

The Role of Judicial Activism and Judicial Response to the Protection of Environment in India

Dr. K. L. Chandrashekhara

Assistant Professor of Law

Vidyavardhaka Law College, Mysuru, Karnataka, India

aijoorchandru@gmail.com

Abstract: *The environmental awareness needs to be cultivated in any society to be an ideal society, or rather to be more precise, in other words, an ideal society means, the society which has the environmental awareness. The dictionary meaning of the word 'environmental' is surrounding objects, region or circumstances and the phrase environmental awareness' will mean that one should be aware of his surrounding so that this surrounding is not disturbed. The Supreme Court and the High Courts have played an active role in the enforcement of constitutional provisions and legislations relating to environmental protection.*

Keywords: environmental awareness

I. INTRODUCTION

The environmental awareness needs to be cultivated in any society to be an ideal society, or rather to be more precise, in other words, an ideal society means, the society which has the environmental awareness. The dictionary meaning of the word 'environmental' is surrounding objects, region or circumstances and the phrase environmental awareness' will mean that one should be aware of his surrounding so that this surrounding is not disturbed. The Supreme Court and the High Courts have played an active role in the enforcement of constitutional provisions and legislations relating to environmental protection. The fundamental right to life and personal liberty enshrined in Article 21 has been held to include the right to enjoy pollution free air and water. A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for future generations and to ensure good quality of life that the legislature has enacted anti-pollution laws and incorporated many statutory provisions for the protection of the environment. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which has to be borne by the future generations. The judicial response to almost all environmental litigations has been very positive in India. The primary effort of the Court while dealing with the environmental related issues is to see the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws.

Over the years, together with a spreading of environmental consciousness, there has been a change in the traditionally held perception that there is a tradeoff between environmental quality and economic growth as people have come to believe that the two are necessarily complementary. The current focus on environment is not new environmental considerations have been an integral part of the Indian culture. The need for conservation and sustainable use of natural resources has been expressed in Indian scriptures, more than three thousand years old and is reflected in the constitutional, legislative and policy framework as also in the international commitments of the country.

Even before India's independence in 1947, several environmental legislation existed but the real impetus for bringing about a well-developed framework came only after the UN Conference on the Human Environment.¹ Under the influence of this declaration, the National Council for Environmental Policy and Planning within the Department of Science and Technology was set up in 1972. This Council later evolved into a full-fledged Ministry of Environment and Forests (MoEF) in 1985 which today is the apex administrative body in the country for regulating and ensuring

¹Stockholm, 1972.

environmental protection. After the Stockholm Conference, in 1976, constitutional sanction was given to environmental concerns through the 42nd Amendment, which incorporated them into the Directive Principles of State Policy and Fundamental Rights and Duties.

Since the 1970s an extensive network of environmental legislation has grown in the country. The MoEF and the pollution control boards (CPCB i.e. Central Pollution Control Board and SPCBs i.e. State Pollution Control Boards) together form the regulatory and administrative core of the sector.

A policy framework has also been developed to complement the legislative provisions. The Policy Statement for Abatement of Pollution and the National Conservation Strategy and Policy Statement on Environment and Development were brought out by the MoEF in 1992, to develop and promote initiatives for the protection and improvement of the environment. The EAP (Environmental Action Programme) was formulated in 1993 with the objective of improving environmental services and integrating environmental considerations in to development programmes.

Other measures have also been taken by the government to protect and preserve the environment. This chapter attempts to highlight only legislative initiatives towards the protection of the environment.

The Role of Legal Mechanism in India

The 73rd and 74th Constitutional amendments of 1992 recognized the three-tier structure of the government by devolution of power to the local bodies namely, panchayats in rural areas and municipalities in urban areas. With the passage of bills by the state legislatures and devolving powers and allocating revenue sources, these local bodies can become institutions of self-government. The eleventh schedule contains environmental activities such as soil conservation, water management, social forestry and non-conventional energy that panchayats can undertake. The twelfth schedule lists activities such as water supply, public health and sanitation, solid waste management and environmental protection which the municipalities can undertake. These grass root level institutions can facilitate greater participation by the people in local affairs, promote better planning and implementation of developmental and environmental programmes and be more responsive to the needs of the people.

