TEAM CODE- T-23

BEFORE THE HON'BLE

SUPREME COURT OF AASHIYANA

Application No._____ of 2018

UNDER ARTICLE 32 OF THE CONTITUTION OF THE AASHIYANA

&

SECTION 22 OF THE NATIONAL GREEN TRIBUNAL

PINEAPPLE INDIA INC. &

JACK AND JUDY BING RECYCLING CO…….....APPELLANT

Vs.

GOVT. OF AASHIYANA AND ANR.....RESPONDENT

MEMORIAL ON BEHALF OF THE APPELLANT

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STATEMENT OF JURISDICTION

The Hon'ble Supreme Court of Aashiyana has original jurisdiction to try, entertain and dispose of the present case by virtue of Article 32 of The Constitution of India, 1950. Also under S. 22 of National Green Tribunal Act, Supreme Court is empowered to hear appeal on those cases that are adjudged by the National Green Tribunal.

Furthermore, Rule 5 Order XLVII of the Supreme Court Rules, 1966[2] allows the Supreme Court to hear all the Petitions together.

[2]Rule 5 Order XLVII of the Supreme Court Rules, 1966 reads as : Where there are two or more appeals arising out of the same matter, the Court may at any time either on its own motion or on the application of any party, order that the appeals be consolidated.

STATEMENT OF FACTS

Boski is the national capital territory of Aashiyana. Pineapple India Inc. was duly incorporated company having its holding company in USA manufactures PinePhones. The Government of Aashiyana enacted E-Waste Rules in 2016. JJB Recycling Co(incorporated in 2016) took authorisation under 2016 Rules and accepted the EPR scheme. The company is authorized and licensed by the SPCB & CPCB for safe Collection, Transportation, Dismantling, Segregation, Disposal of E-waste, The Air Act, 1981 and Water Act, 1974. It employed 600 workers. JJB Company had a contract with Pineapple Inc. wherein it agreed to recycle phones of Pineapple Inc. which it gathers under its 'end of life take back scheme.' A big part of the landfill collapsed in afternoon. A PIL was filed in the SC. SC formed a committee to advise on reduction of e-waste. The committee found that 'PLANNED OBSOLESCENCE' is prevalent in electronic industry. The committee found that the companies selling Mobile Phones, Laptops and Computers have certain 'warranty void' clauses and also launched new version of product very frequently. This forces consumers to buy latest versions which leads to more electronic waste. In order to counter this problem, committee recommended certain reforms. Law Commission agreed to the views of committee and enacted a Bill.The Govt. passed the bill and enacted **Right to Fair Repair Act, 2018** which mandates that every device should have mention its minimal life expectancy, longer warranty periods and criteria to measure a product's strength. PineApple India Inc. along with other companies has challenged the constitutional validity of this Act on the ground of violation of Part III rights. The SC has accepted the appeal and is listed for final hearing. It was found that company was violating various norms of EPA and 2016 rules. A complaint was filed to CPCB which sent a team to take sample from the plant and nearby area. The Commission found that the levels of lead, cadmium and mercury due to burning of batteries and CRT have increased the level of these chemicals in Road Dust. The Air Control Equipment was faulty and the water facility was in bad condition. The CPCB took samples from the Main Stream and found that notwithstanding the fact that pollutants from other sources reach the water bodies, it is clear that this canal is also heavily impacted by contaminants that are found in e-waste even exceeded the limits mentioned in consent form. It was also found that due to increased level of mercury, a species of Fish named MATASAYA had died in Main Stream. The Board took emergency measures and ordered closure of the recycling plant. An appeal was filed by Company against Board to NGT. The NGT upheld the order of the Board. It imposed a fine of Rs. 10.5 Cr on JJB & ordered compensation of Rs. 450 Crore on account of loss of Biodiversity and restoration of ecology. It fixed all costs of cleaning Main Stream on JJB Company. The company has appealed to SC against this.The SC clubbed both matters.

ISSUES FOR CONSIDERATION

ISSUE I. WHETHER JJB COMPANY IS LIABLE UNDER VARIOUS ENVIRONMENT LAW LEGISLATIONS? IF YES, TO WHAT EXTENT? IS THE FINE IMPOSED BY NGT IS PROPORTIONAL?

ISSUE II. WHETHER THE CPCB'S ORDER OF CLOSURE OF JJB PLANT BE JUSTIFIED? ALSO, WHETHER OR OT CPCB IS CORRECT AUTHORITY TO TAKE SAMPLE AS E-WASTE RULES ARE FRAMED UNDER ENVIRONMENT PROTECTION ACT BUT RELEVANT AUTHORITY UNDER THIS ACT IS CENTRAL GOVERNMENT?

ISSUE III. WHETHER RIGHT TO REPAIR ACT IS CONSTITUTIONALLY VALID?

ISSUE IV. WHETHER RIGHT TO REPAIR CAN BE TAKEN TO BE PART OF EXTENDED PRODUCER RESPONSIBILITY?

