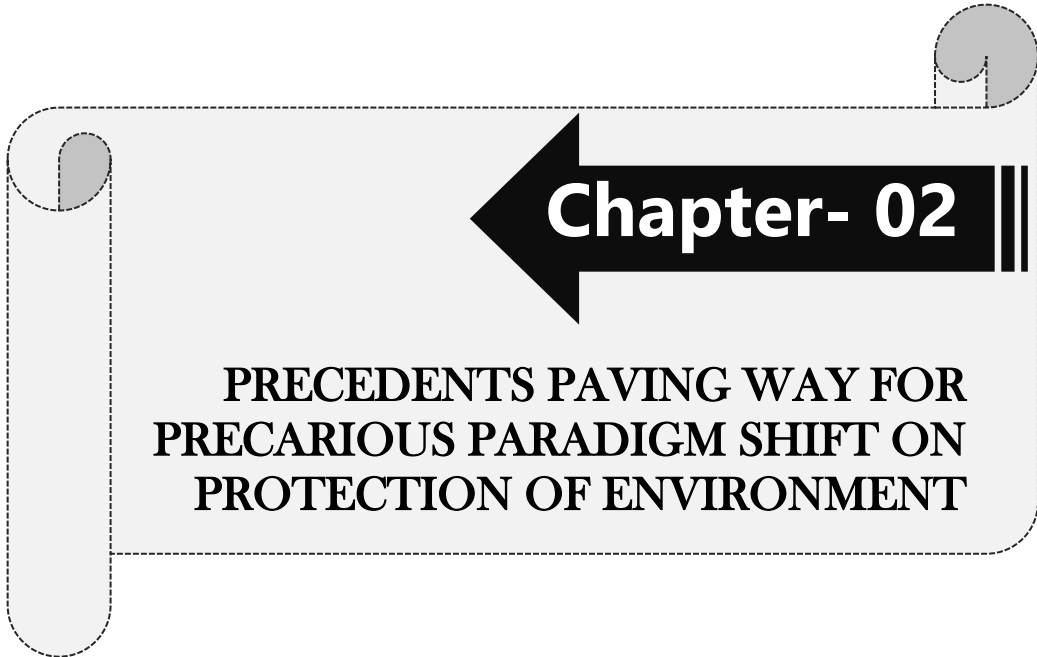




Chapter- 02

PRECEDENTS PAVING WAY FOR PRECARIOUS PARADIGM SHIFT ON PROTECTION OF ENVIRONMENT

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ABSTRACT

A comprehensive Indian environmental legislation has been developed thanks to the multiple advancements brought about by judicial activism. The Supreme Court has voiced concern about routinely granting such ex post facto approval, no system of law or rules has been established. In addition, the polluter pays principle should be applied in such circumstances, modified, and expanded to the level required to restore and safeguard the environment on a strict and mandated basis, with the establishment of a Board/body responsible for environmental restoration.

Key Word: Restoration, Environment, Polluters.

Development and the environment are two sides of the same coin, and none can be given up for the other. On the other hand, both are crucial for a better future for us. The Supreme Court and the High Courts must proceed in this case with the utmost caution; only then will we be able to achieve our objective of creating a developed nation free of pollution for the coming generation.

According to a recent prediction by the 2022 Environmental Performance Index, almost 50% of the world's remaining greenhouse gas emissions in 2050 will come from China, India, the United States, and Russia. A few weeks before, the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report emphasized as a final caution that immediate deep emissions reductions are necessary across all sectors if global warming is to be confined to 1.5°C. UN Secretary-General Antonio Guterres added at the release of the IPCC Report, "Some government and business leaders are saying one thing, but doing another. In other words, they are lying. And the outcomes will be disastrous."