The Supreme Court and the High Courts have played an active role in the enforcement of constitutional provisions and legislations relating to environmental protection. The fundamental right to life and personal liberty enshrined in Article 21 has been held to include the right to enjoy pollution free air and water. In *R.R. Delavoi v. The Indian Overseas Bank* case, 1991, the Madras High Court pointed out: '*Being aware of the limitations of legalism, the Supreme Court in the main and the High Courts to some extent for the last decade and a half did their best to bring law into the service of the poor and downtrodden under the banner of Public Interest Litigation. The range is wide enough to cover from bonded labour to prison conditions and from early trial to environmental protection*'. This is a new remedy available to public spirited individuals or societies to go to the court under Article 32 for the enforcement of the fundamental right to life (including clean air and water) contained in Article 21.

The Judicial Activism

The interpretation of Article 21 of the Constitution to include the right to clean air and water by the Supreme Court and the High Courts, the remedy available to any citizen to go to the court under the banner of public interest litigation for the enforcement of the right to clean air and water, and the growing public awareness evident in the formation of NGOs and welfare organizations for the promotion of environmental quality, radically altered the situation in the nineties. A summary of selected Supreme Court judgement is mentioned below.²

In *Rural Litigations and Entitlement Kendra v. State of Uttar Pradesh*, the Supreme Court directed the closure of mining operations though blasting in the Doon Valley. It held that closure would cause hardship to the affected parties, but it was a price that had to be paid for protecting and safeguarding the rights of the people to live in healthy environment with minimal disturbance of ecological balance. It further directed the affected areas to be reclaimed and

²For details reference may be made to All India Reports, Supreme Court, for different years. Summaries of court decisions are published in Down to Earth.

afforestation and soil conservation programmes to be taken up so as to provide employment opportunities to the affected workers.³

In *M.C. Mehta v. Union of India* case, the Court directed the stopping of the working of tanneries which were discharging effluents in River Ganga and which did not set up primary effluent treatment plants. It held that the financial incapacity of the tanners to set up primary effluent treatment plants was wholly irrelevant. The Court observed the need for:

Imparting lessons in natural environments in educational institutions;

Group of experts to aid and advise the Court to facilitate judicial decisions;

Constituting permanent independent centre with professionally public spirited experts to provide the necessary scientific and technological information to the Court, and

Setting up environmental courts on regional basis with a right to appeal to the Supreme Court.⁴

A law is usually enacted because the legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for future generations and to ensure good quality of life that the legislature has enacted anti-pollution laws and incorporated many statutory provisions for the protection of the environment. Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which has to be borne by the future generations.⁵

The Judicial Response

The judicial response to almost all environmental litigations has been very positive in India. The primary effort of the Court while dealing with the environmental related issues is to see the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. Even though it is not the function of the Courts to see the day to day enforcement of the law, that being the function of the executive, but because of the non-functioning of the enforcement agencies to implement the law, the courts as of necessity have to pass orders directing them to implement the law for the protection of the fundamental right of people to live in healthy environment. Passing of the appropriate orders requiring the implementation of the law cannot be regarded as the court having usurped the function of the legislature of the executive.⁶

Though the judicial development of environmental law has been vigorous and imaginative, yet at times it may be found wanting. It has certain limitations of its own. For example, in some cases frivolous or vexatious writ petitions are filed in the name of public interest litigation involving environmental matters. It has been noticed that such litigations are filed mala fide and arise out of enmity between the parties.⁷ Sometimes the judicial order is not fully obeyed by the parties concerned. Even the government and its agencies like Pollution Control Board (PCB) have been issuing directions contrary to the orders of the court.⁸

The courts also do not have any scientific and technical expertise in environmental cases and thus it has to depend upon the findings of various commissions and other bodies.⁹ It is because of this reason that the courts have suggested for

³A.I.R. 1985 S.C.652.

⁴A.I.R. 1987 S.C. 965, 1086 and 1988 S.C.1037 and 1135.

⁵*Indian Council for Enviro-Legal Action Vs. Union of India*, (1996) 5 SCC 281 at 293.

⁶*Indian Council for Enviro-Legal Action Vs. Union of India*, (1996) 5 SCC 281 at 294 (popularly known as Coastal Protection Case).

⁷*Subhash Kumar Vs. State of Bihar*, (1991) 1 SCC 598; and *Chhetriya Pradushan Mukti Sangharsh Samiti Vs. State of U.P.*, (1990) 4 SCC 449.

