

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

WP(C).NO. 34463 OF 2015 (G)

PETITIONER(S):

NATURE LOVERS' FORUM AGED 41 YEARS
THIRUVANKULAM
(REG.NO.EKM/TC/979/2014) REPRESENTED BY ITS PRESIDENT
GIREESHKUMAR.M.R. S/O.RAMAN, AGED 41 YEARS
MALAYIL HOUSE, MAMALA.P.O., ERNAKULAM DISTRICT
PIN-682 305.

BY ADV. SMT.DAISY A.PHILIPOSE

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY ITS CHIEF SECRETARY
THIRUVANANTHAPURAM.

2. THE PRINCIPAL SECRETARY TO GOVERNMENT, DEPARTMENT OF
INDUSTRIES, THIRUVANANTHAPURAM.

3. THE DIRECTOR OF MINING AND GEOLOGY,
DIRECTORATE OF MINING AND GEOLOGY, KESAVADASAPURAM
PATTOM PALACE.P.O., THIRUVANANTHAPURAM-695 004.

R1-R3 BY SENIOR GOVERNMENT PLEADER SHRI C.S. MANILAL

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
26.11.2015 ALONG WITH WPC. 33463/2015 AND WPC. 8531 OF 2015, THE
COURT ON 07.12.2015 DELIVERED THE FOLLOWING:

WP(C).NO. 34463 OF 2015 (G)

APPENDIX

PETITIONER(S)' EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE ORDER DATED 16.04.2012 PASSED BY THE HONOURABLE SUPREME COURT IN SPECIAL LEAVE PETITION (C) NO.19628-19629 OF 2009

EXHIBIT P2 TRUE COPY OF THE OFFICE MEMORANDUM NO.L-110114/47/2011-IA.II(M) DATED 18.05.2012, ISSUED BY THE MINISTRY OF ENVIRONMENT AND FORESTS.

EXHIBIT P3 A TRUE COPY OF S.R.O. NO.335 OF 2015, PUBLISHED ON 19.5.2015 BY THE 2ND RESPONDENT.

EXHIBIT P4 A TRUE COPY OF S.R.O. NO.671 OF 2015, PUBLISHED ON 5.10.2015 BY THE 2ND RESPONDENT.

RESPONDENT(S)' EXHIBITS:

EXHIBIT R1(A) TRUE COPY OF THE ORDER OF STATUS QUO AS ON 30.10.2015 OF THE HONOURABLE SUPREME COURT OF INDIA.

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.P(C) No.34463 of 2015,

W.P(C) No.33463 of 2015

and

W.P(C) No.8531 of 2015

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Dated this the 07th day of December, 2015

J U D G M E N T

Ashok Bhushan, C.J.

These three Writ Petitions, filed as public interest litigation, challenge the Notification dated 05.10.2015 (published in the Kerala Gazette Extraordinary dated 06.10.2015) by which proviso to Rule 12 of the Kerala Minor Mineral Concession Rules, 2015 has been inserted. Petitioners prays that the said proviso to Rule 12 inserted as per the aforesaid Notification be declared as ultra vires. Some other reliefs have also been claimed in W.P(C) Nos.33463 and 8531 of 2015 which shall be referred to hereinafter. In W.P(C) No.34463 of 2015 counter affidavit has been filed on behalf of the State which has been adopted in the other two Writ

Petitions by memo filed on behalf of the State of Kerala. Writ Petition No.34463 of 2015 is being treated as the leading case.

2. Brief facts of the case as emerged from the pleadings of the parties are as follows:

W.P(C) No.34463 of 2015 (**Nature Lovers' Forum, Thiruvananthapuram v. State of Kerala and Others**):

3. Petitioner, a voluntary organization, registered under the Travancore-Cochin Scientific, Literary and Charitable Societies Act, 1955, in this Writ Petition has raised an environmental issue affecting public interest. Petitioner's case is that the Apex Court in **Deepak Kumar and Others v. State of Haryana and Others** ([2012] 4 SCC 629) has issued various directions for protecting the environment and ecology. The Apex Court had further directed that lease of area less than 5 hectares be granted/renewed only after getting environmental clearance. The Apex Court further directed all the State Governments to frame Rules incorporating the model guidelines issued by the

Ministry of Environment and Forests. The Apex Court directed the State Governments to incorporate regulatory regime for grant of lease of minor minerals of an area less than 5 hectares. The State Government in pursuance of the Notification has framed the Kerala Minor Mineral Concession Rules, 2015 (hereinafter referred to as "the 2015 Rules") on 07.02.2015. The 2015 Rules provides for grant of lease/permit of minor minerals after obtaining environmental clearance. Proviso to Rule 12 provided that environmental clearance required under Rule 9 shall not be insisted in the case of renewal of quarrying permits in respect of quarries which had a valid permit as on the 9th day of January, 2015. The said proviso was amended by Notification dated 19th May, 2015 wherein in the place of the words "in respect of quarries which had a valid permit as on 9th day of January, 2015" the words "in respect of granite (building stone) quarries which had a valid permit during the financial year 2014-15" have been

substituted. Further amendment has been made by Notification dated 05.10.2015 to the second proviso by which in the place of the second proviso, a new proviso had been inserted which provides that “the mining plan and environmental clearance required under Rule 9 shall not be insisted in respect of renewal of quarrying permits of granite (building stone) quarries which had quarrying permits under the Kerala Minor Mineral Concession Rules, 1967 on or before 26.02.2012”. Petitioner challenges the Notification dated 05.10.2015 alleging that the Notification has been issued brazenly with impunity for serving its own end for exploiting the minerals by grant of mining leases/permits in violation of the Notification issued by the Ministry of Environment and Forests (for short, “the MoEF) and in disobedience of the order passed by this Court in W.P (C) No.31148 of 2014 and the directions issued by the Apex Court in **Deepak Kumar's case** (supra). Petitioner prayed for the following reliefs:

- “i) Declare that the substitution of words and figures in

the first proviso of Rule 12 of Kerala Minor Mineral Concession Rules, 2015 that “in respect of granite (building stone) quarries which had a valid permit during the financial year 2014-15” as per S.R.O. No.335 of 2015 dated 19.05.2015 and substitution of words and figures in the first and second proviso of Rule 12, that the mining plan and environmental clearance required under Rule 9 shall not be insisted in respect of renewal of quarrying permits of granite (building stone) quarries which had quarrying permits under the Kerala Minor Mineral Concession Rules, 1967 on or before 26.02.2012”, as per S.R.O. No.671 of 2015 dated 05.10.2015 is illegal, without jurisdiction and ultra vires the Notifications issued by the Central Government under the Environment (Protection) Act, 1986 and the Environment (Protection) Rules, 1986 and unconstitutional.

ii) Grant such other reliefs that may be deemed fit to this Honourable Court in the interest of justice”.

W.P(C) No.33463 of 2015 (**The Greenstep Nature Society, Kottayam v. State of Kerala and Others**).

4. Petitioner is a registered Society formed by a group of nature loving persons at Ramapuram in Kottayam District with the object of protection from uncontrolled exploitation of natural resources. Petitioner pleads that under the Kerala Minor Mineral Concession Rules, 1967 (for short, “the 1967 Rules”),

unscientific extraction of minor mineral was going on in the State. Noticing the alarming situation, the Apex Court in **Deepak Kumar's case** (supra) directed to modify the Rules by all the States by incorporating necessary conditions for environmental clearance for mining activities as recommended by the MoEF. Suggestions were invited by the State Government for amending the Rules. Petitioner claimed to have given its suggestions. Petitioner also claimed to have filed W.P(C) No.1496 of 2015 which Writ Petition was disposed of by a learned Single Judge on 03.02.2015 observing that if the proceedings to amend the Rules are still to be finalized, submissions made by the petitioner as well might be considered and finalised along with other valid suggestions. Petitioner's case is that there are large number of granite quarries in Ramapuram Panchayat including that of respondents 4 and 5. Petitioner in the Writ Petition has objected to quarrying activities carried on by respondents 4 and 5 which according to the petitioner are trying to be

carried out without obtaining environmental clearance. Petitioner's case is that most of the hills in the area of Ramapuram are being vanished due to the uncontrolled operations of quarries. It is submitted that hills are having vital role in the control of climate in the adjacent areas. It is submitted that removal of surface soil by the operators of granite quarries is the real reason for the uprooting of rocks in the top of the hills. Petitioner in the Writ Petition has referred to various reports including the reports of Tahsildar and Deputy Superintendent of Police forwarded to the District Collector, Kottayam. It is pleaded that there are numerous residential houses including that of the members of the petitioner Society within the dangerous zone of 300 metres from the quarries of respondents 4 and 5. In the peculiar circumstances of Ramapuram Panchayat it is necessary to insist for environmental clearance from the Environment Impact Assessment Authority before granting permits to the granite quarries. Petitioner also relies on a Division

Bench judgment of this Court in **All Kerala River Protection Council v. State of Kerala** (2015 [2] KLT 78) where the Division Bench has interpreted the proviso to Rule 12 of the 2015 Rules. Another Division Bench judgment of this Court in **Najeeb v. Shoukath Ali** (2015 [3] KLT 396) has been relied on by the petitioner where the Division Bench held that valid permit means permit which may entail a permit holder to carry on mining operation and mining operation can be carried out only with environmental clearance. Petitioner has referred to the amendment brought by Notification dated 05.10.2015 to the proviso to Rule 12 which proviso is sought to be challenged in this Writ Petition. It is pleaded that by amending the proviso to Rule 12 by Notification dated 05.12.2015, the State was carried away from its prime duty of protection of environment. The concept of present renewal of permits issued before 27.02.2012 is also not legally sustainable. All the permits valid as on 27.02.2012 have expired and there is no question of renewal of the

permits without obtaining environmental clearance.

