

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1487 OF 2019

1. Vanashakti
a Public Trust, registered under the provisions of the Bombay Public Trust Act, 1950 having its office at Nandakumar Pawar House, Opp. Shri. Jagannath Darshan Building, M.D. Kini Marg, Bhandup Village (East), Mumbai-400 042
 2. Stalin Dayanand,
Aged 54 years, Project Director, Vanashakti and having its office at Nandakumar Pawar House, Opp. Shri. Jagannath Darshan Building, M.D. Kini Marg, Bhandup Village (East), Mumbai-400042
 3. Kripa Janaki Raman,
Aged 54 years, residing at B-8, Sai Shakti, Saibaba Complex, Mohan Gokhale Road, Goregaon (East), Mumbai-400063
 4. Rohit Joshi, Indian Inhabitant,
Aged 40 years, Residing at Flat No.1, Prajakta CHS Brahmin Society Navpada, Thane (West)-400 062
 5. Priya Narayan Mishra,
residing of Mumbai, Aged 48, Indian Inhabitant, residing at A-303, Link Palace, Saibaba Complex, Near Oberoi International School, Goregaon (East), Mumbai-400 063
- .. Petitioners

Versus

1. Union of India
through the Secretary, Ministry of
Environment, Forests and Climate Change,
Indira Parayavaran Bhavan, Aliganj, Jor
Bagh Road, New Delhi-110 003
2. State of Maharashtra, through
The Secretary, Forest Department
Government of Maharashtra, having its
office at New Administrative Bhavan, 15th
floor, Madam Cama Road, Mantralaya,
Mumbai-400 032
3. Chief Conservator of Forests,
Revenue & Forest Department, State of
Maharashtra and having its office at
Mantralaya, Mumbai-400032
4. Principal Chief Conservator of Forests,
State of Maharashtra and having its office at
III floor, Van Bhavan, Ramgiri Rd. Civil
Lines, Nagpur-400 001
5. Chief Executive Officer,
Aarey Colony and having its office at Aarey
Milk Colony, Aarey, Goregaon, Mumbai-
400 065
6. Dairy Development Department,
State of Maharashtra, through The Dairy
Development Commissioner and having its
office at New Administrative Building,
Abdul Gafarkhan Road, Worli Seaface,

Mumbai-400 018

7. Environment Department,
State of Maharashtra, through the Principal
Secretary and having its office at 15th floor,
New Administrative Building, Mantralaya,
Mumbai-400 032
8. Urban Development Department,
State of Maharashtra, through its Principal
Secretary, and having its office at Room
No. 423 (Main Building) Mantralaya,
Mumbai-400 032
9. Revenue Department,
State of Maharashtra, through its Secretary
and having its office at Mantralaya, New
Administrative Building, Madam Cama
Road, Mumbai-400 032
10. Office of Collector, Mumbai Suburban
District, through the District Collector, and
having its office at Administrative Building,
10th floor, Government Colony, Opp.
Chetana College, Bandra (East) Mumbai-
400 051
11. Municipal Commissioner of Greater
Mumbai, through the Municipal
Commissioner, and having its office at Head
Office, Mahapalika Marg, Opp. C.S.T.
Station, Mumbai-400 001
12. Forest Survey of India,
through its Director General and having its
office at Forest Survey of India, Kaulagarh
Road, P.O. IPE Dehradun – 248 195,
Uttarakhand

13. Mumbai Metro Rail Corporation Ltd.
(MMRCL) through the Managing Director,
NaMTTRI Building, Plot No. R-13, 'E'
Block, Bandra-Kurla Complex, Bandra
(East), Mumbai-400051 .. Respondents

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Ms. Gayatri Singh, Senior Advocate a/w Ms. Kruti Venkatesh i/by Mr. Zaman Ali, Advocate for the Petitioners.

Mr. Y.R. Mishra a/w Mr. D.A. Dube, Advocate for Respondent No.1 – Union of India

Mr. A.Y.Sakhare, Senior Advocate a/w Mr. G.W. Mattos, Additional Government Pleader Advocate for Respondent Nos. 2 to 10

Ms. Kiran Bhagalia a/w Ms.Aruna Savla, Smt. Vidya Gharpur, Smt. S.M.Modle and Ms. K.H. Mastakar, Advocate for MCGM Respondent- No.11.

Mr. Ashutosh Kumbhakoni, Advocate General i/by Mr. Akshay P. Shinde, Advocate for Respondent No.12.

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**WITH
PUBLIC INTEREST LITIGATION (L) NO. 86 OF 2019**

Mr. Zoru Darayus Bhathena
Age : 44 years, Occ: Business
501, Vijay Deep, Plot No. 102,
10th Road, Khar (W),
Mumbai 400 052 ..Petitioner

Vs.

1. Water Resources Department
State of Maharashtra
3rd Floor, Mantralaya,
Mumbai 400 032
Through Office of Government
Pleader, Bombay High Court,
Mumbai 400 001.
2. Urban Development Department,
State of Maharashtra,
4th Floor, Mantralaya,
Mumbai 400 032.
Through Office of Government
Pleader, High Court,
Mumbai 400 001.
3. Municipal Corporation of Greater
Mumbai, Storm Water Drain
Department, Through Legal
Department, 3rd Floor, MCGM HQ,
Mumbai 400 001.
4. Mumbai Metro Rail Corporation Ltd.
Plot R-13, E Block, BKC,
Mumbai – 51. ..Respondents

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Ms. Sonal a/w Mr. Manoj Shirsat i/b Pushpa Thapa for the
Petitioner.

Mr. A. A. Kumbhakoni, Advocate General a/w Ms. Geeta Shastri,
Addl. Govt. Pleader for Respondent Nos. 1 & 2.