⁸*Vineet Kumar Mathur Vs. Union of India*, (1996) 7 SCC 714; and *Vineet Kumar Mathur Vs. Union of India*, (1996) 11 SCC 119.

⁹*M.C. Mehta Vs. Union of India*, AIR 1987 SC 965 (popularly known as Oleum Gas Leakage case).

setting up of environmental courts to deal with environmental matters.¹⁰ The government has set up the National Environment Appellate Authority in 1998 to hear the appeals with respect to restrictions of area in which any industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment (Protection) Act, 1986.¹¹

In view of the above scenario, following fundamental questions arise for consideration:

How are the environment and sustainable development defined?

How has the concept of sustainable development been developed at the international and national levels?

What are the constitutional provisions in India for the protection and improvement of the environment?

What is the existing legal mechanism ensuring environment protection and sustainable development?

Is the existing legal mechanism foolproof to ensure environment protection and quality of life for all?

What has been the response of the people and NGOs for the protection and improvement of the environment?

What role has the judiciary played in providing impetus to the movement of environment protection and sustainable development in India?

Is it only a cosmetic approach by way of public interest litigation or is there any substance in it?

What is the impact of socio-economic problems such as poverty, illiteracy, over population on the environment?

How to protect the victims of the environmental harm? And how the basic principles of sustainable development help in this regard?

Environment Protection under Law of Torts

A Common law action under the law of torts is perhaps the oldest of all legal remedies for protection of the environment. Effective remedies exist in this branch of the law to tackle the problem of environment pollution mainly under three categories of torts, namely, nuisance, negligence and strict liability, which was converted into absolute liability by the Supreme Court in the wake of the Bhopal Tragedy. The law of torts allows the plaintiff to sue for damages (including exemplary damages) or for an injunction or both.

As held by the Supreme Court in *M.C. Mehta V. Kamal Nath*,¹² environmental pollution amounts to a tort committed against the community in general. In the words of the apex court:

“Pollution is a civil wrong. By its very nature, it is a tort committed against the community as a whole. In addition to damages, the person guilty of causing the pollution can also be held liable to pay exemplary damages, so that it may act as a deterrent for other not to cause pollution in any manner.”

Nuisance

Perhaps the deepest doctrinal roots of modern environmental law are to be found in the common laws doctrine of nuisance. The law of torts recognizes two categories of nuisance, private nuisance and public nuisance. Whereas private nuisance causes a substantial and unreasonable interference with the use and enjoyment of the plaintiff's property, a public nuisance is one which is an unreasonable interference with a general right of the public by causing an injury or annoyance to persons in the general or a class of persons, as for instance, residents of a particular locality or neighbourhood.

In an English case which is as old as it is famous, *Soltau V. De Held*¹³ the court restrained a Catholic Church from ringing bells at all hours of the day and night and thereby put an effective end to noise pollution in that neighbourhood.

¹⁰Ibid., at 982. See also *Vellore Citizens Welfare Forum Vs. Union of India*, (1996) 5 SCC 647 (popularly known as *T.N. Tanneries case*).

¹¹See infra chapter on “Environment (Protection) Act, 1986 and the National Environment Appellate Authority Act, 1997.”

¹²(2000) 6 SCC 213.

¹³1851 2 Sim NS 133.

Perhaps the first reported case of environmental pollution in India is the judgment delivered by the Calcutta High Court in 1905 in *J.C. Galstaun V. Dunia Lal Seal*.¹⁴ In this case, the plaintiff who owned a garden-house barely 200-300 yards away from the defendant's factory complained that the refuse-liquid discharged from the factory into a municipal drain was not only foul smelling and noxious to the health of the neighbouring residents, but had also reduced the market value of his property. The Subordinate Judge granted a perpetual injunction against the defendant and awarded damages of Rs.1,000 to the plaintiff. This order was confirmed in an appeal filed in the Calcutta High Court.

Similarly, in *Raj Singh V. Babulal*,¹⁵ the plaintiff, a doctor, succeeded in restraining the defendant from using a brick-grinding machine which generated lots of dust, which not only entered his consulting rooms and caused inconvenience to him and his patients, but also polluted the atmosphere in general.

