

(1994) 03 MAD CK 0022
In the Madras High Court

Consumer Action Group

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-03-1994

Acts Referred:

Constitution of India, 1950 — Article 226

Forest Conversion Act, 1980 — Section 2

Wild Life (Protection) Act, 1972 — Section 37(1)

Citation : (1994) 1 MLJ 481

Hon'ble Judges : Kanakaraj, J

Bench : Division Bench

Judgement

Kanakaraj, J.—Not a day passes with a conference on pollution control and environmental management at some part of the world or atleast

an article in the Newspaper and Weekly Magazines about the importance of the subject or the lack of awareness on the part of the citizens, the

Government and the Governmental Authorities. The subject has assumed the Worldwide importance because it threatens the very life and

existence of the human race. That is precisely the reason why several enactments have been passed by the Central and State Governments on the

control of water pollution, air pollution, noise pollution as well as the Environment (Protection) Act, 1986, etc.

2. The petitioner in this case is a trust set up for the purpose of representing consumers and fighting their cause in protecting public health, public

safety and the performance of public duties in this regard. The deponent of the affidavit is a trustee of the said trust and is a well-known member of

the Bar. It is stated that the petitioner trust had earlier filed several writ petitions in preventing the authorities from converting the peoples" park

occupying the erstwhile Madras Zoo into a Five Star Hotel. Recently, they have, filed W.P. No. 19915 of 1993 to restrain the State of Tamil

Nadu from changing the water catchment and ground water areas in the State of Tamil Nadu for building activity and housing projects. In

particular, they are seeking to protect five major lakes in Ambattur, Kakkalur, Nolumbur and Chitlapakkam from being converted into house sites.

3. The petitioner seems to have come across a report in the "Indian Express" dated 20.12.1993 about the conversion of a low lying area by filling

the same with sand for the construction of a memorial to Dr. Ambedkar. The writ petition is for the issue of a writ of mandamus to direct the

respondents to restore the land in Survey No. 4309, Block No. 96, Mylapore village, to its original character and to forbear the respondents from

undertaking any development or construction activity in the area.

4. In the affidavit filed in support of the writ petition, the construction activity is opposed on the following grounds:

(a) u/s 2 of the Forest Conversion Act, 1980, the State Government or other authority cannot use any forest land or any portion thereof, for non-

forest purpose. According to the petitioner, the salient feature of this provision is to prevent deforestation which cause ecological imbalances

leading to environmental deterioration. The area has a board proclaiming "Forest Department - Poaching prohibited".

(b) The low lying area comprises of about 100 acres and is a source for ground water recharge especially for the residents of the area in and

around Greenways Road, Santhome, Adyar, M.R.C. Nagar, Mandavelli, etc. In this connection reference is made to Madras Metropolitan Area

Ground Water Regulation Act, 1986.

(c) Right to a safe and healthy environment and the right to have adequate water supply are part of the right to life guaranteed under Article 21 of

the Constitution of India. Any attempt to negate the said right should be controlled by appropriate directions under Article 226 of the Constitution

of India.

(d) The proposed construction of a memorial and other allied building would contravene the various provisions of the Development Control Rules

with particular reference to the Zoning of the area.

5. Before seeking the relief the petitioner has in categorical terms welcomes the

construction of a memorial to Dr. Ambedkar who is a well-known architect of the Constitution of India. The only grievance is that memorial should be located in an appropriate place and not by converting low lying areas which are absolutely essential for the maintenance of environment and ecology.

6. A counter-affidavit sworn to on 31.12.1993 has been filed on behalf of the respondents 2 and 3. The deponent of the affidavit is the Secretary

to Government, Adi-Dravidar and Tribal Welfare Department, which is dealing with the question of putting up a memorial to Dr. Ambedkar. It is

stated that the sixth respondent is implementing the scheme formulated by the Government in the Adi-Dravidar and Tribal Welfare Department. To

begin with it is stated that the Government of Tamil Nadu are implementing several historical and note-worthy schemes in order to promote the

interest of Adi-Dravidars and Scheduled Tribes in the State. It is then stated that Baba Saheb Dr. B.R. Ambedkar is a multi-sided genius and an

eminent son of India. He had championed the cause of the downtrodden people and helped them to reach the main stream of Indian life. He was

also an architect of the Constitution of India. Says the counter-affidavit, that the Government of Tamil Nadu are trying "to translate all his ideals into

reality" (Italics supplied). It is stated that with a view to perpetuate a memory of Dr. Ambedkar, the Government of Tamil Nadu have decided to

build a fitting monument in Tamil Nadu. Here and now I may state that the respondents have not placed before the court the discussion in the

