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Special Reference to the Aravallis

THE ARAVALLIS IN THE COURTS

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are dispossessed of home and habitat and the citizenry at large is being dispossessed of the ecological benefits of the Aravallis.

The 'commodification' of the Aravallis' resources has led to large-scale damage by miners in the past and the Supreme Court of India has intervened and passed some restraining orders. The real estate sector also looms as an even bigger threat to this fragile ecosystem.

This article walks the reader through some of the major judicial interventions that have attempted to protect the Aravallis in the NCR.

Are All Forests 'Forests'?

While extensive areas of the Aravallis in Delhi and Rajasthan have been notified as 'Reserved' or 'Protected forests', there are barely any areas in Haryana that have been formally notified as forest lands. This situation is true not only for the Aravalli hills but also for the rest of the country where many forested areas with good forest cover are not recorded as a 'forest', and were therefore left out of the purview of the Forest (Conservation) Act 1980 (hereinafter: FCA 1980).

Inclusion under FCA 1980 would mean that formal consent from the Centre or State would be required for any non-forest use of 'forest' land. The issue of what exactly counts as 'forest' was then duly considered by the Supreme Court.

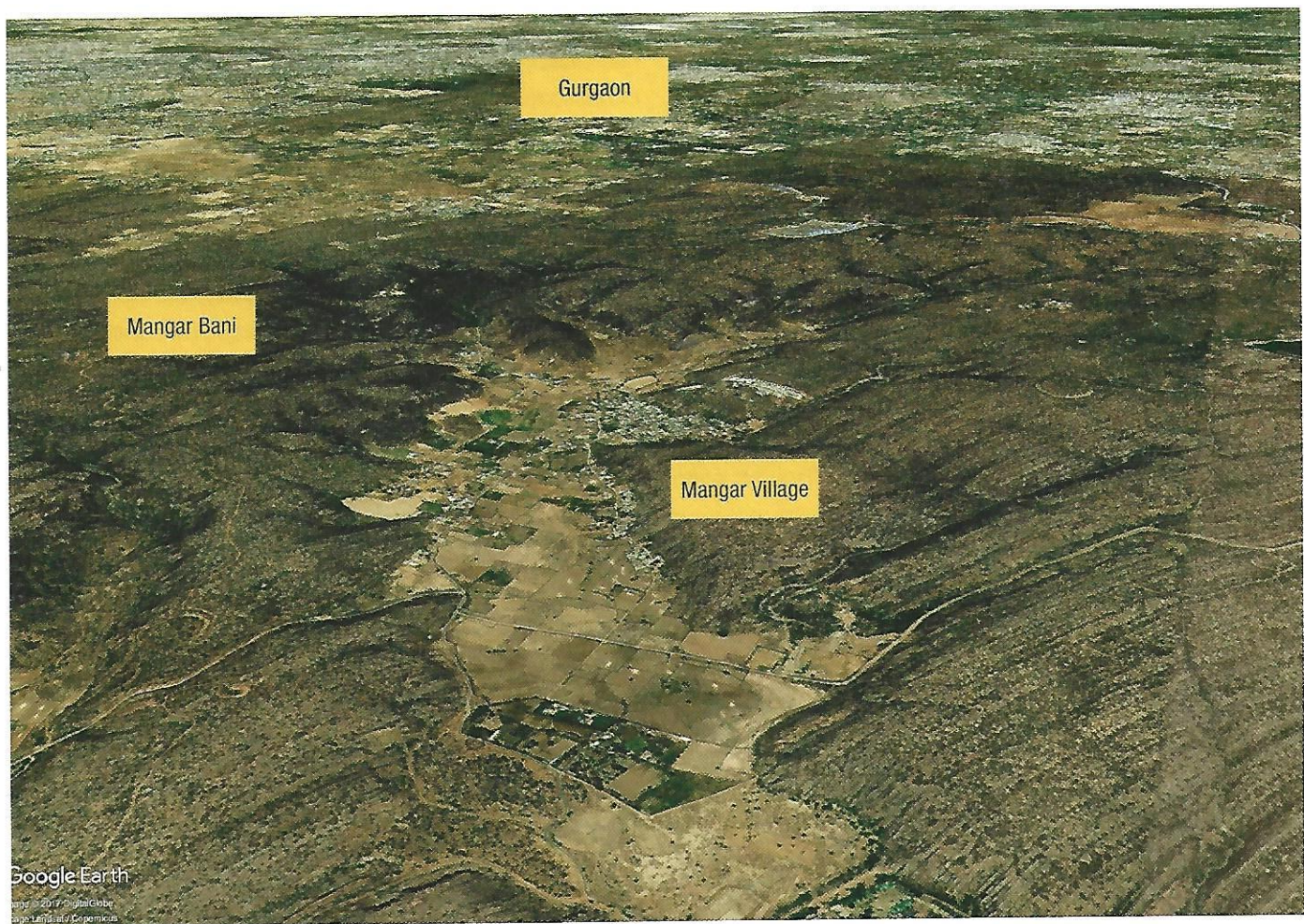
In a landmark judgment of December 1996, it was clarified in the case of *TN Godavarma Thirumulpad vs Union of India*¹ that the FCA 1980 must apply to all forests irrespective of the nature of their ownership or classification. It was also held that the word 'forest' must be understood according to its 'dictionary meaning'. The implication of this judgement was that for the purpose of the FCA 1980, 'forests' include (i) all statutory recognised forests, whether designated as Reserved, Protected or otherwise, (ii) recorded forests, (iii) and in addition, all areas, recorded or not, which fulfill the dictionary meaning of a 'forest'. Secondly, it meant that all lands, whether public, panchayat, or private, were covered by the FCA 1980 Act.