However, in *Kuldip Singh V. Subhash Chandra Jain*,¹⁶ litigation stretching into twenty years failed to assist the plaintiff in his endeavor to prevent a possible pollution in the future. In this case, although the trial court restrained the defendant from constructing a baking oven with a 12 foot chimney, as it would cause a nuisance once the bakery commenced operations, the Supreme Court took a contrary view. Distinguishing between an existing nuisance and a future nuisance, the court observed that a mere possibility of injury does not entitle the plaintiff to any relief.

Negligence

Where there is a failure of the duty to take care and this results in environmental pollution, a suit can, in a fit case, be filed for the tort of negligence.

Thus, where chemical pesticides were stored in a godown in residential area, and fumes emanating from such pesticides found their way into an adjoining property, killing three children and an infant in its mother's womb, it was held that this was a clear case of negligence.¹⁷ In another case, a textile mill was held guilty of negligence because it caused environmental pollution in the following circumstances:

*The factory used to store molasses in tanks. One day, a tank collapsed, emptied into a water channel and ultimately polluted the paddy field of the neighbour, causing great damage to his crop. The court held that the mill was under a duty to take reasonable care of maintaining the tanks since it stored such huge quantities of molasses in them. When this duty is not performed, it amounts to actionable negligence. Moreover, as such damage could be reasonably foreseen, the mill was liable under the law of torts.*¹⁸

Rule of Strict Liability and Absolute Liability

The English rule of strict liability is illustrated in its most classic form in the judgment passed in *Rylands V. Fletcher*,¹⁹ where the court held that a person who keeps intrinsically dangerous things on his land is liable if such things escape and cause loss or damage to others. It was, therefore, held that a person who builds a reservoir on his own land is liable to compensate his neighbor if the water escapes from such a reservoir and damages the neighbour's property. Under the Rule in *Rylands V. Fletcher*, the question of negligence is not relevant at all.

This rule of strict liability has been followed in India and also applied to cases of environmental pollution. Thus, for instance, in the case of *Mukesh Textile Mills V. Sastri*,²⁰ when a tank belonging to mill storing molasses collapsed and the contents polluted the paddy field of a neighbor, the mill was held liable to compensate the neighbor for the loss caused to him.

¹⁴(1905) 9 CWN 612.

¹⁵AIR 1982 All 285.

¹⁶2000 (2) SCALE 582.

¹⁷*Naresh Dutt Tyagi V. State of U.P.*, 1995 Supp. (3) SCC 144.

¹⁸*Mukesh Textile Mills V. Sastri*, AIR 1987 Kar. 87.

¹⁹1868 LR 3 HC 330.

²⁰AIR 1987 Kar. 87.

However, the English law of torts recognizes several exceptions to the Rule in *Rylands V. Fletcher*, as for instance, an act of God, an act of a third party, the fault of the plaintiff, etc. Therefore, the rule cannot be applied in cases where any such defense is available to the defendant.

Environment Protection under the Indian Penal Code

Long before environmental legislation founds its way into the statute book in our country, the Indian Penal Code had, as far back as 1860, made several provisions which could be invoked to protect the environment. Thus, for instance, the object of Chapter XIV of the IPC (Sec. 268 to Sec. 294A) is to safeguard public health, safety and convenience by punishing acts which pollute the environment or threaten people's lives. Thus, these provisions can be sued if there is escape of gas, filth, water, germs –or even noise.

In this connection, the most important provisions are those dealing with public nuisance. Sec. 268 defines “public nuisance” as under:

“A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.”

Although any citizen can initiate a prosecution under Sec. 268 of the IPC by a complaint to the Magistrate (as for instance, when an offensive trade carried on by one person pollutes the air or continuous noises interfere with the health, comfort and sleep of the neighbouring residents), here the biggest lacuna is that the Magistrate can fine the offender a paltry sum of Rs. 200 only!

Section 269 of IPC covers negligent acts that are likely to spread infection of disease which are dangerous to life. Section 270 of IPC covers a malignant act likely to spread infection of disease which is dangerous to life.

The aim of Section 269 and 270 is to convict the people who commit such acts either with the knowledge or having reasons to believe that their acts might lead to the spreading of an infection of disease that is threatening to life.

It has been provided under Section 269 of IPC the person punished with imprisonment for a term that may extend to six months, or fine, or both, while under section 270 of IPC that such people will be punished with imprisonment of either for a term that may extend to two years, or fine, or both, as Section 270 is an aggravated form of the offence under Section 269. The term ‘malignantly’ used in Section 270 connotes the mens rea of the accused who acted maliciously by deliberately spreading the infection. Thus, severe punishment is prescribed under Section 270 as compared to Section 269.

