

**BEFORE THE NATIONAL GREEN TRIBUNAL
EASTERN ZONE BENCH, KOLKATA
(THROUGH PHYSICAL HEARING WITH HYBRID MODE)**

Original Application No.114/2022/EZ

In the matter of:

1. Sirin Tammana

W/o: Rashmin Kumar Panda,
Aged about 35 years, Advocate by Profession,
Resident of Panigrahy Nagar,
Po: Panigrahy Pentho, First Gate,
Digapahandi Road,
P/S: Badabazar,
Berhampur – 760006,
Dist: Ganjam,
Odisha

2. Madhusmita Jadab

D/o: Late Kailash Chandra Jadab,
Aged about 35 years, Advocate by Profession,
Resident of Babajitota Street,
Po: Berhampur,
P/S: Badaiyanathpur,
Berhampur – 760001,
Dist: Ganjam,
Odisha

3. Kishore Chandra Behera

S/o: Late Parsuram Behera,
Aged about 50 years, Advocate by Profession,
Resident of Lanjipalli Main Road,
Po: Berhampur,
P/S: Badaiyanathpur,
Berhampur – 760008,
Dist: Ganjam,
Odisha

4. Natabara Sahu

S/o: Late Gurunath Sahu,
Aged about 61 years,
Vill/Po: Indrakhi,
P/S: Golonthara,
Pin – 761008,
Dist: Ganjam,
Odisha

.... Applicant(s)

Versus

1. State of Odisha

Represented by it's Chief Secretary to Govt. of Odisha,
State Secretariat,

Bhubaneswar,
Pin – 751001,
Odisha

2. Additional Chief Secretary to Government

Revenue and Disaster Management Department,
Government of Odisha,
State Secretariat,
Bhubaneswar,
Pin – 751001,
Odisha

3. Member Secretary

Odisha State Pollution Control Board,
Paribesh Bhawan,
A/118, Nilakantha Nagar,
Unit-8, Bhubaneswar,
Pin – 751012,
Odisha

4. Revenue Divisional Commissioner

Southern Division,
At/Po : Berhampur,
Pin – 760004,
District: Ganjam,
Odisha

5. Collector-cum-District Magistrate, Ganjam Collectorate,

At/Po : Chatrapur,
Pin – 761020,
Dist. : Ganjam,
Odisha

.... Respondent(s)

Date of hearing: 22.03.2023

**CORAM: HON'BLE MR. JUSTICE B. AMIT STHALEKAR, JUDICIAL MEMBER
HON'BLE PROF. A. SENTHIL VEL, EXPERT MEMBER**

For Applicant(s) : Mr. Biranchi Narayan Mahapatra, Adv. (in Virtual Mode)

For Respondent(s) : Ms. Papiya Banerjee Bihani, Adv. for R-3 (in Virtual Mode),
Mr. Anand Prakash Das, ASC for R-4 & 5 (in Virtual Mode)

ORDER

1. This Original Application has been filed by the Applicant alleging that the Baula Bandha water body and its embankment relating to the Plot No.100 (Ac. 1.341 Decimal), 100/132 (Ac. 0.020 Decimal), 101 (Ac. 3.426 Decimal), 101/166 (Ac. 0.180 Decimal), 102 (Ac. 0.842 Decimal) which is recorded as Jalasaya-ii and its

embankment measuring area AC. 3.001 Decimal out of total area measuring Ac. 5.809 Decimal of Khata No.27 at Kalapuri Mouza (Panda Colony, near Engineering School) under Berhampur Tahasil of Ganjam District of Odisha, has been illegally encroached by various persons and constructions have been made thereon, thereby destroying a considerable part of the waterbody.

2. The learned Counsel for the Applicant submits that encroachment of waterbody has been seriously viewed by the Hon'ble Supreme Court of India. In (2001) 6 SCC 496 *Hinch Lal Tiwari Vs. Kamala Devi & Others* the State has been directed to ensure that no waterbody is allowed to be encroached and if there are encroachments over the waterbody, the same have to be removed. The relevant extract of the judgment reads as under:-

"It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is failing in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection against knavish attempts to seek allotment in non-abadi sites. For the aforementioned reasons, we set aside the order of the High Court, restore the order of the Additional Collector dated 25-2-1999 confirmed by the Commissioner on 12-3-1999. Consequently, Respondents 1 to 10

shall vacate the land, which was allotted to them, within six months from today. They will, however, be permitted to take away the material of the houses which they have constructed on the said land. If Respondents 1 to 10 do not vacate the land within the said period the official respondents i.e. Respondents 11 to 13 shall demolish the construction and get possession of the said land in accordance with law. The State including Respondents 11 to 13 shall restore the pond, develop and maintain the same as a recreational spot which will undoubtedly be in the interest of the villagers. Further it will also help in maintaining ecological balance and protecting the environment in regard to which this Court has repeatedly expressed its concern. Such measures must begin at the grass-root level if they were to become the nation's pride."

