International Environmental
Law Research Centre

NARMADA BACHAO ANDOLAN

vs.

UNION OF INDIA

Review Petition

Review Petition under Order 40 of the Supreme Court Rules Read with Order 47 of CPC*, Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No. 319 of 1994, Supreme Court of India, 17 November 2000

CASE NO. 319 OF 1994

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This Review Petition is being filed against the judgment and order of this Hon'ble Court dated 18.10.2000 by which this Hon'ble Court disposed of the above Writ Petition of the petitioners with certain directions, findings and observations (Annexure A). The petitioners are seeking this review on *inter alia* the following grounds which are set out below. It is the petitioner's submission that a review of those parts of the judgment which are assailed herein below are required since those parts of the judgment not only contain errors which are apparent on the face of the record but would also lead to violations of the fundamental rights of the oustees from the Sardar Sarovar Project guaranteed by Article 14 and Article 21 of the Constitution.

'Order' and 'Judgment' refers to Majority Order and Judgment respectively, unless specifically qualified otherwise.

1. ORDER WILL LEAD TO VIOLATION OF THE TRIBUNAL AWARD

Violation of Clause XI, Sub-clause IV(2)(iv) Read with Sub-clause IV(6)(i)

The order/permission for immediate construction of the project upto 90 m needs to be reviewed as construction of 90 m at this stage can take place only in clear violation of the Tribunal order. The order of the tribunal states, *inter alia*:

> Clause XI, Sub-clause IV(2)(iv): Gujarat shall acquire and make available a year in advance of the submergence before each successive stage, irrigable lands and house sites for rehabilitation of the oustee families from Madhya Pradesh and Maharashtra who are willing to migrate to Gujarat. Gujarat shall in the first instance offer to rehabilitate the oustees in its own territory.
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> Clause XI, Sub-clause IV(6)(i): In the event of Gujarat being unable to resettle the oustees or the oustees being unwilling to occupy the area offered by Gujarat, Madhya Pradesh and Maharashtra shall make such provisions for rehabilitation, civic amenities etc. on the lines mentioned in Clauses IV(1) to (4) above.

Together the above two clauses clearly require that lands in all the states for those who will be submerged by construction up to 90 m in July 2001 had to be available in July 2000 itself. It is the admitted position of GoMP that no land is available for PAFs upto 90 m who want to settle in MP.

The detailed position regarding land in Madhya Pradesh is as follows.

The Government of MP claims it has identified lands to be allotted to PAFs. GoMP has identified land through the following ways (Affidavit of GoMP of April 2000, Vol. 156 A, page1):

i. By reducing grazing land areas of villages, and land found suitable for development 'subject to development process',

ii. Forest land,

iii. Land bought from prospective sellers.

None of the lands to be purchased have actually been purchased or even the process for the same initiated. Neither is there any assurance of quality of these lands. Further, of their own admission, most of the lands are mostly pasture lands which are absolutely uncultivable. GoMP has stated in their affidavit dated 11 April 2000 which has been placed before the Supreme Court, that (Vol. 156 A, page 3):

> All the aforesaid parcels of land whether pertaining to grazing land, or under encroachment, or under forest will require to be bought under development process, like tractorisation, land shaping, levelling, ripping, extraction of root stumps, creation of drainage system, examination of availability of underground water for irrigation etc. before allotment to the PAFs.

Obviously, they mean that ALL the identified lands are uncultivable as of now. There is no guarantee about these lands 'becoming cultivable' in the future. Further in the affidavit of GoMP dated 6 July 2000, they have stated that these lands are being shown to those PAFs affected at EL 85 m and 90m. The notice also states (GoMP Affidavit of July 2000, page 99):

> The land will be developed for making it culturable and irrigation will also be provided. Land will be allotted only after all the developments and the works for provision of irrigation are completed.

The notice is self-explanatory in that the land being offered is presently uncultivable and after selection the land will be made cultivable after they are subjected to the development works as stated in the same affidavit. (Page 2-3, paragraph (iv), GoMP Affidavit of July 2000).

> The development process like tractorisation, bunding, ripping, development of drainage system etc. may be carried out only after the PAFs select the land.

Thus, this 'offer' is clearly invalid. Obviously the PAFs will refuse and reject these lands, as all those shown land have done. The GoMP in their affidavit has admitted to this (Affidavit of GoMP, July 2000, page 103):

> The oustees of tehsil Barwani (...) getting affected at 90 m, were shown government lands (...) but none of the oustees selected these lands, stating that these lands are non-culturable, stony, sandy and are hilly; such lands, even if developed by the government, is not liked by them.

Obviously they have rejected these lands since they are uncultivable and the PAFs have no belief in the hollow vague promises of the government of making them cultivable. Shockingly, many of the PAFs affected at 90 m have been offered forest land – and even this was uncultivable! (Affidavit of GoMP July 2000, page 115-116). This is ridiculous considering that even the proposal for the release of these forest lands is yet to be made.

Further, the lands 'identified' in MP are not even in large chaks. Thus, the PAFs do not have the choice to settle as a community, a choice that is at the heart of the principles of the R&R policy. To quote (Affidavit of GoMP, 11 April 2000, Vol. 156A, page 3):

> The State of Madhya Pradesh submits that since the land suitable for agriculture is available in small parcels in large number of villages and not in large 'chaks' the PAFs will have to be offered land and resettled as per the choice where ever the land is available.