The Supreme Court directed State Governments to identify all such areas:

'Each State Government should constitute within one month an Expert Committee to:

The ecologically fragile Aravalli hills support an ecosystem of plants and animals and play an important role in recharging groundwater. These 'ecosystem functions' have no recognised value in the market, while mining for rocks and minerals and real estate development in the Aravallis generate money.

'Accumulation by dispossession' is a concept that refers to the appropriation of public property by individuals, thereby replacing public interest and welfare with the private interests of a few. 'Commodification' refers to viewing something only for its market or traded value. These two concepts encapsulate the story of the Aravalli hills in the National Capital Region (NCR), particularly in Delhi, Gurgaon and Faridabad, where creeping encroachment and the privatisation of Aravalli commonlands has meant that plants and animals



Google Earth image of Mangar village and its Bani which has been in the eye of the storm

- i. Identify areas which are "forest", irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest
- ii. Identify areas which were earlier forest but stand degraded, denuded or cleared
- iii. Identify areas covered by plantation trees belonging to the Government and those belonging to private persons.

Pursuant to the Godavarman judgement, the State of Haryana was also required to identify areas which had not been notified but were considered as 'forest' by their very nature. The State of Haryana responded with a list that included only those areas that its Forest Department had been treating as 'forest', and this was largely limited to areas notified under a local act, the Punjab Land Preservation Act of 1900 (PLPA 1900) and areas planted under the aegis of the Aravalli Project. The earliest legal protection to the Aravallis can be traced in the applicability of the provisions of PLPA 1900.

In its forest identification exercise, the State of Haryana did not include areas that had been recorded as forest in the revenue record. Nor did it include areas that were not recorded or notified as 'forest' even though they fulfilled the dictionary meaning of 'forest' as propounded by the Supreme Court. These gaps were seen as benefiting miners and real estate developers and other owners who want to use Aravalli land for commercial gain without facing the restrictions of the FCA 1980, and at the cost of damage to the ecology, flora and fauna.