Petitioner prayed for the following reliefs:

“i) To declare that the proviso to Rule 12 of the Kerala Minor Mineral Concession Rules, 2015, amended as per Ext.P7, is ultra vires.

ii) Issue a writ of mandamus directing the respondents 1 and 2 to make Regulation 164 of the Metalliferous Mine Regulations as a mandatory condition for granite quarries in the State.

iii) Issue a writ of mandamus directing the respondents No.1 and 2 to ensure that respondents No.4 and 5 and all other quarry operators in the State are running granite quarries only after obtaining approved mine plan and environmental clearances.

iv) Issue such other appropriate writ order direction that this Honourable court deems fit under the facts and circumstances of the case”.

W.P(C) No.8531 of 2015 (Ward III, Swajaladhara Sudhajala Upabhokthru Samithi and Others v. State of Kerala and Others).

5. This Writ petition has been filed by three petitioners; first petitioner is an Association of people and 2nd and 3rd petitioners are its office bearers. Petitioners in the Writ Petition have come up against the ongoing unauthorised, illegal and

indiscriminate mining and quarrying operations of granite building stone by respondents 10 to 30, in Thabore-Sankarankuzhi area in Ward No.III of the 8th respondent-Panchayat in Ernakulam District. Petitioners' case is that though they have represented the matter against the illegal quarrying operations by the private respondents to the State respondents, no effective steps have been taken and hence petitioners are constrained to move this Court. Petitioners allege that provisions of the Metalliferous Mines Regulations, 1961 are being violated by making blasting operations within 100 metres away from the water tank. Without quarrying permit for use of machineries, operations of quarries are going on. Notification dated 14.09.2006 issued under the Environment Protection Act, 1986 (hereinafter referred to as "the 1986 Act") issued for Environment Impact Assessment contemplates environment impact study and environmental clearance for mining activities. Reference and reliance has been placed on the judgment of the Apex Court in **Deepak Kumar's** case

(supra). Reference to order of the National Green Tribunal dated 13.01.2015 has also been made by which the National Green Tribunal directed all the State Governments not to grant mining permit without obtaining environmental clearance. Permits have been issued to some of the private respondents without obtaining environmental clearance. Some of the private respondents have also not obtained necessary permission as required by Sections 233 and 232 of the Kerala Panchayat Raj Act, 1994. Stop memo issued by the Village Officer to stop the private respondents has also been referred to. The first petitioner claimed that it has preferred W.P(C) No.18343 of 2014, during the pendency of which the 2015 Rules have been enforced. Writ Petition No.18343 of 2014 was withdrawn with liberty to file a fresh petition. Proviso to Rule 12 is alleged to be unconstitutional and ultra vires. It is alleged that proviso to Rule 12 directly collides with the provisions of the 2005 Rules and the provisions of the Office Memorandum dated 18.05.2012 issued by the

MoEF as well as the directions contained in the judgment of the Apex Court in **Deepak Kumar's case** (supra). Petitioners have also placed reliance on two Division Bench judgments of this Court in **All Kerala River Protection Council's case** and **Najeeb v. Shoukath Alil's case** (supra). Petitioners with the aforesaid pleadings has amended the Writ Petition by adding a prayer to declare that the proviso added to Rule 12 of the 2005 Rules inserted by Notification dated 05.10.2015 as unconstitutional and ultra vires. Petitioners in the Writ Petition prayed for the following reliefs:

(i) To issue a writ of mandamus or any other appropriate writ order or direction to the Respondents Nos.2 to 5, 7, 8 and 31 commanding them to take appropriate steps to stop and to close down, forthwith the entire mining activities done by the respondent Nos.10 to 30 or any other persons in their respective titlehold leasehold lands, specifically mentioned in Ext.P2.

(ii) To declare that the 1st and 2nd proviso to Rule 12 and the 2nd proviso to clause 'f' of Rule 10 are unconstitutional and ultra vires and hence are struck down.

(ii)(a) To declare that the proviso dated to R.2 of the KMMC Rules by Exhibit P18(a) amendment notification is unconstitutional

and ultra vires and hence is struck down.

(iii) To issue a direction to the respondent Nos.1 to 7, 8 and 31 to take all possible steps to undo the damages caused by the respondent Nos.10 to 30 to the environment including the filling up of the huge pits formed due to illegal mining and damages caused to the residential buildings of the local inhabitants and to realize the respective costs from respective mine operators.

(iv) To direct the respondents f1 to 3 and 7 to take prosecution against the party respondents under the provisions of the relevant statutes for damaging the environment by doing unauthorised and illegal mining operations.

(v) Issue such other writ, direction or order that this Honourable Court may deem fit, just and necessary in the facts and circumstances of the case”.

6. A counter affidavit has been filed by the State in the leading Writ Petition. It is stated in the counter affidavit that there is no public interest involved in the matter. Neither the petitioner nor members of the Association are directly or remotely affected by the present amendments to the rules. Petitioner has no case that the Rule is beyond the legislative competence of the Legislature nor there is any case that the Rule violated any specific fundamental rights of the petitioners. The petitioner

has also no case that the 2015 Rules is in conflict with any Central legislation or the Rules issued therein. As per Sections 15(1) and 15(1A) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as "the 1957 Act") the State is invested with the rule making powers comprehensively on all matters relating to mining of minor minerals. In Notification dated 14.09.2006 no environmental clearance was insisted or required in respect of the minor minerals leases or other concessions below 5 hectares. The Apex Court in **Deepak Kumar's case** (supra) declared that the State Government have to frame Rules for the purpose of effective implementation of the mineral wealth including comprehensive protection of minor minerals. The State Governments were directed to follow the model Rules of 2010 of the Ministry of Mines and also the recommendation of the MoEF in respect of minor minerals. By the Apex Court judgment dated 27.02.2012, for the first time environmental clearance was required even for the interregnum period

between 27.02.2012 till the Rules are framed., i.e., 07.02.2015. It is submitted that there is a precise reason for making the amendment which to a greater extent had been dealt within the Explanatory Note to the Rule. Referring to the judgment in **All Kerala River Protection Council's case** (supra) it is stated that the Division Bench held that no environmental clearance with regard to extraction of minor minerals is required with regard to existing leases on the date of Notification dated 14.09.2006 or Office Memorandum dated 18.05.2012. Against the judgment dated 30.09.2015 of the Division Bench of this Court in W.P(C) No.10694 of 2015, reported in **Paristhithy Samrakshana Janakeeya Samithy v. State of Kerala** (2015 [4] KLT 278), SLP No.30103 of 2015 has been filed by a private party where by interim order dated 30.10.2015, the Apex Court directed for maintaining status quo as on that date by the parties. The proviso inserted as per Notification dated 05.10.2015 to Rule 12 does not militate against the 1986 Act and the Notification issued thereunder.

Office Memorandum dated 18.05.2012 issued by the MoEF was for the purpose of implementing the judgment in **Deepak Kumar's case** (supra) and after implementation of the judgment in the said case, the aforesaid Office Memorandum has become functus officio and has no relevance.

7. We have heard Smt.Daisy A.Philipose, Shri Georgekutty Mathew and Shri K.Abdul Jawad for the petitioners and Shri C.S.Manilal, learned Senior Government Pleader for the State.

8. Learned counsel for the petitioners in support of the Writ Petitions contended that by the amendment made in the proviso to Rule 12, the judgment of the Apex Court in **Deepak Kumar's case** (supra) has been violated. The judgment in **Deepak Kumar's case** (supra) directed all the State Governments to frame Rules to protect environment and to provide for a regulatory mechanism for environmental clearance for extraction of minor minerals of an area less than 5 Hectares. But the State Government by carving out an exception by

framing the proviso to Rule 12 as inserted by Notification dated 05.10.2015 has acted against the judgment and directions of the Apex Court in **Deepak Kumar's case** (supra). The State Government under Article 48A of the Constitution of India is enjoined to protect and improve the environment whereas by the proviso to Rule 12 as initially framed and by amendment as well the State has taken retrograde steps harming the interest of protection of environment. Permitting mining operations by virtue of renewal of permit as contemplated by the proviso to Rule 12 without obtaining environmental clearance is contrary to public interest. The Court and Government are obliged to take preventive methods to protect environment, the State while making subordinate legislation has to take care of the environment. The amendment in Rule 12 is in violation of the Office Memorandum dated 18.05.2012 issued by the MoEF in exercise of the power under the 1986 Act. The Office Memorandum directed that henceforth with regard to mining operations for an area less than five

hectares environmental clearance is to be obtained from the State Impact Assessment Authority and the said project shall be treated as category B projects. The amendment brought by the State Government including by Notification dated 05.10.2015 is also clearly contrary to the law laid down by the Division Bench of this Court in **All Kerala River Protection Council's case, Najeeb's case and Paristhithy Samrakshana Janakeeya Samithy's case** (supra). It is also submitted that the State Government has no legislative competence to make any Rule with regard to the 1986 Act or any law framed thereunder. The amendment of the proviso to Rule 12 impinge upon the two Division Bench Judgments of this Court as noted above. The amendment made by the State Government is repugnant to the law under the 1986 Act and has to be struck down. Proviso to Rule 12 is arbitrary and unreasonable. Large number of permits are renewed by the State under the guise of the 2015 Rules. Under the 1967 Rules permits were granted for one year period only. Permits granted on or before

26.02.2012 expired after one year and there was no occasion for renewal of such permits as on date. Proviso to Rule 12 is also an infructuous exercise made by the State Government.