Ministry and the manner in which the Government decided to erect a memorial. I am referring to this aspect because there is considerable

confusion in the various affidavits filed by the respondents as to the scope and purpose of such a monument or memorial. Be that as it may, the

counter-affidavit proceeds to say that the Government decided to locate the Centenary Memorial Auditorium in an extent of five acres of land at

the Adyar Creek area. Out of an extent of 45.45 acres vested with the Madras Metropolitan Development Authority (herein after called

M.M.D.A."), an extent of five acres have been allotted to the sixth respondent-Corporation, which is said to be a quasi-State Government

Agency, enabling them to enter upon the land to put up the memorial. The counter-affidavit also says that final orders and the mode of disposal of

the land to and in favour of the sixth respondent have not yet been finalised. But the Corporation has been given possession of the lands to the

extent of five acres on 30.4.1993. The foundation stone for the memorial was laid by the Hon''ble the Chief Minister on 14.4.1993. Out of the

extent of 5 acres it is stated that the memorial will only occupy 3,000 M2 (that is Order 75 acres) and the balance area will be used as parks,

lawns and approach roads. They have started filling up the land with sea-sand Coovam house. The site in question falls within Survey No. 4309/1-

2 and 8 of Mylapore village. The area is admitted to be the backwater stretch of Adyar River. The sub-surface formation being clay, it is stated

that the same retards the percolation of stagnant water. Therefore, it is stated that there is no question of re-charge of aquifer in this area.

7. Apart from this development to the extent of five acres, the counter-affidavit proceeds to say that the entire Adyar Creek area is to be

developed as an open area concept which envisages a large wooded area and a cultural and recreational complex. According to the counter-

affidavit the development will keep the area environmentally friendly. According to them, the development will not impede, backwater movement.

The counter-affidavit then proceeds to say that the allegation that the area is classified as forest land is not correct. There was only a notification u/s

37(1) of the Wild Life (Protection) Act, 1972, meant for the protection of the migratory birds visiting the area and to protect the mangrove species

in the area. The notification is only to prevent hunting or shooting wild animals in the area. In other words, the said notification does not prevent the

building activities, nor does it amount to declaration of the area as a sanctuary. In respect of the second ground urged by the petitioner, it is stated

that the quality of water, both surface and sub-surface, is highly brackish. There is formation of clay at a shallow depth and therefore, there is no

question of percolation of stagnant water. It is therefore, contended that stagnant water does not constitute as re-charge aquifer in the area. It is

also contended that the proposed development will be a boon for the public and prevent mosquito breeding and avoid other kinds of pollution. It is

also stated that the proposed development is not contrary to any of the Development Control Rules or zoning of the area. It is also stated that the

built up area is meager when compared to vast extents of vacant space. There is also a proposal to have a library containing the books of Dr.

Ambedkar and other Government publications relating to the Scheduled Castes and Scheduled Tribes people. It is further stated that the sixth

respondent has already spent more than Rs. 22 lakhs by way of filling the area with sea-sand.