In sum, as of today, all identified land is mostly uncultivable and ill fit for agriculture. This is evident from the above admissions of GoMP as also the joint surveys conducted by NBA and government officials. Also, if the government had any cultivable land available with them, then these would have been the lands they would have shown to the PAFs.

The GoMP, in its affidavit of July 2000 submitted to this Court, states that (page 4) at 90 m level, there are 1,034 PAFs of MP yet to be resettled, out of which 435 are to be settled in MP and out of which 228 (page 5) are eligible for land. Thus, GoMP acknowledges that there are 228 PAFs at 90 m who need to be given land in MP but it does not have a single hectare of land to give to them, nor has made the mandatory offers to them.

This is clearly a violation of the NWDTA that irrigable agricultural lands will be made available for rehabilitation one year in advance [NWDTA Clause XI, Sub-clause IV(2)(iv)].

Violation of Clause XI, Sub-clause IV(6) (ii)

This clause reads:

> In no event shall any areas in Madhya Pradesh and Maharashtra be submerged under the Sardar Sarovar unless all payment of compensation, expenses and costs as aforesaid is made for acquisition of land and properties and arrangements are made for the rehabilitation of the oustees therefrom in accordance with these directions and intimated to the oustees [NWDTA Clause XI, Sub-clause IV(6)(ii)].

This clause requires that before submergence,

A. All payment of compensation etc. for acquisition of land has been made,

B. Arrangements are made for rehabilitation of oustees,

C. Oustees are duly intimated of the same.

We have already seen above that one of the key components of the arrangements for rehabilitation, namely land, is not yet ready. Regarding the other aspects, the Court itself has noted in its judgment:

> Affidavit on behalf of the State of Madhya Pradesh draws a picture of rehabilitation which is quite different from that of Gujarat. There seems to be no hurry in taking steps to effectively rehabilitate the Madhya Pradesh PAFs in their home State. It is indeed surprising that even awards in respect of six villages out of 33 villages likely to be affected at 90 mtr dam height have not been passed (paragraph 247).

Further, referring to the status of R&R at 90m in Madhya Pradesh, the judgment states:

> It has not been categorically stated whether the PAFs who are so affected [at EL 85 m and 90m] have been properly resettled or not. On the contrary, it is stated that no Awards in land acquisition cases have been passed in respect of six villages and it is only after the Awards are passed that houseplots will be allotted and compensation paid. (...) For the resettlement of PAFs in Madhya Pradesh out of ten relocation sites mentioned in the affidavit only five have been developed (paragraph 245).

Thus, in terms of the arrangements, it is an admitted fact that:

1. Land acquisition in 6 villages not done,

2. Five out of ten resettlement sites not ready.

While petitioners submit that many other problems remain with the arrangement, the above are the admitted facts recorded by the Court itself. To allow the construction to proceed to 90 m, in the hope that the state will somehow make sure all this is done by the time submergence comes is totally against the spirit and letter of the Tribunal. It turns the condition precedent into a condition subsequent. Further, the performance of the governments, especially the MP Government does not warrant any faith that the arrangements will be complete.

The report of the GRA for M.P, quoted in the Court judgment itself too shows this:

> Even the interim report of Mr Justice Soni, the GRA for the State of Madhya Pradesh, indicates lack of commitment on the state's part in looking to the welfare of its own people who are going to be under the threat of ouster and who have to be rehabilitated (Paragraph 247).

Given this, any construction allowed before all the conditions required by the Clause XI, Sub-clause IV (6) (ii) are completed is a clear violation of the clause.

Violation of the Orders of this Court

In the case of *Shri B.D. Sharma v. Union of India* (1201 of 1990), this Court has passed an order stating that all resettlement and rehabilitation processes should be completed 6 months before the lands are submerged. This means that the rehabilitation of those affected by the 90 m level dam should be complete by 31 December 2000. However, the admitted position, as noted above in detail, is that there is no land for those affected till 90 m, and even the resettlement sites are not ready, nor even the land acquisition is over. There is no way that the rehabilitation can be completed six months before submergence. Thus, the construction up to 90 m is leading to a clear violation of the Order of this Court.

Thus, it is necessary for the court to review the permission to go up to 90 m and instead order the state governments to first complete all the arrangements for rehabilitation, including land, one year in advance, make sure that the rehabilitation is complete six months in advance, order the GRAs to verify the same and only then allow any further construction.

2. CLEARANCE OF THE R&R SUB-GROUP UP TO 90 M

The majority order states: (Paragraph 280, Direction No. 2)

> As the Relief and Rehabilitation Sub-group has cleared the construction up to 90 meters, the same can be undertaken immediately.

It may be noted, however, that the R&R Sub-group has nowhere given an explicit and formal clearance for the construction to proceed to 90 m. It has only indicated that the arrangements are complete to resettle all PAFs affected to 90 m.

As the majority judgment notes (Paragraph 186):

> In its meeting held on 6 January 1999, the R&R Sub-group of the NCA observed that arrangements made by the states for R&R of the balance families pertaining to the dam height EL 90 metre were adequate. (...) Pursuant thereto (...) on 21 January 1999 (...) action plan for resettlement and rehabilitation for balanced families of dam height EL 90 metre was finalised.