Mr. A.Y. Sakhare, Senior Advocate a/w Ms. Aruna Savla, Smt.
Vidya Gharpur, Smt. S.M. Modle and Ms. K.H. Mastakar for
Respondent No.3 – MCGM.

Mr. Ashutosh Kumbhakoni, Advocate General i/b Akshay Shinde

for Respondent No.4.

Ms. Shakuntala S. Wadekar Advocate for WRD (Water Resource Department).

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**CORAM: PRADEEP NANDRAJOG, CJ. &
SMT. BHARATI DANGRE, J.**

RESERVED ON : OCTOBER 01, 2019

DECLARED ON : OCTOBER 04, 2019

JUDGMENT [PER PRADEEP NANDRAJOG, CJ.] :

1. The five Writ Petitioners of W.P. No. 1487/2019, the first being a Public Charitable Trust having object to protect and preserve the western Ghats, coastal zones, forests and rivers, the second being its project Director, the other three being environmental activists and residents of Mumbai have filed Writ Petition No. 1487 of 2019 praying as under:

“a) That this Hon’ble Court be pleased to issue a writ of Declaration, declaring the entire area of Aarey Colony ad measuring 1280 hectare as a ‘Reserved Forest’ or a ‘Protected Forest’ as the case may be, under the Indian Forest Act, 1927 and direct Respondent No.2 to issue a formal notification to that effect under the Indian Forest Act, 1927.

b) *That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus directing Respondent No.2 to declare the entire area of Aarey Colony ad measuring 1280 hectare as a 'Reserved Forest' or a 'Protected Forest' as the case may be, under the Indian Forest Act, 1927 and to issue a formal notification to that effect under the Indian Forest Act, 1927.*

c) *That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus restraining Respondents from granting permissions for any proposed development and/or for any non-forest activity in the entire area of Aarey Colony without following the due process under the Forest (Conservation) Act, 1980.*

d) *That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus directing Respondents to forthwith stop all ongoing construction/development / land filling activities inside Aarey, within the entire area of 1280 hectares.*

e) *That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus directing Respondents to give effect to the implementation of the orders of Hon'ble Supreme Court in T.N. Godavarman v/s. Union of India (W.P. [Civil] No. 202/1995) on having identified Aarey as a 'Forest land'.*

f) *That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus directing Respondents to settle*

and vest all forest rights of tribal communities in Aarey Colony in accordance with The Scheduled Tribes and Other Traditional Forest (Recognition of Forest Rights) Act, 2006.

f-i) That this Hon'ble Court be pleased to issue a writ of Mandamus and/or any other writ or order or direction in the nature of Mandamus directing Respondent No.13 to not carry out any non-forest activity in the entire Aarey Colony including any change of forest landscape by way of cutting/trimming/felling/removal of trees and/or reclamation and/or dumping of debris and/or leveling of land and/or any construction in the entire Aarey Colony and to restore the areas of Aarey Colony allotted to Respondent No.13 to its original position."

2. The Petitioner in Public Interest Litigation (L) No. 86/2019, who is concerned with environment has filed the petition praying as under:

"(a) that this Honourable Court be pleased to issue an appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the construction of a Metro Car Depot on the flood plains of the Mithi river at Aarey;

(b) that this Honourable Court be pleased to issue an appropriate writ, order or direction under Article 226 of the Constitution of India directing the restoration of the natural flood plain of the Mithi river at Aarey;

(c) that this Honourable Court be pleased to issue an appropriate writ, order or direction under Article 226 of the Constitution of India directing the removal of any mechanical barrier/wall at the bank of the Mithi river which is blocking the flow of water to and from the flood plain at Aarey;"

3. The pleadings in W.P. No. 1487/2019 commence with reference to a direction issued by the Supreme Court in the order reported as (1997) 2 SCC 267 T.N.Godavarman Thirumulpad v. Union of India & Ors. in which after referring to the Forest Conservation Act, 1980, which does not define the meaning of the word '*forest*'; holding that the word must be understood according to its dictionary meaning, the Supreme Court held that the description covers statutorily recognized forest, whether designated as reserved, protected or otherwise. The Supreme Court issued a direction to the State Governments to constitute within one month an Expert Committee to identify areas which are forests irrespective of whether they were so notified, recognized or classified under any law and irrespective of the ownership of the land. The pleadings recognize that the continuous mandamus issued is being monitored before the Supreme Court. It is pleaded in paragraph 4 of the petition that the petitioners seek to challenge the destructive activities in the form of construction and commercial activities proposed at the Aarey Milk Colony ("**Aarey**") which was earmarked as Green Zone as per the sanctioned Development Plan: 2014-2034. It is pleaded in the said paragraph that Aarey is contiguous to the Sanjay Gandhi National Park and is having a natural tree cover, most of which is forest species and the area is rich in biodiversity. It is pleaded that Aarey has 12 tribal hamlets and is the

natural habitats of insects, birds, reptiles and leopards. In paragraph 5 it is pleaded that Aarey would be deemed to be a 'forest' . With reference to the documents it is pleaded that to remove and resettle cattle from the City of Bombay, in the year 1945 land comprised in village Aarey was acquired with the object of starting a Government dairy farm. Construction work commenced in the year 1948. The first batch of 300 cattle was removed from the city on 8th March 1947. The area comprised entirely of jungle land and there was hardly any agriculture activity. The pleadings refer to a letter dated 22nd July 1980 addressed by the Divisional Manager Borivali National Park to the Regional Manager Forest Development Corporation of Maharashtra Ltd. informing that at a meeting held on 11th February 1980 the Advisory Committee of the Borivali National Park decided to create a recreational zone in Aarey and exclude the same from the boundary of proposed Sanjay Gandhi National Park. That as per the Management Plan various sectors have been classified for different use such as lion, tiger and panthers safari, a botanical park and recreational area; recognizing existence of a Bacon factory, residential quarters etc. The letter informs that 575.33 hectare land was earmarked as administrative sector, zoological sector and areas under construction. The letter records that in the year 1969, 20 square km area which was revenue land was transferred from the Greater Bombay Milk Scheme at Aarey Colony to the forest division. The letter terminates by recording that

the remainder area needs to be notified as a reserved forest. It records that a proposal was under consideration to issue a Notification under Section 4 of the Indian Forest Act, 1927 to declare the remaining area in Aarey as a reserved forest. The Schedule referred to as Appendix A to the letter records as under:-

