

(2009) 05 KL CK 0040

In the High Court Of Kerala

Case No : WP (C) . No. 12156 of 2008 (S)

Citizen Interest Agency, A Registered

APPELLANT

Vs

Cochin Port Trust and Others

RESPONDENT

Date of Decision : 23-05-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 39, 47, 48A

Citation : (2009) 05 KL CK 0040

Hon'ble Judges : P.R. Ramachandra Menon, J;Kurian Joseph, J

Bench : Division Bench

Advocate : V. Jayaprasad, for the Appellant; P. Parameswaran Nair, Asst. Solicitor, for the Respondent

Final Decision : Dismissed

Judgement

Kurian Joseph, J.—Kerala is a cement deficit State. It is reported that 90% of its requirement is met from neighbouring States and Maharashtra. Surface transport by rail and road alone is resorted to for the transportation. Apart from the resultant problems relating to air pollution, deterioration in quality, loss and damage in transit, loss owing to multiple handling etc., the cost of cement, when compared to other States, is on the higher side in Kerala. Two decades back, Government of India had taken a policy decision to augment the revenue of the Ports by diversifying its activities, particularly in the matter of cargo handling. Cochin is an all weather Port. Transportation of cement in bulk by sea was chosen as one item towards that end by the Cochin Port. The 9th respondent was thus selected for the marine transport of cement in bulk from Gujarat, using Port area on long term lease of Berth and back up area. There are already two such Bulk Cement Sea Terminals in Panvel (New Bombay) and Surat (Gujarat) and one at New Mangalore. The Kerala State Pollution Control Board gave a No Objection Certificate to the 9th respondent on 3-6-1995 to set up bulk cement terminal with facility for storage and for bagging of 20,000 tonnes of cement per month in 2.77 acres of land on lease from the Cochin Port Trust subject to the following

conditions:

1. The applicant shall comply with the instructions that the Board may issue from time to time regarding prevention and control of air, water, land and sound pollution.
2. There shall be sufficient effluent treatment facility by way of septic tank and soak pit.
3. Air pollution control devices by way of bag filters shall be installed.
4. The applicant shall obtain prior consent of the Board before commissioning the project.
5. Trees shall be planted and maintained within and along the periphery of the premises forming a green belt.

2. It appears there were certain representations raising apprehensions on the pollution and hence the consent referred to above was kept in abeyance. In between there were various litigations also leading to the common judgment dated 20th March 2001 in O.P. No. 21218 of 1998 and connected cases. O.P. No. 25882/2000 is one filed by the petitioner herein as a public interest litigation. A Division Bench of this Court elaborately considered all the aspects and dismissed all the writ petitions. Thereafter the consent was revived and the lease agreement was executed. Petitioner herein took up the matter before the Supreme Court in Civil Appeal No. 7909/2001. There were other Civil Appeals as well from the common judgment. All the appeals were disposed of by common order dated 20th November 2001. The apex court observed that some of the observations and findings in the judgment referred to above by the High Court might stand in the way of Environmental Authorities as well as other competent authorities considering the issue of policy and other statutory requirements as per law. In that view of the matter the apex court held as follows:

In the circumstances, while upholding the judgment of the High Court so far as the legality of the order dated 16-10-1998 passed by the Ministry of Surface Transport is concerned, we observe that all other subsequent findings and conclusions of the High Court starting from paragraphs 37 onwards of the impugned judgment will not have any binding effect on any of the authorities of the Ministry of Environment and/or any other authorities who are duty-bound to consider the projects and sanction such projects only if they conform all requirements of law including environmental requirements.

Needless to mention, in view of the order dated 15-10-1998 having been held to be valid, the leases granted pursuant to the same would also remain valid.

(The order dated 15-10-1998 of the Ministry of Surface Transport is the clearance given by the said Ministry for the decision taken by the Cochin Port Trust to lease out 2.77 acres of land for 30 years to the 9th respondent for the purpose of setting up a project for handling and packing of bulk cement).

3. The Ministry of Environment and Forests, Government of India, by order dated 21-2-2007 granted environmental clearance under the Coastal Regulation Zone Notification 1991 subject to the strict implementation of certain conditions stipulated therein as per Ext.P5. The main challenge in the writ petition is that order. The following are the reliefs sought in the writ petition:

I) to declare that the clearance given by the Ministry of Environment and Forest to the 9th respondent for the establishment of bulk cement handling, packing and storage plant at the Q-1 Wharf of 1st respondent for a period of 30 years without obtaining an impact assessment report from an expert body appointed by the Union of India, is illegal and void or in the alternative to call for the records leading to the issuance of Ext.P5 and to issue of writ of certiorari or other appropriate order, or writ and quash the same.