3. In (2018) 13 SCC 390, National Institute of Medical Science University Rajasthan & Anr. Vs. State of Rajasthan & Ors., the Hon'ble Supreme Court has affirmed the view taken by the Court in Jagpal Singh (supra). Paragraphs 40, 41 and 42 of the judgment read as under:-

"40. In M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors.¹ this Court directed enforcement of the rule of law by demolition of unauthorized constructions. It was held as follows:

"The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial

¹(1999) 6 SCC 464

discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion the wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots.”

41. This view was followed and endorsed in *Jagpal Singh* in the following words:

“In M.I. Builders (P) Ltd. v. Radhey Shyam Sahu the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over Rs. 100 crores.

In Friends Colony Development Committee v. State of Orissa² this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion this decision will apply with even greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers, or a dispensary for them.

²(2004) 8 SCC 733

In many States government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored.

42. Keeping in mind the view expressed by this Court in these and other decisions, we also direct the demolition of the unauthorized construction by or on behalf of NIMS on Khasra No. 526. The demolition should be carried out by the Jaipur Development Authority with the assistance of the State Government and the Collector of Jaipur District on or before 30th November, 2017. The Director General of Police of Rajasthan is directed to render all necessary assistance in the process of demolition. The cost of demolition and removal of rubble etc. will be at the expense of NIMS. Any pending application made by NIMS for compounding the unauthorized construction or regularizing it stands superseded in view of our decision.”

4. It is stated that the Applicant sought information under Right to Information (RTI) Act in pursuance to which a list of encroachers has been provided to him from the office of Tahasildar, Berhampur (Bramhapur), District - Ganjam, translated copy of which has been filed as Annexure-A/1 series at page 27 to 34.
5. Affidavit dated 31.10.2022 has been filed on behalf of the Respondent No.3, State Pollution Control Board, Odisha. Along with this affidavit, an Inspection Report of an inspection carried out on 21.09.2022 has been filed. The **Observations** made during the inspection and **Conclusion** and **Recommendations** read as under:-

Following observations are made during inspection :

1. *Stone patching has been made around the embankment of Baula Bandha and concreted /Black topped road has also been constructed around the Adi of Water body.*
2. *No direct discharge of sewage to the Baula Bandha was observed during inspection.*
3. *Small quantities of solid wastes including plastic materials and garbage are found around the embankment of Baula Bandha.*
4. *Few quantities of used plastic bottles, algal growth are also found floating at different portions of the Water body.*
5. *Guard wall of one feet height has been constructed around the Baula Bandha (Except bathing ghats) to restrict the flow of surface runoff during rainy season.*
6. *It was also observed that due to the religious rituals and believing, people are disposing the worshiping wastes such as flowers, leaves and other solid materials in to the Baula Bandha.*
7. *Though Berhampur Municipal Corporation is removing the solid floating materials from time to time, the Corporation has to increase the frequency to reduce its impact on water pollution of the pond water.*
8. *There are four nos. of bathing Ghats constructed at the four directions of Baula Bandha.*
9. *It was apprehended from the surroundings, during rainy season surface run off might be discharged into the water body through bathing Ghats as guard wall was not constructed in those locations.*

10. *There is no provision for removal of excess water during rainy season from the water body.*
11. *Collected one no. of water sample from Baula Bandha on 21.09.2022 for analysis. The analysis result thus obtained indicates that water quality does not conform to Class B (Outdoor Bathing (Organised) with respect to Biochemical Oxygen Demand (BOD), Total Coliform (TC), MPN/100 ml and Fecal Coliform (FC), MPN/100 ml as per MoEF&CC Notification vide GSR No. 742(E) dtd.25.09.2000 for outdoor bathing.*

CONCLUSION & RECOMMENDATIONS :

In view of the above following recommendations are made :

