

# INDIA: CLIMATE RISK MANAGEMENT – RECENT SUPREME COURT JUDGEMENT - INSURANCE SOLUTIONS

Clarity brings strength. The effectiveness of environmental regulations has been strengthened by the recent Supreme Court's land mark judgment in DELHI POLLUTION CONTROL COMMITTEE VS. LODHI PROPERTY CO. LTD. ETC. which provided clarity on various provisions, particularly relating to restitutionary powers of Pollution Control Boards. This judgement can be accessed [here](#).

Some of the key takeaways from the judgement include:

## Legal position crystallised:

- Duty to Restitute Vs Power to Punish and Penalise. There is a distinction between an action for environmental damages for restitution or remediation and imposition of penalties or fines levied at the culmination of a punitive action.
- Liability for environmental damage includes both a compensatory aspect and a restorative or remedial aspect.
- Application of the *Polluter Pays* principle not only includes payment for restoring the damaged environment, taking remedial action to deal with the damage and compensating for the direct harm caused, but also for avoiding pollution.
- The actual degradation of the environment is not a necessary condition for the application of polluter pays principle, as long as the offending activities have the potential of degrading the environment -
- Indian environmental law has assimilated the principle of *Polluter Pays* and there is also a statutory incorporation of this principle in our laws. The invocation of this principle is triggered in the situations;
  - i) when an established threshold or prescribed requirement is exceeded or breached, and it does result in environmental damage,
  - ii) when an established threshold or prescribed requirement is not exceeded or breached, nevertheless the act in question results in environmental damage and also
  - iii) when a potential risk or a likely adverse impact to the environment is anticipated, irrespective of whether or not prescribed thresholds or requirements are exceeded or breached.
- Environmental regulators have a compelling duty to adopt and apply preventive measures irrespective of actual environmental damage. *Ex-ante* action shall be taken by these regulators and for this purpose a certain measure in exercise of powers under Sections 33A and 31A of the Water and Air Acts is necessary.

## Some Relief:

- State Board cannot impose environmental damages in case of every contravention or offence under the Water Act and Air Act. It is only when the State Board has made a determination that some form of environmental damage or harm has been caused by the erring entity, or the same is so imminent, that the State Board must initiate action under Section 33A of the Water Act and Section 31A of the Air Act.
- The Boards (can) impose restitutionary and the compensatory environmental damages in a fair transparent, nonarbitrary manner, with procedural certainty. (In this regard)

Necessary subordinate legislation in the form of rules and regulations must be notified. This shall include methods by which environmental damage is determined, and the consequent quantum of damages are assessed. They may also incorporate certain basic principles of natural justice for fairness in action. At present environmental damages are being levied by the Boards on the basis of certain guidelines issued by the Central Pollution Control Board in its document “*General framework for imposing environmental damage compensation*” issue in December, 2022. These guidelines seem to have been issued pursuant to the directions of the NGT.<sup>30</sup> It is important that these guidelines are reviewed thoroughly and issued in the form of Rules and Regulations.

### **New Trigger:**

These Rules must also create enabling framework for citizens to file complaints about environmental damage. Public participation in environmental protection has assumed great importance with climate change threatening to drastically disrupt our way of living. Boards, being the first line of defence against polluting activities, must provide easy accessibility and encourage public participation in their function and decision making.

### **Final Orders:**

“We direct that the Pollution Control Boards can impose and collect as restitutionary and compensatory damages fixed sums of monies or require furnishing bank guarantees as an *ex-ante* measure towards potential environmental damage in exercise of powers under Sections 33A and 31A of the Water and Air Acts.”

“it is further directed that the power to impose or collect restitutionary or compensatory damages or the requirement to furnish bank guarantees as an *ex-ante* measure under Sections 33A and 31A of the Water and Air Acts shall be enforced only after detailing the principle and procedure incorporating basic principles of natural justice in the subordinate legislation.”

Many laws governing climate related risks in India. Some of them are

1. The National Green Tribunal Act 2010
2. Biological Diversity Act, 2002:
3. The Wildlife Protection Act of 2002
4. Energy Conservation Act, 2001:
5. The Environment (Protection) Act, 1986
6. Air (Prevention and Control of Pollution) Act, 1981
7. Forest (Conservation) Act, 1980:
8. Water (Prevention and Control of Pollution) Act, 1974

The importance of climate protection is also reflected in various provisions of the Companies Act, 2013, as well as in the directives issued by different sectoral regulators.

Companies exposed to environmental litigation resulting from unintentional actions, can consider various insurance policies to cover legal costs and potential liabilities. Some of the insurance policies relevant in this context include:

### **POLLUTION LEGAL LIABILITY / ENVIRONMENTAL IMPAIRMENT LIABILITY POLICY:**

This policy provides coverage in respect of third-party bodily injury and property damage, expenses incurred for remediation of contaminated environment, legal costs associated with

pollution related litigation, business interruption caused by pollution. Here gradual pollution also is covered.

### **COMMERCIAL GENERAL LIABILITY (CGL):**

This policy provides coverage primarily for third-party bodily injury and property damage resulting from pollution caused by accidents. There is no coverage for gradual pollution. The coverage provided under this policy is limited in comparison to coverage under Pollution Legal Liability insurance.

### **D&O INSURANCE:**

Directors and officers may incur personal liability in relation to climate change risks, whether such risks manifest gradually or suddenly, if they neglect to recognise their gravity or fail to adhere to applicable statutory and regulatory requirements. Liability may result from operational lapses or from making inaccurate, misleading, or unsubstantiated statements regarding their company's environmental commitments. For directors of listed companies, the obligations are more in terms of disclosures to be made. As regards the entities coming under RBI supervision, RBI issued Draft Disclosure framework on Climate-related Financial Risks, 2024" on February 28, 2024. One of the significant disclosures to be made reads as under:

"Disclose whether and how climate-related considerations are factored into remuneration of Whole Time Directors/ Chief Executive Officers/ Material Risk Takers. Also disclose the percentage of remuneration recognised in the current financial year that is linked to climate-related considerations"

So, directors have a duty to be constantly vigilant about climate risks, going beyond mere tick-box exercises. They must deliver on their promises and ensure prompt, factual and transparent reporting. It is not that every action against the company will translate into action against directors and officers. Only when they fail in their duties and are involved in any wrong doing actively or passively, cause of action against them arises. Nonetheless, it is necessary to ascertain the extent of coverage available under various policies, including any carve-backs to pollution-related exclusions.

Simply buying the policies is not enough. These policies are meant cover different risks. Care should be taken to properly align them with particular attention to exclusions and limits so that, when called upon, these policies serve their purpose and claims do not fall in no man's land.

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