9. Refuting the submissions of learned counsel for the petitioners, learned Senior Government Pleader contends that the amendment brought by the State to Rule 12 by Notification dated 05.10.2015 is well within the legislative competence of the State. Office Memorandum dated 18.05.2012 on which reliance has been placed by the petitioners is no more applicable since the said Office Memorandum was issued only for compliance of the judgment of the Apex Court in **Deepak Kumar's case** (supra) and after the 2015 Rules having been framed, the direction in **Deepak Kumar's case** (supra) has come to an end. Statutory Rules having come up by framing of the 2015 Rules, the judgment in **Deepak Kumar's case** (supra) cannot be relied. It is further submitted that Office Memorandum dated 18.05.2012 cannot be said to be any order issued by

the MoEF. There is no compliance of the provisions of the Rules framed under Article 77 of the Constitution of India. The Office Memorandum dated 18.05.2012 is only a Circular issued by the Director for compliance of the judgment in **Deepak Kumar's case** (supra) and have no force of law. The proviso to Rule 12 has to be preferred to Office Memorandum dated 18.05.2012. The Office Memorandum cannot militate against the Rules framed by the State.

10. Learned counsel appearing for the intervenors contended that Rules 12 and 13 inserted by Notification dated 05.10.2015 are fully within the jurisdiction of the State and at best the benefits of Rules 12 and 13 can be taken only for a period of three years. It is submitted by learned counsel for one of the intervenors that application for environmental clearance filed by the applicant is pending since 2014 and although several inspections have been made, environmental clearance has not been granted. In such circumstance, Court should not interdict the mining

operations.

11. In view of the pleadings on record and the submissions made by the parties, the following are the issues which arise for consideration in these Writ Petitions.

I. Whether the proviso to Rule 12 inserted as per Notification dated 05.10.2015 is not in accordance with the directions and guidelines issued by the Apex Court in Deepak Kumar's case (supra)?

II. Whether the proviso to Rule 12 is in violation of the Office Memorandum dated 18.05.2012 issued by the MoEF?

III. Whether the Office Memorandum dated 18.05.2012 issued by the MoEF is not the Order issued by the Central Government and have no force of law?

IV. Whether the Office Memorandum dated 18.05.2012 was only for the purpose of giving effect to the directions issued by the Apex Court in Deepak Kumar's case (supra) and when the 2015 Rules have already been framed by the State Government, Office Memorandum dated 18.05.2012 has become infructuous?

V. Whether the proviso to Rule 12 inserted by Notification dated 05.10.2015 is not in accord with the law laid down by the Division Bench of this Court in All Kerala River Protection Council v. State of Kerala and Najeeb v. Shoukath Ali (supra)?

VI. Whether the proviso to Rule 12 as inserted as per Notification dated 05.10.2015 is manifestly arbitrary, unreasonable and deserves to be declared as unconstitutional?

VII. To what relief the petitioners are entitled in these Writ Petitions?

ISSUE NO.I

12. Before we proceed to discuss the issues raised in these Writ Petitions, it is necessary to look into the statutory provisions regulating the field of mining of minor minerals. The Parliament enacted the 1957 Act to provide for the development and regulation of mines and minerals under the control of the Union. Section 2 of the 1957 Act declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the

development of minerals to the extent provided therein. Under Section 15, the State Government was empowered to make rules in respect of minor minerals. The State in exercise of the power under Section 15 has framed the 1967 Rules. Chapter II deals with grant of quarrying permits in respect of lands in which minerals belong to the Government. Chapter III deals with grant of quarrying permits in respect of lands in which minerals belong to private persons. In the present case we are concerned with mining permits. The mining permit was contemplated to be granted for a period of one year.

13. In the latter part of 20th Century, concern regarding protection and conservation of nature was internationally felt. Various international conferences were held with participation of large number of countries where the issues of environment and ecology were discussed and resolutions were passed. Decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972 in which India participated where it was decided to take

appropriate steps for the protection and improvement of human environment. The 1986 Act was enacted by the Parliament for the protection and improvement of environment and for matters connected therewith. Section 3 empowered the Central Government to take measures to protect and improve environment. Section 5 empowers the State Government to give directions notwithstanding anything contained in any other law but subject to the provision of the 1986 Act. Section 6 empowered the Central Government to make rules to regulate environmental pollution. The Central Government in exercise of the powers under Section 6 framed the Environment (Protection) Rules, 1986 (for short, "the 1986 Rules"). Rule 5 provides for prohibition and restriction on the location of industries and carrying on process and operations in different areas. The Central Government in exercise of the powers under Section 3(2) of the 1986 Act read with the power under clause (d) of Rule 5(3) of the 1986 Rules has issued Notification dated 27.01.1994 which Notification

provided statutory regulations and provisions for regulating mining of major minerals. The MoEF, issued another Notification dated 14.09.2006 in exercise of the aforesaid powers where requirement of prior environmental clearance with regard to several projects and activities were provided for. Paragraph 2 of the Notification provided as follows:

“2. Requirements of prior Environmental

Clearance (EC):- The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category B in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:

- (i) All new projects or activities listed in the Schedule to this notification;
- (ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which cross the threshold limits given in the Schedule, after expansion or modernization.

(iii) Any change in product-mix in an existing manufacturing unit included in Schedule beyond the specified range.

However, modernization or expansion proposals without any increase in pollution load, and without any additional water and/or land requirement are exempted from the provisions of this notification:

Provided that, a self certification, stating that the proposal shall not involve any additional pollution load, waste generation or water requirement, be submitted to the regulatory authority by the project proponent.”

Schedule to the Notification included “mining of minerals”. The Notification further provided that area less than 50 hectares and more than 5 Hectares is category B project which shall require environmental clearance. There was no statutory provision thus requiring environmental clearance for mining lease of less than 5 Hectares area.

14. The Apex Court had occasion to consider the impact of carrying mining operations by short term permits/mining leases in the area less than 5 hectares in **Deepak Kumar's case** (supra). In the said case, the State of Haryana issued an auction notice proposing to

auction the extraction of minor minerals, boulders, gravel and sand quarries of an area not exceeding 4.5 hectares in several Districts. The Apex Court directed for report by the Central Empowerment Committee to make a local inspection and submit report. Submission was made before the Apex Court that grant or allotment of mining licence/lease of smaller plots of less than five hectares should not be encouraged from the environmental point of view and that the applicability of Environmental Impact Assessment Notification of 2006 has to be seen in its letter and spirit so as to ensure environmental safeguards in place and implemented for sustainable mining. The Apex Court observed that collective impact of mining in area less than 5 hectares may be significant, hence the necessity of a proper environmental assessment plan. The following was laid down in paragraph 11:

“11. We find that it is without conducting any study on the possible environmental impact on/in the river beds and else - where the auction notices have been issued. We are of the considered view that when we are faced with a situation where extraction of alluvial

material within or near a river bed has an impact on the rivers physical habitat characteristics, like river stability, flood risk, environmental degradation, loss of habitat, decline in biodiversity, it is not an answer to say that the extraction is in blocks of less than 5 hectares, separated by 1 kilometre, because their collective impact may be significant, hence the necessity of a proper environmental assessment plan.”

The Apex Court in the aforesaid case noted that MoEF has constituted a Core Group to look into the environmental aspects associated with mining of minor minerals. Reports were submitted. The details of the reports were extracted in paragraph 19 of the judgment. For the purpose of the present case, paragraph 19 (4.8) and (5.0) where it was recommended that minor minerals may be subject to a simpler regulatory regime, which is, however, similar to major minerals regime. Paragraph 19 (4.8) and 19(5.0) is quoted below:

“4.8 Uniform Minor Mineral Concession Rules:

The economic value of the minor minerals excavated in the country is estimated to contribute to about 9% of the total value of the minerals whereas the non metallic minerals contribute to about 2.8%. Keeping in view the large extent of mining of minor minerals and its significant potential to adversely affect the environment, it is recommended that Model Mineral Concession rules may be framed

for minor minerals as well and the minor minerals may be subjected to a simpler regulatory regime, which is, however, similar to major minerals regime.

5.0 Conclusion:

Mining of minor minerals, though individually, because of smaller size of mine leases is perceived to have lesser impact as compared to mining of major minerals. However, the activity as a whole is seen to have significant adverse impacts on environment. It is, therefore, necessary that the mining of minor minerals is subjected to simpler but strict regulatory regime and carried out only under an approved framework of mining plan, which should provide for reclamation and rehabilitation of the mined out areas. Further, while granting mining leases by the respective State Governments "location of any eco - fragile zone(s) within the impact zone of the proposed mining area, the linked Rules / Notifications governing such zones and the judicial pronouncements, if any, need be duly noted. The Union Ministry of Mines along with Indian Bureau of Mines and respective State Governments should therefore make necessary provisions in this regard under the Mines and Minerals (Development and Regulation) Act, 1957, Mineral Concession Rules, 1960 and adopt model guidelines to be followed by all States.

phasis supplied)"

The Apex Court noted the recommendations in the report in paragraph 21 and further observed in paragraph 24 that the State Governments have to frame proper rules in accordance with the recommendations under Section 15

of the 1957 Act. Paragraphs 21 and 24 are as follows:

“21. Further, it was also recommended that States, Union Territories would see that mining of minor minerals is subjected to simpler but strict regulatory regime and carried out only under an approved framework of mining plan, which should provide for reclamation and rehabilitation of mined out areas. Mining Plan should take note of the level of production, level of mechanisation, type of machinery used in the mining of minor minerals, quantity of diesel consumption, number of trees uprooted, export and import of mining minerals, environmental impact, restoration of flora and host of other matters referred to in 2010 rules. A proper framework has also to be evolved on cluster of mining of minor mineral for which there must be a Regional Environmental Management Plan. Another important decision taken was that while granting of mining leases by the respective State Governments, location of any eco - fragile zone(s) within the impact zone of the proposed mining area, the linked Rules / Notifications governing such zones and the judicial pronouncements, if any, need to be duly noted.