1. *Municipal Authority shall take necessary measures to remove the solid materials including plastic bottles, Algae and other foreign particles from the surface of the water body on regular interval basis.*
 2. *There shall be provision for removal of excess water during rainy season from the Baula Bandha.*
 3. *Awareness shall be created among the local people of the surrounding areas to prevent disposal of garbage/solid wastes/ worshipping wastes into the water body.”*
6. Along with this Inspection Report, Water Analysis report has also been filed. Annexure-R-3/3 shows Dissolved Oxygen (DO) to be 11.0 mg/L whereas Biochemical Oxygen Demand (BOD) is shown as 9.0 mg/L.
 7. In para 8 of the affidavit of the State Pollution Control Board, also it is stated that very high values of dissolved oxygen (11.0 mg/l) have

been observed in the analysis result which may be ascribed to eutrophic condition of the pond.

8. Counter-affidavit dated 09.11.2022 has been filed on behalf of the Respondent No.5, Collector-cum-District Magistrate, Ganjam.
9. The affidavit of the State Respondent states that necessary and effective steps shall be taken for disposal of the OPP cases bearing OPP Case No.8/2022 to 89/2022 (82 nos.) under the Orissa Public Premises (Eviction of Unauthorized Occupants) Act, 1972 at the earliest.
10. In the affidavit of the Collector & District Magistrate, Ganjam dated 09.11.2022 it has not been disputed that Baula Bandha was a tank which was used for channeling water for irrigation by the Irrigation Department but over the course of years it has lost its significance as well as existence since decades.
11. It is stated that the plots in question i.e. Plot Nos.100, 100/132, 101, 101/166, 102 in Khata No.27 relating to Baula Bandha were initially classified as 'Jalasaya' and 'Adi' spread over an area measuring Ac.5.809 but with the passage of time the land has changed its character and there is no waterbody existing at present over an area of Ac. 2.421 which has been encroached.
12. It is also stated that a new water channel was created to provide water to the agricultural fields as a result of which the Baula Bandha was no more found useful and the said tank became dry.
13. Thereafter, slum dwellers started residing there, illegally constructing their houses since more than 40 years and the entire area has now become a slum colony known as 'Panda Colony' with hundreds of families residing there.

14. It is also stated that the nature of the land over plot no.101/266 area measuring Ac. 0.075 and plot no.101/283 area measuring Ac. 0.225 Khata No.18/142 was converted to 'Kissam Gharabari-I' vide Alienation Case No.02/2003 and this land has now been allotted in favour of Bharatia Jeevan Bima Nigam, Berhampur.
15. It is further stated that the character of the Plot No.101/99 area measuring Ac.0.199 and Plot No.102/198 area measuring Ac.0.069 in Khata No.18/92, Mouza – Kalapuri has been changed vide Alienation Case No.631/1993 and the said plots are no more 'Jalasaya' and the land has been allotted to Sampadak Naveen (a weekly newspaper unit).
16. It is further stated that several encroachment cases were booked against the encroachers between the year 1982 and 1995 to safeguard the land in question but several of the encroachers approached the court of Sub-Collector, Berhampur and the Appellate Court vide order dated 22.11.1995 remanded the case with a direction to the Tahasildar, Berhampur to give an opportunity of hearing to the Appellant.
17. Thereafter, the Tahasildar, Berhampur issued notices for eviction of illegal encroachers which order was challenged by several encroachers before the Hon'ble High Court of Odisha by filing writ petition and in one such Writ Petition No. W.P.(C) 16747/2012 the Hon'ble High Court has passed the following orders on 17.09.2019 :

"In the circumstance and in absence of positive material as to the ultimate outcome involving the L.E. case indicated herein and taking in account the fact that the petitioners enjoying interim protection of this court since Sep 2012, the court disposed the matter observing that in the event the LE case

indicated herein above has been disposed of in favour of the petitioners, then there may not be eviction of the petitioners provided there is no legal impediment otherwise. The court further observed in the event the L.E. case indicated herein above has not been disposed of as of now after remand order passed by the Sub-Collector, Berhampur, it may not be appropriate to evict the petitioners unless the remand L.E. Proceeding is closed.”