It is worth recounting that in the 1990s the Supreme Court saw both real estate and mining as a threat to the Aravallis. The Shekhar Singh case² (filed in 1990) pertained to real estate activity in and around the Raisena hills in Gurgaon. During the course of the hearings, the Ministry of Environment and Forest (MoEF) issued a Notification on May 7, 1992 known as the 'Aravalli Notification'. This notification extended to Gurgaon District of Haryana which then included Mewat, as well as Alwar, Rajasthan. It prohibited any activity of setting up new industry, mining operations, cutting of trees and any

construction activities including construction of roads and laying of transmission line, without the prior permission of the MoEF. This prohibition was extended to all Reserved forests, Protected forests or areas shown as 'forests' in Government Records, to land recorded as *gair mumkin pahar, gair mumkin rada, gair mumkin behed, banjad beed and rundh*, areas covered under Section 4 and 5 of PLPA and the Sariska National Park and Sanctuary. This was the primary legal protection in the 1990s and till today for the Aravalli hills in Gurgaon. For some reason, the MoEF notification was not made applicable to areas of Faridabad and other parts of Haryana. This was an anomaly that left large parts of Haryana's Aravalli forests unprotected. The situation changed partially in 1996 when the Supreme Court issued directions to include all those areas that are not recorded as 'forest' as areas to be protected under the FCA 1980.

The impact of mining and real estate activity in the Aravalli hills of Faridabad was noticed by the Supreme Court in its order dated May 10, 1996³ when the Court was hearing a petition on pollution caused by stone-crushing and mining operations. The Court noted that mining in the vicinity of the tourist resorts of Badkhal Lake and Surajkund posed a danger to the subsoil hydrology of the region. The order stated:

'The mining activities in the vicinity of these tourist resorts may disturb the rainwater drains which in turn may badly affect the water level as well as the water quality of these water bodies. The mining may also cause fractures and cracks in the subsurface, rock layer causing disturbances to the aquifers which are the source of groundwater. This may disturb the hydrology of the area.'

On these grounds, the Court directed the stoppage of all mining activity within a 2 km radius of Badkhal and Surajkund. The Supreme Court also directed that no construction of any type will be permitted within a 5 km radius of Badkhal Lake and Surajkund and that all 'open areas' shall be converted into 'green belts'. It is to be noted, however, that this protection was not only for Aravalli areas around the water bodies but extended to settled city areas in the plains that fell within that radius.

In subsequent orders in 1996-98, the extent of the buffers where this ban was to be enforced was reduced to less than 1 km, not only in the plains but also in the hills where the buffers were actually required, thus leaving most of Faridabad's Aravallis unprotected.

The period from 1998-2002 saw massive mining in the Faridabad Aravallis which reached deep into the ground, often well below the water table, in search of veins of 'badarpur' silica sand. In May 2002, on a petition filed by the Ridge Management Board of Delhi, the Supreme Court banned mining and pumping of groundwater within 5 km of the Delhi-Haryana border on the Haryana side and in the Aravallis, within 48 hours. Subsequently, on the finding of the Central Empowered Committee (CEC) constituted by the Supreme Court that mining operations are being carried out in forest plantation areas, the Supreme Court passed an order on October 29, 2002⁴ prohibiting and banning all mining activities in *all* of the Aravalli hills from Haryana to Rajasthan. However this order of the Supreme Court was partly modified by an order dated December 16, 2002⁵ and in Rajasthan, mining was allowed subject to permission under FCA 1980 and the Environment (Protection) Act 1986 (EPA 1986). Importantly, this order of December 16, 2002 also stated that, in the event of a dispute:

'No mining activity would be permitted in respect of areas where there is a dispute of applicability of the FC Act, till such time the dispute is resolved or approval under the FC Act is accorded, in addition to order already passed in Writ Petition No. 4677 of 1985.'

In the meantime, the Haryana government did a *volte face* regarding areas treated by the Forest Department as 'forests' and submitted to the Court that these were not actually 'forests'. The apex Court said in the context of mining that areas notified under section 4/5 of the PLPA and forests in the government record were to be treated as 'forests' even if the notifications had expired, and any form of mining in such areas would require permission under the FCA 1980.

While reviewing its orders with respect to mining, the Supreme Court in 2004 continued the requirement of permission under the FCA 1980 for mining in PLPA section 4/5 areas. For Aravalli plantation areas, however, even this was not allowed, and mining was completely restricted. After considering several reports including recommendations by the National Environmental Engineering Research Institute (NEERI), the Court concluded that:

'The Aravalli hill range has to be protected at any cost. In case despite stringent conditions, there is an adverse

irreversible effect on the ecology in the Aravalli hill range area, at a later date, the total stoppage of mining activity in the area may have to be considered. For similar reasons such step may have to be considered in respect of mining in Faridabad district as well.'