SUMMARY OF ARGUMENTS

ISSUE I. WHETHER JJB COMPANY IS LIABLE UNDER VARIOUS ENVIRONMENT LAW LEGISLATIONS? IF YES, TO WHAT EXTENT? IS THE FINE IMPOSED BY NGT IS PROPORTIONAL?

The counsel humbly submits before this Hon'ble Court that the petitioner has not violated the provisions of various Environmental law legislations as the petitioner had been working according to the implementation guidelines of the CPCB and also that the sample relying on which the liability was fixed, was taken from Main stream. Also the fine imposed by the Hon'ble NGT is not proportional as PPP principle cannot be applied in the present case and that it does not covers all the heads of Schedule 7 of NGT Act, 2010.

ISSUE II. WHETHER THE CPCB'S ORDER OF CLOSURE OF JJB PLANT BE JUSTIFIED? ALSO, WHETHER OR OT CPCB IS CORRECT AUTHORITY TO TAKE SAMPLE AS E-WASTE RULES ARE FRAMED UNDER ENVIRONMENT PROTECTION ACT BUT RELEVANT AUTHORITY UNDER THIS ACT IS CENTRAL GOVERNMENT?

The counsel humbly submits before this Hon'ble Court that the closure order by CPCB is discriminatory and violates principle of natural justice without non-grant of appropriate opportunity while ignoring the substantive and relevant considerations. Furthermore CPCB is not the correct authority to take the samples since E-waste rules are framed under EPA, thus the correct authority to take or collect the samples is Central Government. Moreover it is contended that the Central Government regulates and holds power over CPCB under various sections of Air and Water Act.

ISSUE III. WHETHER RIGHT TO REPAIR ACT IS CONSTITUTIONALLY VALID?

The counsel humbly submits before this Hon'ble Court that the Right to Fair Repair Act, 2018 as enacted by the Government of Aashiyana in an effort to combat the electronic waste is constitutionally invalid in all terms. The act so constituted by the Government violates the Part III rights of the petitioners as conferred upon by the Constitution of Aashiyana. Also it causes reasonable threat of leakage of trade secrets of the petitioner Companies which causes harm as well as is not safe both for the consumers as well as the products so manufactured.

ISSUE IV. WHETHER RIGHT TO REPAIR CAN BE TAKEN TO BE PART OF EXTENDED PRODUCER RESPONSIBILITY?

The counsel humbly submits before this Hon'ble Court that the legislative intent behind the EPR scheme and Right to Repair Act is different as the former talks about the protection of environment from e-waste while the latter talks about reduction in planned obsolescence and it gives right to repair electronic products to the independent repair shops which leads to reduction of monopoly of the manufacturers in the market.

Furthermore, the former gives sole responsibility of end products to the manufacturers while the latter deals with repair of electronic products by third party (independent repair shops).

ARGUMENTS ADVANCED

ISSUE NO. 1: WHETHER JJB COMPANY IS LIABLE UNDER VARIOUS ENVIRONMENTAL LAW LEGISLATIONS? IF YES, TO WHAT EXTENT? IS THEFINE IMPOSED BY NGT PROPORTIONAL.

1.1. That The Appellant Is Not Liable Under Various Environmental Law Legislations.

The counsel humbly submits that the appellant has not violated the provisions of various environmental law legislations and most respectfully showeth that:

1.11. That the appellant followed the implementation guidelines of CPCB

1) **Rule 23** of **E-Waste Rules,2016** requires that The collection, storage, transportation, segregation, refurbishment, dismantling, recycling and disposal of e-waste shall be in accordance with the procedures prescribed in the guidelines published by the Central Pollution Control Board from time to time. Implementation of e-waste (Management and Handling) Amendment Rules, 2011 shall be in accordance with the guidelines prescribed by the Central Pollution Control Board from time to time.
2) The appellant took authorization under the E-waste Rules, 2016 and also accepted the EPR Scheme. It had been working according to the guidelines given by CPCB[3]. The E-Waste (Management) Rules, 2016 mandate CPCB to prepare guidelines on implementation of E-Waste Rules, which includes specific guidelines for extended producer responsibility, channelization, collection centres, storage, transportation, environmentally sound dismantling and recycling, refurbishment, and random sampling of EEE for testing of RoHS parameters.
3) According to the Guidelines given for Environmentally Sound Recycling of E-Waste, A recycler has to obtain consent to establish and operate from SPCBs/PCCs under the Water (Prevention and Control of Pollution) Act, 1974 and the Air (Prevention and Control of Pollution) Act,1981[4]

[3] . In order to ensure effective implementation of E-Waste Rules and to clearly delineated the role of producers in EPR, MoEF & CC, Government of India in supersession of E-Waste (Management and Handling) Rules, 2011 has notified the E-Waste (Management) Rules, 2016 vide G.S.R. 338(E) dated 23.03.2016 which will be effective from 01-10-2016. These rules are applicable to every producer, consumer or bulk consumer, collection centre, dismantler and recycler of e-waste involved in the manufacture, sale, purchase and processing of electrical and electronic equipment or components specified in schedule – I of these Rules.

