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INCONSISTENT APPLICATION OF POLLUTER PAY PRINCIPLE IN INDIAN ENVIRONMENTAL JURISPRUDENCE

SUBMITTED BY- ANSHUMAN BISARYA

1. INTRODUCTION

Environment has been an important facet of Indian Judiciary. A country which worships nature and its elements, environment has occupied a great space in Indian context. Although, arguments are made that Indian Judiciary overstepped its boundaries of separation of powers, the Indian Judiciary's take and environmental Jurisprudence that emanated from the M.C Mehta PIL's and subsequent rulings has shaped the contours of Environmental Jurisprudence in India. Indian Judiciary has well embraced international principles such as Polluter Pay Principle and Preventive Approach which has been reflected in their judgements striking a very delicate balance between environment and its protection vis-à-vis right to development. The focus on development has risen sharp in the recent decades but so has the Indian Judiciary's vigilance to keep it in check and not destroy the environment and promote a sustainable pattern of growth where environment and development go hand in hand. However, despite having rich environmental jurisprudence emanating from High Courts and Supreme Court, a need was felt that courts with specific focus on environment deemed as 'environmental courts' should be established.

This need was observed by Supreme Court in *M.C Mehta v Union of India*¹, *Indian Council for Enviro-Legal Action v Union of India*² and *A.P Pollution Control Board v Professor M.V Nayudu*³ that cases pertaining to environment needed assessment of scientific data, for a speedy and faster judicial adjudication and process, 'environmental courts' established regionally with a Judge and 2 subject-matter experts would expedite.⁴ Supreme Court in all these cases by 1996 realized that the limitations of the Judiciary in adjudication of matters pertaining to environment

¹ *M.C Mehta v Union of India* AIR 1987 SC 965

² *Indian Council for Enviro-Legal Action v Union of India* 1996 3 SCC 212

³ *A.P Pollution Control Board v Professor M.V Nayudu* 1992 2 SCC 718

⁴ Sridhar Renganan et al. National Green Tribunal of India- an observation from environmental judgements, *Environmental Science and Pollution Research* 2018 Springer

and abuse of process of Law and pushed for establishment of “dedicated green benches”⁵

The Law Commission of India in its 186th report published in 2003 in its recommendation put forth that environmental courts should be established in India.⁶ Additionally, an impetus can also be traced from Rio Declaration of 1992 specifically its principle 10 that talk about greater access of information and ‘effective’ access to Judicial process that leads to a swift redressal and remedial for the citizens.⁷ Furthermore, India’s fast growth brought with it a slew of challenges posed to the environment with the growth putting forth number of Indian ‘mega-cities’ to grow 2-fold in timeline of 2008-2021⁸. With the industrial growth came the release of toxic gases, more industrial units and plants being setup, deforestation to make way for industries and residential spaces, all this had an impact especially on India’s rural regions where air pollution and deforestation combined with soil erosion and declining fertile soil levels and fresh and ground water availability, India’s rural regions’ health and welfare was in jeopardy.⁹

All this culminated into the creation of National Green Tribunal Act, 2010 (hereinafter to be referred to as the 2010 Act) passed by the Parliament inspired under Article 21 of Constitution of India which talks about right to a clean and healthy environment and this paved way for creation of National Green Tribunal (hereinafter to be referred to as NGT) in 2010. The focus matter for NGT would be to adjudicate and dispose of ‘civil’ cases (although in criminal offences, NGT can only issue ‘recommendations’ in respect of punishment) pertaining to matters of environmental protection and forest conservation and natural resources. NGT also within its ambit had inclusion of legal rights enforcement in relation to environment.¹⁰

Prior to establishment of NGT, there National Environment Appellate Authority of Ministry of Environment and Forest. As per the 2010 Act, the Tribunal shall have jurisdiction on civil cases

⁵ J. Michael Angstadt, *Securing Access to Justice through environmental Courts and Tribunals: A Case in Diversity*, *Vermont Journal of Environmental Law*, 17, pg. 345-371 (2016).