24. We are of the view that all State Governments / Union Territories have to give due weight to the above mentioned recommendations of the MoEF which are made in consultation with all the State Governments and Union Territories. Model Rules of 2010 issued by the Ministry of Mines are very vital from the environmental, ecological and bio - diversity point of view and therefore the State Governments have to frame proper rules in accordance with the recommendations, under S.15 of the Mines and Minerals (Development and Regulation) Act, 1957. “

The Apex Court in paragraph 29 further directed that in the meanwhile, leases or minor minerals including their renewal for an area of less than five hectares be granted by the States only after getting environmental clearance from the MoEF. After the judgment of the Apex Court in **Deepak Kumar's case** (supra), the MoEF, taking note of the directions in the aforesaid case and other aspects has issued an Office Memorandum dated 18.05.2012 providing that mining activities be permitted in area less than five hectares only after obtaining environmental clearance such activities be treated as included in category B of Environment Impact Assessment Notification dated 14.09.2006. The details pertaining to the Office Memorandum dated 18.05.2012 shall hereinafter be considered in detail.

15. Shri C.S.Manilal, learned Senior Government Pleader contended that the direction contained in paragraph 29 of the judgment in **Deepak Kumar's case** (supra) for grant of lease of minor minerals or renewal for the area less than 5 hectares was only operative

till rules have been framed by the State Government. It is submitted that the direction in paragraph 29 was in the nature of interim order and is no more in operation after the framing of the 2015 Rules dated 07.02.2015. He submitted that a Division Bench of this Court in **All Kerala River Protection Council's case** (supra) has accepted the submission that the direction contained in paragraph 29 in **Deepak Kumar's case** (supra) was only an interim direction till the 2015 Rules are framed. He submitted that judgment of the Apex Court in **Deepak Kumar's case** (supra) is no more relevant and was confined only for the interregnum period till the concerned State Government framed Rules. Directions in paragraph 29 of the judgment of the Apex Court in **Deepak Kumar's case** (supra) cannot be said to be the sum total of the judgments.

16. It is true that direction was issued directing the State Governments not to grant lease or renewal of mining lease for area less than 5 hectares without obtaining environmental clearance and the State

Governments were directed to frame Rules in accordance with the report of the Central Empowering Committee noted in the judgment and the observations made in the judgment in **Deepak Kumar's case** (supra). The Apex Court has noted that strict regulatory regime for minor minerals is also necessary as it is prevalent with regard to major minerals. Environmental study before grant of major minerals is already in the statutory scheme. The report also emphasised about strict regulatory regime which found the approval of the Apex Court in **Deepak Kumar's case** (supra) with regard to minor minerals. The direction in paragraph 29 was in accord with the observations made by the Apex Court in the body of the judgment and the direction in paragraph 29 cannot be read as divorced from the law as explained and laid down by the Apex Court in **Deepak Kumar's case** (supra). The submission that the direction in paragraph 29 is only an interim order and hence was not to operate after the 2015 Rules have been framed overlooks the ratio of judgment. The direction in paragraph 29 to be

followed in the interregnum was on the basis of the law as explained and laid down by the Apex Court in the body of the judgment. Even if the direction in paragraph 29 can be treated as interim direction and was operative till framing of the 2015 Rules, the ratio of the judgment in **Deepak Kumar's case** (supra) has not come to an end after the 2015 Rules have been framed. Whether the 2015 Rules have been framed in accordance with the ratio of the judgment and the law laid down by the Apex Court in **Deepak Kumar's case** (supra) has to be looked into and examined. Thus, the question which needs to be answered is as to whether the proviso to Rule 12 as inserted by Notification dated 05.10.2015 is in accordance with law as explained and laid down by the Apex Court in **Deepak Kumar's case** (supra).

17. Rule 12 proviso as originally enacted contained in the 2015 Rules is as follows:

“Provided that, the environmental clearance required under Rule 9 shall not be insisted, in the case of renewal of quarrying permits, in respect of quarries which had a valid permit as on 9th day of January, 2015”.

Rule 12 suffered first amendment by Notification dated 19.05.2015 by clause 2 of the Amendment Rules. The following amendment was made in Rule 12:

“In Rule 12, in the first proviso, for the words and figures “in respect of quarries which had a valid permit as on 9th day of January, 2015” the words and figures “in respect of granite (building stone) quarries which had a valid permit during the financial year 2014-15” shall be substituted”.

By subsequent Notification dated 05.10.2015 first and second provisos of Rule 12 were substituted by another proviso which is to the following effect:

“2. Amendment of the Rules.-In the Kerala Minor Mineral Concession Rules, 2015.-

(i) In Rule 12, for the first and second proviso the following proviso shall be substituted, namely:-

Provided that the mining plan and environmental clearance required under rule 9 shall not be insisted in respect of renewal of quarrying permits of granite (building stone) quarries which had quarrying permits under the Kerala Minor Mineral Concession Rules, 1967 on or before 26th February, 2012.

(ii) For rule 13, the following rule shall be substituted, namely:-

13. Restriction on grant of quarrying permit in the same area.- A permit holder shall not be eligible for a permit on a particular area of contiguous land owned and possessed by him if

he has availed himself of permits for quarrying in the same land for a period of 3 years in different spells from the date of publication of the Kerala Minor Mineral Concession (Second Amendment) Rules, 2015.

Provided that the permit holder may apply for a quarrying lease in case he desires to continue quarrying from the area for a period of more than 3 years if he is able to satisfy all the conditions laid down in the rules dealing with quarrying leases”.

The proviso now inserted by Notification dated 05.10.2015 grants exemption to those mining permits which were operating on or before 26.02.2012. The proviso thus created a category of mining permits which does not require any environmental clearance, i.e., permits which were operating on or before 26.02.2012. As per the 1967 Rules, permits could have been issued only for a maximum period of one year. Thus all permits granted on or before 26.02.2012 were to expire on or before 26.02.2013. All permits required renewal if any of them were to be operated for any subsequent period. Rule 9 of the 2015 Rules contemplates that no renewal of mining permit can be granted without environment clearance. As per Rules 9 and 12, renewal

of permit for quarrying has to be granted after clearance of all statutory licences/clearances. An exception has been created by the proviso to Rule 12 as inserted by Notification dated 05.10.2015. Thus any person having a permit prior to 26.02.2012 did not require any environmental clearance. The Explanatory Note which is appended to Notification dated 05.10.2015 is useful to note which is to the following effect:

“Explanatory Note

This does not form part of the notification, but is intended to indicate its general purport)

The Kerala Minor Mineral Concession Rules, 2015 were issued under Notification No.G.O (P)16/2015/ID dated 7th February, 2015 and published as per S.R.O. No.72/2015 in the Kerala Gazette Extraordinary No.288 dated 7th February, 2015. In the order dated 27th February, 2012 of the Hon'ble Supreme Court of India, in Deepak Kumar v. State of Haryana case ([2012] 4 SCC 629) environmental clearance has been made mandatory for grant/renewal of quarrying leases till the rules are framed by the State Governments and Union Territories as per the directions given by the Court in this order. Considering the particular situation prevailed in the State environmental clearance could not be insisted by the State Government during such period. In the judgment dated 23rd March, 2015 of the Hon'ble High Court of Kerala in W.P(C) No.31148/2014 and other connected cases, the Hon'ble Court has

made it clear that the quarrying permits granted/renewed after 27th February, 2012 without obtaining environmental clearance are not valid. The rule 12 of the above rules was challenged before the Hon'ble High Court in W.P(C) No.31148/2014 and other connected cases and in the judgment dated 23rd March, 2015, the Hon'ble Court has also made it clear that there was no necessity of environmental clearance for issuance of quarrying permit in a area less than or equal to 5 hectares before 27th February, 2012. In order to make the renewal of permits issued before 27th February, 202 possible and to give sufficient time to the existing quarrying permit holders for obtaining environmental clearance and mining plan for applying for quarrying lease, Government have decided to amend rules 12 and 13 of the Kerala Minor Mineral Concession Rules, 2015.

The Notification is intended to achieve the above object".

The Explanatory Note refers to the Division Bench judgment of this Court in **All Kerala River Protection Council v. State of Kerala** (supra) wherein this Court had held that those mining leases which were current on the date of the judgment of the Apex Court in **Deepak Kumar's case** (supra) as well as on the date of the Office Memorandum dated 18.05.2012 issued by the MoEF did not require any environmental clearance and requirement of environmental clearance was only to

operate prospectively after the judgment of the Apex Court as in **Deepak Kumar's case** (supra) as well as the Office Memorandum dated 18.05.2012 issued by the MoEF. The State Government appears to have followed the said analogy for permitting renewal of permit operating on or before 26.02.2012. The analogy drawn by the State is wholly inappropriate. It was clearly laid down by the Division Bench of this Court in **All Kerala River Protection Council's case** (supra) that any lease coming up subsequent to the judgment in **Deepak Kumar's case** (supra) and the Office Memorandum dated 18.05.2012 issued by the MoEF required environmental clearance. In view of the fact that judgment of the Apex Court in **Deepak Kumar's case** (supra) did not contemplate any retrospective operation nor the Office Memorandum dated 18.05.2012 contemplated any such retrospective operation. The above was held by the Division Bench in **All Kerala River Protection Council's case** (supra). Leases are granted for a particular year and the question of renewal shall come

only after expiry of the original period of lease. It is clear that any lease which was continuing on the date of judgment of the Apex Court on 27.02.2012 as well as Office Memorandum dated 18.05.2012 issued by the MoEF required environmental clearance at the time of renewal. Hence there is no such law laid down by the Division Bench in **All Kerala River Protection Council's case** or **Deepak Kumar's case** (supra) that in so far as permits are concerned at the time of renewal of permits subsequent to the judgment of the Apex Court in **Deepak Kumar's case** (supra) and the Office Memorandum dated 18.05.2012, they do not require any environmental clearance. As noted above, the Apex Court in **Deepak Kumar's case** (supra) has emphasised about the regulatory regime for mining of minor minerals also. The Apex Court thus clearly noted that environmental clearance be insisted for mining area of less than 5 hectares and the interim direction issued on 29.02.2012 has to be read as sum total of what was laid down in the said judgment and the State cannot be heard

to contend that since it has framed the 2015 Rules, it is absolved from following the ratio laid down by the Apex Court in **Deepak Kumar's case** (supra) We thus conclude that proviso to Rule 12 as inserted by Notification dated 05.10.2015 cannot be said to be in accordance with the ratio of the judgment laid down in **Deepak Kumar's case** (supra).