[4] 7.0 Guidelines for Environmentally Sound Recycling of E-Waste-7.1 Recyclers., pg.17

4) In the case of ***Bihar State Pollution Control v. Hiranand Stone Works And Ors***[5], it was held that-"*The guidelines of CPCB in fact have been framed to make a unified policy which may control and govern all concern. The guidelines are in form of general information to all the industrial units which are proposed to be established or operating in accordance with guidelines. They are required to perform or run their industrial operations in accordance with the guidelines*."
5) The appellant also got authorization and license by the State Pollution Control Boards and the Central Pollution Control Board for safe collection, transportation, dismantling, segregation, and disposal. The appellant made arrangements of such facilities in such a manner that environmental consequences of hazards associated with its transport could be kept at minimum.
6) E-Waste Rules provides that the concerned State Pollution Control Board, on being satisfied that the application is complete in all respects and that the applicant is utilizing environmentally sound technologies and possess adequate technical capabilities, requisite facilities and equipment to dismantle or recycle and process e-waste in compliance to the guidelines specified by Central Pollution Control Board from time to time and through site inspection, may grant authorisation to such applicants stipulating therein necessary conditions as deemed necessary for carrying out safe operations in the authorised place only.[6]
7) The appellant submitted a detailed plan for the collection of the e-waste, mode of collection, details of collection etc. as required in the EPR Scheme. The fact that the appellant got its authorization fulfills the condition given above.

1.11.<u>That the respondent took samples from the Mainstream.</u>

1) CPCB took emergency measures against the appellant relying on the sample which was collected from the mainstream. Mainstream flows near the industrial area around which all the industries are situated. CPCB on taking sample alleged that the appellant is responsible for the destruction of Ecology and hence made it liable under various Environmental Law Legislation and imposed fine upon it.
2) The appellant humbly submits before this Hon'ble court that the fact that sample was taken from Mainstream invites other possibilities that other industries situated nearby could be responsible for the damage to the environment.

[5] AIR 2005 Pat 62
[6]Sub rule(3)- Procedure for grant of authorisation to dismantler or recycler,Rule 13

3) In the case of ***Deepak Nitrite Ltd v. State Of Gujarat & Ors***[7]**,** it was held that a company cannot be held liable under various Environmental Laws unless a finding has been given that the industrial unit concerned is the polluter. In what manner pollution has been caused should have been ascertained, particularly when a separate common effluent treatment plant had been erected and a channel was provided through which water would flow into river which would reach the sea thereby not causing any damage anywhere.
4) On the basis of above contention it can be inferred that the appellant cannot be claimed to pollute the environment on the basis of sample collected from Mainstream.
5) The appellant is a recycling company. According to the 3R Principle – Reduce, Reuse, Recycle, recycling reduces waste going to final disposal, decreases consumption of natural resources and improves energy efficiency. It is, in this respect, a key process, which can be improved through innovative and more effective processes and technologies. More collection of electrical and electronic appliances allows for more efficient recycling, keeps valuable e-waste components (e.g. metals) in the economy and safely disposes of its harmful components in order to prevent risks to human health and the environment.
6) In the case of ***Pravinbhai Jashbhai Patel And Ors. v. State Of Gujarat And Ors.***[8] it was held that the polluting effect of Industrial Effluents is noticed as depending upon quantity as well as quality of the Industrial Effluents. This is ascertained by determining the polluting potential of the industrial effluents.
7) Hence in the present case it can be inferred from the status of the appellant that its effluents did not have the polluting potential.

1.2. <u>That The Fine Imposed By Ngt Is Not Proportional.</u>

The counsel humbly submits that the NGT imposed a fine of Rs. 10.5 Crore by applying PPP Principle and also a compensation of Rs. 450 Crore on account of loss of Biodiversity and restoration of ecology. It fixed all costs of cleaning Main Stream on the appellant. The fine imposed is not proportional.

1.12 <u>The fine cannot be imposed by applying PPP principle.</u>

1) The 'Polluter Pays Principle means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also to the cost of restoring the

[7] Appeal(civil) 1521 of 2001.
[8] (1995) 2 GLR 1210.

environmental degradation.[9] Many leading cases reflects that the fine imposed by NGT was to the extent of harm done to the environment including compensation to the victims.