⁶ Law Commission of India 183th Report, Law Commission of India, <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf> (last visited on 12th February)

⁷ Aprajita Singh, *A Decade of National Green Tribunal of India: Judgement Analysis and Observations*, Research Square, <https://doi.org/10.21203/rs.3.rs-792456/v1> (last visited on 12th February)

⁸ Hannes Taubenböck et al., *Urbanization in India–Spatiotemporal Analysis Using Remote Sensing Data*, 33 *ENV'T & URB. SYS.* 179, 180 (2009)

⁹ Kirk R. Smith et al., *Air Pollution and Rural Biomass Fuels in Developing Countries: A Pilot Village Study in India and Implications for Research and Policy*. 17 *ATMOSPHERIC ENV'T*: 2343, 2350 (1983); Bina Agarwal, *Gender, Environment, and Poverty Interlinks: Regional Variations and Temporal Shifts in Rural India, 1971–91*, 25 *WORLD Dev.* 23, 24 (1997)

¹⁰ *Supra* Note 4 at pg.11313

and would deal with substantial question on environment including enforcement of legal rights pertaining to environment. NGT is bestowed with original jurisdiction under section 14 of the 2010 Act to deal with cases questions coming out of Water (Prevention and Control of Pollution) Act, 1974, The Water (Prevention and Control of Pollution) cess Act, 1977, The Forest (conservation) Act, 1980, The Air (Prevention and control of Pollution) Act, 1981, The Environment (Protection) Act, 1986, The Public Liability Insurance Act, 1991 and Biological Diversity Act, 2002.¹¹ Section 15 of 2010 Act empowers the Tribunal to deal with environmental damage pertaining to accidents and also handling of hazardous waste and compensation can be sought and given under the same section.¹²

Critically, NGT is a 'quasi-judicial' body and by virtue of that, has limited power. The objective of NGT's creation was to offload the case load from the Courts and to improve the '3rd pillar' of environmental democracy¹³ NGT can also take *Suo moto* appeals if need be.¹⁴ Appeals from NGT are to be directly taken to Supreme Court.

From a comparative analysis of Environmental Courts¹⁵, NGT stands apart, it has cleaved from traditional setups in different jurisdictions that apart from traditional judges, it has sought to include expert members who chosen on the basis of knowledge, scientific training, and practical expertise on matters of environment and science associated with it.¹⁶ As earlier stated, NGT has both judicial members and subject expert members from disciplines such as life sciences, physical science, engineering or technology.¹⁷ Chairperson of Tribunal is to be appointed by central govt in due consultation with CJI. Members to be appointed as per recommendations of a selection committee as per manner prescribed by central government.¹⁸

The paper shall be focusing on NGT's decisions and the jurisprudence they have laid down in cases referred to and considered and, in that context.

¹¹ Ibid

¹² Supra Note 6

¹³ Pring G. & Pring C, *Environmental Courts & Tribunals: A guide for policy makers*, UNEP, <https://wedocs.unep.org/bitstream/handle/20.500.11822/10001/environmental-courts-tribunals.pdf?sequence=1&isAllowed=y>

¹⁴ Supra Note 4

¹⁵ Supra Note 2 at pg.355

¹⁶ Supra Note 2 at pg. 354

¹⁷ Gitanjali Nain Gill, *A Green Tribunal for India*, *Journal of Environmental Law*, 22 pg. 461-474 (2010)

¹⁸ NGT Act §S.6(3), Acts of Parliament, 2010 (India)

RESEARCH QUESTIONS

- i. HAS NGT'S CREATION ADDED STRENGTH TO INDIAN ENVIRONMENTAL JURISPRUDENCE?
- ii. HAS NGT'S APPLICATION OF POLLUTER PAY PRINCIPLE HAS BEEN CONSISTENT?

2. DECISIONS OF NGT ON POLLUTER PAY PRINCIPLE

Since its inception in 2010-11, NGT has been crucial to environmental jurisprudence and vigilance and has tried to struck a delicate balance between environment and its protection vis-à-vis right to development keeping in line with international followed/observed principles in relation to environment.

