishable under Sections-177 and 181 of the Indian Penal Code (for short, 'the I.P.C').

81. It is true that in the said affidavit, Sri. C. Swamy did not disclose that the work of making temporary road on the beach was taken up for mobilizing the materials and equipment. The said fact ought to have been disclosed by him. However, the beach was restored to its original condition as per the interim direction issued by this Court on 23rd January, 2020. The Petitioner has also pleaded that Sri. C. Swamy is being prosecuted for some other offences committed in his official capacity as well.

82. On plain reading of Section-340 of the Cr.P.C it is apparent that an inquiry, as required under sub-section (1) of Section 340 of Cr.P.C can be initiated when the Court is of the opinion that it is expedient in the interest of justice that an inquiry should be held. On this aspect, it is necessary to refer to a decision of the Apex Court in the case of ***Iqbal Singh Marwah and another –vs- Meenakshi Marwah and another***⁷.

The Apex Court has laid down that as a general rule, the Courts consider it expedient in the interest of justice to start

⁷ (2005) 4 SCC 370

prosecution as contemplated by Section-476 of the old Code i.e., Code of Criminal Procedure, 1898, which is *pari materia* with Section-340 of Cr.P.C., only if there is a reasonable foundation for the charge and there is a reasonable likelihood of conviction. The Apex Court further held that test to be applied for coming to the conclusion of necessity of holding an inquiry is whether the act or omission complained of will have an impact on the administration of justice and it is not necessary that in every case where false or incorrect statements are made in the affidavit, that Court can come to a conclusion that it is expedient to take action as contemplated under Section-340 of the Cr.P.C. Paragraph-23 of the said decision reads thus:

“23. In view of the language used in Section 340 Cr PC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words “court is of opinion that it is expedient in the interests of justice”. This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary inquiry and record a finding to the effect that it is expedient in the interests of

justice that inquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remediless. Any interpretation which leads to a situation where a victim of a crime is rendered remediless, has to be discarded”.

(underlines supplied)

83. In the present case, pursuant to the direction issued by this Court on 23rd January, 2020, *status-quo ante* has been

restored by restoring of the beach to its original condition. A temporary road which was made on the beach to enable the equipment and materials to reach the place of storage. The said work was done only for mobilizing the machineries and equipment. The said illegality has been un-done by restoration of *status-quo ante*. Hence, in our view, it is not expedient and it is not a fit case to initiate inquiry as contemplated under sub-section (1) of Section-340 of Cr.P.C.

IA- 3/2021:

84. Interlocutory application (IA-3/2021) has been filed by the petitioner in W.P.No. 1332 of 2020 making allegation that the second respondent has started the work of the project, as can be seen from the photographs produced. The second respondent has filed written objections to the said application (IA-3/2021) in which, it is specifically pleaded that the work which is seen in the photographs produced by the petitioner is being carried out by the City Municipal Council, Karwar for formation of a bund, keeping in mind the ensuing monsoon and the same has nothing to do with the proposed project. In support of the said contention, the letters dated 10th March, 2021 and 24th March, 2021 addressed by the City Municipal

Council Karwar are annexed to the said statement of objections. There is no reason to dispute the correctness of what is stated in the statement of objections. Therefore, it cannot be concluded that the work of the project has been commenced by the second respondent in Writ Petition No. 1332 of 2020 relating to the proposed 2nd stage Development.

85. For the foregoing reasons, the writ petition No. 2336 of 2020 must succeed in part only to the extent of challenge to the consent granted by KSPCB on 1st July, 2020 and subsequent resolutions dated 24th November, 2020 and 6th January, 2021. As observed earlier, Writ Petition No.1332 of 2020 cannot be entertained in view of suppression of material facts. Hence, we pass the following:

ORDER

- i) We hold that the consent for establishment bearing No.CTE-318752 dated 1st July, 2020, granted by the Karnataka State Pollution Control Board, its resolution dated 24th November, 2020 bearing No. Ka Ra Ma Ni Mam/231/ Ne Mam Sa/Ni. Ko/2020-21/3998 on item No. 231:27.1 and its another resolution dated 6th January, 2021

bearing No. Ka Ra Ma Ni Mam/232/ Ne Mam Sa/Ni. Ko/2020-21/4433 (B) on item No. 232:01: (vide Annexure-AB, Annexure-AC and Annexure-AD respectively) are illegal and stand vitiated;

- ii) We direct the Karnataka State Pollution Control Board to decide the applications made for grant of consent for establishment, in terms of what is stated in the memo of undertaking dated 15th June, 2021 and subject to what we have observed in paragraph No.62 above, as expeditiously as possible. Appropriate decision shall be taken on the applications preferably within a period of one month from the date on which this judgment is uploaded on the official website of this Court;
- iii) The other grounds of challenge to the said 2nd stage Development of Karwar Port stand rejected;
- iv) We direct the State of Karnataka and the Director of Ports and Inland Water, Karwar Port to ensure that all the terms and conditions of Environmental Clearance dated 23rd January, 2019 (Annexure-B)

issued by the State Level Environment Impact Assessment Authority (SEIAA) are scrupulously followed and implemented. Needless to add that unless and until the consent for establishment is granted to the project by KSPCB, the work of the 2nd stage Development of Karwar Port cannot be commenced;

- v) We direct that the State Government shall comply with condition No.32 incorporated in specific conditions in the Environmental Clearance of submitting a copy of Marine and Riparian Biodiversity Management Plan duly validated by the State Bio-Diversity Board before the commencement of work;
- vi) Writ petition No. 1332 of 2020 is not entertained for the reasons set out in paragraph 41 above. Writ petition No. 2336 of 2020 is partly allowed on the above terms with no orders as to the costs;

- vii) Interlocutory application (IA-I of 2020) and Interlocutory application (IA-3 of 2021) filed by the petitioner in W.P.No. 1332 of 2020 are rejected;
- viii) The rest of the pending interlocutory applications shall stand disposed of;
- ix) There will be no order as to costs.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

VR