2) An application filed by an environmentalist SAFE, alleging Simbhaoli sugar mills and distillery discharged untreated, highly toxic and harmful effluents into the Phudera drain which joins the holy River Ganges. The contamination was so high that it not only polluted the Syana Escape canal and the River Ganges but also threatened endangered aquactic species, such as dolphins and turtles. It also polluted the groundwater of villages adjacent to the river. The NGT applied PPP principle and imposed a fine of Rs. 5 Crores and Rs. 20 crores for the installation cost of an incinerator for its spent wash and concentrate effluents to achieve zero discharge.
3) Similarly in the case of ***Samir Mehta v. Union of India & ors***.[10], the sinking of ship forms a thick film of oil on the surface of sea and large scale damage was caused to mangroves and marine ecosystem. But the fine imposed by NGT was only Rs. 100 Crores by applying PPP principle which is one of the biggest compensation amounts ever paid by a private entity against environmental damage done.
4) In both the cases it is seen that fine imposed by NGT is only to the extent of harm done to the environment. The magnitude of damage to the environment in the present case is smaller than that of the above cases but the fine imposed by NGT in the present case is comparatively very high.

1.21. That the case of appellant does not fall under all the heads of Schedule 2 of NGT Act,2010.

1) NGT imposes fine and compensation under **Sec 15** of **NGT Act**. Subsection 4 states that-" *The Tribunal may, having regard to the damage to public health, property and environment, divide the compensation or relief payable under separate heads specified in Schedule II so as to provide compensation or relief to the claimants and for restitution of the damaged property or environment, as it may think fit.*"[11]
2) The case on hand gives no instances of any physical ailment or the damages to any private property or any other property. The damage alleged to be done by the appellant also does not covers the points given in Schedule 2 of NGT Act,2010.

[9] Indian Council for Enviro-Legal Action v. UOI and Ors., (1996) 3 se c 212, 242-43, 246.
[10] 1995(2) GLR 1210.
[11] NGT Act,2010.

3) The special NGT's jurisdiction empowers it to order relief and compensation to victims of pollution and other environmental damage arising out of the enactments in Schedule I, including restitution of property damaged and the environment.[12]
4) In the case of ***Ramdas Janaradan Koli vs. Secretary, MoEF***[13], that the NGT has applied the PPP principle where the rights of the parties are clearly defined and the information is complete. But the same has not been reflected in the instant case. Hence, it can be concluded that the appellant is not liable under Environmental Law Legislations and thus fine imposed by NGT was not proportional.

ISSUE NO. 2: WHETHER THE CPCB ORDER OF CLOSURE OF JJB PLNT BE JUSTIFIED? ALSO, WHETHER OR NOT CPCB IS CORRECT AUTHORITY TO TAKE SAMPLE AS E-WASTE RULES ARE FRAMED UNDER ENVIRONMENT PROTECTION ACT BUT RELEVANT AUTHORITY UNDER THIS ACT IS CENTRAL GOVERNMENT.

The counsel on behalf of the petitioner no. 2 humbly submits that the closure order by CPCB is arbitrary, discriminatory and has been passed in an undue haste without proper application of mind, non-grant of appropriate opportunity and by taking into consideration irrelevant materials, while ignoring the substantive and relevant considerations. It violates principle of natural justice. Furthermore, central govt. was the correct authority to take samples and not CPCB as most respectfully showeth:

2.1 <u>That closure order violates principle of natural justice</u>

1) Natural justice is regarded as an important procedural safeguard against undue exercise of its power by any authority. It has been characterized as "fair play in action". It is a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this country.[14]
2) To give a hearing to the affected person is a necessary element of audi alteram parte. The essential requirement of natural justice is that before someone is condemned he ought not to make a decision adverse to a party without affording him an effective opportunity of adequately meeting the allegations made against him and of presenting his own case.

[12] R.K. Patel vs. Union of India.
[13] M.A. No. 19/2014 in Appln. No. 19 of 2013.
[14] Kumaaon Mandal Vikas Nigam Ltd. V. Girija Shankar Pant, AIR 2001 SC 24 : (2001) 1 SCC 182. , Inderpreet Singh Kahlon v. State of Punjab (2006) 11 SCC para 142: AIR 2006 SC 2571.

3) The SC emphasising on the right of hearing, has stated in ***Sangram Singh v. Election Tribunal***[15] *"...our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them....our laws should be construed, wherever that is reasonably possible, in the light of that principle."*
4) The grant of a license certainly creates certain rights in favour of the licensee, and if the licensing authority was of the opinion that the license was obtained by misrepresentation, then a show cause notice should have been given to the appellant, as well as an opportunity of hearing.[16] Thus, it has been held that it would be necessary for the licensing authority to follow principles of natural justice and give a hearing to the licensee before cancelling his license. In the case of ***SL kapoor v. Jagmohan***[17], it was held that "*Even when an emergency action is to be taken, right of hearing may not be excluded. Natural justice is flexible concept. The question to consider will be whether or not minimal natural justice, "the barest notice and littlest opportunity" of hearing can still be provided. Moreover, the court has stated that the non-observance of natural justice is itself prejudice to any man.*"
5) The Madhya Pradesh High Court in ***Mandu Distillers v. M.P Pradushan Niwaran Mandal***[18] quashed the order of closure made by the State Pollution Control Board on the ground that there was denial of principles of natural justice and violation of procedural safeguard.
6) In the case of ***Ridge v. Baldwin***[19], it was stated that breach of principles of natural justice is in itself sufficient to grant relief and no further de facto prejudice need not be shown. This view has been followed in ***John v. Rees***[20].
7) The decision maker cannot take extraneous matters into consideration; it cannot base its decision on any material unless the person against whom it is sought to be utilised has been given an opportunity to rebut or explain the same.[21]
8) It is regarded as a fundamental principle of natural justice that no materials should be relied on against a party without giving him of an opportunity of explaining the same. The right to know the materials on which the authority is going to take a decision is a part of the right to

