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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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A CRITICAL ANALYSIS OF THE SCOPE OF “POLLUTION” UNDER THE ENVIRONMENTAL LAWS WITH RESPECT TO THE POLLUTER PAYS PRINCIPLE IN INDIA.

AUTHORED BY - TANISHA B CHETAN

(III Year)

Abstract

‘With development comes destruction’. Development and destruction go hand in hand because the former is the cause which leads to the latter, which is the effect. In the pursuit of leading a life filled with needs, one leaves the environment far, far behind. There have been numerous debates about the same. Conventions and treaties are signed between countries to keep a check on the deterioration of the environment. Pollution is a huge contributor to the environmental degradation and it is the need of the hour to control the pollution. Banning single use plastic, shifting to CNG or electric vehicles, getting emission tests are a few ways to control pollution. This paper is divided into various components which try to delve into the roots of the implementation of one such solution – The Polluter Pays Principle. It will start with explaining the history of pollution laws. Knowing the history will help the readers to know what were the best practices followed and what mistakes to avoid in the future. This will be followed by the definition of “pollution” as given in the laws. It is essential to understand the provisions in the constitution with respect to the environment to lead a healthy life. Having knowledge about the ‘Polluter pays principle’ and the interpretation of the judiciary, will enhance the readers understanding of the ambiguity that the researcher is trying to highlight. The aim of this paper is to not only highlight the ambiguity in this aspect, but also to provide plausible solutions to combat the problem of pollution.

Keywords: Pollution, Polluter Pays Principle, India, Environment

INTRODUCTION

The world is advancing at an unprecedented rate. There are new inventions in every domain, be it agriculture, automobile, gadgets or even law. But, the renewable and non-renewable sources of energy are deteriorating rapidly. Countries across the globe are coming up with solutions to control climate change. But the question is, to what extent are these steps helping to control climate change? What is the ground reality? And what are the problems that arise while implementing these policies or laws? Pollution is one of the most important contributor to climate change. It has been in the limelight for a couple of decades now and it is said that it will only get worse.

ORIGIN OF ENVIRONMENTAL LAW IN INDIA

During the ancient times, there was emphasis on the care for the natural resources. Our ancient people learnt to live with five elements of nature, the 'earth', the 'water', the 'air', the 'light' and the 'cosmos' and they worshipped them in reality and symbolically.¹ Hindu religious literature, to wit, the sacred Vedas, Puranas and Upanishadas, proffer considerable information about relationships between man and nature and indebtedness of mankind towards nature. Vedic literature is replete with verses for upkeep and protection of environment and also prevention of pollution. Myths, folklore, art, culture and religion adored energy (solar), trees and wild life with reverence.² The Vedas, Upanishadas, Puranas and other scriptures emphasise the importance of maintaining an ecological balance.³

British Raj

During the early British era, they plundered the natural resources and were indifferent to forest conservation. Wood was in high demand for the British Navy, which added to the depletion of forests. In 1806, the British government started exercising control over the forests by appointing a commission to enquire into availability of teak in Malabar and Travancore.⁴ They systematically plundered the resources available in India.

¹ Furqan Ahmad, *ORIGIN AND GROWTH OF ENVIRONMENTAL LAW IN INDIA*, Journal of the Indian Law Institute, July-September 2001, Vol. 43, No. 3 (July-September 2001), pp. 358-387

² Furqan Ahmad, *ORIGIN AND GROWTH OF ENVIRONMENTAL LAW IN INDIA*, Journal of the Indian Law Institute, July-September 2001, Vol. 43, No. 3 (July-September 2001), pp. 358-387

³ Furqan Ahmad, *ORIGIN AND GROWTH OF ENVIRONMENTAL LAW IN INDIA*, Journal of the Indian Law Institute, July-September 2001, Vol. 43, No. 3 (July-September 2001), pp. 358-387

⁴ Furqan Ahmad, *ORIGIN AND GROWTH OF ENVIRONMENTAL LAW IN INDIA*, Journal of the Indian Law Institute, July-September 2001, Vol. 43, No. 3 (July-September 2001), pp. 358-387

In the late British period, they began the organized forest management by taking administrative steps. These included formulation of forest policy and legislations to implement policy decisions.