8. The very same deponent of the affidavit sworn to on 31.12.1993 has filed another counter-affidavit sworn to on 14.2.1994. The facts disclosed

in this counter-affidavit clearly show that either the I rue facts were not disclosed in the counter-affidavit dated 31.12.1993 or that there has been

some change in the attitude of the respondents. This is precisely the reason why I slated earlier that the respondents are not very clear in their mind

as to the manner in which they propose to construct the memorial to Dr. Ambedkar. In this counter-affidavit it is stated that the Government had

decided to construct the memorial auditorium as a conventional centre type and not as a memorial sanctity. It is rather difficult to understand what

the respondents mean by the words ""memorial of sanctity"". However, they say that the auditorium is to be used for conducting Seminars,

Conferences, Annual General Body Meetings of Companies, Cultural programmes, Marriages, Dramas and Government functions which will

propagate the ideals and teachings of Dr. Ambedkar. By merely adding at the end of each sentence that the Auditorium is for propagating the

ideals and teachings of Dr. Ambedkar, the respondents cannot improve their case. It is rather difficult to understand how he Annual General-Body

Meeting of the Companies, Marriages and Dramas can propagate the message of Dr. Ambedkar. What is more it is stated that the Managing

Director of the sixth respondent-Corporation will alone be the authority for she allotment of the Auditorium. It is further stated that near the

entrance there will be provision of library and a mini-conference hall. It is again difficult to understand as to how there can be a library at the

entrance of the Auditorium. There is clearly a confusion of thoughts in the minds of the respondents regarding the construction of the memorial or

monument. The counter-affidavit proceeds to say that certain Rules and Regulations have been framed for the allotment of Auditorium and sets out

such Rules which are about nine in number. The respondents have not placed before me any original records to prove that rules have been framed.

When the construction of the Auditorium has not even commenced, I do not know how the respondents will frame the rules for the allotment of the

Auditorium. There is a rule which says that no performance will be held after 10.00 p.m. except with the specific permission of the Managing

Director. Experience shows that such Rules will be observed only in the breach, the fact that Auditorium will be leased out for marriages,

conference, etc. shows that there will be a dining hall and a big sized kitchen. By way of making a lip service to the memory of Dr. Ambedkar, it is

stated that preference will be given to those people who belong to the Scheduled Caste and Scheduled Tribe community in respect of the allotment

of the Auditorium. The respondents have not also shown before me any sanctioned plan for the construction of the Auditorium. The rough plan that

was shown to the Court has now been explained by the learned Advocate General, by stating that the best part of the five acre plot will be

occupied by the Auditorium, and the dining hall and the car park. The plan shown to me signed by the Chief Architect says that it is the proposal

Baba Saheb Dr. Ambedkar Centenary Memorial Auditorium. There is a 72 metres wide road on the western extremity as well as in the eastern

extremity. The road also runs through the centre of the plot reaching the Greenways Road. There is large car parking area plus a small park on the

south-eastern side of the plot. It is also slated that there is going to be a statue of Dr. Ambedkar abutting the Greenways Road.

9. I will now refer to the counter-affidavit filed by the fourth respondent - M.M.D.A. This counter-affidavit gives certain basic facts which may

useful for the disposal of the writ petition. It is stated that the crescent shaped land of the extent of 56 acres in Block No. 96, Mylapore village of

which the said five acres forms part, is a low-lying area in most of its parts. During flood times this site is said to hold the backwaters of Adyar

river. In G.O.Ms. No. 2186, Revenue, dated 16.10.1990, the fourth respondent was entrusted with the task of reclamation and development of

45.45 acres allotting the balance of 10 acres to the Central Institute of Brackish Water Acqua Culture (CIBA). About Order 275 acres was

allotted to the War Widows Association and Government of Assam. The fourth respondent took possession of the said land of 45.45 acres on

5.2.1991. Later about Order 0.07 acres of land was allotted to the Kuchipudi Arts Academy in G.O.Ms. No. 622, dated 29.5.(sic) Similarly,

about 5 acres were allotted to the sixth respondent in G.O.Ms. No. 293, Revenue, dated 8.4.1993. The fact that the Government has not been

making any final decisions in regard to the allotment of lands in the low-lying area and that there is no finality attached to these allotments, is seen

from the counter-affidavit. Out of 10 acres allotted to CIBA, about 7 acres were resumed from CIBA by G.O.Ms. No. 751, Revenue, dated

16.8.1993. About three acres of land had been allotted to Pallavan Transport Corporation and about Order 30 acres to Indian Oil Corporation. It

is stated that the respondents are considering changing the location if three acres allotted to CIBA. It is admitted that there is a sewerage pumping

station of Metro Water Board in the site occupying an extent of Order 69 acres. These lands are situate in Survey Nos. 4309/1 Part 2, part 8, 24

and 25 of Block No. 96, Mylapore Revenue Village. The land is said to fall partly under the category of ""Open space and Recreational"" and partly

under ""Institutional"" and partly in ""Commercial Use Zones"". This is seen from the Detailed Development Plan for Awai Nagar area of Mylapore.