Numerous final cautions on the effects of climate change have been given, but they have not led to a significant acknowledgment of the acts or omissions that cause it, to be recognized as legal wrongs with suitable remedies in India. The standpoint from which environmental issues are regarded is one obstacle to the articulation of climate change as a legal wrong in India, aside from the lack of a climate-related parliamentary act. Despite the fact that the wide-ranging effects of climate change are well known and easily accessible, the environmental catastrophe is still viewed as a "pollution problem." The conduct of environmentally irresponsible entities and the way courts treat them show the narrow perspective of the pollution paradigm.ⁱ

Resource management, a significant issue that stresses the concept of "sustainable development," which emphasizes that the right to development should not

have a negative influence on the potential of natural resources, was always on our minds.

Since the majority of environmental issues before the Apex Courtⁱⁱ are the result of public interest litigation (PIL) under Articles 32 and 226 of the Indian Constitution, this PIL has also been crucial in promoting environmental protection.

We now know that no trade or business that is harmful to flora and fauna or humans can be conducted in the name of the fundamental right. However, it is occasionally discovered that these industries, businesses, or trades are conducted in a way that endangers vegetation cover, animals, aquatic life, and human health. In light of this, we can only pray that the court would embrace a sustainable development policy and play a crucial part in preserving the environment and promoting India's economic growth.

A comprehensive Indian environmental legislation has been developed thanks to the multiple advancements brought about by judicial activism. Thus, the Supreme Court of India has demonstrated its superiority in the area of environmental justice administration not only before the legislative and executive, but also before its counterparts in industrialized and developing countries, regardless of their age.

"Any disturbance of the essential environment elements, namely air, water, and soul, which are necessary for living, would be hazardous to life," the Supreme Court ruled in *M. C. Mehta v. Kamal Nath*ⁱⁱⁱ. As a result, a court with jurisdiction under Article 32 may impose fines for environmental destruction in addition to monetary damages.^{iv}

In *Abhilash Textiles v. Rajkot Municipal Corporation*^v, the Gujarat High Court ruled that "the petitioners cannot be allowed to harvest profit at the price of the public health."

In order to protect the happiness and health of the locals, it is advised that hazardous industries not be located in or close to densely populated areas or colonies. It relates to Articles 48A and 51A (g) of the Directives and Principles of State Policy.

With the help of the "polluter pays" and "public trust theory" as well as the "polluter pays" and "precautionary principles," Indian courts have given environmental law fresh meaning and substance. The environmental rule of law, ecocentrism, and other more recent ones like the "species best-interest standard" have also entered the legal system. Courts all throughout the world frequently cite Supreme Court decisions for their audacious and forward-thinking perspectives. Overall, India is a prime example of

a country with 1.3 billion people, millions of whom live in poverty, prioritizing environmental law and safeguarding its ecological riches.

The Supreme Court's rulings in *Pahwa Plastics*^{vi} Pvt. Ltd. on March 22, 2022, and *Electrosteel Steels Ltd.*, issued in 2021, collectively deviate significantly from the court's illustrious past and signal a dramatic change in the court's attitude toward environmental issues.

The National Green Tribunal (NGT) ruled in June 2021 that it is legally compulsory for industrial units that produce synthetic organic compounds, specifically formaldehyde in the state of Haryana, to first acquire environmental clearance from the Union environment ministry. A public hearing and an environment impact assessment report were also required of the units before approval was given (or not).

The NGT determined that the units in question were functioning illegally because none of them had received an earlier environmental approval. The displeased industrial entities then petitioned the Supreme Court to overturn the tribunal's ruling. They argued that they were “bona fide under the impression” that they were not required to obtain environmental clearance to manufacture formaldehyde and further that “it was thought that Environmental Clearance was not required for (the) units”.

The Supreme Court was asked to decide whether an establishment with about 8,000 employees that was established after receiving "consent to establish" and "consent to operate" from the appropriate statutory authority and that had applied for ex post facto environmental clearance could be shut down while the clearance was being issued, even though it might not release pollutants or might be found to comply with the regulations.