However, even this assertion of the R&R Sub-group was ill-conceived and not based on any cross checking of the ground realities. Possibly, it was based only on statements of the state governments. The arrangements were, in fact, not ready – not in January 1999, nor, one and a half years later, in July 2000.

It has already been shown above how the arrangement with regards the land acquisition, as also the resettlement sites are not ready even today (hence not ready in January 1999 too). It has also been shown above that no land is available in MP and hence even this arrangement is not ready. Clearly, the R&R Sub-group has shown great irresponsibility in assessing the 'adequacy' of arrangements. In fact, this persisted even after the fact that lands are not available had been pointed out to them by the GoMP.

Situation of Land for Resettlement

Soon after the R&R Sub-group meeting of January 1999, this Court permitted construction on the dam upto 88 m from 80.3 m (85 m exclusive of humps by Order of this Court dated 18 February 1999 and later humps of 3 m). In this connection, the NCA wrote to Madhya Pradesh Government regarding the very 'arrangements' that R&R Sub-group had found 'adequate'. In a letter from Shri Afroze Ahmed, Director (Rehabilitation), Narmada Control Authority to Government of Madhya Pradesh dated 12 March 1999 (placed before the Supreme Court in GoMP Affidavit dated 14 July 1999, Court Volume 123, page 18), he writes:

> I would like to draw your kind attention regarding Government of MP's submission during the 43rd R&R Sub-group meeting of NCA held on 06.01.1999 and also during the inter-state meeting on 21.01.1999 for the finalisation of the R&R Action (sic) for the dam height EL 90 m, that 1,973 ha has been identified in Dhar and Jhabua districts for the allotment of MP-PAFs in MP including PAFs of dam height EL 85 m, and EL 90 m who are entitled for the land in MP. (...) I shall be grateful if you could kindly arrange to send the details of land available indicating Name of Place/village.

Shri Mazumdar, Member (Rehabilitation), Narmada Valley Development Authority in his reply dated 26.3.1999 also placed before the Supreme Court in GoMP's affidavit dated 14 July 1999 (as Court Volume 123, page 19) stated:

> At the outset, it may be stated that the Government of MP neither in their affidavits submitted to Honourable Supreme Court nor in the meetings of RCNCA, NCA, SSCAC, R&R Sub-group including the 43rd meeting held on 6 January 1999, ever said that an area of 1,973 ha of land identified by the State of MP can be made available to or can be allotted to those PAFs who are being affected at EL 85 m and/ or 90 m.

Thus, it was clear that even the arrangements regarding land availability were not in place in January 1999.

The position as of today has already been given above. The GRAs had been asked by the courts to report on the ground realities of the land availability in all the three states. Petitioners do not have access to the GRA reports submitted to this court. However, the findings of the GRA as noted in the order itself are quite evident:

> (5) The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees (Paragraph 280, Direction No. 5).
>
> Even the interim report of Mr Justice Soni, the GRA for the State of Madhya Pradesh, indicates lack of commitment on the state's part in looking to the welfare of its own people who are going to be under the threat of ouster and who have to be rehabilitated (Paragraph 247).

Given this, it is indisputable that the arrangements for resettlement of PAFs upto 90 m were not complete in January 1999 (when the R&R said they were) and are not complete till date, R&R Sub-group thus showed complete irresponsibility when it recorded 'adequacy' where there was none. It is shocking that it did not bother to change its recordings even after MP pointed it out to the NCA that they do not have land. Hence the noting in the judgment with regards the findings of R&R Sub-group may be suitably modified and construction of the dam be ordered to be immediately stopped. Further, R&R Sub-group should not be trusted with any major responsibility.

3. CLEARANCE FOR FURTHER CONSTRUCTION

Clearance from R&R angle

The court has ordered that further construction (over 90 m) will be subject to clearance and monitoring by the R&R Sub-group (Paragraph 280, Direction No. 2). The NCA will give the final clearance based on the clearance of the R&R and Environment Sub-group. In view of the facts given above it is seen that the R&R Sub-group has found arrangements adequate even when the arrangements were not ready. Petitioner has already demonstrated similar irresponsibility at earlier points (Vol. 147, pages 69-70). For instance, the R&R Sub-group has never monitored the progress of R&R with respect to specific clauses of the Tribunal Award. Even when the Sub-group itself decided that lands for resettlement should be acquired in minimum chunk of 200 ha, they allowed the states to acquire lands in much smaller pieces not suitable for community resettlement. Hence, the R&R Sub-group cannot be relied upon to impartially monitor the readiness and implementation of rehabilitation in terms of the provisions of the Award, orders of this court and state policies. Hence this very critical function needs to be given in the hands of more independent and responsible machinery.

The court order asks the R&R Sub-group only to 'consult' the GRAs. In view of the fact that the GRAs are headed by retired judges enjoying the confidence of the court, they would be far more appropriate agencies to carry out this function of clearing further construction. However, the GRAs as the name suggests are essentially created for grievance redressal. More over, the GRAs themselves have the limitation that their entire machinery is essentially on deputation from the state governments. Further, since there are 3 different GRAs in three states, it would be difficult for the GRAs to take a holistic point of view regarding the project.