THE CONSTITUTION OF INDIA AND THE ENVIRONMENT

The topic about the conservation and preservation of environment appeared only in the 6th five year plan. Initiatives taken across the globe nudged India to expand its horizon to environmental protection and conservation. Therefore, following the U.N. Conference on the Human Environment held at Stockholm, Sweden, in 1972, the Constitution of India was amended by the 42nd constitutional amendment and the subject of "ecology and environment" was incorporated for the first time through articles 48 A and 51A(g).⁵

Article 48A incorporated under part IV of the Constitution, contains the directive principles of state policy. This was a one of a kind initiative because the obligation to protect the environment was not only on the State, but also on the citizens of the country. Although the directive principles of state policy are not enforceable in the court of law, the State must keep in mind all the principles under part IV. Protection and improvement and safeguarding of forests and wildlife is stated under Article 48-A.⁶ Article 51 A (g) incorporated under part IV-A of the Constitution, contains the fundamental duties of the citizen towards the country.⁷

While the executive and legislative wings of the state are implementing the directive principles by policy decisions and appropriate legislations, the judicial wing is also implementing them through judicial activism.⁸ Article 51 A (g) made it a fundamental duty for all the citizens of India not only to protect and improve the natural environment but also to have compassion for all living creatures. The constitutional duty entrusted upon the state to protect and improve the natural environment is

⁵ Bhaskar Kumar Chakravarty, *ENVIRONMENTALISM: INDIAN CONSTITUTION AND JUDICIARY*, Journal of the Indian Law Institute , January-March 2006, Vol. 48, No. 1 (January-March 2006), pp. 99-105

⁶ India Constitution, art 48 - A

⁷ India Constitution, art 51 A (g)

⁸ Bhaskar Kumar Chakravarty, *ENVIRONMENTALISM: INDIAN CONSTITUTION AND JUDICIARY*, Journal of the Indian Law Institute , January-March 2006, Vol. 48, No. 1 (January-March 2006), pp. 99-105

based on the "Doctrine of Public Trust".⁹ This doctrine originally developed in ancient Roman empire. According to this doctrine, there are certain natural resources, such as, rivers, seashores, forests, wild lives, air etc., which are held by the state in trustship for the free and unimpeded use of general public. According to Roman law, these natural resources are either owned by none (res nullius) or by everyone in common (res communis).¹⁰ Under the English common law, however, the sovereign could own these natural resources but the ownership was limited in the sense that the crown could not grant these resources to private owners, if the effect was to interfere with the public interest.

Article 37 expressly mentions that the provisions contained in the directive principles of state policy of the Constitution should not be enforceable by any court, but nevertheless the principles laid down in those provisions are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.¹¹

POLLUTION DEFINED IN THE **ENVIRONMENTAL LAWS**

The term 'pollution' as defined in three major pollution related laws in India (The Environment Protection Act, 1986¹², The Water (Prevention and Control of Pollution) Act, 1974¹³ and The Air (Prevention and Control of Pollution) Act, 1981¹⁴ which prescribe certain constitutive elements- presence of any solid, liquid or gaseous substance present in such concentration as may be, or tend to be, injurious to environment; such concentration may be or tend to be injurious to human being or other living creatures or plants or property or environment'; and such presence that 'may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural or other legitimate uses, or to life and health of animals or plants or aquatic organisms.'