[15] AIR 1955 SC 425: (1955) 2 SCR 1.
[16] Baraka Overseas Traders v. Dir Gen of Foreign Trade, 2006 8 SCC 103 para 17: 2006 (12) JT 45.
[17] AIR 1981 SC 136: (1980) 4 SCC 379.
[18] Misc. Petn. 2038 of 1993
[19] (1964) AC 40.
[20] (1970) 1 Ch 345.
[21] Mp jain administrative law

defend self. If without disclosing any material to the concerned party, the adjudicator takes the same into consideration, and decides the matter against him, then the decision would be vitiated for it amounts to denial of a real and effective opportunity to the party to meet the case against him.[22]

9) It is necessary that all the grounds on which action is proposed to be taken must be communicated to the person concerned. If it transpires that action was actually taken on a ground which had not been communicated to him earlier, then the action will be invalid.[23]

2.2 <u>That Procedure was not followed</u>

1) Under **sec 11** of **EPA** and **sec 21(4)** of **Air Act** it is clearly given that notice must be given before taking an action against the person concerned. In the present case the govt has violated this principle and thus deprived the petitioner of natural justice.

2) In the case of ***CATA Sales Co-Op Society V. AP Govt.[24]***, the Hon'ble court held that the proviso to **Sec 21(4)** of **Air Act** specifically provides for an opportunity of being heard, the passing of the impugned order by CPCB thus should be held to be per se illegal and consequently liable to be set aside.

2.3 <u>That there was clear violation of sec 26 of Air Act</u>

1) The result of any analysis of a sample of emission taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3) and (4) are complied with. Subject to the provisions of sub-section (4), when a sample of emission is taken for analysis under sub-section (1), the person taking the sample shall—(a)serve on the occupier or his agent, a notice, then and there, in such form as may be prescribed, of his intention to have it so analysed;

2) When a statute expressly imposes the requirement of giving a notice, the issue of notice is mandatory as it goes to the jurisdiction of the authority.[25] When once a valid consent order is granted and when the Pollution Control Board intends to revoke the same, proper opportunity should have been extended to the party concerned.[26]

3) In the case of ***Delhi Bottling Co. Pvt. Ltd. v. CBCB[27]***, a sample of trade effluent was taken by the board from bottling company's discharge stream and after analysis was found not

[22] UOI v. Varma T.R AIR 1957 SC 882 at pp. 884 and 885

[23]Mardana Mosque Trustee v. Badi-ud-din Mahmud, (1967) 1 AC 13, Fairmouth Investments v. Secretary Of State for Environment, (1976) 2 All ER 865.

[24] (2003) 2 UPLBEC 1602.

[25] ibid

[26] M/s Chemplast Sanmar Ltd v. CPCB

[27] AIR 1986 Delhi 152.

conforming with the requirements of the consent order granted to company. The board filed a suit under the Water Act, 1974 and accordingly an injunction was issued by the court requiring the company to establish a treatment plant which the bottling company challenged. The Court held that the sample was not taken in strict compliance with procedure as under Sec 21 of the Water Act, 1974 and this evidence cannot be regarded as admissible.

2.4 <u>That the notice was not given to the appellant</u>

1) In the case of ***East India Commercial Co. v. Collector of Customs***[28], it was stated by the Hon'ble court that notice is the first and extremely important step in the hearing procedure. Any proceeding taken without notice would violate natural justice and would thus be invalid. Notice is regarded as the minimum obligatory condition. It is the sine qua non of fair hearing. The right to a hearing becomes illusory if the party has no knowledge of the allegations which he has to meet.
2) The same has been reiterated in the case of ***Canara Bank v. Debases Das***[29], it was held that notice is the first limb of the principle that no one should be condemned unheard. In the absence of notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated.
3) In the case of ***Kan Singh v. STA Tribunal***[30] without any notice to the appellants, RTA took into consideration the fact of grant of permits to the government owned corporation for some other interstate routes and on that basis also granted by the permit and rejected the application of the appellants. Quashing the RTA's order and also of the state transport appellate tribunal, the SC held that the appellants were not given on opportunity by the RTA to know what materials were considered by it after the closure of the hearing of the applications on the basis of which its granted the permit to the govt undertaking. On the other hand, the govt corporation had full opportunity to know all the documents placed by the appellants before the RTA. The grant of the permit was thus held to be a clear violation of the principles of natural justice.
4) It was also propounded in the case of ***Associated Trades v. State Of West Bengal***[31], the Court held that the SPCB should give the industry an opportunity to take any remedial measures for the purpose of prevention and control of water pollution before passing an order of closure of industry under Section 33-A of the Water Act, 1974.