In *Sanjay Goel V. Dongsan Automotive India Pvt. Ltd.*, 2016, the High Court of Madras handled a case which was related to contaminated effluents and dust particles emitted from a factory were thrown into neighbouring land, thus harming the health of the people living in that area and also allowed breeding of mosquitoes. It was held by the court that it was a prima facie case under various offences, which includes Section 269 of IPC.

In *Ramkrishna Baburao Maske V. Kishan Shivraj Shelke*, 1974, the Bombay High Court said if a commercial sex worker who is suffering from a disease of syphilis, communicates the disease to another during sexual intercourse, then she will not be held liable under Section 269.

Fouling water of public spring or reservoir

Section 277 of IPC deals with the person who voluntarily contaminates any public spring or reservoir that belongs to every member of the community. This act must be done in order to render it less fit to be utilized for the purpose for which it is generally used. The act must be done voluntarily.

The term ‘corrupts or fouls’ is used in this section connotes the act of physically deteriorating or defiling the condition of water from any public spring. Thus, someone taking a bath in a private tank will constitute an offence under this section.

The use of the expression ‘less fit’ rather than using ‘unfit’ is deliberate as the water may not have been rendered totally unfit for use, but even if it has been turned less fit, the accused is held to be guilty. The word ‘voluntarily’ has the same meaning as given under Section 39 of IPC.

Punishment

A person under this section shall be punished with either simple or rigorous imprisonment which may extend up to three months, or with the fine maximum five hundred rupees, or both.

The offence under this section is bailable, non-cognizable and non-compoundable, and it is triable by the Magistrate of the first class.

Making atmosphere noxious to health

Section 278 of IPC deals with the punishment for making the atmosphere noxious to health and due to such noxious atmosphere health of the general public is affected.

Section 278 applies to such trades which produce noxious and offensive smells. Trades such as making candles by boiling stinking stuff, a factory for making Sulphur spirit, vitriol etc., or a tannery where skins are steeped into water thus, making the atmosphere vitiated. Even from burning bricks lime in a kiln produces smoke which is noxious. The setting up of a noxious trade in the vicinity of a populated locality is always considered as a nuisance.

Punishment

A person under this section shall be punished with a fine extending up to five hundred rupees.

The offence under Section 278 is a bailable, non-cognizable and not compoundable, and is triable by the Magistrate. Offence and summons should ordinarily be issued in the first instance.

The provisions of Sec. 290 of the IPC (which provides punishment for public nuisance) have been invoked in the past if any act or omission of a person causes injury to another person by polluting the environment. Even cases of noise pollution can be tackled under this provision.

Similarly, sec. 426 to sec. 432 of the IPC deal with the offence of "mischief", if any pollution is caused as a result thereof, these provisions can be usefully invoked in fit cases.

II. CONCLUSION

We have more than 200 Central and State legislations which deal with environmental issues. More legislation means more difficulties in enforcement. There is a need to have a comprehensive and an integrated law on environmental protection for meaningful enforcement. It is not enough to enact the legislations. A positive attitude on the part of everyone in society is essential for effective and efficient enforcement of these legislations.

The Environment Protection Laws have failed to bring about the desired results. Consequently, for the purpose of efficient and effective enforcement of these laws, it is necessary to set up the Environment Courts; with one Judge and two technical experts from the field of Environmental Science and Ecology. These Courts should be allowed to adopt summary proceedings for speedy disposal of the cases. To begin with we may have such Courts at the State and National levels that may later be extended to district level on need-based principle. In order to discourage prolonged litigation, the provisions should be confined to single appeal.

In order to enforce the environmental laws stringently, mere mis-description and technical flaws should be disregarded by the Courts. The creative role of judiciary has been significant and laudable. The jurisdiction of the Courts has been expanded by way of Public Interest Litigation. The Supreme Court of India has played a vital role in giving directions from time to time to the administrative authorities to take necessary steps for improving the environment.

Finally, protection of the environment and keeping ecological balance unaffected is a task which not only the government but also every individual, association and corporation must undertake. It is a social obligation and fundamental duty enshrined in Article 51A(g) of the Constitution of India.