“APPENDIX “A”

Legal position of the areas of Borivali National Park as it stood on 22/7/1980:

(A) Thane District	Hectare	Sq.Kms.
1 Reserved forest	4000.673	40.006
2 Protected forest	8.518	0.085
3 Area acquired under Special Land Acquisition Act from Ghena village	1027.020	10.270
4 Revenue Land from Kavesar village transferred in exchange	2.670	0.026
Total	5038.881	50.388

(B) Bombay Suburban District:

1 Reserved Forest	1702.283
2 Protected forest from Shimpoli & Borivli villages	6.725

3	<i>Revenue Land transferred from Aarey Milk Scheme</i>	<i>2076.073</i>	
	<i>Total</i>	<i>3785.081</i>	<i>37.850</i>
		<i>GRAND</i>	<i>88.239</i>
		<i>TOTAL</i>	<i>sq.kms.”</i>

Appendix “B” to the letter records as under:-

“APPENDIX- B”

		<i>Hectare</i>	<i>Sq.Kms.</i>
1	<i>Total forest area of the Borivali National Park Division in Thane District</i>	<i>5038.881</i>	<i>50.388</i>
2	<i>Total forest area of the Borivali National Park Division in Bombay Suburban District</i>	<i>3785.081</i>	<i>37.860</i>
	<i>Grand total of the Division:</i>	<i>8825.962</i>	<i>88.239</i>
I.	<i>Areas proposed to be disforested for regularizing the encroachments</i>		
	<i>1. Thane District</i>		
	<i>i) Reserved Forest</i>	<i>9.225</i>	
	<i>ii) Protected Forest</i>	<i>0.556</i>	
			<i>9.781</i>
II.	<i>Areas which will not be included in the proposed National Park being isolated</i>		

patches

1. Bombay Suburban District

i) Reserved forest 7.239

ii) Protected forest 6.725

13.964

*III. Areas of the Recreational 575.330
Zone proposed to be excised
from Borivli National Park*

*Grand Total of I, II & III 599.075 5.990
sq.kms.*

*The proposed areas of the Borivli National Park to
be notified under Wildlife Act will be 82.249 sq.kms.”*

4. The pleadings proceed to refer to a letter dated 10th October 1980 addressed by the Regional Manager of the Forest Development Corporation of Maharashtra Ltd. to the Managing Director of the Forest Development Corporation Maharashtra recording therein that for a better management of Aarey it would be advisable to declare the area as a reserved forest under the Land Revenue Code to be delegated to the park authorities so that the park authorities could evict the encroachers under the Land Revenue Code. The pleadings further proceed to make a reference to a letter dated 8th June 2004 written by the Governor of Maharashtra to the Chief Minister of the State of Maharashtra recording that Aarey Milk Colony comprises 3,126 acres of land out of which 955 acres were allotted to 27 Institutions most of

which were not using the land for the purpose it was allotted and recommending that the Government should resume the said land. It is recommended in the letter that the entire Aarey Milk Colony could be merged with the Borivli National Park. The pleadings proceed further by recording to a table prepared on 16th October 2006 by the State of Maharashtra recognizing 32 hectare land in Aarey Colony to be forest land. The pleadings then referred to a Notification dated 13th May 2009 sanctioning modification of a Development Plan to reserve 7500 square meter land in Aarey Milk Colony for a Muslim cemetery, making a reference in the Notification that the land in Aarey Milk Colony was a forest area. Copious reference is made in the pleadings to reports of Indian Researchers and Government Agencies recognizing that the land comprising Aarey had forest like characters having trees, shrubs, herbs, grasses, herbaceous (non-woody) plants, mosses algae, fungi, insects, mammals, birds, reptiles, amphibians and microorganism living on the plants and in the soil, which interact with one another and that the soil, water and minerals to make up what may be called a forest. The reports referred to are: (i) Biodiversity of Aarey Milk Colony and Film City (2007-2009), which highlights that 76 varieties of Birds, 86 varieties of Butterflies, 13 varieties of Amphibians, 46 varieties of Reptiles, 5 varieties of Scorpions, 19 varieties of Spiders, 3 varieties of Theraphosid Spiders, 16 varieties of Mammals including Leopard, Jungle Cat, Flying Fox and Jackal were found in Aarey; (ii)

Journal Article published in '*Journal of Threatened Taxa*' published in April 2010 titled "*Description of a new Species of Scorpion of the Genus Lychas*" writing that the Eco-system of Aarey was vibrant requiring the area to be saved as a forest; and (iii) Experts Study Report published in December 2017 in "*The Xavier's Research Journal, Vol. 8*", titled '*Aarey Milk Colony, Mumbai*' opining that Aarey is a forest territory, highlighting that the study conducted revealed 530 species of flowering plants including trees, shrubs, herbs, climbers, twinners etc.