The fourth respondent, however, hastens to add that under the Development Control Rules, Memorials, Botanical Gardens, Water front

developments, Office complex and Transportation terminals arc permissible under the above zones. It is further staled that the sale proceeds from

the proposed office complex the fourth respondent has decided to make the other improvements. The fourth respondent however, admits that the

development scheme is called ""Development of Urban Forest in Adyar Creek Area"". The fourth respondent then proceeds to say about the future

developments like an Urban Forest in an extent of 21.39 acres and two flood moderation ponds on an ex-tent of 12 acres with necessary pumping

arrangements with a holding capacity of 2.5 million cubic feet of water. There will be walk-ways and resting places and boating facilities in the

ponds. The cost of such development proposals is expected to be around Rs. 8.5 crores. The fourth respondent has not commented upon the

proposed Auditorium to he constructed by the sixth respondent. So far as he other proposals of the fourth respondent, it is stated that the same

will be ecofriendly and the area will be converted into a clean forest of selected species with water-bodies, which will become an improved source

for ground water recharge for people residing around. It is further stated that the afforestation proposed in the scheme will invite more migratory

birds to nest in the area. What one can decipher from the counter-affidavit of the forth respondent is that the development referred to in the

counter-affidavit will no doubt, help to improve the environment and preserve the migratory birds as well as the ground water recharge facility. I do not read the fourth respondent's counter-affidavit as approving of the proposal to construct an Auditorium by the sixth respondent. The fourth respondent nowhere says that such an Auditorium has been permitted by the M.M.D.A. In my opinion, the counter-affidavit of the fourth respondent is clearly in favour of the contention of the petitioner and does not in any way support the theory of the sixth respondent as adumbrated in his counter-affidavit.

10. The Miscellaneous Petitions, W.M.P. Nos. 621 and 622 were filed by the 7th and 8th respondents for impleading themselves as party to the writ petition. By an order dated 20.1.1994, I allowed the petitions and impleaded them as parties because their affidavits also disclose that their interest in maintaining the ecology and environment of the area. A large extent of 4.3 square kilometres has been declared u/s 37 of the Wild Life (Protection) Act, 1972 as being an area closed to hunting for a period of five years from 13.5.1992. This area is right from the Adyar river on the south upto the road leading from Foreshore Estate to the Kabali theatre. Similarly, on the East, the boundary is given as Bay of Bengal and on the West the road from Kabali theatre proceedings to the Bridge on the Adyar River. As correctly explained by the sixth respondent in his first counter-affidavit this notification only means that hunting of wild animals and birds is prevented in the area. It does not certainly mean that the area has been declared as Forest or a Sanctuary.

11. Before taking up the various contentions of the learned Counsel for the petitioner I may refer to the classification of the lands in the Permanent Land Register produced by the respondents. It shows that Survey No. 4309/2 is said to belong to the Fisheries Department and meant for the development of Adyar Fish Farm. The plan attached to the said Permanent Plan Register shows that the proposed five acre plot for the memorial is to be located on the eastern side of R.S. No. 4309/2 and bounded on the East by the Temple View Apartments. As stated in the counter-affidavit of the fourth respondent R.S. No. 4309 has been subdivided into smaller extent as and when the lands were assigned to the various parties for various purposes. But the major part of the low-lying area is