In view of the above the most appropriate arrangement would be for the three GRAs to accord clearance for further construction based on the situation in their respective states, and a central independent authority (independent from the project) like the NHRC (National Human Rights Commission) to give the final clearance for construction based on the state-wise clearance of the three GRAs and after consulting the R&R Sub-group.

Clearance for construction from environmental angle

Similarly, an independent expert group/agency should be created to certify that environmental mitigation measures are progressing as per the norms. Based on this the agency would give permission for further construction at each stage. This permission would be given by the agency after consulting the Environment Sub-group. Even this should happen only after the project has received fresh clearance after a comprehensive environmental impact assessment.

Such an independent agency is required because the Environment Sub-group consists of the implementing agencies themselves and to leave the monitoring to the Sub-group can lead to conflict of roles and interests.

The judgments of the court may be suitably reviewed in the view of the above.

4. LINKAGE OF CONSTRUCTION TO R&R

The Tribunal Award clearly lays down a linkage between the extent of resettlement and the height of the dam. This is done through a number of clauses, mainly Clause XI, Sub-clause IV (2)(iv) and Clause XI, Sub-clause IV (6)(ii). The first of these specifies that land must be made available one year in advance of submergence. The second states that in no event can the areas be submerged unless full compensation is paid and arrangements for rehabilitation

are in place and intimated to the oustees. The use of the words 'in no event' indicates the spirit of the Tribunal order in unequivocal terms. The order of the Supreme Court in the B.D. Sharma case goes further and makes it mandatory for rehabilitation to be complete in all respects six months prior to submergence.

Apart from these specific linkages, the Tribunal Award also provided for an overall linkage between the construction and submergence. Reading the relevant clauses of the Tribunal together shows that the Tribunal required the land as well as the location of the rehabilitation villages in all the three states to be identified within two years of the Tribunal Award. This clearly shows the Tribunal's intention that all arrangements for rehabilitation including land had to be in place before construction progressed to a point where it could submerge any village.

The monitoring of the rehabilitation by the R&R Sub-group has never explicitly considered these requirements of the Tribunal and the orders of this Court. Hence, it is not sufficient for the Court to direct that the dam be built as per the Tribunal Award and that the resettlement be monitored by the R&R Sub-group. There is a need for the Sub-group (or any other agency that is mandated to monitor the R&R) to be directed to monitor and record explicit findings on the various provisions of the Tribunal Award including the abovementioned clauses and the order of this Court in the B.D. Sharma case. The absence of such directions has led and will continue to lead to submergence without rehabilitation. The directions in the majority order may therefore be suitably reviewed.

5. SITUATION OF LAND AND RESETTLEMENT

Situation in MP

The status of the land availability and other arrangements like resettlement sites, land acquisition in state of MP have already been outlined above.

Situation in Maharashtra

The Government claims that at EL 90 m 220 PAFs remain to be resettled. This is a gross underestimate. The ground reality is that the government has chosen to ignore thousands of those to be affected. This gross underestimation of PAFs has been pointed out by petitioners (Volume 137, pages 20-21). This underestimation is due to:

A. A large number of PAFs have been omitted due to sketchy and faulty baseline and level surveys.

B. Although some of the 'tapu' villages and those that will be rendered socially unviable have been declared affected, the adivasis residing in those villages have not been counted as declared PAFs! For instance, Maal, Bamana, Teenismaal, Khardi, Savaria, Bilgaon, Atti and other villages (a handful of the PAFs here have been declared but most omitted).

C. There are a number of adivasis who are eligible for PAF status, being adult sons or other reasons, and whose claims are pending. There are at least 757 such claims in 24 affected villages and 477 adivasis with similar claims in the R&R sites. These claims are yet to be verified.

D. Another crucial issue is the issue of cut-off date for adult sons. If a realistic and just cut-off date were adopted instead of the arbitrary 1.1.1987 then a further significant increase in the number of oustees would ensue.

Given the above, large number of PAFs are not even counted as affected at 90 m though they would be. This situation has been presented by the petitioner to GRA Maharashtra. However, since the report is not available to the petitioners, it is not clear what GRA has to say on this issue.

Related to this is the issue of land availability in Maharashtra. While Maharashtra claims that some land is available and this is sufficient to resettle the PAFs upto 110 m, the ground reality is totally different. There is no land virtually in Maharashtra. This is evident most clearly from the fact that the government still does not have land to allot to the 201 families who have been shifted here 4-6 years ago but are yet without land.

The petitioners do not have access to the report of the GRA which was supposed to verify the land availability in Maharashtra. However, the one reference to the GRA report in the Court Order does not augur well. As the Court notes (Paragraph 280, direction No. 5):

(5) The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees.

The reference to the reports of all authorities and the finding that there is slackness in the work of identification of land is worrying. The ground reality is that there is no land, and even when the PAFs affected at 90 m have asked the government to show land to them, the government has not been able to do so. GRA report seems to support this. It is imperative that the report of the GRA on land availability be made public so that the real situation is clear.

At this point, the situation is that a large number of PAFs in Maharashtra are to be affected by the 90 m level of dam and there is no land to resettle them – a clear violation of the Award. Thus, this is an additional ground to review the judgment's directions permitting construction to go to 90 m.