ISSUE NOS.II, III, IV & V:

18. All the above three issues being interconnected are taken together. After the judgment of the Apex Court in **Deepak Kumar's case** (supra) the MoEF issued Office Memorandum dated 18.05.2012. It is useful to extract the order dated 18.05.2012 which has been brought on record as Ext.P2 in the leading Writ Petition which is to the following effect:

"No.L - 11011/47/2011 - IA.II(M)

Government of India
Ministry of Environment & Forests

Paryavaran Bhavan
C.G.O. Complex, Lodi Road,
New Delhi - 110003
Telefax: 24362434
Dated the 18th May, 2012

OFFICE MEMORANDUM

Sub: Order of Hon'ble Supreme Court dated 27.2.2012 in I.A. no. 12-13 of 2011 in SLP (C) no. 19628-19629 of 2009 in the matter of Deepak Kumar etc. Vs State of Haryana and Ors. – Implementation thereof – Regarding.

Reference is invited to the above mentioned order of the Hon'ble Supreme Court directing inter alia as under:

"We in the meanwhile, order that leases of minor mineral including their renewal for an area of less than 5 ha be granted by the States / UTs only after getting environmental clearance from the MoEF."

2. The Environment Impact Assessment (EIA) Notification, 2006, as amended, requires mining projects (new projects, expansion or modernisation of existing projects as also at the stage of renewal of mine lease) with lease area of 5 ha and above, irrespective of the mineral (major and minor) to obtain prior environment clearance under the provisions thereof. Mining projects with lease area of 5 ha and above and less than 50 ha are categorized as category 'B' whereas projects with lease area of 50 ha and above are categorized as category 'A'. The category 'A' projects are considered at the central level in the Ministry of Environment & Forests while category 'B' projects are considered by the respective State / UT Level Environment Impact Assessment Authority, notified by MoEF under the EIA Notification, 2006.

3. In order to ensure compliance of the above referred order of the Hon'ble Supreme Court dated 27.2.2012, it has now been decided that all mining projects of minor minerals including their renewal, irrespective of the size of the lease would henceforth require prior environment clearance. Mining projects with lease area up to less than 50 ha including projects of minor mineral with lease area less than 5 ha would be treated as category 'B' as defined in the EIA

Notification, 2006 and will be considered by the respective SEIAAs notified by MoEF and following the procedure prescribed under EIA Notification, 2006.

4. Further, the Hon'ble Supreme Court in its order dated 16.4.2012 in the above mentioned matter and the linked applications has observed as under:

"All the same, liberty is granted to the applicants before us to approach the Ministry of Environment and Forests for permission to carry on mining below five hectares and in the event of which Ministry will dispose of all the applications within ten days from the date of receipt of the applications in accordance with law."

Accordingly, the respective SEIAAs in dealing with the applications of the applicants referred to in the above mentioned order shall ensure that the directions of the Hon'ble Supreme Court are effectively complied with and the applications of such applicants are disposed of within the time limit prescribed by the Hon'ble Court in accordance with law.

This issues with the approval of the Competent Authority.

Sd/-

(Dr. S. K. Aggarwal)

Director"

19. Learned Senior Government Pleader contended that Office Memorandum dated 18.05.2012 issued by the MoEF cannot be said to be a Government Order since it was not issued by the Central Government and was issued only by the Director, S.K.Agarwal. He submitted that the said order is not a Government Order issued by

the Central Government since it is not in accord with the Rules as framed by the Central Government under Article 77 of the Constitution of India. It is further submitted that the subject matter of the order being only implementation of the order of the Apex Court in **Deepak Kumar's case** (supra), purpose of Office Memorandum dated 18.05.2012 shall come to an end as soon as the State framed Rules as directed by the Apex Court and since the State Government has already framed the 2015 Rules, the Office Memorandum dated 18.05.2015 issued by the MoEF has become infructuous. Office Memorandum dated 18.05.2012 also refers to a subsequent order of the Apex Court dated 16.04.2012 in **Deepak Kumar's case** (supra) which is as follows:

"All the same, liberty is granted to the applicants before us to approach the Ministry of Environment and Forests for permission to carry on mining below five hectares and in the event of which Ministry will dispose of all the applications within ten days from the date of receipt of the applications in accordance with law."

As noted above, the Central Government is empowered under Section 5 of the 1986 Act to issue directions in

writing to person/officer or authority. Sections 5 of the Act is as follows:

“5. Power to give directions.- Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and such person, officer or authority shall be bound to comply with such directions.”

The Central Government as noted above, by virtue of Section 3 is entitled to *“subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution.”*

20. Thus the Office Memorandum dated 18.05.2012 issued by the MoEF clearly emanate from its power under Sections 3(1) and 5. Thus the MoEF has issued the order in exercise of the statutory power and it is not an executive order issued under Article 77 of the Constitution. Submission of the learned Government

Pleader is that the Office Memorandum dated 18.05.2012 was issued only by the Director and not by the Central Government also cannot be accepted since in the end of the Order it is mentioned that "this Order is issued with the approval of the competent authority". The Order was issued by the Director but the said order was issued with the approval of the competent authority as noted in the order itself. Learned Senior Government Pleader has placed reliance on the judgment of the Apex Court in **Gulf Goans Hotels Co. Ltd. v. Union of India** (AIR 2015 SC 2032) to contend that the order issued by the Central Government having not been in accordance with Article 77 is not an order and has no enforceability. **Gulf Goans Hotels's case** (supra) was a case where appellants have constructed beach resorts and beach bungalows. High Court has directed for demolition on the ground that those constructions were in violation of the guidelines issued by Internal Ministerial Committee by the Ministry of Tourism on 11.06.1986. Subsequently, Coastal

Regulation Zone (CRZ) Notification under the 1986 Act was issued on 19.02.1991. The constructions of the appellants were not in violation of the said Notification. It was contended by the appellants before the Apex Court that the guidelines having not been issued in accordance with Article 77 are unenforceable and on that basis, the direction to demolish the construction was invalid. Learned Senior Government Pleader relied on paragraphs 15, 17 and 21 of the judgment which are to the following effect:

“15. Article [77](#) of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article [77](#) provides that all executive action of the Government must be expressed to be taken in the name of the President. The celebrated author H.M. Seervai in Constitutional Law of India, 4th Edition, Volume 2, 1999 describes the consequences of Government orders or instructions not being in accordance with Clauses (1) or (2) of Article [77](#) by opining that the same would deprive of the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden would be on the Government to show that

they were, in fact, so made. In the present case, the said burden has not been discharged in any manner whatsoever. The decision in *Air India Cabin Crew Association v. Yeshaswinee Merchant*: (2003) 6 SCC 277-para 72, taking a somewhat different view can, perhaps, be explained by the fact that in the said case the impugned directions contained in the Government letter (not expressed in the name of the President) was in exercise of the statutory power Under Section [34](#) of the Air Corporations Act, 1953. In the present case, the impugned guidelines have not been issued under any existing statute.

17. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and would really represent an expression of opinion. In law, the said guidelines and its binding effect would be no more than what was expressed by this Court in *State of Uttaranchal v. S.K. Vaish*: (2011) 8 SCC 670 in the following paragraph of the report:

“It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles [77\(1\)](#) and [166\(1\)](#)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the Governor, as the case may be [Articles [77\(2\)](#) and [166\(2\)](#)]. In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government.” [Para 23]

“A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter

under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles [77\(1\)](#) and (2) or Articles [166\(1\)](#) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article [77\(2\)](#) or Article [166\(2\)](#). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot take cognizance of the earlier noting or decision for exercise of the power of judicial review." [Para 24]

21. If the guidelines relied upon by Union of India in the present case fail to satisfy the essential and vital parameters/requirements of law as the trend of the above discussion would go to show, the same cannot be enforced to the prejudice of the Appellants as has been done in the present case. For the same reason, the issue raised with regard to the authority of the Union to enforce the guidelines on the coming into force of the provisions of the Environment Protection Act so as to bring into effect the impugned consequences, adverse to the Appellants, will not require any consideration".

In the aforesaid case the Apex Court held that the guidelines relied on by Union of India were not issued in accordance with the procedure prescribed in the rules framed under Article 77, hence they have no statutory force. The above case is clearly distinguishable and not applicable to the facts of the present case. Distinction of the present case is

clearly made out in view of the observations made by the Apex Court in paragraph 15 itself. A case cited before the Apex Court in **Air India Cabin Crew Association v. Yeshawinee Merchant** ([2003] 6 SCC 277) was distinguished by the Apex Court holding that in the said case Government letter was issued in exercise of the statutory power under Section 34 of the Air Corporation Act, 1953. When an order is issued in exercise of the statutory power it is not an executive order so as to conform to the rule framed under Article 77(2). As noted above, Office Memorandum dated 18.05.2012 issued by the MoEF was in exercise of the powers under the 1986 Act, hence the reliance placed by the learned Senior Government Pleader **Gulf Goans Hotels's case** (supra) by the learned Senior Government Pleader is misplaced.