comprised in R.S. Nos. 4309/1 Part and 4309/8 and 4309/2 Part. Several maps and sketches have been placed before me and I will refer only to those maps which are relevant for the case. In the Madras Guide Maps published by Survey of India with copy rights reserved in favour of the Government of India, prepared in the year 1970 shows that the entire area notified under the Wild Life (Protection) Act as the area closed to hunting, is nothing but the Adyar River estuary. In fact the backwaters from the mouth of Adyar River is supposed to enter the Creek with which we are concerned. In course of time and without any regard for the preservation of ecology and the environment, most of the low-lying areas have already been converted into the bungalows for the Honourable Ministers and the Honourable Judges. It is significant to note that even in such bungalows several low-lying areas and large size ponds are still in existence. It is good that such ponds and low-lying areas are maintained and developed. These are the bungalows which are available on the south of Greenways Road. The conversion of the low-lying area on the north of the Greenways Road has also commenced long back. Apparently, the agencies like the petitioner and the 7th and 8th respondents were not active during those days. But they have woken up and come to court at least at this stage when there is yet a large extent of about 50 acres available as a low-lying area. The plan filed by the fourth respondent in respect of Avvai Nagar area as per the development plan referred to in their counter-affidavit shows R.S. No. 4309 and the use to which the same can be put to as per the Development Control Rules. It is only necessary to refer to the fact that out of the 56 acres referred to in the counter-affidavit of the fourth respondent most of it is shown as "open space and recreational zone". There are only two small patches where already the Government had permitted a construction of a Fish Farm and a building for the Kuchipudi Arts Academy. In any event as seen from the counter-affidavit of the fourth respondent at least 45.45 acres are today available as a low-lying area, vested with the fourth respondent.

12. There is one other intriguing point which has not been explained by the parties. According to the fourth respondent an extent of 56 acres in the area called as Adyar Creek comprises of low-lying wet lands. This area is said to hold the backwater of Adyar river during flood times. By

G.O.Ms. No.2186, Revenue, dated 16.10.1990. The entire area except for the sites allotted to others, was handed over to the fourth respondent

and they took possession of 45.45 acres as early as on 5.2.1991. No doubt, the Government has been making hap-hazard allotment to various

bodies out of the said area. However, none of the counter-affidavits disclose as to the manner in which the extent of 5 acres is being allotted to the

sixth respondent without resuming the same from the fourth respondent. The counter-affidavit of the second third respondents gives an indication

that the respondents have not finalised as to the manner of transferring the five acres of land from the fourth respondent to the sixth respondent.

This is clear from the following sentence:

The Government have also permitted the Tamil Nadu Adi-Dravidar Housing and Development Corporation, a Quasi State Government Agency to

enter upon the land to put up the memorial pending issue of final orders and mode of disposal of the land.

[Italics supplied]

I am unable to see as to why the Government should act in such a haste and hurry, to fill up the wet lands with sea-sand even before proper

decisions are taken, after consideration of the various issues.

13. The learned Advocate General raises a preliminary objection as to the maintainability of the writ petition on the ground that the petitioner

cannot raise the issue as a public interest litigation. The locus of the petitioner is not challenged. But it is said that prayer cannot be sustained

because no legal wrong or legal injury is sought to be caused to a determinate class of persons and such determinate class of persons, is by reason

of poverty disabled to approach the court for relief. In particular the following passage in Janata Dal Vs. H.S. Chowdhary and Others, is relied on:

We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases

where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class

or group of persons is violated and as far as possible, not entertain cases of individual wronger injury at the instance of a third party, where there is

an effective legal-aid organisation which can take care of such cases.

I do not agree with this contention. Firstly, it is not a public interest litigation in

the strict sense of the term. This is a case initiated by a Consumer

Action Group strictly for the purpose of protection and improvement of human environment. Their action is supported by two well known

organisations, namely, 7th and 8th respondents who are equally interested in the welfare of the people. This is a litigation for and on behalf of the

public and not a public interest litigation. Further, the very same Hon'ble Judges of the Supreme Court quote with approval the dictum laid down in

S.P. Gupta 's case. It is as follows:

...any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or

from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or

legal provision. This is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realisation of

the constitutional objectives.

I therefore, reject the preliminary objection raised by respondents 1 to 6.