5. The pleading further highlight communications *inter se* the Government Departments recording that area comprising Aarey Milk Colony was a forest, being apart from the communications above referred to: (i) The Management Plan of Sanjay Gandhi National Park, (ii) The Statistical Outline prepared by the Forest Department in the year 2013, (iii) A detailed project report prepared in November 2011 concerning Aarey Milk Colony, (iv) A letter dated 21st November 2012 written by the District Collector to the Additional Chief Secretary (Revenue) informing that the land proposed to be acquired for the Metro Car Depot is full of grass and native trees, (v) The proposal to declare Eco-Sensitive Zone around Sanjay Gandhi Park prepared by the Forest Department recording that the area of Aarey is a forest, (vi) The Management plan prepared by the Forest Department for the period 2013-2014 till 2022-2023 recording that Aarey Colony is an

unclassified forest, (vii) Transport Study Map prepared by the Mumbai Metropolitan Regional Development Corporation showing Aarey Colony as a forest land, (viii) Project Note of Municipal Corporation for Greater Mumbai concerning the Goregaon-Mulund Link road, pursuant where to the alignment of an elevated corridor cutting through Aarey Colony was changed accepting the fact that the ecology and environment in Aarey would be adversely affected if the road as proposed was laid on the ground, (ix) Scientific imaginary prepared by Maharashtra Remote Sensing Application Centre in the year 2006 showing land in Aarey Colony to be thickly covered by vegetation including trees, (x) The views of a Technical Committee constituted by the Government of Maharashtra on 6th March 2015 on the issue of setting up a Metro Car Shed at Aarey containing a dissenting note dated 12th June 2015 by environmental experts from IIT Bombay and NEERI i.e. Dr. Shyam Asolekar and Dr. Rakesh Kumar to the effect that Aarey Colony must be saved and preserved as a forest. Further reference is made to affidavits deposed to by Officers of the Forest Department before National Green Tribunal in O.A. No. 34/2015 renumbered as O.A. No. 45/2018.

6. On the aforesaid material relied upon, the Petitioners plead that the land comprised in Aarey Colony needs to be declared as a reserved or a protected forest. It is pleaded that in O.A. No. 34 of 2015 prayer

was made before the National Green Tribunal to declare Aarey as either a forest or an eco-sensitive zone but was withdrawn on the stated advice given by the Tribunal to withdraw the same; order dated 20th September 2018 passed by the Tribunal recording that the applicants were withdrawing the Original Application with liberty to take action as per law.

7. Further pleadings are to the effect that Mithi river, as it flows past Aarey Milk Colony, overflows when there is excess water in the river and thus, the land abutting the river bank functions as a flood plain and *vice versa* by acting as a catchment area during the rainfall because topology of the land is a slope with depressions towards Mithi river. Meaning thereby, when Mithi river overflows the depressed land in Aarey Milk Colony acts as a flood plain and when the river flow is less, the water which accumulates in the depressions feeds the river.

8. The crystal which emerges from the distillate of the pleadings and the documents relied upon in W.P. No. 1487/2019 is that Aarey Milk Colony needs to be declared either as reserved or a protected forest or alternatively as an eco-sensitive zone of Sanjay Gandhi National Park because it has all the characters of a forest in view of the order passed by the Supreme Court in T.N. Godavarman's case (supra) and additionally the lands abutting Mithi river, which included the land on which the

proposed Metro Car Shed is proposed to be set up is a flood plain.

9. The petitioner of PIL (L) No.86/2019 pleads that not only the Technical Committee's Report relied upon in the companion petition highlighted the land in question being a flood plain of Mithi river, pursuant to an order dated 16th August 2017 passed by the Supreme Court in CA No.10463-64/2016 Mumbai Metropolitan Region Development Authority Vs. Jalbiradari & Ors. a joint Committee of IIT Mumbai and NEERI was constituted to submit a report because in the Appeal the Supreme Court was dealing with orders passed by the National Green Tribunal in Appeal No. 8/2013 and the Appeal No. 7/2015. The orders passed by the NGT took note of development work along the banks of Mithi river which flooded extensively on 26th July 2005 causing havoc in the downstream urbanized areas. Over 1000 people had died and several thousands had fallen ill. The Supreme Court widened the scope of the proceedings as recorded in the order dated 16th August 2017. The petitioner relies upon a report submitted under cover of a letter dated 13th March 2018 as also a policy decision taken by the State Government vide GR notified on 5th September 2019 concerning State Water Policy as per which vide para 9.4.1 rivers were to be protected from any form of construction on their flood plains.

10. Since the prayers made in the petitions if granted would

adversely impact the interest of Mumbai Metro Rail Corporation Ltd. which proposes to establish a Metro Car Shed on the land in dispute, the response brings out that the land in question has till date not been declared as reserved or a protected forest under Indian Forest Act, 1927. The Development Plan shows reservation of 33 hectare land as reserved for a Metro Car Depot/Workshop; that the Metro line is being constructed in collaboration with Japan International Cooperation Agency; that the decision dated 26th October 2018 by a coordinate Bench of this Court deciding *Writ Petition (L) No. 2766 of 2017 Ms. Amrita Prithwishwar Bhattacharjee & Anr. Vs. State Government of Maharashtra* binds this Bench and operates as *res judicata*. It is pleaded that in the said petition though challenge was to Notifications dated 24th August 2017 and 9th November 2017 issued by the Urban Development Department, State of Maharashtra under Maharashtra Regional and Town Planning Act, 1996 reserving 33 hectare land in question for Metro Car depot, the challenge was premised on the argument that as per the decision of the Supreme Court in *T.N.Godavarman's case* (supra) the land was required to be declared as a forest area and alternatively as an eco-sensitive zone. The basis of the challenge to the two Notifications as afore-noted was rejected by the Division Bench.