NGT through its order banned 'rat-hole' mining in Meghalaya. Rat-hole mining, a primitive style of coal mining prevalent in Meghalaya that results in loss of the top-most fertile soil cover in addition to pollution of air and water.¹⁹ However, this order was not respected and rat-hole mining continued to be done which led to loss of 3 lives and arrests were later made. The flagrant disregard and disobedience of NGT's order led to loss of 3 lives and cost the State Exchequer 600 crore rupees.²⁰ This is just one of laudable decisions of NGT, however, the paper would focus on NGT's decision and its application of Polluter Pay Principal.

NGT has decided many matters under the guiding principle of 'polluter pays principle' Polluter pays principle was adopted in 1972 as "economic principle for allocating the costs of pollution control". Under this, the polluter shall pay the costs of pollution as well prevention and control measures and is legally bound to protect environment and in doing so has to pay for costs for preventive and reduction of pollutant and treatment of the said pollutant.²¹

In *Samir Mehta v Union of India and Ors*²² The NGT directed compensation to be paid for

¹⁹ Baniateilang Majaw, *Ending Meghalaya's Deadly Occupation: India's National Green Tribunal's Ban on Rat-hole mining*, JSTOR, <https://www.jstor.org/stable/26160091> (last visited on 12th February)

²⁰ Ibid

²¹ OECD, *The polluter Pays Principal OECD Analysis and Recommendations*, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(92\)81&docLanguage=En#:~:text=The%20Polluter%2DPays%20Principle%20\(PPP,the%20costs%20of%20pollution%20control.](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(92)81&docLanguage=En#:~:text=The%20Polluter%2DPays%20Principle%20(PPP,the%20costs%20of%20pollution%20control.) (last visited on 12th February)

²² *Samir Mehta v Union of India and Ors* MANU/GT/0150/2016

ecological damage and loss of livelihood and ecosystem imbalance brought about as per polluter pays principle. Similarly, in *Krishan Kant Singh v National Ganga River Basin Authority*²³, NGT imposed payment of fine of 5 crore rupees to be paid to concerned State pollution Boards based on the premise of Polluter Pays principle with a view for river conservation although this decision has courted some controversy w.r.t how the compensation amount was arrived at. Polluter Pay principle can be further evidenced in NGT's decision in *R.K Patel v Union of India*²⁴ where aggrieved farmers were to get 10 lakh rupees in Vapi, Gujarat owing to pollution caused by hazardous waste.

In *Manoj Mishra v Union of India and Ors*²⁵, the matter was related to the clean Yamuna River plan, directions were issued to civic and municipal authorities of Delhi-NCR that saw inclusion of environmental compensation fee in property/house tax.

2.1 INCONSISTENCY IN APPLICATION

Interestingly, it is to be noted that as per research report by Centre for Science and Environment published in 2018²⁶, NGT's penalty imposed in cases where it has adjudicated under Polluter Pays, NGT has imposed penalty as 5% of project cost, this was justified by NGT in *Goa Foundation v Union of India and Ors*.²⁷ Stating that SC's penalty imposed of 10% is somewhere on the higher side and stated that 5% of project cost is determined as compensation amount with 'exactitude' is tough.²⁸

However, NGT's application of Polluter pays principle has been questioned as well, in *Ajay Kumar Negi v Union of India*²⁹ NGT imposed penalty of 5 crore owing to forest damage caused by the Tidong-I Hyrdo Electric Project. However, as per committee constituted by the NGT observed in its report that although violations were there on part of the offending party, the estimate of damage accrued was less than what was imposed and the offending company had paid compensation as per forest laws.

²³ *Krishan Kant Singh v National Ganga River Basin Authority* 2014 SCC OnLine NGT 2364

²⁴ *R.K Patel v Union of India* Original Application No. 199 of 2014

²⁵ *Manoj Mishra v Union of India and Ors* SLP(C) no. 91216 of 2010

²⁶ Archana Shankar, *Review of NGT decisions evoking the Polluter Pays Principle*, JSTOR <https://www.jstor.org/stable/resrep38095.4> (last visited on 12th February)

²⁷ *Goa Foundation v Union of India and Ors*. Writ Petition (C) No. 435 of 2012

²⁸ Supra Note 23

²⁹ *Ajay Kumar Negi v Union of India* MANU/GT/0112/2015

A similar inconsistency w.r.t application of Polluter Pay Principal by NGT can be seen in *Mohammed Kabir v Union of India*³⁰, The Judges of the NGT Bench cited difficulty to calculate and come up with compensation amount.