14. Though the arguments of the learned Counsel for the petitioner on the basis of preserving wet lands and maintaining the eco systems are very

attractive and tempting. 3 repeatedly asked the counsel to show as to how a court of law can interfere in such matters. A discussion on the points

raised by the counsel will to some extent answer the question posed by me. At the outset I may record the concession made by the petitioner that

he is not pressing the point based on the notification issued by the Ministry of Environment and Forest relating to coastal stretches and imposing

restrictions on such coastal zones. Though there is a reference to estuary and creeks and backwater which are influenced by tidal action, learned

Counsel for the petitioner says that the petitioner has not been able to collect necessary materials to show that the subject creek falls within a

coastal regulation zone referred to in the notification. One other aspect of the case can also be disposed of. This aspect relates to the notification

issued under the Wild Life (Protection) Act. I have already indicated that the notification issued u/s 37 of the Wild Life (Protection) Act, is only in

respect of the prevention of hunting wild animals and birds in the area. There is no notification declaring the area as a Forest area or a sanctuary.

Therefore, it cannot be contended that the respondents have violated any of the

notifications under the Wild Life Protection Act or the Forest Conservation Act, 1980.

15. While paying homage and deliberating on the Centenary Celebration of Dr. Ambedkar, it is but proper that we begin with a reference to the

Constitution of India. Though a later introduction by the Constitution 42nd Amendment, 1976. Article 48-A is in furtherance of the United Nations

Conference on human environment held at Stock-home in June, 1972 in which India had participated. That conference had taken a number of

steps for the protection and improvement of human environment. Article 48-A of Constitution of India is as follows:

48-A. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Protection of

environment. Read with Articles 51-A(g), 14 and 21, the Supreme Court has drawn the following conclusions:

(a) It is a constitutional duty not only of the State but also of every citizen to protect and improve the environment and natural resources of the country.

(b) Though neither Article 48-A nor 51-A is judicially enforceable by itself, it becomes enforceable through the expanding interpretation of Article

21, so that in case of a failure of the foregoing duties, the Supreme Court or a High Court would entertain a petition under Article 32 or 226, as a

Public Interest Litigation brought by any individual or institution in the locality or any social action group, even by a letter.

The fundamental duties introduced by the same Amendment Act is also worth looking into. Article 51-A is as follows:

51-A. It shall be the duty of every citizen of India-

(a)

(b)

(c)

(d)

(e)

(f)

(f) to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

The emphasis made by the learned Counsel for the petitioner is that the respondents have no right or jurisdiction to convert wet lands and low-lying areas into building auditorium or car parks. At the risk of repetition I make it clear that the petitioner has no objection for the construction of a memorial to Dr. Ambedkar in a fitting manner. The manner in which the Auditorium has to be constructed has been explained by in the second counter-affidavit of the sixth respondent. It does not make a secret of the idea of the respondents to erase the wet lands atleast an extent of five acres for the present. It need not be emphasised that the construction of an Auditorium with Car parks, dining halls and kitchen will certainly pollute the area apart from destroying the wet lands. The question is whether the court can permit such a conversion of wet lands.

16. Learned Counsel for the petitioner has also placed before me certain Text Books on India's Wetlands Mangroves and Coral Reefs issued by the World Wide Fund For Nature India for the benefit, of the Ministry of Environment and Forests (Government of India). A perusal of the said book makes one feel as to why there should be no systematic destruction of such wet lands when they have considerable potential to preserve and maintain the eco systems. To quote one passage:

Wetlands are transitional zones that occupy an intermediate position between dry land and open water. Ecosystems dominated by the influence of water, they possess characteristics of both terrestrial and aquatic ecosystems and properties that are uniquely their own.

There is enough material to suggest that the wet lands of the nature and characteristic found in the Adyar estuary has promising potentialities and capabilities to become a bird sanctuary or water resource. There is an interesting passage on how to identify a wet land. There is another book on preserving our fresh water. Wet lands issued by the U.S. Department of Interior, Fish and Wild Life Service. Here again there is an interesting passage on how certain water birds depend only on small wet lands. It is stated that they nest on small, often temporary wet lands ranging in size from fractional acre puddles upto 100 acres or more. There is yet-another book by Edward Maltby on ""Water-logged Wealth"". The National Institute of ecology and the International Scientific Publications have brought out a book on ""Wet lands Ecology and Management."" This is a book

published with the support from UNESCO, Paris and the Department of Science and Technology, New Delhi. There are interesting articles about

the development of Mangroves in estuary. I am not certainly going to write a thesis on Wet Lands. But I am only referring to these Text Books to

show that the Authorities should have bestowed some thought to these interesting aspects of life before embarking upon the construction of an

Auditorium by converting wet lands.