21. The Division Bench of this Court in **All Kerala River Protection Council's case** (supra) has elaborately considered the Office Memorandum dated 18.05.2012 and has held that the above Order issued by the MoEF was

not confined only to implementation of the judgment of the Apex Court in **Deepak Kumar's case** (supra) rather it introduced a mechanism for obtaining environmental clearance for lease area having less than 5 hectares. Use of the word “henceforth” in paragraph 3 was specifically noted. It is useful to quote paragraphs 53, 54, 55 and 56:

“53. After the judgment of the Apex Court dated 27/02/2012 in **Deepak Kumar's case** (supra) Government of India, Ministry of Environment and Forests came up with office memorandum dated 18/05/2012. By direction dated 18/05/2012, the Government of India included mining areas of less than 5 hectares under the environment regime as contemplated by Notification dated 14/09/2006. Government of India directed that mining projects with lease area upto less than 50 hectares including projects of minor mineral with lease area less than 5 hectares would be treated as category B.

54. The above direction of Government of India is clearly referred to its power under S.5 of the 1986 Act providing for environmental clearance for lease area less than 5 hectares. Thus there remains no doubt that even for lease area less than 5 hectares, after the judgment of the Apex Court in **Deepak Kumar's case** (supra) environmental clearance is required for grant / renewal of mining lease.

55. Question as to whether mining lease for areas less than

5 hectares which were continuing on the date of the Apex Court Judgment in Deepak Kumar's case (supra) required environmental clearance has to be examined looking into the directions issued by the Apex Court as well as the order of the Government of India dated 18/05/2012.

56. Order of the Apex Court in Deepak Kumar's case (supra) is in the nature of an interim order which is clear by the words used "in the meanwhile". The order directed that leases of minor minerals including their renewal for an area of less than five hectares be granted by the State / Union Territories only after getting environmental clearance from MoEF. The order thus used the words "be granted" which clearly meant that it referred to the leases to be granted, after the Government of India's order dated 18/05/2012. Paragraph 3 of the order used the word "henceforth" which clearly meant that the order was to be operated with regard to leases and renewals which were to be granted for an area less than 5 hectares after the issue of the order".

22. We have held in the above case that after Office Memorandum dated 18.05.2012 for the leases or mining permits for area less than 5 hectares environmental clearance is to be obtained. The said order still continues to be in force and cannot be said to be wiped out merely because the 2015 Rules have been framed by the State Government. Rule 12 proviso is clearly not in accord with the Office Memorandum

dated 18.05.2012. Renewal of mining permit is also a grant, hence for renewal also as per Office Memorandum dated 18.05.2012, environmental clearance was necessary. Thus we conclude that Office Memorandum dated 18.05.2012 has been issued in exercise of the powers under the 1986 Act and further order dated 18.05.2012 cannot be said to have become infructuous after framing of the 2015 Rules by the State Government.

23. It is further relevant to note that in **All Kerala River Protection Council's case** (supra) Rule 12 proviso came up for consideration. Rule 12 originally contained a proviso that environmental clearance required under the 2015 Rules shall not be insisted in the case of renewal of quarrying permits as on 09.01.2015. The Division Bench considered the proviso and laid down the following in paragraph 71:

“71. One submission which has ben pressed by the learned counsel for the intervenors is that proviso has been engrafted in R.12 to the effect that environmental clearance required under R.9 shall not be insisted, in the case of renewal of quarrying permits, in

respect of quarries which had a valid permit as on 9th day of January, 2015. Whether the permit was valid as on 09/01/2015 is the question which has to be examined with regard to the facts of each case / each permit. We having held that after the judgment of the Apex Court in Deepak Kumar's case and the order of the Government of India, Ministry of Environment and Forests dated 18/05/2012 all mining operations required environmental clearance with regard to area less than 5 hectares for obtaining permit thereafter or renewal environmental clearance is required. We thus are of the view that the concept of valid permit as on 09/01/2015 under the proviso to R.12 has to be read accordingly. There being no challenge before us with regard to any of the 2015 Rules, it is not necessary for us to say anything more. Issue Nos. II and VII are answered accordingly”.

The Division Bench clearly held that in view of the judgment of the Apex Court in **Deepak Kumar's case** (supra) and Office Memorandum dated 18.05.2012, all mining operations required environmental clearance with regard to area less than 5 hectares. The Division Bench held that the concept of valid permit as on 09.01.2015 has to be thus read accordingly. The Division Bench clearly read down that the proviso to Rule 12 in the above manner. In a subsequent judgment, we had further occasion to consider the proviso to Rule

12 as it existed originally in **Najeeb's case** (supra) in which judgment referring to our earlier judgment in **All Kerala River Protection Council's case** (supra) the following was laid down in paragraph 8:

"8. Division Bench has held that the proviso to Rule 12 in respect of quarries which has valid permit as on January, 2015 have to be read in accordance with the law as has been noticed and laid down in the judgment. When it has been held by the Division Bench that no mining operation can be undertaken without obtaining environmental clearance subsequent to the date as mentioned above, no mining operation can be carried out by any permit holder without obtaining environmental clearance. The word 'valid permit' used in the proviso to Rule 12 has to be read accordingly. The word 'valid permit' means permit which may entail a permit holder to carry on mining operation and mining operation can only be carried out along with environmental clearance. Those permit holders who does not have environmental clearance cannot be said to have valid permit on the relevant date. We, thus, are of the view that no error has been committed by the learned Single Judge in refusing to modify the interim order."

All the above issues were again considered by the Division Bench in **Paristhithy Samrakshana Janakeeya Samithy's case** (supra) in which the following was laid down in paragraphs 8, 9, 10, 12 and 13:

"8. As noted above, the main concern shown in this public interest litigation is carrying on quarrying operations without there being valid permits by the private respondents. Permits which were even claimed by the private respondents on the basis of which they were carrying mining operations have already come to an end as noted above. Petitioners have a grievance that permits of the private respondents were renewed without they having obtained or submitted any environmental clearance. Petitioners have relied on the Division Bench judgment of this Court in All Kerala River Protection Council v. State of Kerala (supra). The Division Bench had occasion to consider all aspects of the mining operations in the State by lease or mining permit as well as the consequences of the Rules 2015. The Division Bench after relying on the judgment in Deepak Kumar and Others v. State of Haryana & Others (supra) as well as the orders issued by the Central Government which were referable to Environment Protection Act, 1986 recorded its conclusion in paragraph 82 which is extracted below:

"82. In view of the foregoing discussion, we come to the following conclusions.

(i) In case where quarrying/mining/lease which were existing on the date of issuance of Notification dated 14.09.2006 or on the date of issue of the order dated 18.05.2012 by the Government of India, Ministry of Environment and Forests with regard to area less than 5 hectares no environmental clearance with regard to extraction of minor mineral is required. Notification dated 14.09.2006 contemplated obtaining environmental clearance only with regard to new projects/new activities.

(ii) Government Order dated 10.01.2014 cannot be relied on by the parties in view of the restraint order issued by the National Green Tribunal dated 27.09.2013 till such time the restraint order continues.

(iii) By amendment of Section 14 by Act 37 of 1986 making Section 4 applicable to minor minerals also the provision contained in Section 4 shall be applicable to mining operations by a person holding mining lease or any other kind of mineral concession. It cannot be accepted that mining operation with effect from 10.02.1987 cannot be continued by a person holding any other mineral concession apart from mining lease.

(iv) Judgment of the Apex Court in Deepak Kumar's case (supra) did not contemplate environmental clearance for an area less than 5 hectares with regard to existing mining lease/mining permits on the date of judgment. Paragraph 29 of the judgment clearly directed that leases of minor minerals including their renewal for an area of less than five hectares be granted by the State/Union Territories only after getting environmental clearance.

(v) Environmental clearance as contemplated by Notification dated 14.09.2006 required environmental clearance for new projects/new activities.

(vi) The Notification dated 14.09.2006 having been applied vide order dated 18.05.2012 of the Government of India, Ministry of Environment and Forests all mining operations for new project and new activities for an area less than 5 hectares after 18.05.2012 required environmental clearance carried through either a mining lease or mining permit.

(vii) Interim order passed by the Apex Court on 27.01.2012 was intended by the Supreme Court to operate till the Rules have been framed by the States taking into consideration the guidelines and recommendations of the Ministry of Environment and Forests.

(viii) As per Rule 68 no mining/quarrying operations can be permitted without there being an approved mining plan. But such rule is subject to exception as engrafted in Rule 66, i.e., for existing lease holders, time has been allowed to submit mining plan."

9. In view of the law laid down by the Division Bench as above, no mining operations by mining permit is permissible without obtaining environmental clearance as required by notification dated 14.09.2006 read with the order of the Central Government dated 18.05.2012.

10. Rules 2015 now also do prescribe obtaining of environmental clearance before grant of mining permit or renewal

of mining permit. One of the issues which has been raised in this Writ Petition is regarding the validity of the 1st proviso to Rule 12. Rule 12 for ready reference is quoted below:

"12. Renewal of a quarrying permit.—On receipt of an application in Form - A, a quarrying permit may be renewed for a further period of two years but not exceeding one year at a time after complying with the procedure provided for grant of quarrying permit under R.9 and subject to the production of all other statutory licenses/clearances/No Objection Certificate, etc. from other statutory authorities concerned:

Provided that, the environmental clearance required under R.9 shall not be insisted, in the case of renewal of quarrying permits, in respect of quarries which had a valid permit as on 9th day of January, 2015.

Provided further that the approved mining plan required under R.9 shall not be insisted till 1st April, 2016 for renewal of a quarrying permit."

The Division Bench of this Court in All Kerala River Protection Council v. State of Kerala (supra) had occasion to consider Rule 12, 1st proviso. The Division Bench in the context of Rule 12 held thus:

"71. One submission which has been pressed by the learned counsel for the intervenors is that proviso has been engrafted in R.12 to the effect that environmental clearance required under R.9 shall not be insisted, in the case of renewal of quarrying permits, in respect of quarries which had a valid permit as on 9th day of January, 2015. Whether the permit was valid as on 09/01/2015 is the question which has to be examined with regard to the facts of each case/each permit. We having held that after the judgment of the Apex Court in Deepak Kumar's case and the order of the Government of India, Ministry of Environment and Forests dated 18/05/2012 all mining operations required environmental clearance with regard to area less than 5 hectares for obtaining permit thereafter or renewal environmental clearance is required. We thus are of the view that the concept of valid permit as on 09/01/2015 under the proviso to R.12 has to be read accordingly.