11. Ms. Gayatri Singh learned Senior Counsel for the Writ

Petitioners argued in harmony with the pleadings in the Writ Petition and highlighted that as per the direction issued by the Supreme Court in T.N.Godavarman's case (supra) the word 'forest' not being defined either in the Indian Forest Act 1927 or the Forest (Conservation) Act, 1980 required the dictionary meaning of the word 'forest' to be adopted. The dictionary defined forest as a large tract of land having trees. With reference to the various Articles and Reports to which we have referred to above, counsel highlighted that the same evidenced that the land comprised Aarey Milk Colony was thickly wooded and that 33 hectare land in dispute was equally thickly wooded and *de-facto* was a forest. Counsel pleaded that it needed to be conferred *de-jure* status as a forest. Counsel also relied upon the communications by the Forest Department *inter se* the department and to other departments highlighting the entire Aarey Milk Colony should be declared as a reserved forest.

12. In response, Shri. A.A.Kumbhakoni learned Advocate General urged that the decision in Writ Petition (L) No. 2766/2017 operated as *res judicata*. Learned Advocate General referred to lay out maps of Aarey to show that extensive parcels of land were already used for non forest purposes. Shri. A.Y.Sakhare counsel for Respondent Nos. 2, 3 and 6 to 10 adopted arguments of learned Advocate General and additionally referred to Notification dated 16th January 1996 (not

forming part of the pleadings in the Writ Petition) issued by the Revenue and Forest Department State of Maharashtra under Wildlife (Protection) Act 1972 notifying the situation and limits of the Sanjay Gandhi National Park to be 8696 hectare out of which 2076 hectare land comprised in Aarey was transferred as forest land, and 1280 hectare remained as part of Aarey Milk Colony.

13. The record of the Dairy Development Department concerning Aarey Colony shows that parcels of land totaling 525 hectare were utilized as follows: (i) 18 Adivasi Padas, (ii) Slum areas, (iii) Office of the CEO, Aarey Milk Colony, (iv) Aarey Milk processing plant, (v) New Zealand Hostel building, (vi) Dairy Diploma College, (vii) Around 30 units of cattle sheds – consisting of 16,120 buffaloes, (viii) 17 Godowns – 12 of which are around 7000 sq. ft. and 5 are around 3000 sq. ft., (ix) 12 vendor stalls – including food vendors, etc. (x) VIP rest house, (xi) Police Station, (xii) Wireless Station, (xiii) Maharashtra Agro Industries Development Corporation Office, (xiv) Modern Bakery, (xv) Office of Poultry Development Organization, (xvi) BMC school – from class 1st to 10th, (xvii) Aarey Hospital, (xviii) Veterinary Quality Control Lab, (xix) Temples, (xx) Gymnasium, (xxi) Adani Electricity Sub-station, (xxii) 4 gardens, (xxiii) 2 nurseries and (xxiv) Boat club-near Aarey lake.

14. The learned counsel also highlighted that the issue whether Aarey Milk Colony was liable to be declared as an eco-sensitive zone was pending consideration before the National Green Tribunal in O.A. No.193/2016 for the reason the MoEF Notification dated 5th December 2016 notifying the eco-sensitive zone around Sanjay Gandhi National Park excluded the 33 hectare land on which the Metro car shed was proposed to be established and the challenge before the National Green Tribunal was to the exclusion of said land from the area comprising the eco-sensitive zone. Learned counsel highlighted that this was also noted by the Division Bench of this Court in its decision in *W.P. (L) No. 2766/2017 Amrita Prithwishwar Bhattacharjee Vs. State of Maharashtra & Ors.*

15. The pleadings in the Writ Petition show that land in Aarey village was acquired to set up a Dairy and shift the cattle from the city of Mumbai to said area. The acquired land was a forest and hardly used for agricultural purpose. How much land was acquired is not known. The records being old are not available. But, Appendix A to the letter dated 22nd July 1980 to which we have referred to herein above, while noting pleadings of the writ petitioners, reveals with reference to Appendix A therewith, which also we have reproduced herein above, that pertaining to Aarey Milk Colony (learned counsel for the petitioners agree that reference to Bombay Suburban District in the

Appendix was a reference to Aarey village), 2076.073 was transferred to the Forest Department for Sanjay Gandhi Park land constituting Aarey Milk Colony is 1280 hectare. Learned counsel for the parties were in agreement that the issue has to be decided with reference to the land currently recorded in the revenue record as the area comprising Aarey Milk Colony. The 1280 hectare land is under control of the Forest Department and that the 33 hectare land in question falls within the said 1280 hectare land. It is also an admitted position that 525 hectare out of 1280 hectare land has already been diverted for the 24 purposes noted by us herein above, though most of which has not been utilized by the allottee departments and continues to be a green area.

16. It being not in dispute that the word 'forest' has not been defined in the Indian Forest Act, 1927 nor the Forest (Conservation) Act 1980 the ordinary dictionary meaning of the word 'forest' has to be adopted; which would mean a large tract of land covered by trees on which no agricultural activity is undertaken.

17. But the problem would be: What would be the measure of a large tract of land. Further what extent of tree cover of land should exist for the land to be treated as forest land?

18. Regretfully, the State of Maharashtra has not formulated any

policy laying down the parameters to determine either the extent of land or treat coverage therein for qualifying the land as a forest. We find that State of Gujarat has notified a policy as per which 2 hectare continuous land having tree coverage of above 50% would qualify the land as a forest land.

19. Areas requiring to be declared as reserved or protected forest is pending consideration before the Supreme Court in T.N.Godavarman's case (supra). The issue pertaining to 33 hectare in question being wrongly excluded from the eco-sensitive zone is pending consideration before the National Green Tribunal in O.A. No.193/2016 wherein the Notification dated 5th December 2016 notifying the eco-sensitive zone around Sanjay Gandhi National Park has been challenged to the extent it excludes the 33 hectare land in question.