⁹ Bhaskar Kumar Chakravarty, *ENVIRONMENTALISM: INDIAN CONSTITUTION AND JUDICIARY*, Journal of the Indian Law Institute, January-March 2006, Vol. 48, No. 1 (January-March 2006), pp. 99-105

¹⁰ Bhaskar Kumar Chakravarty, *ENVIRONMENTALISM: INDIAN CONSTITUTION AND JUDICIARY*, Journal of the Indian Law Institute, January-March 2006, Vol. 48, No. 1 (January-March 2006), pp. 99-105

¹¹ India Constitution, art 37

¹² THE ENVIRONMENT (PROTECTION) ACT, 1986 No. 29 OF 1986

¹³ THE AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981 ACT NO. 14 OF 1981

¹⁴ THE WATER (PREVENTION AND CONTROL OF POLLUTION) ACT, 1974 [NO. 6 OF 1974]

POLLUTER PAYS PRINCIPLE

The Polluter Pays Principle (PPP) is an environmental policy principle that has been incorporated into many international and national legal frameworks, and it is based on the concept that those who cause pollution should be responsible for paying for the damages caused by their actions.¹⁵ The PPP is intended to shift the economic burden of pollution from society to the polluter, and to create incentives for polluters to reduce their pollution levels.¹⁶ This principle has been implemented in a variety of ways, including taxes on pollution, fees for permits to pollute, and liability laws that hold polluters responsible for the damages they cause.¹⁷

The PPP was first introduced in the 1972 Declaration of the United Nations Conference on the Human Environment, which was held in Stockholm, Sweden.¹⁸ The declaration stated that "polluters should bear the cost of the pollution they cause," and it was later incorporated into the Rio Declaration on Environment and Development in 1992.¹⁹ This principle has been further reinforced by many international environmental treaties, such as the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Montreal Protocol on Substances that Deplete the Ozone Layer, and the Convention on Biological Diversity, among others.²⁰

In addition to its inclusion in international environmental agreements, the PPP has also been integrated into many national legal frameworks, including those of the European Union and individual countries such as Canada, India, and China.²¹ The European Union, for example, has implemented the PPP through a variety of mechanisms, including the Emissions Trading System, which allows companies to buy and sell permits to pollute, and the Industrial Emissions Directive, which sets emission limits for various industrial sectors.²² Similarly, in India, the PPP has been applied through the National Green Tribunal, which has imposed penalties on companies and individuals for causing

¹⁵ United Nations Environment Programme, *The Polluter Pays Principle: Making Polluters Pay for Environmental Damage*, 2014

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ United Nations General Assembly, *Declaration of the United Nations Conference on the Human Environment*, 1972.

¹⁹ United Nations Conference on Environment and Development, "Rio Declaration on Environment and Development," 1992.

²⁰ United Nations Environment Programme, *The Polluter Pays Principle: Making Polluters Pay for Environmental Damage*, 2014.

²¹ Ibid.

²² European Commission, *The EU's Polluter Pays Principle*, 2021.

Despite its widespread adoption, the PPP has been criticized by some who argue that it may create an incentive for polluters to continue polluting as long as they can afford to pay for the damages caused. Others argue that the PPP may not be appropriate in cases where the polluter cannot be identified or where the damages caused by the pollution are difficult to quantify.²³

The PPP is an important environmental policy principle that has been incorporated into many international and national legal frameworks. The principle is intended to shift the economic burden of pollution from society to the polluter, and to create incentives for polluters to reduce their pollution levels. While the PPP has been criticized by some, it remains an important tool in the effort to address environmental pollution and protect human health and well-being.

INTERPRETATION OF THE JUDICIARY

The Polluter Pays Principle has been applied by the National Green Tribunal in a number of cases. There is an uncertainty with respect to determining when to apply the polluter pays principle and as to what constitutes polluting.

The Municipal Corporation of Shimla and Solan, in the case of *Dr. Karan Singh v. State of Himachal Pradesh*²⁴ was directed by the NGT to collect monetary contribution for the effective disposal of Municipal Solid Waste (MSW) from the houses depending on the kind and size of the houses. The monetary contribution for each house within their limit is based on the Polluter Pays Principle.

In the case of *Kamal Anand v. State of Punjab*²⁵, the corporation was instructed to charge a specific amount in addition to the property tax from households, shops, hotels, and industrial buildings on a monthly basis, as allowed by the relevant authorities based on PPP. Similarly, in the case of *Manoj Misra v. Union of India*²⁶, which dealt with pollution in the Yamuna river, the NGT allowed the

²³ United Nations Environment Programme, *The Polluter Pays Principle: Making Polluters Pay for Environmental Damage*, 2014.