The issue of construction in areas notified under section 4 and 5 of the PLPA 1900 was reviewed by the Supreme Court in 2008. In an order dated May 14, 2008⁶, the Court denied 'permission for construction in such areas and held that

'In view of the notification under Section 4 when the clearing or breaking up of the land is not permitted that itself is a bar from fresh construction because a construction only can take place if clearing and breaking of an area/land taking place.'

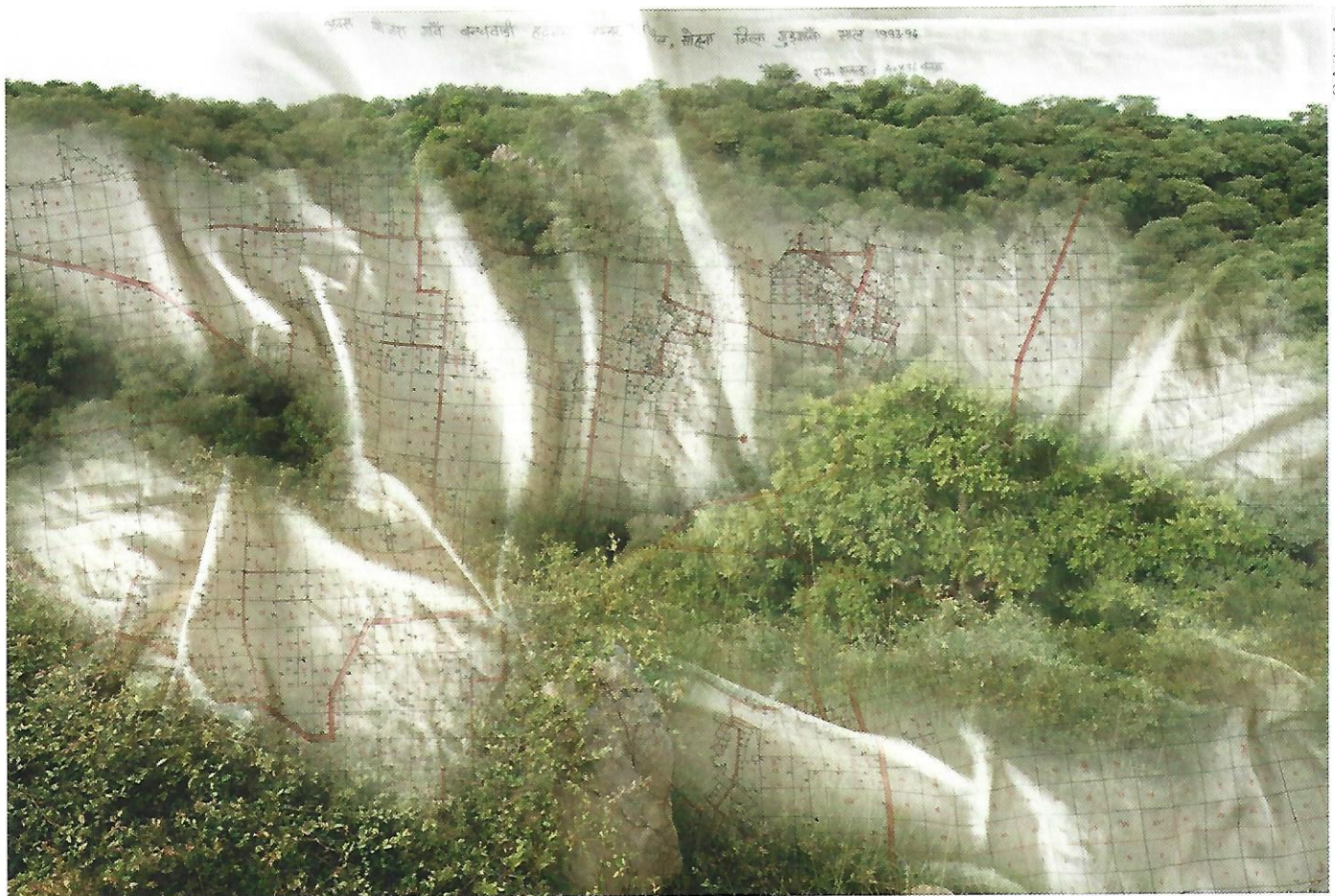
In 2009⁷, the Supreme Court observed that its Aravalli Notification of May 7, 1992 was not being followed and in most cases mining operations were being carried out recklessly with the sole aim of maximising profit. The State of Haryana was also found to be granting mining leases in the area where plantations had been undertaken with the aid of international donors and mining was being done in a manner