In *Naim Sharif Hasware v M/S Das Offshore Co*³¹ NGT imposed a fine of 25 crores on Das Offshore stating that company with knowledge and intent did not observe EIA (Environment Assessment Study) process which led to destruction and disruption of mud-flats and mangroves in Maharashtra's Raigad district. The Bench observed that "company is liable to face the legal consequences for environment degradation and should pay a heavy penalty" and that the fine so imposed was considered just and fair. Interestingly, this 'just and fair amount' was never afforded an explanation as to how it was calculated and understood and arrived at. The company appealed to SC who later reduced the fine imposed to 12 crores.

NGT's adaptation of polluter pay principle has been questioned because there does not seem to be a proper method on how compensation is arrived at and in cases, the polluter pays small or fraction of cost for clean-up. Especially in context of UP's sugar and distillery units, the Tribunal has imposed lower costs as fines and penalty (sometimes as small as 0.6% as opposed to Central Board's stipulated 3%) in proportion to the turnover these offending companies generate.³²

Under traditional environment court in other jurisdictions, while specialized courts have their focus area on speedy expedited resolution and unburdening the Courts and laying down jurisprudence of environmental law of concerned nation, many researches have put forth that while focused jurisprudence and Courts for same has its benefits, these specialized courts may suffer from "loss of the generalist perspective"³³ However, with regards to NGT, this needs to be seen. As of now, the benefits have been reaped and NGT seemed to have struck a good fine balance between environment and right to development sometimes arching towards environment end more (imposition of unjustified fines and lack of proper method to come up with compensation) but NGT seems to not outrightly discard development but tries to ensure that both environment and development go hand in hand.

³⁰ *Mohammed Kabir v Union of India* MANU/GT/0088/2016

³¹ *Naim Sharif Hasware v M/S Das Offshore Co* MANU/SCOR/49282/2019

³² Supra Note 23

³³ Richard L. Revesz, Specialized Courts and the Administrative Lawmaking System, 138 U. PA. L. REV. 1111, 1117 (1990).

CONCLUSION

NGT's creation was much needed as was recognized by Supreme Court. With India's rapidly advancing growth and burdening of Supreme Court and High Courts with other disciplines of matters, NGT's creation was a welcome step. It was also unique in comparison to other specialized environment courts setup. While NGT has lessened the burden of Supreme Courts and High Courts and has gone to lay down jurisprudence under the guidance of Internationally followed principles such as Polluter Pays Principle. Although, NGT should be applauded as it has via its decisions focused on environment saving and its protection, it has not outrightly discarded or shelved development that could have created a dissuasive and possibly not investor friendly environment that would have gone against the current economic policies of India. NGT via its decisions have struck a fine balance, it has via its orders not shunted development, it has left the door open for development whilst maintaining a firm stance on environment and its protection creating a deterrence effect. However, in pursuing this fine balance, there have been instances where NGT has overstepped the mark. The lack of compensation payment mechanism is a point of concern as arbitrary fines and penalties imposed would fall afoul of Indian constitution's commitment to being fair and not arbitrary. Especially so, it is the author's suggestion that a penalty/ compensatory amount devising mechanism be formulated so as to bring more transparency.

Transparency is needed as that would not only send a clear message to companies who aim for developmental projects and not pay heed to ecology, they would consider the penalties that would be coming their way should they overstep. As of now, NGT's arbitrary penalty schemes have led to appeals which frustrates the idea of creation of a specialized Judicial approach in the first place, not excluding the right of appeal before the Apex Court but if a more transparent approach is embraced by the NGT, it would lead to a more stable and non-arbitrary jurisprudence.