²⁴ *Dr. Karan Singh v. State of Himachal Pradesh*, 2013 SCC OnLine 884

²⁵ *Kamal Anand v. State of Punjab*, 2014 SCC Online NGT 6893

²⁶ *Manoj Misra v. Union of India*, 2015 SCC OnLine NGT 840

Corporation and the Delhi Jal Board to collect funds from the general public based on PPP. The NGT suggested that the safest way to determine the amount of environmental compensation payable by Delhi residents would be to calculate a certain percentage of their property or house tax.

The NGT established a designated fund called the "Green Tax Fund" in the case of Court on its own motion v. State of Himachal Pradesh²⁷, in order to promote environmentally conscious development in all areas. As part of this initiative, the NGT mandated that individuals travelling to the Rohtang Pass glacier in public or private vehicles must pay a reasonable amount of Rs. 100 for heavy vehicles and Rs. 50 for light vehicles, based on PPP, as a contribution to the fund. Additionally, a fee of Rs. 20 per tourist travelling through CNG or electric buses to Rohtang pass was imposed by the NGT.

These legal cases illustrate the NGT's adoption of the "deemed to be polluting" approach, where entities or individuals are held accountable for causing environmental harm regardless of whether they have surpassed a specific pollution threshold. The use of PPP in these cases demonstrates that it is not dependent on a particular pollution level being exceeded by the concerned entities or individuals. For instance, even though vehicles on the road generally possess pollution clearance certificates, the NGT directed them to pay for the pollution they generate. Similarly, in the Rohtang Pass case²⁸, the court mandated that all vehicle users (including those with electric vehicles) in the area must deposit a sum into the Green Tax Fund. While it is good that the 'deemed to be polluting' theory has been adopted, it is important to ensure that costs are completely internalized. To achieve this, measures should not be limited to ecologically sensitive regions, as observed in the Court on its own motion v. State of Himachal Pradesh case.²⁹ Instead, they should be applied to all vehicles on the road, given that their usage will inevitably lead to pollution in the environment. This is supported by the fact that natural resources, such as air and water, cannot be confined to a specific area, and the consequences of their misuse will eventually affect everyone. Kamal Anand v. State of Punjab³⁰ provides an instance of such cost internalization where a specific amount is required to be deposited by every household, shop, hotel, or industrial building that generates waste, akin to paying house or property tax.

²⁷ Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 1

²⁸ Court on its own motion v. State of Himachal Pradesh, 2014 SCC Online NGT 1

²⁹ Ibid.

³⁰ Kamal Anand v. State of Punjab, 2014 SCC Online NGT 6893

In general, this strategy does not rely on a legal characterization of pollution but instead presumes that particular activities are inherently polluting, and as a result, PPP is applied. This implies that it could be challenging to establish legal pollution in many, if not all, of these cases. Furthermore, these cases are characterized by continuous, ongoing pollution, as opposed to one-time occurrences like industrial accidents. Furthermore, there are no specific individuals or entities that can be identified as responsible for the pollution in these cases. Pollution is a gradual and ongoing process that is dispersed and not centralized. It seems that the NGT has developed a procedure for using PPP to deal with cases of decentralized, ongoing pollution without addressing the issue of rule violation.

The NGT has also considered cases where pollution was present and then applied PPP. For example, in *Samir Mehta v. Union of India*, an oil spill occurred in the Arabian Sea from ship M.V. Rak Carrier, and the NGT based its decision on the damage caused to the mangroves and marine ecology on the Bombay coast due to the oil spill. Similarly, in *Kasala Malla Reddy v. State of Andhra Pradesh*³¹, the NGT emphasized the pollution of groundwater and air resulting from industrial units.