6. RATIONALISATION OF POLICES IN VARIOUS STATES

The petitioners have pointed out in their submissions that the rehabilitation policies in the three states are dissimilar. Not only that, but the policy regime in MP and Maharashtra violate the spirit and letter of the NWDT Award requirements. Also, some of the policies have shortcomings which violate the fundamental rights of the people. For instance, a large number of tribals do not have title to their land simply because the land is still held on the name of the grandfather or great grandfather and division has not been recorded in the land records. This is their custom. However, these are then classified as landless and in MP they are not entitled to land. Petitioners have given a detailed analysis of this in written submissions (Vol. 147, pages 16-24, especially pages 21-22, written submissions of petitioners February 2000, Displacement, Resettlement and Rehabilitation). These shortcomings in polices, if not rationalised, will violate the fundamental rights of the affected people. Note that the Government call this 'liberalisation of policies, but the more appropriate term would be 'rationalisation'. The Court has recorded in the judgment (Paragraph 193):

> There is no requirement that the liberalisation of the packages by the three states should be to the same extent and at the same time, the states cannot be faulted if the package which offered, though not identical with each other, is more liberal than the one envisaged in the Tribunal Award.

However, petitioners have pointed out that the package in Maharashtra and MP is not fully as per the Tribunal Award, and also that some rationalisation will be needed to ensure that the letter and spirit of the Tribunal Award as well as fundamental rights are ensured. Therefore, this particular observation needs to be reviewed and the states directed to rationalise the packages as petitioners have submitted. This is also important, as the land requirement would go up at each stage once the rationalisation takes place and hence the amount of land required for clearance for further construction would change.

7. OTHER CATEGORIES OF OUSTEES (NON-SUBMERGENCE AFFECTED PEOPLE)

The majority judgment does not consider it necessary to order any relief to the non-submergence oustees, including the canal affected people, the downstream affected people, the people with non-agricultural occupations etc. Only in terms of the colony affected people, it notes that the GRA, Gujarat 'is trying to guide in respect of (...) issue relating to Kevadia Colony' (Paragraph 215).

This judgment needs to be reviewed. In general, as the FMG (Five Member Group, appointed by GoI) has recommended (Vol. 6, page 86):

> complete census of all categories (…) affected in any manner whatsoever, including canal affected persons, persons affected downstream of the dam, groups and individuals providing supplies and services to others (…) a number of category-specific rehabilitation package should be worked out.

> Two points are very important in this recommendation. One is that the FMG has called for a census/ survey of all those affected in any manner whatsoever. It is implicit in this that the nature and extent of impact on these categories will also be included in the survey. The other significant point in this is it calls for category specific packages rehabilitation packages, and not for the same package for each. Again, implicit in this is that the package developed would depend on the nature and extent of impact. In declining to grant the relief to these affected people, the Court possibly has assumed that the impact is marginal (e.g. on the people who would lose their livelihoods due to dispersion of the community) or that it is too far in the future (e.g., downstream affected) or that indeed those affected would actually benefit (e.g., canal affected people). However, these are based on assertions by the state governments and not necessarily on any ground surveys.

Hence, it is imperative that the Court orders a survey, as recommended by the FMG, to carry out a census of the nature and extent of impact on various categories, and then develop suitable packages for those affected depending on this nature and extent. Land based rehabilitation would be necessary where the lost livelihood depended on land; in other cases, appropriate packages would need to be evolved. It may ask some expert body to carry this out, under the supervision of the GRA, with input from the affected people themselves.

With respect to specific categories, the following can be stated.

Colony affected people

The Court has not mentioned anything in this regard except that the GRA, Gujarat is guiding in the issue of Kevadia Colony affected people. But the Court has declined to give any relief to these people. In this context, it is important to note that the majority judgment accepts the proposition that ILO Convention has to be read into the domestic legal regime. To quote:

> 86. While accepting the legal proposition that international treaties and covenants can be read into the domestic laws of the country the submission of the respondents was that Article 12 of the ILO Convention No. 107 stipulates that '[t]he populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws (…).
>
> 87. The said Article clearly suggested that when removal of the tribal population is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the land previously occupied by them (…).

The judgment then goes on to state that the rehabilitation package contained in the Award of the Tribunal fulfils this requirement.

However, the petitioners had pointed out that the ILO Convention 107 would apply to the Colony affected people also since they were tribals and were displaced in 1961 (Note in rejoinder of petitioners on R&R, May 2000, page 3). In their case however, lands of equal quality have NOT been given and they do not come under the ambit of the Award. Thus, their basic right to life under Article 21 with the ILO Convention read into it has been violated. The current 'package' offered to them - merely a small sum of money – is nowhere near any kind of rehabilitation, a fact that even the FMG recognised. This needs to be reviewed and Court should issue directions to Gujarat Government to immediately provide them with land based rehabilitation.

Canal affected people

The Court has said that: (Paragraph 196):

> [M]ost of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output'

However, there are large number of people who would be rendered landless, or marginal by the canal. Further, there are likely to be number of people whose remaining land would not be in the command area. None of these people would be then the 'beneficiaries of the project'. The official surveys themselves point some of the above (Vol. 4, page 198). Surveys regarding whether remaining land will be in the command or not have to be carried out. Thus, clearly, there will be many who do not benefit on the whole but would lose significantly their sources of livelihood. Hence, it is necessary to carry out some surveys, and then develop appropriate package for those affected.