[28] AIR 1962 SC 1893: (1963) 3 SCR 338
[29] (2003) 4 SCC 557, para 15: AIR 2003 SC 2041
[30] RLW 2005 (1) RAJ 90, 2004 Cri LJ 3253.
[31] 1952 AIR 75, 1952 SCR 284.

2.5 That the Central govt. is the correct authority to take samples

It is humbly submitted that CPCB was not the correct authority to take samples. Central govt. regulates and holds power over CPCB and is, therefore, the correct authority to take samples.

1) **Sec 34** of **Water Act** empowers the central government to contribute in each financial year to enable the Board to perform its functions under this Act.
2) **Sec 36** of **Water Act** and **Sec 33** of **Air Act** respectively talks about the fund and all sums paid by the central government to the central board.

Also, **Sec 37** of **Water Act** states that the central board can borrow money from any source in accordance with, the terms of any general or special authority given to it by the Central Government. Furthermore, **Sec 38** of **Water Act** and **Sec 34** of **Air Act** respectively obligates the central board to prepare budget and forward it to the central government.

3) **Sec 39** of **Water Act** states that the central board has to prepare Annual report giving full account of its activities and forward copies to the central government. Also, **Sec 40** of **Water Act** and **Sec 35** of **Air Act** board has to prepare an annual statement of accounts in such form as may be prescribed by the Central Government.

This clearly shows that the central govt. regulates CPCB and hence should be correct authority to take samples.

Moreover, since e-waste rules are framed under EPA which empowers central govt. to issue directions, henceforth, it should be the correct authority to take samples.

4) **Sec 5** of **EPA** states that notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government to exercise its powers and issue directions for:

(a) the closure, prohibition or regulation of any industry, operation or process;

Thus, it is clear that CPCB was not the correct authority to take samples from the appellant's plant.

ISSUE NO. 3: WHETHER RIGHT TO REPAIR ACT IS CONSTITUTIONALLY VALID.

It is humbly submitted before this Hon'ble Court that the **Right to Fair Repair Act, 2018** as enacted by the Government of Aashiyana in an effort to combat the electronic waste is constitutionally invalid in all terms. This issue has been discussed in detail with the help of various sub-issues as mentioned below :-

3.1 Violation of Part III rights of the petitioners .

1) It is very humbly submitted before this Hon'ble Court that **Article 19(1)(g)** guarantees to all its **citizens** the right to practice any profession, or to carry on any occupation, trade or business. However, under **Article 19(6)**, the State is not prevented from making a law

imposing, in the interests of the general public, **reasonable restrictions** on the exercise of the above right.

2) It is very humbly submitted by the petitioner that in the instant case where the Government of Aashiyana has enacted the **Right to Fair Repair Act, 2018** is an **unreasonable restriction** caused which infringes the fundamental right of the petitioner to carry on any trade or business with freedom. There are various grounds on which a Restriction can be challenged: Any restriction imposed by the state by any law on the right guaranteed under Article 19(1) (g) can be challenged on the ground either that the restriction is unreasonable, or that the restriction is in excess of the right, or that even activities which are not pernicious or that the procedure laid down for curbing any activity is unjust, arbitrary or unreasonable.[32]
3) The expression "**reasonable restriction**" signifies that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public.[33] **There has to be a nexus between the restriction and the object sought to be achieved and the object must not, itself, be repugnant to the letter or the spirit of the Constitution.[34]**. Legislation which is arbitrary or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedoms guaranteed in Article 19 (1) (g) and the social control permitted by Clause (6) of Article 19, it must be held to be wanting in that quality.[35]
4) In the instant case the object of the legislation as shown by the Government is to curb the e-waste. But the restriction so caused or the provisions of the enacted act in no way form a nexus to the object of the legislation. It has been also provided that batteries and other components to third-party repair shops should be freely accessible for replacement, **unless safety dictates otherwise.** By providing parts to third party repair shops, the obligation as to who will be held responsible for the damages, if any, caused after the repair of the product. Also it would be unsafe for any trader to provide its parts to rival competitors as there is a threat of reverse engineering on the part of the Company to whosoever the components are made available. Also it has been contended by the Government that the enactment of such legislation will stimulate job creation in the country. It is very humbly submitted that the stimulation of job creation could have been easily possible if the Government on the other hand would have mandated the petitioners only to start more repair service stations in order to

[32] Rameshwaral Haralker v. UOI AIR 1970 Cal 520
[33] T.P. Enterprise v. UOI 1982 SC CR. 341
[34] Habibullah v. Gulam Ahmed Baba 1979 Kashmir LJ 309.
[35] Chintamon Rao v State of MP; AIR 1951 SC 118

ease the consumers and provide easy accessibility to the product parts. This was not the only way to achieve the norms as stated by the Government.