18. It is stated that the aforesaid order was passed in a bunch of Writ Petitions vide W.P.(C) 16741/12, W.P.(C) 16545/12, W.P.(C) 16746/12, W.P.(C) 16742/12, W.P.(C) 16740/12, W.P.(C) 16743/12 and W.P.(C) 16744/12.
19. Thereafter, OPP cases were initiated under the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972. However, the fate of those eviction proceedings have not been disclosed in the counter-affidavit. OPP Case No.8/2022 to OPP Case No. 89/2022 (total 82 cases) have been initiated under the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972.
20. The State Pollution Control Board, Odisha has filed further affidavit dated 03.01.2023 bringing on record the Water Analysis Report which reads as under:-

(1) “The test Results of water samples collected from the pond at Baulabandha at Kalapuri Mouza (Panda Colony near Engineering School), Tahasil : Berhampur in Ganjam district, furnished in the Test Report No.OS/366/10/2022 dated 01.10.2022 is related only to the samples submitted to the Central Laboratory for analysis vide Regional Office, Berhampur letter

No.2905/legal/54/2022 dated 21.9.2022. The said sample has been analyzed in the Central Laboratory and the analysis report was forwarded to the RO, Berhampur vide Lt. No.18426 dtd.01.10.2022. In the analysis report under the heading “Note (i)” it is indicated that the results stated above related only to the items tested.

(2) As may be seen from the Field protocol submitted along with the Sample, by the Regional Officer, Berhampur the colour of the pond water is light green-to green. This indicates the eutrophication/algal growth in the water body. Further, as the sample has been collected in the day time (i.e. 1.30 PM) and from the near-to-surface layer, oxygen concentration in the pond due to photosynthetic activity of the algae will be naturally more. The oxygen concentration in such water bodies during night time will be less due to absence of photosynthetic activity and consumption of oxygen by algae from the water body. This is called diurnal variation of Dissolved oxygen (DO) in an eutrophicated/ algal rich water bodies.

(3) Therefore, there is the possibility of high concentrations of DO in such polluted water bodies where BOD value maybe high.

(4) Analysis reports containing of water quality of other pond waters such as Narendra, Markanda, Indradyumna, Swetaganga and Parvati Sagar pond in Puri during January-March, 2022, where DO values are high with BOD values greater than 3.0 mg/L. Water quality Management Plan of Bindusagar pond prepared by the Board (page. 9 and 10 may be referred) where such phenomena are mentioned.”

21. We have heard the learned Counsel for the parties and perused the documents on record.
22. The learned Counsel for State Respondents has referred to the judgment of the Hon'ble High Court of Odisha passed in Writ Petition (C) No. 8797 of 2004; (Tapan Kumar Das Vs. Commissioner, Cuttack Municipal Corporation & Ors.) along with other connected cases decided on 11.10.2012. The High Court gave certain directions to the effect that Revenue Divisional Commissioner (R.D.C.) (C.D.) Cuttack, shall form a Committee and this Committee shall deal with the protection, preservation and conservation of water bodies in the city of Cuttack and take decision accordingly. It was also provided that applications for change of classification/kisam of land from 'Jalasaya' to 'Homestead' shall be processed through the Tehsildar, Sadar, Cuttack, to the Collector for appropriate orders and the decision of the Collector shall then be placed before the Committee for approval and if the Committee is of the opinion that the lands which have lost their characteristic as 'Jalasaya' and those which are actually not 'Jalasaya' or 'Swampy' lands but have been recorded as 'Jalasaya', change of classification of such lands may be allowed. The Division Bench of the High Court further directed that it will be open for the State Government to adopt the directions given in respect of Cuttack city for other cities in the State. Paras 14 and 15 of the High Court judgment has held as under:-

“14. Considering the facts and circumstances of the case, for preservation and conservation of tanks/water bodies in Cuttack City, and to deal with such tanks/water bodies, we direct as follows:

(1) The State Govt. shall act upon the report dated 31.08.2007 submitted by the R.D.C (C.D.) Cuttack, and the affidavit dated 18.05.2020 filed by the Principal Secretary to Govt. H&U.D. Department and shall ensure that the steps indicated therein are taken within a period of two years from today.

(2) The R.D.C. (C.D.) Cuttack, under his chairmanship shall form a Committee not exceeding seven members including the Vice Chairman, C.D.A., Municipal Commissioner, CMC, Cuttack, and an Environmentalist of the State Pollution Control Board, Odisha. Needless to say, the other members of the Committee shall be nominated by the R.D.C. The Committee shall deal with the protection, preservation and conservation of water-bodies in the city and shall take decisions accordingly.

(3) The applications for change of classification/kissam of lands from Jalasaya to homestead shall be processed through the Tahasildar, Sadar, Cuttack, to the Collector for appropriate orders. The decision of the Collector shall be placed before the Committee as constituted above for approval. Only after approval of the Committee, change of classification/kissam of the land shall be allowed. The Committee shall record the reasons for allowing change of classification/kissam of such lands. However, if the Committee is of the opinion that the lands, which have lost their character as Jalasaya, and those, which are actually not Jalasayas or swampy lands but have been recorded as Jalasaya, change of classification of such lands may be allowed. This shall be effective from the date of the judgment.