Other occupations

There are large number of persons living in submergence area who would lose their livelihood due to loss of community and/or loss of river. For example, fisher people, shopkeepers, carpenters, etc. would lose their livelihoods but were not being rehabilitated. NBA had pointed out that while no surveys were done, its estimates of these were several thousand families, mostly in MP NBA called for an immediate survey of the same and development of rehabilitation package.

The Court Judgment quotes Gujarat in saying that number of such families in MP was 'not more than couple of hundred' (page 123) (no survey is mentioned by Gujarat for this) and then (Paragraph 194):

> In our opinion, it is neither possible nor necessary to decide regarding the number of people likely to be so affected because all of those who are entitled to be rehabilitated as per the Award will be provided with benefits (…).

But the very argument was that the Tribunal Award leaves out these people. Also, why is it not possible to decide number of people so affected? A simple survey would suffice. Such a survey would put to rest the question of whether there are few hundreds or few thousands such families. Even if there are only few thousands, Article 21 of the Constitution certainly guarantees their right to be rehabilitated and livelihoods restored.

In sum, carrying out surveys and developing appropriate packages will take care of all the grounds that the Court has raised. Petitioners too had asked only for the development of appropriate packages and not same package for all categories (Vol. 147, page 11).

Hence, the Court may review the judgment appropriately and order the carrying out of the survey and development of the appropriate packages for all those affected in any manner whatsoever by the project, to safeguard the rights of the affected people under Art. 21 and Art. 14 of the Constitution. This issue is extremely critical because it pertains to the Fundamental Rights of the people.

8. ENVIRONMENT IMPACT ASSESSMENT AND ENVIRONMENTAL CLEARANCE

The central premise of the majority judgment vis-à-vis the environment impact assessment and the 1987 environmental clearance is that there was a proper application of mind by the authorities. (Paragraph 119). The arguments of the Gujarat and the Union Government is that the government was aware that the critical studies remained to be done and this was considered while according the clearance. The majority judgment has accepted this contention.

> Even though complete data with regard to the environment was not available, the Government did in 1987 finally give environmental clearance (Paragraph 77).

and,

> [It] is not possible (...) for this Court to accept the contention of the petitioner that the environmental clearance of the project was given without application of mind. It is evident, (…) that the environmental clearance of the project was unduly delayed. The Government was aware of the fact that a number of studies and data had to be collected related to environment. Keeping this in mind, a conscious was taken to grant environmental clearance (Paragraph 119).

This contention cannot stand the test of accepted and established legal principles. In short, application of mind cannot take place if there is nothing to apply one's mind to. Hence, the 1987 clearance must be held as null and void as the minority judgment has held.

Even after the conditional environmental clearance of 1987, there has been no comprehensive environmental impact assessment of this project which is necessary to ensure that there are no serious adverse environmental impact of the project which either cannot be mitigated or the cost of whose mitigation would be too high. This

assessment is necessary for safeguarding the environment which has been held to be part of the fundamental right of the citizens under Article 21 of the Constitution. A majority judgment inasmuch as it finds such a comprehensive assessment unnecessary, is erroneous and contrary to the law on the subject laid down by this Hon'ble Court. The majority judgment, insofar as it relies on the Environment Sub-group of the Narmada Control Authority as an adequate safeguard against potential damage of the environment caused by this project is erroneous since the Environment Sub-group is a Sub-group of the dam construction authority which is the Narmada Control Authority, and, therefore, cannot relied upon to act as an adequate regulatory agency. The very fact that the project has been allowed to go ahead for so long without a comprehensive environmental impact assessment is an adequate ground for not trusting the Environment Sub-group alone as a safeguard against potential environmental damage to be caused by the project.

The majority judgment insofar as it holds that the conditional environmental clearance is not illegal even if it violates the Ministry of Environment's own guidelines for such clearance, since it is merely an administrative clearance, is also an error on the face of the records. Whether the clearance is administrative or statutory, the fact that the clearance violates the established guidelines of the Ministry of Environment itself, is an indication of the fact that the government's own standards for environmental safeguards have not been followed and, therefore, the project could be environmentally hazardous and allowing such a project to go ahead in violation of such administrative guidelines would be a violation of Article 21 of the Constitution. This part of the majority judgment also needs to be reviewed and the project authorities asked to carry out a proper EIA and seek a clearance based on the same. The minority judgment and order in this aspect – in particular minority order pages 30-31, points 1-5 of Directions – may be adopted in to as the final judgment and order of this court on this matter.

9. LACHES (DELAY)

The majority judgment finds the petitioners guilty of laches as the petitioners were active in 1986 and did not bring up the matter to the Court till 1994. It may be pointed out that the petitioners had taken a step-by-step approach and had gone to the Executive (Government) with all the issues. It had hoped that the Government would consider the issues raised by it. This period was marked by two reviews of the project, namely the Morse Committee and the FMG. It was only natural that NBA would wait for the reports of these committees and give the government enough time to implement their recommendations. It was only when the government's response was bureaucratic and indifferent to these findings and recommendations that the NBA finally decided to move the Supreme Court.