5) Also the enactment of such a legislation affects the economic situations too .In **Shivshakti Sugars Ltd. v. Shree Renuka Sugar Ltd. & Ors**[36], Supreme Court Justices Sikri and Sapre said that, "*The court needs to avoid that particular outcome which has a potential to create an adverse effect on employment, growth of infrastructure or* ***economy****, or the revenue of the state." Court further held that where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation … India is on the road of economic growth. In such an environment it becomes the bounden duty of the Court to have the economic analysis and economic impacts of its decisions.*"
6) Thus, it is very humbly submitted before this Hon'ble Court that the Right to Fair Repair Act, 2018 as enacted by the Government of Aashiyana violates the Part III rights of the petitioners as conferred upon by the Constitution of Aashiyana.

3.2 <u>Violation of Company's trade secrets.</u>

1) It is very humbly submitted before this Hon'ble Court that the Right to Fair Repair Act,2018 as enacted by the Government of Aashiyana clearly violates the petitioners right to trade and also compels it to disclose its trade secrets with other companies by providing its components in open market. Trade secret is a formula, process, device or other business information that is kept confidential to maintain an advantage over the competitors. It is the information which includes formula, pattern, compilation, programme, device, method, technique, or process, that derives independent economic value from not being generally known or readily ascertainable.[37]
2) In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention, with respect to **information which is a secret; has commercial value; and has been subject to reasonable steps for ensuring its secrecy**. Members to ensure that natural and legal persons have the possibility of preventing such information, within their control, from being disclosed to, acquired by, or used by others without their consent, in a manner contrary to honest commercial practice. In the instant case where the Government has made it mandatory for the Electronic manufacturers to provide

[36] 2017 (5) TMI 1509
[37] (Black Law's Dictionary Eight Edition as cited in Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh, 2010 (112) BOMLR 3759]

their components to third party repair shops, it not only mandates to provide for their product parts but also mandates the electronic manufacturers to make their repair information too available in the open market. Making repair information available in the open market also infringes the petitioner's Right to Reputation under Article 21 of the Constitution of Aashiyana. Right to reputation is a facet of the right to life of a citizen under Article 21.[38] Any mishappening caused to the product of a consumer during repair will directly harm the reputation of the Original manufacturer of the product and no independent repair shop or service shop would take the sole responsibility of the harm so caused.

3) It is humbly submitted before this Hon'ble Court that the act so enacted by the Government also infringes the Economic rights of the petitioner. Providing components of its original product for repair to independent repair shops would affect the economic rights as it will be a loss to the Original manufacturers. Also third party repair shops with this information could reverse engineer the key components and offer them at a lower price to consumers, undercutting the company's bottom line and possibly doing damage to the equipment with replacement parts that don't meet the company's specifications.
4) Thus, it is very humbly submitted that the **Right to Fair Repair Act** must not compel the Original electronic manufacturers to provide for repair information as for the safety of the consumers as well as for the safety of the products so manufactured.

ISSUE NO. 4: WHETHER RIGHT TO REPAIR CAN BE TAKEN AS A PART OF EXTENDED PRODUCER RESPONSIBILITY.

The counsel humbly submits before this hon'ble court that the petition of Right to Repair Act cannot be taken to be a part of Extended Producer Responsibility and most respectfully showeth that:

4.1. Aim of the Legislature in enacting the Right to Repair Act and Extended Producer Responsibility is different.

1) EPR Scheme has been incorporated under the E-waste Rules, 2016 to curb the problem of increasing e-waste in the environment. A clean environment that includes clean air, water, land and energy, is essential for human existence, conducting business and creating wealth[39]. Extended producer responsibility (EPR) is a policy tool that holds producers responsible for the post-use collection, recycling, and disposal of their products (Lifset 1993). The basic concept is to promote environmental impact reduction at end of life by (1) making manufacturers internalize the end-of-life costs of their products so as to incentivize the design

[38] State of Bihar v. Lal Krishna Advani, (2003) 8 SCC 361.
[39] Durga Dutt Ors v State Of HP CWPILNO.15 of 2010

of products that are more recyclable and have lower toxicity[40], and (2) to ensure there is sufficient and stable financing for running a collection and recycling system for post-use products. (Mayers et al. 2012)