II) to declare that the no objection certificate dated 01-01-2002 issued by the State Pollution Control Board to the 9th respondent to install a plant for handling, packing and storage of cement at Q-1 Wharf of 1st respondent without obtaining an impact assessment report from a competent expert body, is illegal and ultra vires the Environment (Protection) Act and violative of various judgments of the Apex Court or in the alternative to call for the records leading to the issuance of the no objection certificate dated 01-01-2002 to the 9th respondent and issue a writ of certiorari or any other writ, order or direction, quashing the same.

III) to issue an order of injunction restraining the 9th respondent from proceeding with any construction in pursuance of the permission/no objection certificate granted by the respondents to install the cement handling, packing and storing plant at the Q-1 Wharf of the 1st respondent.

IV) to issue a writ of mandamus or any other writ, order or direction, directing the respondents 3 and 5 to direct the 9th respondent not to proceed with any construction in pursuance of the clearance/no objection certificate granted by them.

V) to issue a writ of mandamus or any other writ, order or direction, directing the respondents 3, 5 and 10 to obtain a comprehensive impact assessment report from a competent and an expert body, adhering to well recognized international practices and guidelines.

VI) to direct the authorities to conduct a public hearing with notice to the petitioner who had consistently defended the protection of Cochin backwaters from pollution and other ecological violations.

VII) to declare that Clause [1][a] of para 2 of the Coastal Regulation Zone Notification dated 19-02-1991 is violative of Article 14 21 39(e) 47 48A and 51A(g) of the Constitution of India and the Environmental [Pollution] Act 1986.

VIII) to pass an order of injunction restraining the respondents 3, 4, 5 and 10 from giving clearance/permission to any hazardous industry to be constructed or continue to be operated or to permit handling, packing or storing of any

hazardous chemical/substance in the Coastal Regulation Zone.

IX) to declare that the activity permitted by the 3rd and 5th respondents enabling the 9th respondent to establish a cement handling, packing and storing plant at Q-1 Wharf of the 1st respondent is a prohibited activity under the Notification dated 19-02-1991 regulating activities in the Coastal Regulation Zone.

X) to declare that the activity permitted to be conducted by the 9th respondent at the Q-1 Wharf of the 1st respondent is an environmental hazard injuriously affecting the health of the residents of Kochi and the aqua life of the river as it will cause air and noise pollution and hence it is arbitrary and violative of Article 14 21 39(e) 47 48A and 51A(g) of the Constitution of India.

XI) to issue a writ of mandamus or any other order, writ or direction to the 2nd respondent to pass a comprehensive, forward looking and Environment friendly Rules which are in conformity with the Constitutional mandates, after repealing the existing Rules, made under Environment [Protection] Act 1986.

XII) to declare that the proposed site for cement handling facility in the Cochin Port Trust area is not a developed area and the area is not falling in CRZ-II zone as on 19-02-1991, the date of CRZ Notification.

XIII) to direct the 10th respondent to re-classify the area surrounding Cochin backwaters as CRZ-I after scientific study in order to protect the estuarine calculation and its rich bio-diversity.

4. Though Ext.P5 environmental clearance was granted on 21-2-2007 the writ petition is filed only on 8-4-2008, after more than one year.

5. Heard Sri.Vydhyanathan, learned Senior Counsel appearing for the writ petitioner,, Sri.Jayasankar, learned Counsel appearing for the 9th respondent. Sri.Anand, learned Counsel appearing for the 1st respondent, Sri.Chandramohan Das, learned Counsel appearing for the Pollution Control Board and Sri.Benjamin Paul learned Senior Government Pleader appearing for the State.

6. Apparently for some of the reliefs including the request for new legislation, it is for the petitioner to approach the concerned forum and this Court will not be justified in issuing any direction for a legislation. Learned Senior Counsel appearing for the petitioner would contend that the impugned Ext.P5 order was passed without obtaining environment impact assessment as required in the Environment Impact Assessment Notification of 2006. It is also contended that there is no independent appraisal of the relevant factors. It is further contended that cement being a hazardous chemical under the Manufacture, Storage, Import of Hazardous Chemical Rules, 1989, environmental clearance should not have been granted by the Ministry. There is also a contention regarding the zoning of the Cochin Port area. According to the learned Senior Counsel, at any rate, a public hearing should have been conducted before granting the clearance.