In particular, with reference to the clearance of the Ministry of Environment and Forests, it was difficult for the NBA to obtain the official documents, as is the case always. Even when the NBA eventually obtained the clearance letters it decided to wait till the period mentioned therein for studies to be completed ended. Even after this, as the Ministry of Water Resources and Ministry of Environment and Forests debated the issue back and forth, it was difficult for NBA to know and obtain conclusive documents about the status of the clearance. Therefore, NBA decided to wait for the report of the FMG which it hoped would shed light on the situation. However when the Government tried to undermine the review by the FMG, the NBA decided to move the Court.

It may further be pointed out that the NBA had filed cases in the district and high courts on specific issues related to the project. It is only when these courts did not address the concerns raised that the NBA had to move the Supreme Court. Also, the implementation of the R&R programme had then taken off in full swing in Gujarat and in a somewhat sluggish manner in other states. More and more cases of serious violations of basic human rights of the affected people were coming to light at this point which the existing machinery (NCA and its sub-groups) was neither willing nor capable of addressing. This too prompted the petitioners to come to this Court. It may also be pointed out that an NGO had approached the Gujarat High Court and subsequently this very Court in the 1980s itself to safeguard the rights of the affected people.

Given all this, the petitioners cannot be said to be guilty of laches.

The majority judgment insofar as it holds that a public interest petition should also be dismissed if it is delayed on the ground of laches is also erroneous and liable to be reviewed. Such a principle is incorrect in law and will have serious deleterious consequences on public interest. The principle of laches is akin to a principle of limitation which is based on the principle that a person who does not challenge the violation of his rights for a sufficient length of time is deemed to have acquiesced to that violation which then gives a vested right to the party which has

caused such violation. Such a principle obviously cannot apply to a public interest case where a party has come to Court not in its own interest but in the interest of the general public. The fact that such a party has moved the Court late cannot mean that the public interest should be compromised merely because of any delay on the part of the person who has moved the Court not in his own interest but in the general public interest. In public interest cases, the yardstick for determining whether a matter be entertained or not must always be in public interest and cannot be a technical plea of laches on the part of the person who has moved the case in public interest. In a case like the present one, in deciding whether the petition should be entertained or not on the ground of environmental impact, costs/benefits, etc., the Court can certainly take into consideration the fact that the construction of the project had begun and had proceeded significantly. Yet if the petitioner has come forward with the case as it has in the present case, that even the remaining costs and adverse consequences of the project would greatly outweigh its benefits and, therefore, the project needs to be reviewed even at this stage, the Court must not reject such a plea merely on account of laches. For instance, if the facts which emerged were that the dam was being built in a seismically active and high risk zone, and that there were very high chances of a dam collapse within the next few years resulting in a loss of lakhs of lives, could the Court refuse to entertain such a plea on the ground of laches? This principle laid down in the majority judgment will have serious deleterious consequences to public interest if it were to be followed, as it would have to be by all other courts in such cases.

10. AMENDMENT/REVIEW OF THE TRIBUNAL AWARD

The majority judgment states that:

> Once the Award is binding on the States, it will not be open to a third party like the petitioners to challenge the correctness thereof. ... We therefore, do not propose to deal with any contention which, in fact, seems to challenge the correctness of an issue decided by the Tribunal (Paragraph 82).

The above principle laid down by the majority judgment is erroneous for at least three reasons: Firstly, It is incorrect to hold that the award of a Tribunal is binding itself on the State and cannot be challenged even in the Supreme Court. It is submitted that every order of any Court or Tribunal must be subject to judicial review by a higher Court or reviewable by the Tribunal itself. Even under order 47 of the CPC, a review is allowed against any decree or order from which no appeal is allowed on *inter alia* the ground of an error apparent on the face of the record, or due to a discovery of new matter or evidence which was not within the knowledge of the petitioner when the decree was passed or for any other sufficient reason. Even if the order happened to be an award of a Tribunal, this principle must clearly be held to apply to it, otherwise it would lead to a situation in which even the subsequent facts clearly show the award of the Tribunal to be erroneous and grossly against public interest, such an order would still have to be enforced. For example, if it was discovered after the award that the construction of the dam permitted by an award would lead to its immediate collapse and would thereby kill lakhs of people, could it be said that there was no possibility of a review of such an order. In the present case, the petitioners had shown that the assumptions on which the Tribunal's award was based, had been found to be grossly incorrect by discovery of facts which went to the very root of the matter and, therefore, the award needed to be reviewed. These subsequently discovered facts included facts regarding the number of people displaced, the facts regarding environmental impact which were not considered by the Tribunal, the hydrology of the river, etc.

That even otherwise, the petitioners or the affected people were not parties to the proceedings of the Narmada Tribunal. Thus, if the award violated the fundamental rights of the petitioners, it was surely open to them to challenge the award on that ground. The Constitution clearly empowers and makes it the responsibility of the Hon'ble Court to protect the fundamental rights of the citizens of this country even if those fundamental rights are violated by the award of a Tribunal. This Court would still have the power and responsibility to make suitable orders to prevent that violation. It is, thus totally erroneous as a matter of law for this Hon'ble Court to have held that third parties like the petitioners cannot challenge the correctness of an award even if it violates their fundamental rights. In fact, passing of an award which affects the rights of the petitioners without giving them a hearing is a violation of natural justice and it has been held by this Hon'ble Court that this Court can entertain a challenge on that ground even to a judgment of this Hon'ble Court passed in a case in which that party was represented. However, in case where an award of any Tribunal is made in violation of natural justice and which affects fundamental rights of some citizens, it would surely be open to challenge in this Hon'ble Court on the ground of violation of natural justice as well as violation of fundamental rights. This part of the majority judgment, therefore, also needs to be reviewed.