17. Turning now to certain decided cases, the first reference is to *People United for Better Living in People United for Better Living in Calcutta-*

Public and another Vs. State of West Bengal and others, . In that case the very question was raised as to whether wet lands in the eastern fringe of

the City of Calcutta should be maintained as wet lands or whether any development could be permitted. The learned Judge who decided the case

had traced the history of Law of Environment and the use of wet lands as areas which not only promote environment but also provide a haven for

vast number of living creatures. Disappearance of such wet lands would threaten the very existence of such living creatures including migratory

birds. There was also reference to the land use of the city under the Town and Country Planning Act. The court was concerned with the

conversion of a large tract of wet lands for the construction of a World Trade Centre. It was urged that the construction of such a Centre will

enhance the trading activities of the country as a whole. It was further urged that it will be in the interest of the public because several benefits were

accepted to flow from the construction of the Trade Centre. While accepting that the object of the project was laudable, the Calcutta High Court

directed the preservation of the wet lands and restrained the conversion of the same for any other purpose. The court issued an order of injunction

against the State from reclaiming any further wet land. The court also restrained the respondent from granting any permission to any person

whatsoever for the purpose of changing the use of the land from agricultural to any other purpose. The respondents were directed to maintain the

character of all the wet lands in the then existing form. Several-paragraphs in the said judgment of the Calcutta High Court were relied upon by the

learned Counsel for the petitioner. In particular, it is good to see the manner in which the court tried to weigh the balance of interest namely, the

benefits arising out of retaining the wet lands and the benefits arising out of a development like the construction of a World Trade Centre. In my opinion the said judgment completely supports the case of the petitioner. Learned Advocate General M)ughl to distinguish the said judgment by referring to paragraph 39 of the judgment. In other words, according to the learned Advocate General, in that case the respondents were unable to prove economic viability of the new project. But it is to be remembered that the ratio of the judgment was not based on the above lack of particulars, only. The ratio of the above judgment was based on the other considerations relating to the preservation of environment which is relied on by the learned Counsel for the petitioner.

18. The next important submission on behalf of the petitioner is based on the Town and Country Planning Act read with the Development Rules.

To begin with the counter of the fourth respondent as well as the plan relating to Awai Nagar area submitted by them clearly shows that the subject

area comprising of five acres where the memorial and auditorium is sought to be put up is declared as ""open space and recreational"". No doubt the

other areas vested with the M.M.D.A. comprising of 45.45 acres have been shown as institutional, commercial etc. But we are not concerned with

those areas because the proposed construction is of an extent of five acres allotted to the sixth respondent which clearly lies within the description

open space and recreational"". Rule 4 of the Development Control Rules relates to the use of the site or premises as specifically designated in the

development plan. Sub-clause (d) says that no piece of land shall be used as a site for the construction of a building for any development if the

authority considers that,

(iv) if the site is likely to be inundated and satisfactory arrangement for proper drainage is not possible, or

(v) if the site is a filled up. tank or low lying or of made up soil by depositing rubbish or offensive matters and the proposal is likely to be affected

by dampness owing to the sub-soil water, or

(vi) if the site docs not abutt any existing public or private street forming part of a layout sanctioned under the provisions of the relevant local body

act.

Rule 14 describes the purpose for which a site which is zoned as ""Open Space

and Recreational"" can be put to. Argues Mr. Sriram Panchu that the various uses mentioned therein does not permit the construction of a ""Kalyana Mandapam"" or an Auditorium. There is a restriction for the use of electric motors exceeding 5 horse powers. It is argued that in an Auditorium of the magnitude proposed by the sixth respondent there-will necessarily be generators. Similarly, if a dining hall and kitchen are to be provided there will be modern type of cooking implements which will far exceed 5 horse power motor. By contrast learned Counsel refers to Rule 13 which specially permits ""Kalyana Mandapam"". Similarly, Cinema theatres, Assembly Halls and Reading rooms are permitted under mixed residential zones under Rules of the Development Control Rules : Under Rule 7, primary residential zone, Community Halls, clubs and welfare institutions occupying a floor area not exceeding 300 square metres is permitted with the special sanction of the concerned authority. The argument is that the proposed construction is not permissible in the zone declared as ""Open Space and Recreational"". It is also contended that no special sanction has been obtained from any authority.