7. It is to be noted that the application of the 9th respondent for environmental clearance was made in terms of the then existing 1994 Notification dated 27-1-1994. It was not mandatory in terms of the said Notification to go for an environment impact assessment in case the authority was of the view that there was no significant impact on the environment. The reports of the authorities would indicate that they had addressed this issue taking note of the process for which the project is set up. Transportation of bulk cement by sea from Gujarat Port to Cochin Port is in special vessels. The conveyance of cement from the vessel to the project site is pneumatic and the cement is stored in silos. The packing is done in completely enclosed surroundings. The specific conditions and general conditions attached to the impugned Ext.P5 order, which are noted below, would clearly indicate the application of mind of the Ministry of Environment and Forest on the specific activity from the point of view of prevention of pollution. The conditions read as follows:

(A) Specific Conditions:

(i) All the conditions and measures stipulated by the Kerala State Pollution Control Board vide their letter No. PCB/NOC/181/95, dated 6-6- 1995 and 1-1-2002 should be strictly implemented.

(ii) It should be ensured that during handling, transportation, storage, there should be no dust generated/spillages. The entire system of handling cement within the port complex should be covered. Water spray systems should be installed at appropriate locations where there could be possibility of fugitive dust emission.

(iii) It should be ensured that bag filters must be designed for emission limits of 50 ug/Nm³.

(iv) Arrangement for treatment of liquid effluents should be made so as to ensure that the untreated effluents are not allowed to be discharged into the sea/ marine water.

(v) Appropriate safety devices such as masks should be provided for use by the workers at the site and their usage by them should be ensured.

(vi) No other products other than the cement should be handled, stored or transported in the Coastal Regulation Zone area.

(vii) It should be ensured that the project proponent ties up with Cochin Port Trust for availing services like pipelines, electricity etc., including fire fighting measures and spillage mitigation.

(B) General Conditions:

(i) A separate Environmental Management Cell with suitably qualified staff to carry, put various environment related functions should be set up under the charge of a Senior Executive who will report directly to the Chief Executive of the Company.

(ii) The project will be monitored by this Ministry's Regional Office at Bangalore. Full support should be extended to the officers of this Ministry's Regional Office at Bangalore and the officers of the Central and State Pollution Control Boards by the project proponents during the inspection for monitoring purposes by furnishing full details and action plans including the action taken reports in respect of mitigative measures and other environmental protection activities.

(iii) In case of deviation or alteration in the project including the implementing agencies, a fresh reference should be made to this Ministry for modification in the clearance conditions or imposition of new ones for ensuring environmental protection. The project proponents shall be responsible for implementing the suggested safeguard measures.

(iv) This Ministry reserve the right to revoke this clearance, if any of the conditions stipulated are not complied with to the satisfaction of this Ministry.

(v) This Ministry or any other competent authority may stipulate any other additional conditions subsequently, if deemed necessary, for environmental protection, which shall be complied with.

(vi) A copy of the clearance letter shall be marked to the concerned Panchayat/local NGO, if any, from whom any suggestion/representation has been received while processing the proposal.

(vii) State Pollution Control Board should display a copy of the clearance letter at the Regional Office, District industries Centre, and Collector's Office/Tahsildar's Office for 30 days.

(viii) The project proponent should advertise atleast in two local newspapers widely circulated in the region around the project, one of which shall be in the vernacular language of the locality concerned informing that the project has been accorded environmental clearance and copies of clearance letters are available with the Tamil Nadu (sic. Kerala) State Pollution Control Board and may also be seen at Website of the Ministry of Environment & Forests at <http://www.envfor.nic.in>. The advertisement should be made within 7 days from the date of issue of the clearance letter and a copy of the same should be forwarded to the Regional Office of this Ministry at Bangalore.

(ix) The project proponents should inform the Bangalore Regional Office as well as the Ministry, the date of financial closure and final approval of the project by the concerned authorities and the date of start of Land Development Work. Separate clearance shall be obtained by project proponent for handling and storage of these chemicals.

8. It is also significant to note that the 9th respondent had obtained an environment impact assessment report from the Water and Power Consultancy Service (India) Ltd., a Government of India undertaking, as early as in February 2001 with regard to the cement handling, storage and packing facility at Cochin Port. It is seen that the Kerala Coastal Zone Management Authority had

considered the said report while forwarding its views to the Ministry. Still further, it is to be noted that even under the 2006 Notification, the environment impact assessment is to be made only in respect of cement plants and for isolated storage and handling of hazardous chemicals. Cement is not a hazardous chemical under the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989, since the same is not included in the Schedule. The contention is that some of the ingredients in cement are included in Schedules I and II and therefore cement is a hazardous substance. We are afraid the contention cannot be appreciated. Even if some of the scheduled hazardous chemicals are used for the manufacture of cement, that does not necessarily mean that the end product, namely cement, is a hazardous chemical. Further, the activity for which environment clearance is given is not for manufacture of cement, but only for handling, storage and package of cement.