20. In Writ Petition (L) No. 2766/2017 as noted above, while laying challenge to the Notifications dated 24th August 2017 and 9th November 2017 issued by the Urban Development Department, State of Maharashtra under Maharashtra Regional and Town Planning Act 1966, pertaining to the Development Plan of Mumbai Metropolitan Region, the land in question was reserved for a Metro car shed and the petitioners while making a reference to the directions issued by the Supreme Court in T.N.Godavarman's case (supra) had also made a

reference to the letters dated 22nd July 1980, 16th October 1980, 8th June 2004 and 16th October 2006. The Division Bench held that therefrom it could not be inferred that the area is a forest area. We hasten to add that the material placed before us is much more than what was placed before the Division Bench on the issue of the green coverage in the area. On the issue of the Notification declaring eco-sensitive zones around Sanjay Gandhi National Park the Division Bench held that the said Notification was not challenged before it and further that the issue was pending consideration before the National Green Tribunal. Though not expressly stated, the principle of 'Comity' has been relied upon. Meaning thereby, the said issue has to be urged before the National Green Tribunal pertaining to the Notification dated 6th December 2016.

21. We have perused the decision of the Division Bench of this Court in W.P. (L) No.2766/2017. Arguments having concluded on 15th June 2018 the judgment was pronounced on 26th October 2018. The Division Bench has noted that the case of the petitioners therein was that the land was required to be treated as a forest and being located on the banks of Mithi river had to be treated as a flood plain. It was rich to flora and fauna. That the MoEF Notification dated 16th December 2016 wrongly excluded the land from the eco-sensitive zone. The Division Bench noted that to establish the metro car shed, on 11th

March 2015 the State Government constituted a Technical committee comprising six members (including two environmental experts) to advert its consideration to the delicate issue of environmental impact on setting up a metro car depot. The Committee tendered its report on 11th August 2015 primarily recommending the metro car depot to be located at Kanjur Marg with only a small stabilizing unit at Aarey. The Division Bench noted that as per the report if for some reason land at Kanjur Marg was not available the metro car depot be located at Aarey within 20.82 hectare land. The two environmental experts expressed their dissent and attached three notes evidencing a contrary view. That pursuant to the report the Government of Maharashtra issued a directive on 16th October 2015 accepting the report of the technical Committee and approved the land at Kanjur Marg to be allotted to Mumbai Metro Rail Corporation Ltd. But the land was found to be under dispute. The Division Bench noted that the General Consultant for the project addressed a letter to the Mumbai Metro Rail Corporation Ltd. on 1st February 2016 listing potential financial impact on the delayed finalization of the location of the metro depot. Further, technical difficulties in relation to the proposed site at Kanjur Marg were cited with a view to demonstrate its non-viability; being land required to be filled up by three meters to four meters which would conflict with two monsoon seasons time period. The General Consultant recommended that the metro depot be constructed at Aarey

using double Decker Lay Out. Mumbai Metro Rail Corporation Ltd. held a board meeting and resolved to request the State Government to effect necessary modifications in the Development Plan of Mumbai Metropolitan Area resulting in the State of Maharashtra resolving on 16th March 2016 that 33 hectare land in Aarey be reserved for the metro car depot. On 30th December 2016 the State Government approved the modified lay out – to Aarey as proposed by Mumbai Metro Rail Corporation Ltd. subject to fulfillment of certain conditions. This necessitated a modification in the Development Plan – 1991 for Mumbai Metropolitan Region. A notice was issued as required by law to change the development plan. 2382 objections were received. On 24th August 2017 the Notification under challenge in the petition was issued by the Urban Development Department under Maharashtra Regional and Town Planning Act, 1966 whereby not only 33 hectare land in dispute but certain other tracts were deleted from the non-development zone. The conditions enumerated in the Notification to mitigate the adverse environmental impact were made a part of the Notification. The same as under were noted by the Division Bench:

“(1) Open area shown on the Part Plan of proposed modification shall be kept open and it shall be binding to conserve the trees on part of the said land permanently.

(2) To mitigate the environmental impact to Aarey Colony

following measures shall be undertaken:

- i) Ground water recharging arrangements to be provided in the Depot.*
 - ii) Plantation of Trees as per recommendation of the Committee*
 - iii) Trees above 10 feet height of native variety only be planted.*
 - iv) Plantation to be undertaken by professional agencies only.*
 - v) Annual Audit of plantation by Third Party and Reports posted on the Company's website.*
 - vi) MMRC to maintain these trees for 5 years.*
- (3) Total 33 Hectors of land shall be used only for Metro Car Depot/ Workshop, allied users only. Commercial user shall not be permitted.*
- (4) Before development of the land for the purpose of Car Shed, Mumbai Metro Rail Corporation Limited shall obtain necessary permissions from concerned Department as required under the all other prevailing laws.*
- (5) The character of overall construction shall be such that the underground water table shall not get disturbed.”*

22. The Division Bench noted that the challenge was premised to the Notification dated 24th August 2017 on the ground that the land being a forest without the necessary permission from the forest department land use could not be changed. The Division Bench noted that the challenge to the eco-sensitive zone Notification was pending

before the National Green Tribunal. The Division Bench noted that the argument of the land being a flood plain of Mithi river was also urged, yet the challenge failed.

23. The petitioners herein have challenged the decision of the Division Bench before the Supreme Court. Petition seeking Special Leave to Appeal (CC) No. 14933/2019 has been filed. During argument copy of the said petition was handed over to the Court and we find that in the synopsis case pleaded by the petitioners herein before the Supreme Court is that land in Aarey Milk colony is a lush vegetative land; rich in flora and fauna and thus to delete 33 hectare land from non-development zone and reserve it for a metro car shed is illegal. It is pleaded in paragraphs 5,7, 8 and 10 of the Special Leave Petition as under:-

“5. While deciding that petition the High Court realized that there are two critical points of law involved (i) whether the land covering an area of 33 hectare which was a subject matter of the Writ Petition before the High Court was forest land, in which case no non-forest activity could take place and (ii) whether the notification dated 5.12.2016 the MoEF which excluded 33 hectare of Aarey Milk Colony from the Draft Ecological Sensitive Zone Notification was legal. These points of law were also subject matter of different petitions pending before the Bombay High Court in W.P. (L) No. 2766/2017 and the NGT in O.A. No. 193/2016.