that was adversely impacting the groundwater table and causing irreparable damage to critical groundwater reserves. While passing its order, the Court observed that it was not only suspending unauthorized mining but all mining operations being carried out on a disproportionate scale in the Aravalli Hills of Gurgaon and Faridabad.

After being shown satellite imagery of the mined areas, the Court noted:

'26 ... the devastation caused to the area by the extensive mining operations. Extraordinary situations demands extraordinary remedies. In the circumstances, we are of the view that mining operations should be immediately suspended in the above area.'

By its order dated May 8, 2009, the Supreme Court suspended all mining in the Aravalli Hills in Districts Faridabad and Gurgaon admeasuring about 448 sq km. The suspension of mining was to remain in force until such time as a reclamation plan was drawn up and duly certified by the State of Haryana, the MoEF and the CEC.



A *shajra* is a revenue department map showing landholdings in a village. Photographer Aditya Arya created this image to express the controversy about individual share in Mangar Bani.

The Court emphasised that restoration could be both technical and biological. While passing the banning order, the Court cited the principle of 'sustainable development', clearly implying that any future mining operations would need to be governed by this principle. On January 28, 2011, the landmark Jagpal Singh⁸ judgement of the Supreme Court required states across the country to make and implement action plans to restore village commonlands to panchayat ownership. This order has so far seen limited application in the NCR Aravallis but has the potential to halt and even reverse their creeping privatisation. After this order, some Punjab and Haryana High Court orders have ruled in favour of the restoration of village commonlands.

In its Lafarge judgement⁹ of 2011, the Supreme Court revisited the Godavarman judgment and gave twelve directions to prevent situations where forests were treated as non-forests and projects were given the go ahead leading to *fait accompli* situations. It directed that the exercise to identify forests as per the dictionary meaning of the word be completed and that district-level geo-referenced forest maps be prepared. This important judgement re-focused attention on the issue of identifying 'forests' to bring them under the purview and protection of the FCA 1980.

Curiously, the Court's direction to begin the exercise of identifying forest areas was not undertaken by the state of Haryana. And that is why the geo-referenced forest map submitted by the state government was rejected by the MoEF on November 22, 2012 in the context of a draft Development Plan for the Mangar area, stating that the state government has only considered those areas which are recorded as 'forest' and left out areas which can be defined as 'forest' as per the dictionary meaning of the word. Even the pristine and densely forested Mangar Bani was not counted as a forest! As a result, the MoEF kept the Mangar Draft Development plan in abeyance till all forests in Haryana were identified as per the orders of the Court.

The National Green Tribunal steps in

When attempts were being made to fragment that part of the Aravalli area called *gair mumkin pahar* in Gurgaon and Faridabad, concerned citizens approached the newly established National Green Tribunal (NGT) to protect these areas and their biodiversity. In several orders and

judgments, the NGT has considered that any kind of activities that have the effect of fragmenting this area may require clearance (under FCA 1980) from the MoEF.