9. Yet another contention advanced by the learned Senior Counsel is on the zoning. According to the Counsel, the project area does not fall within the CRZ II. But the competent authority, namely the Kerala Coastal Zone Management Authority, has classified the area under CRZ II. It is seen from Ext.P13 CRZ status report of the Centre for Earth Science Studies that "Cochin Port Trust has already developed the project site and surrounding area by providing infrastructure facilities for unloading, packing & transport of goods from Mattancherry wharf. The entire project area is built up. The project site being within the Kochi Corporation limits, it is categorised under the CRZ-II (CZMP, 1985)". It is also reported therein that "100 m landward of the HTL is the CRZ. It is under CRZ-II category. As per the CRZ Notification, operational construction for ports and harbours is a permissible activity, except in CRZ-I(i)". If the petitioner has any dispute or grievance on such categorisation, it is for the petitioner to pursue the matter before appropriate authorities.

10. It is true that the Kerala State Pollution Control Board had stated before this Court in the earlier round of litigation that if necessary it would go for a public hearing. But the petitioner has not been able to show any specific provision which mandatorily required a public hearing before granting the environmental clearance, under the 1994 Notification. The application was to be processed under the 1994 Notification and under the said Notification requirement of public hearing was at the discretion of the assessing authority. Compared to the transportation of cement by rail and road, the reports would show that there is hardly any air pollution by the marine transportation of bulk cement. The apprehension is with regard to the handling and package and subsequent transport. It needs no scientific study to note that transportation from Cochin to various places within the State would only cause less pollution, assuming if any, compared to the transportation of cement in gunny bags by road and rail from other States to Kerala and the multiple handling involved in the process. Marine transport in bulk would not only augment the revenue of the Port Trust but it would also benefit the consumers in Kerala, since the price of cement will be comparatively less in view of the cheaper mode of transportation. In this context

it is significant to refer one communication from the Port to the Ministry (Ext.P15 dated 8-8-2002) which reads as follows:

While on the subject, I wish to point out that it is understood that the proposed method of cargo handling is a proven technology in use at many major ports in advanced countries. Similar facilities are also in operation at other Indian Ports such as New Mangalore Port Trust, Surat, Panavel etc. Kindly also note that unless the facilities are set up in time, the port will not be in a position to augment its cargo (estimated at approximately 1-1.5 mtpa) and vessel volumes. As on date the Port has already lost nearly Rs. 14 crores due to the delay in execution of the project.

The loss estimated as in 2002 is Rs. 14 crores due to the delay in implementation of the project conceived in the year 1995. Naturally it must be much more now. As there was no interim order in this case and reportedly the work has been in progress now nearing completion, we do not propose to consider that issue.

11. In this public interest litigation the apprehension mainly is on pollution. From the discussions we have made above, it is fairly clear that by the marine transport of bulk cement, the impact on the environment is less compared to the surface transport of cement. The Ministry of Environment and Forest, Government of India, has adverted to the reports of the competent authorities like Centre for Earth Science Studies, the Kerala State Pollution Control Board, Kerala Coastal Zone Management Authority and that of the Water and Power Consultancy Service (India) Ltd. in granting the clearance. The clearance was given on 21-2-2007. The writ petition is filed only on 8-4-2008. Much water has flowed down the bridge. It is brought to our notice that the project is almost complete and the same is about to be commissioned on obtaining the final clearance from the competent authorities. As already noted by us above, 90% of the requirement of cement in the State is met by other States and the transport hitherto was only by rail and road leading to escalation in price, deterioration in quality and air pollution. In view of the modern technology used by the 9th respondent, the people of the State are only apparently benefited in terms of quality and price as can be seen from the various reports. In view of the stringent conditions imposed by the authorities, the petitioner need not have any apprehension at all on the air pollution. After commissioning the project, in case there is any pollution, it would certainly be open to the petitioner to bring the same to the notice of the Kerala State Pollution Control Board in which case prompt action will be taken by the said authority to abate the pollution. Subject to the above liberty, the writ petition is dismissed.