11. LARGE DAMS – BENEFITS AND COSTS

The majority judgment deals with the issue of large dams and their overall benefits to the country. This issue was not an issue before the Court – only the Sardar Sarovar Project was under discussion. The issue of the impacts of large dams does form a background to the issue of SSP, but there was no material presented or discussed related to the same, nor was the issue itself under adjudication. Moreover, the issue of large dams has been extensively discussed, debated and a large number of studies have been carried out on this all over the world. In 1998, the World Bank and International Union for Conservation of Nature initiated the setting up of the World Commission on Dams to assess the impacts and experience of dams all over the world. This Commission consists of eminent experts from all over the world representing both the dam-building sector and those who oppose large dams as welt as some independent academics. The Report of this Commission is to be released on 16 November by Nelson Mandela. The 'India Country Study' prepared for the WCD is already public. This study is a devastating indictment of large dams in India, not only from the angle of social and environmental impacts but also from the viewpoint of economic and financial performance.

Given the complexity of the issue, it is not proper for the Court to conclude on this without giving due consideration to the large knowledge-base including the India Country Study. It is understandable that the Court did not go into all this material since this (performance of large dams in general) was not an issue before the Court. However, it then follows that the Court cannot give any findings on the same. Particularly, the judgment contains observations about the experiences specific to certain projects, namely Bhakra Nangal, Nagarjun Sagar Dam, Tehri, Bhillai Steel Plant, Bokaro and Bala Iron and Steel plants (Paragraph 267) Regardless of whether the ground reality in these areas is reflected in the said observations or not (experience from these areas actually runs contrary to these observations) the fact is that there was no material before the Court on these areas and hence these observations should not from a part of the judgment.

Hence, the judgment may be reviewed in light of the above and the general discussion on the benefits of dams presented as a part of conclusions of the Court may be deleted.

12. PILS AND INTERVENTION IN INFRASTRUCTURE PROJECTS

The Court judgment observes that judicial interventions in policy decisions and in particular with regards to the infrastructure projects should be made only at the time such decisions are being taken and once the construction/ implementation of the project begins the judiciary should not interfere. This raises certain serious issues and it may be necessary for the judgment to be reviewed in light of these. These issues are :

a) The working of the government is largely non-transparent and non-participatory. The common people and even people directly affected by policy decisions related to infrastructure projects are not informed that the Government is considering any such thing. The related studies, documents, factors under consideration and so on are not available to the people as a matter of right. In most of the cases people get to hear of the project only after decisions have been taken, considerable amount of money spent and work initiated. Thus, it is very difficult for the people to intervene in any meaningful manner at this stage.

b) In certain cases when people have approached the courts at the policy making stage itself, the courts have rejected their claims on the grounds that the cause of action has not yet taken place and it is premature.

c) In many cases the implementation of the projects results in violations of basic rights of the people. At this point, the people certainly have a right to challenge this and ask that projects be implemented in a manner that the basic rights are not violated. It may happen in such cases that it is found there is reasonable ground to believe that it would be impossible to implement the project without violation of the fundamental rights of the people. In such cases certainly the right to challenge the project itself would remain even though the project may be in an advanced stage.

In any case the overall public interest in general and the fundamental rights of the people in particular cannot be superseded on the grounds of delay, given especially the absence of right to information.

The part of the judgment related to these issues may be suitably modified in the light of the above and in particular directions or at least observations with regard to the need for right to information be included in the same.

Public Interest Litigation (PIL)

Public Interest Litigation (PIL) is a unique contribution of the Indian judiciary and needs to be strengthened further. It is not anybody's contention that frivolous and even mala fide cases of PIL do not exist. However the percentage of such frivolous cases are very small and the Judiciary has enough powers and discretion to handle these. Indeed the percentage of frivolous and mal-intentioned cases would be far more in the case of regular litigation as compared to PIL.

Given this situation the remarks with regard to PIL made in the Judgment are likely to be interpreted especially by the lower courts as an indictment of PIL in general. Even a hint of displeasure of the Supreme Court towards PILs can cause enormous setback to this special innovation of the judiciary which has greatly empowered common people. It would therefore be appropriate for the said remarks be deleted from the judgment. In fact, unless the Court wanted to say that this petition by the NBA was in any manner a 'Publicity Interest Litigation' or 'Private Inquisitiveness Litigation' these remarks (Paragraph 256) would be out of place in the judgment. It is clear that the Court has not directly cast any such aspersions on the current petition because if this were the case, the Court would have said so directly. Hence, it is important that these remarks be removed to prevent any negative impacts on PILs.

Prayers

It is therefore respectfully prayed that this Court may be pleased to:

A) Review and recall the majority judgment and order in the light of the above, and

B) Considering the importance of the matter, grant oral hearing to the petitioners in this review petition, and,

C) Until the review petition is disposed off, stay and suspend the operation of the judgment dated 18/10/99, and,

D) Pass any other order that this court may deem fit and proper.