In one such case, Haryali Welfare Society vs Union of India¹⁰, while dealing with the issue of the construction of boundary walls in an area recorded as *gair mumkin pahar*, the NGT observed:

'... the land in question is a part of Gair Mumkin Pahar Area, where formerly no agricultural activity of whatsoever nature was being carried out. Virtually, there was no human interference in the said area and had allowed growth of Flora species as generally found in forest/denuded forest. However, as of today it appears due to real estate pressure the anthropogenic activity in the said area has increased. No wonder therefore, persons are bent upon fragmenting the pieces of land for real estate development and in process they are erecting fences around the plots of their ownership. In these circumstances, pending the decision in the matter whatever it is a forest land or not, any such anthropogenic activity which may promote the fragmentation and consequent construction of such land would be deleterious to fragile environment in the said area – Aravalli Hill Region'

In this case, the NGT directed the State of Haryana with respect to identification of forest area in *gair mumkin pahar* in district Faridabad, and till that decision is taken no construction was to be allowed for the property in question. In another case, Sarvadaman Singh Oberoi vs Union of India and Ors, the NGT observed that:

'Continuity of Aravalli hills is very crucial as it acts as a wildlife corridor for free movement of wild animals between Sariska in Rajasthan to Delhi ridge area. Any attempt to tamper with the hill eco-system will have its adverse repercussions in the ground water profile of the region leading to acute water shortage.'

In this case the issue was with respect to an attempted change in land records from *gair mumkin pahar* to agriculture by the land owner, which could have allowed him to claim that the land was not part of the Aravallis, which in turn would have enabled him to use the land for non-forest purposes. In this regard the NGT observed:

' ... it is also admitted that "most of the khasra numbers in Aravalli hills are included under category of Gair Mumkin Pahar and is thickly stocked with trees. It is also submitted that Aravalli hills is very crucial as it acts as wild life corridor."'

The NGT directed the State of Haryana to take appropriate action against the illicit felling of trees and breaking of land or any non-forest activity in forest areas including *gair mumkin pahar*.

In other judgements, the Supreme Court has also spoken up for the right of other species to exist. In *TN Godaverman vs Union of India & Ors*, (2012) 3 SCC 277, the Supreme Court judgment dated February 13, 2012 stated:

'11 ... Laws are man-made, hence there is likelihood of anthropocentric bias towards man, and rights of wild animals often tend to be of secondary importance but in the universe man and animal are equally placed.'

'17. Environmental justice could be achieved only if we drift away from the principle of anthropocentric to eco-centric ... Eco-centrism is nature-centred where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligation to non-humans independently of human interest.'

From the above review of some important judgements, it is clear that the Courts have responded to and taken great interest in the issue of both mining and construction in the Aravallis. Their judgements have invoked modern principles of 'sustainable development' as well as 'inter-generational equity'. However, some of the protections are stalled as the exercise of identifying forests and delineating the Aravallis is primarily the responsibility of the Executive. The Courts have exhorted the Executive to complete the exercise of identifying forests, and have kept fragmentation and construction on hold till that is done. Mining is banned in certain areas because of a verifiable track record of unsustainable mining. The issue of who owns the Aravallis is also under litigation for many villages in district, regional and national courts. However the situation is still in flux and numerous cases are still under adjudication.

Will the NCR Aravallis be protected for future generations?
The next few years will be decisive.

Endnotes:

1. (1996) 9 SCR 982
2. Writ Petition No. 598 of 1990
3. *M.C. Mehta vs Union of India & Ors*, (1996) 8 SCC 462
4. *T.N Godavarman Thirumulpad vs Union of India & Ors* (2008) 16 SCC 337
5. *T.N. Godavaram Thirumulpad vs Union of India & Ors* (2006) 16 SCC 401
6. *M.C. Mehta vs Union of India & Ors* (2008) 7 SCC 294
7. *M.C. Mehta vs Union of India & Ors* (2009) 6 SCC 142
8. *Jagpal Singh vs State of Punjab* (2011) 11 SSC 396
9. *Lafarge Umium Mining (p) Ltd vs Union of India* (2011) 7 SCC 338
10. Original Application No.269 of 2013, Judgement dated 20.07.2015

Rahul Choudhary is an environmental lawyer with a special interest in issues concerning the protection and conservation of the environment across the country. He has taken up various matters pertaining to the Aravalli hills, including felling of trees, construction, pollution from wastedumps, water bodies and ponds. He is also associated with the Legal Initiative for Forest and Environment (LIFE), an organization working on environmental democracy. ■