(4) The Committee shall also make enquiry, if it is so necessary, to find out whether classification of the lands recorded as Jalasaya has been changed by

orders of the Tahasildar during operation of the order of status quo passed by this Court on 08.04.2005 in O.J.C. No. 6721/1999. In case it is found that the classification has been changed during continuance of the order of status quo, the same shall be treated as non est in the eye of law.

15. For the aforesaid purpose, Cuttack city shall be construed to be the old Cuttack City comprising the areas shown in the satellite maps of the ORSAC of 1990 and 2006, which have been annexed to the Report of the R.D.C. dated 31.08.2007. It will be open to the State Govt. to adopt the directions given in respect of Cuttack City in the foregoing paragraph for other cities in the State.”

23. No doubt, certain lands over a period of time may have lost their character as ‘Jalasaya’ and the ‘Jalasaya’ itself may have been degraded with the passage of time but that does not by itself absolve the moral obligation of the State Respondents to restore the Baula Bandha waterbody to its original pristine glory. If certain lands have been permanently degraded and permanent constructions have been made thereon, land of an equivalent area either nearby or as far as possible close to the original Baula Bandha must be identified by the State Respondents and converted into a waterbody. Such directions have earlier been given by the Tribunal in the Original Application No. **106/2021/EZ (Sisir Kumar Panda Vs. Union of India & Ors).**

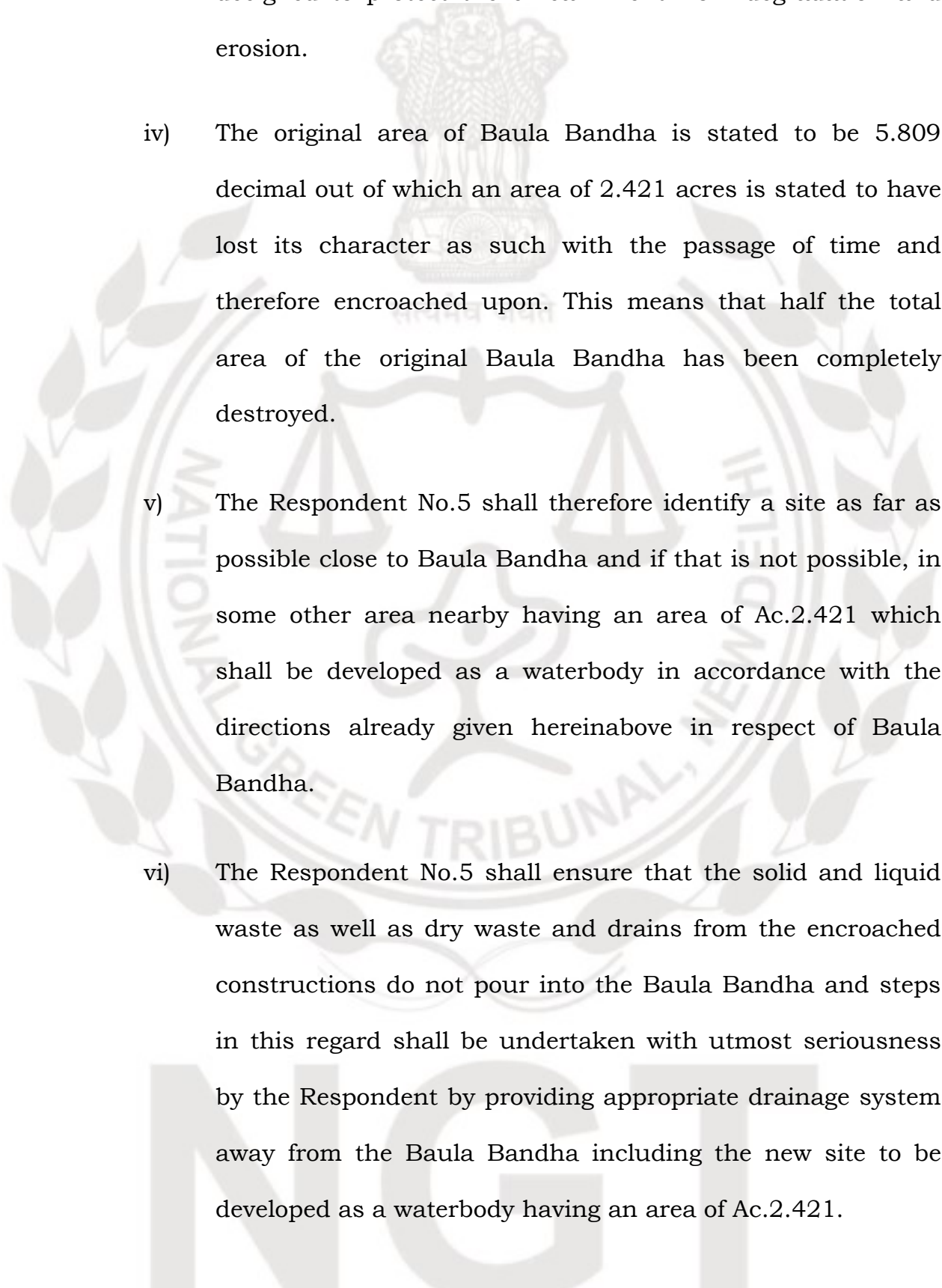
24. Now, coming to the existing waterbody or whatever remains of the original waterbody Baula Bandha, the Inspection Report shows that while there is no direct discharge of sewage into the Baula Bandha, small quantities of solid waste including plastic materials and garbage were found around the embankment of Baula Bandha.