A Supreme Court panel led by Justice Indira Banerjee came to the conclusion that manufacturing units of the appellants appoint roughly 8,000 personnel and have a high annual turnover. Regardless of whether the facility truly emits pollution, it is improper to shut down a business that supports the local community and the economy merely because it failed to acquire an environmental clearance in a timely manner. It was further observed that Ex post facto environmental approval should only be granted under rare circumstances and after taking into account all pertinent environmental issues, it was further observed.

The Act of 1986^{vii} does not forbid ex post facto [Environmental Clearance], according to the Honorable Supreme Court. In appropriate circumstances, where the projects are in compliance with environmental standards, some relaxations and even the

issuance of ex post facto EC in accordance with the legislation, in strict compliance with Rules, Regulations, Notifications, and/or applicable orders, are not prohibited.

The legality of post facto clearances is at the core of the ruling. Note that neither the Act of 1986^{viii} nor the Environment Impact Assessment Notification of 2006 use this phrase. It is a phrase that the executive first used in a "office memorandum," or instruction that regulated how the office operated. Prior environmental clearance, or statutory authority approval prior to the start of the activity, is what is required by law.

The court firmly established that "post facto permission" is legal in the Pahwa Plastics case^{ix}. A simple reading of the court's conclusion reveals that its main focus was on the industry's "8,000 employees" and "large annual turnover," as well as how it supports "livelihoods" and the "economy of the nation."

Additionally, a unit that does not get prior approval as required by law constitutes a "technical irregularity"; nonetheless, the court claims that this is true even if the unit pollutes the environment. This result is certain to have major ramifications for both the environmental rule of law and the citizens' right to life, which is protected by Article 21.^x

Pahwa Plastics case ^{xi} is also likely to have an impact since, up until now, courts have not seen environmental law infractions as simple statutory law violations but rather as an infringement of the constitutional right to clean air, water, and healthy ecosystems. The court has already authorized "post facto approvals," so this is nothing new. The ruling in Electrosteels Steel Ltd^{xii}. of 2021, which was also written by Justice Banerjee, in which a unit in Electrosteel that had received environmental clearance had moved its location away from the site for which the clearance had been granted by almost 5.3 km. The shift called for a new clearance because these clearances are site-specific and dependent on the ecological parameters of each site. However, the court decided differently: The issue is whether a business that supports hundreds of people and contributes to the nation's economy should be shut down for the technical irregularity of changing its location without first obtaining environmental clearance, without giving the business the chance to regularize its operation by obtaining the necessary clearances and permissions, even though the business may not otherwise be in violation of pollution laws. The response must be adverse. The court decided in the word ex post facto environmental clearance should not normally be provided, and particularly not for the asking. Ex post facto clearances, approvals, and/or elimination of technical irregularities in accordance with Notifications under the 1986 Act cannot be rejected rigidly and pedantically, disregarding the repercussions of halting the operation of a steel factory that is already in operation.

The Act of 1986^{xiii} permits "post facto approval," the court emphasized time and time again. However, there is no mention of "post facto approvals" in the Act. Additionally, "post facto" clearances are not mentioned in the Environment Impact Assessment Notification of 2006.

The court also granted complete power to decision-makers. Pahwa Plastics claims that although "ex post facto environmental clearance should not be obtained consistently," it may be given under "extraordinary situations". However, these "circumstances" are not yet known. Last but not least, the court set a time limit for the government to provide a "post facto approval" - "where the adverse effects of denial of ex post facto approval outweigh the consequences of regularization of operations by grant of ex post facto approval"

The duty of the State cannot be limited to that of a facilitator or generator of economic activity for the immediate improvement of the fortunes of the State, according to the Public Trust Doctrine, which is a part of the law of the land. In order to ensure sustainable development over the long term, the State must also serve as a trustee for the benefit of the general public in relation to the natural resources.

CONCLUSION

Although the Supreme Court has voiced concern about routinely granting such ex post facto approval, no system of law or rules has been established. In addition, the polluter pays principle should be applied in such circumstances, modified, and expanded to the level required to restore and safeguard the environment on a strict and mandated basis, with the establishment of a Board/body responsible for environmental restoration.