7. *The question is whether the High Court could have gone into issues not covered by Writ Petition (L) No. 2766/2017 which was restricted to the issue of change of land use from No Development Zone to 'Metro Car Depot/Workshop, allied Users' of an area ad measuring 33 hectare that petition therefore sought to challenge the notifications giving effect to the change in land use. Whether the High Court followed the correct procedure in not clubbing the matters together to hear all the overlapping legal issues simultaneously.*
8. *Worse still, while observing that the petition seeking a declaration that Aarey Colony is a forest land was pending before the NGT (now the High Court), this Bench of the High Court proceeded to hold in paragraph 80 that Aarey Milk Colony is not a forest.*

X X X

10. *The proceedings in which this impugned order was made involved challenge to the notifications dated 24.08.2017 & 09.11.2017 issued under the Maharashtra Regional & Town Planning Act, 1966 regarding change in land use from 'No Development Zone' to 'Metro Car Depot/Workshop and allied uses' with respect to lands ad measuring 33 hectares in Aarey Colony. Whereas the issue in WP (L) No. 2766/2017 filed by the petitioner pertains to seeking a declaration of the entire Aarey Colony as a "Reserved forest" or a "Protected forest" where it relied inter alia, on the decision dated 12.12.96 of the Supreme Court in T.N.Godavarman Thirumulkpad vs. Union of India (1997 2 SCC 267) wherein the Supreme Court held as under:*

- “3. *It has emerged at the hearing, that there is a misconception in certain quarters about the true scope of the Forest Conservation Act, 1980 (for short “the Act”) and the meaning of the word “forest” used therein. There is also a resulting misconception about the need of prior approval of the Central Government, as required by Section 2 of the Act, in respect of certain activities in the forest area which are more often of a commercial nature. It is necessary to clarify that position.*

4. *The word “forest” must be understood according to its dictionary meaning. This description covers all statutorily recognized forests, whether designated as reserved, protected or otherwise for the purpose of Section 2(i) of the Forest Conservation Act. The term “forest land”, occurring in Section 2, will not only include “forest” as understood in the dictionary sense, but also any area recorded as forest in the Government record irrespective of the ownership. This is how it has to be understood for the purpose of Section 2 of the Act. The provisions enacted in the Forest Conservation Act, 1980 for the conservation of forests and the matters connected therewith must apply clearly to all forests so understood irrespective of the ownership or classification thereof.”*

22. Pleadings what was wrong, in the view of the petitioners, in the decision of the Division Bench, in paragraphs 12, 13, 14 and 15 of the Special Leave Petition it is pleaded as under:

“12. The High Court further wrongly stated that the ESZ Notification dated 05.12.2016 had not been challenged. It also wrongly concludes at para 51 that since 165 hectare of land is not included in ESZ, Aarey Colony cannot be treated as a forest. An area declared as ESZ does not imply that it is a forested area. A non-forest area can fall under ESZ since ESZ is a buffer area/zone around (and outside of) a National Park or a Sanctuary and therefore, this ESZ only acts as a shock absorber and helps in conserving wildlife inside the National Park or a Sanctuary. The High Court wrongly concludes that since an area of 33 hectare has been carved out of ESZ, not only is this area but the entire area of Aarey Colony ad measuring 1280 hectare is not a forest. Why status quo should be ordered.

13. If the petitioners herein succeed before the Bombay High Court in obtaining a declaration that Aarey Milk Colony is a forest, then the Government plan to build a car shed/ workshop and build other commercial premises in Aarey Milk Colony will automatically follow since non forest activity is impermissible in a forest area.

14. If the petitioners herein succeed before the NGT to have the MoEF Notification dated 5.12.16 set aside

then the consequences will be that the entire Aarey Milk Colony will fall within the Ecological Sensitive Zone, in which case non forest activity is not permissible.

15. *Since the restoration of the forests of Aarey Milk Colony is not possible once the trees are cut and the flood plains of the Mithi river covered over with concrete, the more prudent approach would be to order the immediate final hearing of Writ Petition (L) No. 2766/2017 pending before the Bombay High Court and O.A.No. 193/2016 pending before the NGT, Pune and, in the interim, order all construction work in the Aarey Milk Colony to temporarily stopped. This is prayed for in the Application for Directions filed with this SLP.”*

23. Thereafter in the petition seeking Special Leave to Appeal in paragraph 16 onwards the facts have been pleaded to highlight that the Division Bench erred in not declaring the land either as a forest or flood plain or eco-sensitive zone. In paragraph 23 the grievance raised is that the said Division Bench ought to have summoned the file of the instant writ petition. Overlooking the fact that the instant petition was filed in October 2018 arguments were concluded in W.P. (L) No. 2766/2017 on 15th June 2018 and the judgment was pronounced on 26th October 2018, the prayers made in the petition seeking Special Leave to Appeal (which are interesting) read as under:-

“25. In view of the above, petitioner herein prays for

following reliefs:

- a) *For an order directing the NGT, Pune to expeditiously proceed with and decide O.A. No. 193/2016 (Vanashakti Public Trust Vs., Union of India & Ors.) irrespective of the observations made by the Bombay High Court in the impugned order;*
- b) *For an order directing the Bombay High Court to expeditiously proceed and decide the Writ Petition (L) No. 2766/2017 (Vanashakti Public Trust Vs. Union of India & Ors.) irrespective of the observations made by the Bombay High Court in the impugned order;*
- c) *For an order staying the operation of the impugned order.*
- d) *For an order stopping all construction work related to the car shed/workshop and related issues until the above mentioned writ petition in the Bombay High Court and the OA in the NGT, Pune are finally decided.”*

24. The pleadings before the Supreme Court in the petition seeking Special Leave to Appeal challenging decision dated 26th October 2018 reinforce the fact that the petitioners understand the point that the issues raised by them in the instant petition were raised before the Division Bench which pronounced said decision and the core of their grievance is that till National Green Tribunal decided O.A.