There being no challenge before us with regard to any of the 2015 Rules, it is not necessary for us to say anything more. Issue Nos. II and VII are answered accordingly."

The Division Bench held that the proviso to Rule 12 refers to valid permit. Thus while renewing permit under Rule 12, environmental clearance need not be insisted only when the applicant had valid permit on 09.01.2015. The Division Bench had occasion to further consider and interpret the proviso to Rule 12 in *Najeeb v. Shoukath Ali* (2015 (3) KLT 396). Referring to the judgment of the Apex Court in *Deepak Kumar and Others v. State of Haryana & Others* (supra), the Division Bench in its judgment dated 15.07.2015 has laid down the following in paragraph 8:

"8. Division Bench has held that the proviso to Rule 12 in respect of quarries which has valid permit as on January, 2015 have to be read in accordance with the law as has been noticed and laid down in the judgment. When it has been held by the Division Bench that no mining operation can be undertaken without obtaining environmental clearance subsequent to the date as mentioned above, no mining operation can be carried out by any permit holder without obtaining environmental clearance. The word 'valid permit' used in the proviso to Rule 12 has to be read accordingly. The word 'valid permit' means permit which may entail a permit holder to carry on mining operation and mining operation can only be carried out along with environmental clearance. Those permit holders who does not have environmental clearance cannot be said to have valid permit on the relevant date. We, thus, are of the view that no error has been committed by the learned Single Judge in refusing to modify the interim order."

From the above discussion it is clear that while granting renewal of permit under Rule 12, obtaining environmental clearance need not be insisted only when the applicant had valid permit as on 09.01.2015. On 09.01.2015 for a valid permit for carrying on mining operations, obtaining environmental clearance is a precondition. Thus only those permits can take benefit of Rule 12,

1st proviso which were permits having valid permit as on 09.01.2015.

12. Statutory authorities are under statutory obligation to ensure that no mining operation is carried out in disregard to the statutory provisions and requirement of law. Under Article [48A](#), the State is obliged to protect and improve the environment.

13. Protection of environment is possible only when all regulatory regimes are followed. The State which is enjoined to protect the rights of individuals and to provide environment for protection of the rights guaranteed under Article [21](#) cannot negate its duty or close its eyes to illegal mining operations being carried out by certain persons whose only interest is to earn by exploiting natural resources. Petitioners by this Writ Petition has rightly raised the issues in public interest and we are of the considered opinion that petitioners have made out a case for issuing appropriate directions to the appropriate authority”.

When the Division Bench as noted above, interpreting the proviso to Rule 12 as it existed at the relevant time held that valid permit to enable a permit holder to carry on mining operations means valid permit obtained with environmental clearance, the said declaration of law shall equally apply with regard to any mining operation undertaken even after the amendment of Rule 12 as per Notification dated 05.10.2015. We

thus come to the conclusion that the amendment brought as per Notification dated 05.10.2015 is not in consonance with the Division Bench judgment of this Court in aforementioned three cases. Issue Nos.II, III, IV & V are answered accordingly.

ISSUE NO.VI

24. As observed above, the concern that environment and protection of natural resources grew world wide in the latter half of the 20th Century. By the Constitutional Amendment Act, 1976, Article 48A has been inserted in part IV of the Constitution enjoining upon the State to endeavour to improve and protect the environment to safeguard the forest and wild life of the country. Article 48A is quoted as follows:

“48A. Protection and improvement of environment and safeguarding of forests and wild life.- The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”.

By the same Constitutional Amendment Part IVA (fundamental duties) was also incorporated in the Constitution. Article 51A(g) provided as follows:

“51A. Fundamental duties.-....

.....

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”.

Justice O.Chinnappa Reddy sounded the concern while making the following observation in **State of T.N. v. M/s.Hind Stone etc.** (1981 SC 711) in paragraph 6 which is to the following effect:

“6. Rivers, Forests, Minerals and such other resources constitute a Nation's natural wealth. These resources are not to be frittered away and exhausted by any one generation. Every generation owes a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. It is in the interest of mankind. It is in the interest of the Nation. It is recognised by Parliament. Parliament has declared that it is expedient in the public interest that the Union should take under its control the regulation of mines and the development of minerals. It has enacted the Mines and Minerals (Regulation and Development) Act, 1957. We have already referred to its salient provisions. Section 18, we have noticed, casts a special duty on the Central Government to take necessary steps for the conservation and development of minerals in India. Section 17 authorises the Central Government itself to undertake prospecting or mining operations in any area not already held under any prospecting licence or mining lease. Section 4A empowers the State

Government on the request of the Central Government, in the case of minerals other than minor minerals, to prematurely terminate existing mining leases and grant fresh leases in favour of a Government Company or Corporation owned or controlled by Government, if it is expedient in the interest of regulation of mines and mineral development to do so. In the case of minor minerals, the State Government is similarly empowered, after consultation with the Central Government. The public interest which induced Parliament to make the declaration contained in Section 2 of the Mines and Minerals (Regulation and Development) Act, 1957, has naturally to be the paramount consideration in all matters concerning the regulation of mines and the development of minerals. Parliament's policy is clearly discernible from the provision of the Act. It is the conservation and the prudent and discriminating exploitation of minerals, with a view to secure maximum benefit to the community. There are clear sign posts to lead and guide the subordinate legislating authority in the matter of the making of rules".

25. The Apex Court time and again has been emphasising about the protection of natural resources. In **M.C.Mehta v. Kamal Nath and Others** ([1997] 1 SCC 388), in paragraphs 23, 25 and 34 the Apex Court laid down the following:

"23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the

environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled an ecological perspective on property: A call for judicial protection of the public's interest in environmentally critical resources published in Harvard Environmental Law Review Vol. 12, 1988 page 311 in the following words:

"Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970's as well as the pesticide scare of the 1960's. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained."

"[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. "There is a limit to the capacity of the environment to service ... growth, both in providing raw materials and in assimilating by product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable."

Professor Barbara Ward has, written of this ecological imperative in particularly vivid language:

"We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death."

There is a commonly recognized link between laws and social values, but to ecologists a balance between laws and values

is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources - for example, wetlands and riparian forests can no longer be destroyed without enormous long term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions.

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the

enjoyment of the general public rather than to permit then use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority:

“Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.”

34. Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.”

The Apex Court in **T.N. Godavarman Thirumalpad v. Union of India and Others** ([2002] 10 SCC 606) has emphasised that it is the duty and constitutional obligation of the State to protect the natural resources. In paragraph 17 the following was laid down:

“17. Art.48A in Part IV (Directive Principles) of the Constitution of India, 1950 brought by the Constitution (Forty second Amendment) Act, 1976, enjoins that "State shall endeavour to protect and improve the environment and to safeguard the forests

and wildlife of the country". Art.47 further imposes the duty on the State to improve public health as its primary duty. Art.51A(g) imposes "a fundamental duty" on every citizen of India to protect and improve the natural "environment" including forests, lakes, rivers and wildlife and to have compassion for living creatures. The word "environment" is of broad spectrum which brings within its ambit "hygienic atmosphere and ecological balance". It is, therefore, not only the duty of the State but also the duty of every citizen to maintain hygienic environment. The State, in particular has a duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Art.21 protects right to life as a fundamental right. Enjoyment of life and its attainment including the right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man made and the natural environment. Therefore, there is constitutional imperative on the Central Government, State Governments and bodies like municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve the man made environment and

natural environment”.

In **T.N. Godavarman Thirumulpad v. Union of India and Others** ([2006] 1 SCC 1) the Apex Court laid down that it is the obligation of all concerned including Union and State Governments to conserve natural resources which are assets of the entire Nation. The following was laid down in paragraph 1:

“1. Natural resources are the assets of entire nation. It is the obligation of all concerned including Union Government and State Governments to conserve and not waste these resources. Art.48A of the Constitution of India requires the State shall endeavour to protect and improve the environment and to safeguard the forest and wild life of the country. Under Art.51A, it is the duty of every citizen to protect and improve the natural environment including forest, lakes, rivers and wild life and to have compassion for living creatures”.

One more significant pronouncement was made by the Apex Court in **M.C. Mehta v. Union of India** ([2004] 12 SCC 118) held that development and the protection of environment are not enemies but in case of doubt, however, protection of environment would have precedence over the economic interest. The following was laid

down in paragraph 48:

“48. Development and the protection of environment are not enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, a series of orders have been passed by this Court in [T.N. Godavarman case T. N. Godavarman Thirumullpad v. Union of India, 1991 Supp (2) SCC 665; 1997 (2) SCC 267; 1997 (3) SCC 312; 1997 (5) SCC 760; 1997 (7) SCC 440; 1997 (10) SCC 775; 1998 (2) SCC 59, 341; 1998 (6) SCC 190; 1998 (9) SCC 632, 660, 672; 1999 (5) SCC 736; 1999 (9) SCC 121, 151, 216; 2000 (6) SCC 413; 2000 (10) SCC 494, 579, 645; 2002 (9) SCC 502] regulating the felling of trees in all the forests in the country. Principle 15 of the Rio Conference of 1992 relating to the applicability of precautionary principle, which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation, is also

required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straitjacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment”.

In **Deepak Kumar's case** (supra), the Apex Court expressed the same concern i.e., without conducting any environmental study, States are issuing notices for grant of licences/permits for exploiting the minerals which is affecting the environment, river beds, etc.