The NGT has applied PPP in cases where there is a violation or non-compliance with laws. *Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors*³². is one such example where the respondent companies were directed to pay for running mining activities in an unauthorized manner without Environmental Clearance or consent by the concerned State Pollution Control Board. Likewise, in *The Proprietor, M/s. Varuna Bio Products v. The Chairman Tamil Nadu Pollution Control Board*³³, an accusation was made against a chemical industry for operating without obtaining necessary consent. Despite no effluent discharge by the industry, the NGT found it in violation of the law for operating without the required consent. Consequently, the NGT ordered the industry to pay Rs. 25000 under PPP. This suggests that in some cases, PPP is applied solely based on the violation of the law, without considering any harm caused to individuals, their property, or the environment.

OBSERVATION

From the cases discussed above, three main patterns are apparent. Firstly, the NGT has applied PPP to activities that are continuous in nature and where there are no clearly identifiable polluters or a

³¹ *Kasala Malla Reddy v. State of Andhra Pradesh*

³² *Gurpreet Singh Bagga v. Ministry of Environment and Forests and Ors*

³³ *The Proprietor, M/s. Varuna Bio Products v. The Chairman Tamil Nadu Pollution Control Board*

small group of polluters. In such cases, the NGT has treated the activities as inherently polluting, without determining whether they fit within the legal definition of pollution. It is possible that many of these activities do not violate environmental laws but may still be causing pollution.

To summarize, there are three patterns that emerge from the discussed cases. Firstly, for ongoing activities without identifiable polluters or small groups of polluters, NGT has applied PPP without verifying whether such activities meet the legal definition of pollution. These activities may not necessarily violate environmental laws, but they may be polluting in nature. Secondly, there are clear cases of pollution such as oil spills where environmental damage is acknowledged. Thirdly, in some cases, NGT has applied PPP despite there being no discharge by the respondent company, as a violation of environmental laws was established.

Although making polluters pay for pollution may seem like a progressive idea, it is important to avoid creating a situation where those who can afford to pay are granted a "right to pollute." In other words, the ultimate objective is not to accumulate a large fund through the application of PPP but to adopt an environmentally friendly lifestyle, which requires a significant shift in current modes of production and consumption.

PLAUSIBLE SOLUTION

The Polluter Pays Principle as mentioned earlier is a common law provision. It does not have a specific test to prove who is a polluter. This causes disruption while deciding cases related to the Principle. One plausible solution to try and overcome this ambiguity is to list out what comes under the Polluter Pays Principle or what does not come under the Polluter Pays Principle. This method of having a test has proven effective in other matters with respect to the Constitution, copyrights and many other legal questions.

RD Shetty V International Airport Authority of India³⁴ case – test of instrumentality

The issue in the present case was whether the International Airport Authority can be considered as a State for the purpose of Article 12. Justice Bhagawati introduced a test known as the ‘Instrumentality Test’. If the factors laid down in the abovementioned test are satisfied, then a particular authority can

³⁴ RD Shetty V International Airport Authority of India AIR 1979 SC 1628

be considered as other authority under Article 12. The five conditions were as follows –

- Whether the State is the Chief funding source of the institution?
- Whether there is an existence of deep and pervasive State control?
- Whether the functional character is governmental in nature?
- Whether a department of the Government is transferred to a corporation?
- Whether the corporation enjoys a monopoly status which is State conferred or State protected?

The most important condition of these is that the State should have control and presence of Governmental essence. When the same test was applied to International Airport Authority, it was held that it fulfils the required conditions and therefore, it comes under the scope of “other authorities” of Article 12.

Grounds for copyright infringement

Section 51 of the Copyrights Act, 1957 states that making infringing copies for sale or hire or selling or letting them for hire, permitting any place for the performance of works in public where such performance constitutes infringement of copyright, distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright, public exhibition of infringing copies by way of trade and importation of infringing copies into India.

A test for the Polluter Pays Principle will reduce the ambiguity to a great extent and if not the final solution, will atleast act as a stepping stone towards resolving this issue.

CONCLUSION

Development is important and so is conserving the environment. The Polluter Pays Principle is one step that will act as a catalyst to further this balance between development and conservation. Deeper thought and deliberation with respect to the Polluter Pays Principle will pave the way for a better mechanism to determine the damages to be paid in situations. This is a small initiative to shed light on a matter that is the need of the hour.