No.193/2016 pertaining to the eco-sensitive zone Notification dated 5th December 2016 and till the Supreme Court decides in T.N. Godavarman's case (supra) concerning the lands to be notified as reserved or protected forest, this Court ought not to have decided legality of the Notifications de-reserving the land in dispute and reserving the same for a metro car shed. Meaning thereby, notwithstanding recognizing the fact that the remedy was to move interim applications before the Supreme Court in the T.N. Godavarman's case (supra) and before the National Green Tribunal in O.A.No.193/2016, the writ petitions were filed. The prayers made before the Supreme Court are not to quash the decision of the Division Bench but firstly to direct the National Green Tribunal to expeditiously decide O.A. No.193/2016 and secondly to decide the instant petition irrespective of the observations made by the coordinate Bench of this Court in W.P. (L) No. 2766/2017; a prayer which is hit by the principles of *res-judicata*.

25. We are respectfully bound by the decision of the Division Bench.

26. We emphasize at the costs of repetition, pertaining to the issue of the area to be declared as a reserved forest or a protected forest since the proceedings before the Supreme Court are pending in T.N. Godavarman's case (supra) petitioners should file an application before the Supreme Court and concerning the eco-sensitive zone

Notification dated 5th December 2016 an application should be filed before the National Green Tribunal. The petitioners themselves have filed as Ex. LL an affidavit deposed to by Dr. Amit Lowe on 18th June 2016 on behalf of MoEF filed before the National Green Tribunal in O.A. No. 34/2015(WZ), *inter-alia*, stating as under:

“That with reference to the declaration of the Aarey Colony covering an area of 1280 hectare as ‘Forest land’ under Forest Conservation Act, 1980, it is submitted that the Ministry in consultation with the State Government / Union Territories has formulated draft parameters for classification of an area as forest under the Forest (Conservation) Act. These parameters are in final stage of examination before they are filed before the Hon’ble Supreme Court for their approval. Once the approval is obtained then a decision to apply these parameters in the context of the Aarey land could be taken up.”

27. This itself shows that the appropriate forum to be approached is the Supreme Court.

28. Concerning the case pleaded in PIL (L) No. 86/2019 that the report submitted by IIT Bombay and NEERI, placed before the Supreme Court in CA No.10463-64/2016, suffice it to state that even this issue relating to the report has to be urged before the Supreme Court and not in a separate proceedings. We have perused the report.

It notes that the total length of Mithi river is 75.84 km out of which 8.23 km downstream part is influenced by the tidal effect of Mahim creek. The river traverses through Powai, Marol, Andheri and runs below the runway of the International Air-port and Meanders through Bandra-Kurla complex. It discharges through the Mahim creek into the Arabian Sea. The report notes that the channelization of the river by erecting vertical concrete walls was wrong. It suggests remedial measures pertaining to the flood plain in Aarey Colony. It notes that the natural course of the river had already been altered leading to an acute 90 degree's turn at the edge of the proposed Metro Yard. The report also notes that large tracts of lands having depression at the site of the proposed Metro Yard have been extensively filled up. Though not expressly stated, the report recognizes the irretrievable change in Topology and therefore in the proposed eco-rejuvenation master plan it proposed solutions in a manner the Metro Yard could be constructed without further environmental damage. Since the report has been called for by the Supreme Court and the issue of flood plain of Mithi river is being considered by the Supreme Court, on the principle of Comity the Petitioner ought to approach the Supreme Court by filing an application. The water policy relied upon does not expressly prohibit construction on a flood plain. It lays emphasis to protect flood plain while planning constructions. In any case, the Technical Committee Report which would be considered by the Supreme Court

notes that low lying area at the site of the Metro Yard has already been filled up and the course of the river has been altered, meaning thereby the remedial measure to be taken concerning this stretch of the river has to be debated before the Supreme Court. We also note that the concerns of the two environmental experts as per the dissenting note dated 12th June 2015 have been taken note of and mitigating conditions imposed when the draft plan-1991 for Mumbai Metropolitan Region was amended, which remedial measures we have noted in paragraph 20 above.

29. Repeatedly, Davids (environmentalist) take on industrial Goliath's. Relationship with nature and love for environment alone is true and all other relationships are unreal and temporary, is their belief. Their hearts are a temple of devotion to flora and fauna. In the instant case, the Davids row their boat with faith, courage and devotion in the storm of development; but directionless. The Greens fail in the instant petition because they have lost touch with the procedure to be followed as per law.

30. Since we agree that the coordinate Division Bench decision of this Court ties our hands, we need not elaborate on the submissions made by the learned counsel for the respondents that 525 hectare land has already been diverted to 24 departments and the map of Aarey Colony shows that the said 24 diversions are spread over the 1280

hectare of land in Aarey Milk Colony i.e. do not form a contiguous part, requiring therefrom to be inferred that what was originally a forest has degenerated and the clock cannot be put back. We do not make any comments thereon for the reason the petitioners have to now swim or sink before the Supreme Court with respect to the Special Leave Petition filed by them and the proceedings before the National Green Tribunal.

31. The Writ Petition and the PIL are accordingly dismissed but without any order as to costs.

SMT. BHARATI DANGRE, J.

CHIEF JUSTICE