2) Also according to the guidelines of CPCB for implementing EPR is the responsibility of every producer of electrical and electronic equipment (EEE) for channelisation of e-waste to an authorised dismantler / recycler to ensure environmentally sound management of such waste. It is based upon the principle that producers (usually brand owners) have the greatest control over product design and marketing and these same companies have the greatest ability and responsibility to reduce toxicity and waste.[41] The impetus is the potential impact of post-use electronics at home and abroad: consumer electronics contain toxic materials that are harmful to both the environment and human health if not managed properly. A well-functioning EPR implementation, in conjunction with adequate environmental regulation, can help alleviate these problems by ensuring the proper recycling of e-waste in the short term (via adequate financing) and reducing the environmental impact of e-waste in the long-term (via design incentives)[42].
3) It is basically an environmental protection strategy to reach an environmental objective of a decreased total environmental impact of a product, by making the manufacturer of the product responsible for the entire life-cycle of the product and especially for the take-back, recycling and final disposal.[43] EPR Scheme is a driving force behind the adoption of remanufacturing initiatives as it "focuses on the end-of-use treatment of consumer products and has the primary aim to increase the amount and degree of product recovery and to minimize the environmental impact of waste materials"[44].On the other hand, Right to Repair Act is made to counter planned obsolescence, which is a policy of planning or designing a product with an artificial limited useful life, so it will become obsolete after a certain period of life. The rationale behind the strategy is to generate long terms sales volume by reducing the time between repeat purchases. The act force vendors to design products for longer life and easier maintenance in

[40] Conceptually, EPR assigns end-of-life costs to producers, so if toxicity is regulated and affects end-of-life management, then EPR incentivizes toxicity reduction.

[41] Hanisch, C. (2000). Is Extended Producer Responsibility Effective?. Environ Sci Technol, 34 (7), pp.170 A-175 A.

[42] Journal of Industrial Ecology, 2013 by Yale University DOI: 10.1111/j.1530-9290.2012.00574.x

[43] Thomas Lindhqvist, "Towards an [EPR]- analysis of experiences and proposals," April 1992

[44] Johnson, Michael R.; McCarthy, Ian P. (2014-10-01). "Product recovery decisions within the context of Extended Producer Responsibility". Journal of Engineering and Technology Management. Engineering and Technology Management for Sustainable Business Development9–28. doi:10.1016/j.jengtecman.2013.11.002.

an effect to combat abusive practices like manufacturers legally preventing users from repairing their devices and creating monopoly in repair. Its sole purpose behind enacting the Right to Repair Act is that devices shall be easier to repair; batteries and other components should be freely for replacement, unless safety dictates otherwise. Manufacturers shall give other companies excess to their components so that consumers can visit those companies for repairs. It promotes and protects effective competition in trade and commerce, protect consumers from unfair and misleading market conduct and reduce prices of repairing.

4) According to Eggman[45] it also "*provide consumers with the freedom to have their electronic products and appliances fixed by a repair shop or service provider of their choice*" The right to repair electronics refers to government legislation that is intended to allow consumers the ability to repair and modify their own consumer electronic devices, where otherwise the manufacturer of such devices require the consumer to use only their offered services or void the product's warrant and also they don't want their customers to be able to repair their devices themselves or take them to local shops to get them fixed there. Instead, they would rather have you pay them to repair your devices, often at a cost that's much more than what an independent repair shop would charge. Thus from the above contentions it can be inferred that aim of Legislature while introducing EPR Scheme in E-Waste Rules and enacting The Right to Repair Act is different. Firstly, the former aims at solving the problem of E-waste in the Environment and the latter aims at decreasing the restrictive trade practices of the companies and preventing them from abusing the dominant position in the market. Secondly the former in particular deals with the proper handling of e-waste which is typically a costly operation and the burden is been shifted from local governments to the electronics industry under EPR. In addition, EPR also allow end users to return used electronics free of charge and requires advertising of take-back programs[46] whereas latter act deals with the freedom to have their electronic products and appliances fixed by a repair shop or service provider of their choice.
5) Thus, the aim of the EPR scheme and Right to Repair Act has been made with different purposes. Hence the Act cannot be part of Extended Producer Liability.

[45] Susan Talamantes Eggman (D-Stockton) has announced that she will be introducing the California Right to Repair Act.
[46] Atasu, A. and R. Subramanian. 2012. Extended producer responsibility for e-waste: Individual or collective producer responsibility? Production and Operations Management 21(6): 1042–1059.

PRAYER

In light of the issues raised, arguments advanced, reasons given and authorities cited it is most humbly and respectfully requested by the counsel on behalf of the Appellant that this Hon'ble Supreme Court may be pleased to adjudge and declare that:

1. The JJB Company is not liable under the various Environmental Legislations. Also that the fine imposed by the NGT is not proportional.

2. The CPCB's order of closure of JJB plant is not justified and that CPCB is not the correct authority to take sample as E-waste rules are framed under Environment Protection Act but relevant authority under this Act is Central Government.

3. The Right to Fair Repair Act is constitutionally invalid.

4. The Right to Repair cannot be taken to be a part of Extended Producer Responsibility.

AND/OR

Pass any other Order, Direction, or Relief that it may deem fit in the Best Interests of Justice, Fairness, Equity and Good Conscience.

For this Act of Kindness, the Appellant as in duty bound, shall forever pray.

The Appellant

Sd/-

(COUNSELS FOR THE APPELLANTS)