Plastic bottles and Algal growth were found floating at different parts of the said waterbody. During religious rituals people are disposing the worship wastes such as flowers, leaves and other solid materials into the Baula Bandha.

25. The Berhampur Municipal Corporation is taking steps to remove the solid floating materials from the waterbody from time to time. There are four bathing ghats constructed at four points of the Baula Bandha. It was apprehended from the sight of the surrounding area that during rainy season surface runoff might be discharged into the waterbody through the bathing ghats as guard wall was not constructed at these locations. There is no provision for removal of excess water. Stone patching has been made around the embankment of Baula Bandha and concreted/black topped road has been constructed around the 'Adi' of the waterbody.

26. We, therefore, dispose of the Original Application No. **114/2022/EZ** with the directions to the Respondent No.5, Collector-cum-District Magistrate, Ganjam as under :-

- i) Steps shall be taken by the Respondent to protect the remaining area of Baula Bandha with proper railing/fencing or wall or guard wall of appropriate height to ensure that there are no further encroachments into the waterbody.
- ii) The embankment of the Baula Bandha shall be protected by planting grass and other shrubs and creating an eco-friendly park all around which can be used by the general public for recreation.

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- iii) The eco-friendly embankment shall be planted with local shrubs and bushes or even ornamental plants specifically designed to protect the embankment from degradation and erosion.
 - iv) The original area of Baula Bandha is stated to be 5.809 decimal out of which an area of 2.421 acres is stated to have lost its character as such with the passage of time and therefore encroached upon. This means that half the total area of the original Baula Bandha has been completely destroyed.
 - v) The Respondent No.5 shall therefore identify a site as far as possible close to Baula Bandha and if that is not possible, in some other area nearby having an area of Ac.2.421 which shall be developed as a waterbody in accordance with the directions already given hereinabove in respect of Baula Bandha.
 - vi) The Respondent No.5 shall ensure that the solid and liquid waste as well as dry waste and drains from the encroached constructions do not pour into the Baula Bandha and steps in this regard shall be undertaken with utmost seriousness by the Respondent by providing appropriate drainage system away from the Baula Bandha including the new site to be developed as a waterbody having an area of Ac.2.421.
 - vii) The Odisha State Pollution Control Board shall take water samples from the existing Baula Bandha every six months including the new waterbody to be created as directed

hereinabove and if the water parameters are not in conformity with the parameters prescribed by the Pollution Control Board or Ministry of Environment, Forests and Climate Change (MoEF&CC), appropriate and stringent directions in this regard shall be given by State Pollution Control Board to the concerned authority and ensure compliance of the directions.

- viii) The directions given hereinabove, shall be complied with by the State Respondents by **31.12.2023** and affidavit of compliance shall be filed by the District Magistrate, Ganjam, before the Registrar, National Green Tribunal, Eastern Zone Bench, Kolkata by **14.01.2024**.

27. There shall be no order as to costs.

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B. Amit Sthalekar, JM

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Prof. A. Senthil Vel, EM

March 22, 2023
Original Application No.114/2022/EZ
SKB

NGT