26. From the above, it is clear that it is the Constitutional obligation of the States to protect environment and Article 48A which is part of the directive principle of State policy enjoins the State to make its policy in conformity with the principle as contained in Article 48A. In the present case, the

principle challenge is to the proviso to Rule 12 of the 2015 as inserted by Notification dated 05.10.2015. Petitioner's case is that the said proviso deserves to be declared as arbitrary, unreasonable and unconstitutional. What are the grounds for striking down a subordinate legislation need to be looked into before embarking upon the enquiry further.

27. The Apex Court in **Indian Express Newspapers v. Union of India** ([1985] 1 SCC 641) lays down that subordinate legislation may be questioned on any of the grounds on which plenary legislation is to be questioned. In addition it may also be questioned on the ground that it does not conform to the statute or on the ground that it is unreasonable. The following was laid down in paragraph 75:

“75. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute.

That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock L. J. in *Mixnam. Properties Ltd. v. Chertsey U. D. C.*, (1964) 1 QB 214 thus:-

"The various grounds upon which subordinate legislation has sometimes been said to be voidcan, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say : "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires" If the courts can declare subordinate legislation to be invalid for "uncertainty," as distinct from unenforceablethis must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain ."

28. Again in *Secretary, Ministry of Chemicals & Fertilizers v. Cipla Ltd.*, ([2003] 7 SCC 1) grounds for challenge of subordinate legislation was reiterated in paragraph 4.1 which is quoted below:

"4.1 It is axiomatic that the contents of a policy document cannot be read and interpreted as statutory provisions. Too much of legalism cannot be imported in understanding the scope and

meaning of the clauses contained in policy formulations. At the same time, the Central Government which combines the dual role of policy - maker and the delegate of legislative power, cannot at its sweet will and pleasure give a go - bye to the policy guidelines evolved by itself in the matter of selection of drugs for price control. The Government itself stressed the need to evolve and adopt transparent criteria to be applied across the board so as to minimize the scope for subjective approach and therefore came forward with specific criteria. It is nobody's case that for any good reasons, the policy or norms have been changed or became impracticable of compliance. That being the case, the Government exercising its delegated legislative power should make a real and earnest attempt to apply the criteria laid down by itself. The delegated legislation that follows the policy formulation should be broadly and substantially in conformity with that policy; otherwise it would be vulnerable to attack on the ground of arbitrariness resulting in violation of Art.14".

29. Petitioners' contention is that there is no rational nexus with the objects sought to be achieved by granting exemption to those permit holders who had mining permit on or before 26.02.2012. It is submitted that the Apex Court in **Deepak Kumar's case** (supra) as well as Office Memorandum dated 18.05.2012 issued by the MoEF has directed that no mining activities be permitted without obtaining environmental clearance thereafter.

Restriction was both on the fresh grant and renewals of the mining leases. When the restriction is there with regard to renewal of a mining lease whether exemption to a mining permit which was current prior to 26.02.2012 has any rational nexus with the objects sought to be achieved. The object and the Constitutional obligation on the State as noted above, is to take steps and frame its policies to conserve natural resources and permit mining operation in accordance with the environmental study. There is no dispute that mining permits were granted prior to the judgment of the Apex Court in **Deepak Kumar's case** (supra) and before the Office Memorandum dated 18.05.2012 without any environmental study. When the permits were granted prior to 26.02.2012 without environmental study, whether those permits should be renewed without insisting any environmental clearance, has no nexus with the object sought to be achieved. As noted above, as per Rule 9, mining permits can be granted only after obtaining environmental clearance. When the 2015 Rules has made

provision for environmental clearance for grant of permit in accordance with the statutory regulations and the observations and directions made by the Apex Court in **Deepak Kumar's case** (supra), creating an exception for limited category of permit holders who had valid permit prior to 26.02.2012 has no rational nexus with the objects sought to be achieved. In view of the above, we are of the clear opinion that proviso to Rule 12 as inserted by Notification dated 05.10.2015 is arbitrary and unreasonable. We have observed that proviso to Rule 12 inserted by Notification dated 05.10.2015 cannot be said to be in accordance with the law laid down by the Division Bench of this Court in **All Kerala River Protection Council's case** as well as **Najeeb's case** (supra). In paragraph 8 of the decision in **Najeeb's case** (supra) the following was laid down by the Division Bench:

"8. Division Bench has held that the proviso to Rule 12 in respect of quarries which has valid permit as on January, 2015 have to be read in accordance with the law as has been noticed and laid down in the judgment. When it has been held by the Division Bench

that no mining operation can be undertaken without obtaining environmental clearance subsequent to the date as mentioned above, no mining operation can be carried out by any permit holder without obtaining environmental clearance. The word 'valid permit' used in the proviso to Rule 12 has to be read accordingly. The word 'valid permit' means permit which may entail a permit holder to carry on mining operation and mining operation can only be carried out along with environmental clearance. Those permit holders who does not have environmental clearance cannot be said to have valid permit on the relevant date. We, thus, are of the view that no error has been committed by the learned Single Judge in refusing to modify the interim order".

The Division Bench has held that no mining operation can be undertaken without obtaining environmental clearance subsequent to Office Memorandum dated 18.05.2012 for any fresh activity, no mining operation is permissible by a permit without obtaining environmental clearance. Proviso to Rule 12 having inserted by Notification dated 05.10.2015 is thus not in accord with the law as laid down by the Division Bench, hence the said proviso has to be held as unconstitutional. We thus answer Issue No.VI holding that proviso to Rule 12 inserted by Notification dated 05.10.2015 is

manifestly arbitrary, unreasonable and deserves to be declared as unconstitutional.

ISSUE NO.VII

30. Now we come to the last issue as to what reliefs petitioners are entitled in these Writ Petitions.

31. In W.P(C) No.34463 of 2015, which is the leading Writ Petition, the only prayer is to strike down the proviso to Rule 12 inserted BY Notification dated 05.10.2015. The first proviso to Rule 12 inserted as per Notification dated 19.05.2015 having already substituted by Notification dated 05.10.2015, there is no necessity to consider the validity of the first proviso to Rule 12 of the 2015 Rules, inserted as per Notification dated 19.05.2015. We have already held that the proviso inserted by Notification dated 05.10.2015 being unconstitutional, W.P(C) No.34463 of 2015 deserves to be allowed.

32. Prayers in W.P(C) No.33463 of 2015 and WP(C) No.8531 for declaring the proviso to Rule 12 inserted by

Notification dated 05.12.2015 as unconstitutional has also to be allowed.

33. In W.P(C) No.33463 of 2015, one of the prayers is to direct respondents 1 and 2 to make Regulation 164 of the Metalliferous Mine Regulations as a mandatory condition for granite quarries in the State. In the Division Bench Judgment of this Court in **Paristhithy Samrakshana Janakeeya Samithy's case** (supra) the Division Bench has considered the submission based on the 1961 Regulations. In paragraph 14, the following was observed:

“14. One more submission which has been emphasised by the learned counsel for the petitioners is that the private respondents while carrying on mining operations are not following the provisions of the Mines Act or the 1961 Regulations. It is submitted that provisions of the Mines Act and 1961 Regulations provide for safety of mines and the work. It is submitted that Mines and Mineral (Development and Regulations) Act, 1957 and the Rules framed thereunder are basically concerned with extraction of the minerals and methods of safety are provided elsewhere. It is submitted that the private respondents who had been carrying on mining operations are engaged in open cast mining and hence various restrictions as contained in the Mines Act are also attracted.

Referring to Section [3](#) of the Mines Act learned counsel for the petitioners submitted that although Section [3\(1\)](#) provides exemption with regard to mining of murrum, laterite, boulder, gravel, shingle, ordinary sand, etc. but where the depth of excavation exceeds six metres or persons employed are more than 50 and explosives are used, Regulation under the Mines Act comes into play and exemption is taken away”.

In the operative portion of the said judgment this Court has issued the following direction as direction No.2:

“(2) The 2nd respondent shall also ensure that relevant provisions of the Mines Act, 1952 and Metaliferous Regulations, 1961 as far as applicable to a mining operation is followed in its letter and spirit and in event the aforesaid provisions are violated, appropriate action under the said provisions be promptly taken”.

In view of the above, the directions already issued by the Division Bench are sufficient to protect the interest of the petitioner and ends of justice will be served by issuing similar directions in this Writ Petition also. The further prayer is to direct respondents 1 and 2 to ensure that respondents 4 and 5 and all other quarry operators in the State are running quarries only after obtaining approved mining plan and environmental clearance. Suffice to say that we having

held that environmental clearance is necessary for carrying on mining operations, it is to be ensured by all concerned that no mining operation under mining permit is to be carried out without environmental clearance. In W.P(C) No.8531 of 2015, apart from challenging the second proviso to Rule 12 of the 2015 Rules, the petitioners have also prayed for a direction to the State respondents to take steps to close down forthwith the entire mining activities done by respondent Nos.10 to 30 or any other persons and to take relevant steps against those who damage the environment by doing unauthorised and illegal mining operations.

In view of the foregoing discussion, we dispose of all the Writ Petitions in the following manner:

(1) The proviso to Rule 12 of the 2015 Rules inserted by Notification dated 05.10.2015 is declared as unconstitutional and inoperative.

(2) Concerned authorities shall also ensure that relevant provisions of the Mines Act, 1952 and Metalliferous Mine

Regulations, 1961 as far as applicable to mining operations carried by, on the strength of mining permit is followed in its letter and spirit and in the event the aforesaid provisions are violated, appropriate action under the said provisions be taken by the concerned authorities.

(3) State respondents, including concerned District Collectors and Geologists shall take steps to ensure that no mining operations be carried out by any person holding mining permit without obtaining environmental clearance as contemplated by the 2015 Rules.

Parties shall suffer their own costs.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**