19. In support of these arguments learned Counsel for the petitioner sites the judgment in Bangalore Medical Trust Vs. B.S. Muddappa and others, . That case related to a tank in the City of Bangalore, which had been reserved as an ""Open Space"" in the improvement scheme. By an order of the Government, the said area was allotted to a Medical Trust for the purpose of constructing a hospital. The action of the Government was challenged by the residents of the locality on the ground it Is contrary to the provisions of the Act and the legislative intent to protect and preserve the environment which was absolutely essential as a place of recreation and play ground for the general public. In that case, no doubt, the Apex Court approached the issue from the point of view of the reservation of the area by the Bangalore Development Authority as an Open Space and the concomitant public interest arising there from. The Apex Court has posed several questions in paragraph 45 of the judgment all of which can be equally asked against respondents 1 to 6 in this case. I am in particular attracted by these sentences in the said judgment:

The role of the administration was highly disappointing. In their tunings even a show of awareness of law and fact was missing. This culture of

public functionary, adorning highest office in the State of being law to himself and the administration acting on dictate, for whatever reason disturbs

the balance of rule of law.

Learned Advocate General seeks to distinguish these judgments by saying that the Apex Court was concerned with breach of statutory rules

whereas we are not concerned with such violation of such statutory rules. I do not agree with this contention. The reference to the various rules

under the Development Control Rules suggests that the proposed development cannot be made in the zone categorised as "Open Space and

Recreational". In this case, I have to record that not even the sanctioned plan has been placed before the court, much less a special sanction for

using the area for any purpose other than the purpose mentioned in the development plan and the Development Control Rules.

20. There is one other judgment of the Supreme Court which supports the case of the petitioner. That is Tarun Bharat Sangh, Alwar Vs. Union of

India and others, . In that case also a Social Action Group concerned with the protection of environment and preservation of wild life filed an

public interest action for the enforcement of the statutory notification promulgated under certain laws relating to Wild Life, Environmental

Protection and Forest Conservation. Despite such notifications, the authorities were permitting mining operations by various persons, by grant of as

many as 400 mining privileges to private persons. In that case there was a notification u/s 35 of the Wild Life (Protection) Act, 1972 declaring the

area as a sanctuary. There were also certain other notifications under Rajasthan Forest Act, 1953. The Apex Court observed while professing to

protect environment by means of such notifications, they cannot at the same time permit degradation of the environment by authorising mining

operations. Learned Advocate General sought to distinguish this case by saying that no such violation of any such notification is alleged in the

present writ petition. In my opinion, the approach of the learned Advocate General cannot be sustained. If one goes through the entire judgment,

one is able to see that the court was enforcing the twin task of compliance with notifications and also the prevention of the devastation of the

environment and Wild Life in the protected area. The Apex Court in that case has gone to the extent of saying that the damage already done by

mining operations should be rectified as far as possible by restorative and reafforestation scheme.

21. The last aspect of the case is based on the proposal made by the World Wild Life Fund for declaring the Adyar estuary as the Bird Sanctuary.

In this report the manner in which the Adyar Creek comprising of an extent of 56 acres referred to in the counter-affidavit of the fourth respondent

is explained. It is stated that the Adyar River opens into the sea at a place close to Theosophical Society, on the southern shore there are still

ramnants of mangrove growth. In the northern side of the river leads into the backwater which is a shallow of water about 1 square mile in the area

lying between Santhome and Adyar. The list of Marine Wealth and the list of birds mammals etc. found in the area are attached to the report.

Reference is made to as many as 176 types of birds which visit the area during various times of the year. Certainly all (he 176 types of birds may

not still be visiting the area. But one can see that quite a number of birds do visit the area even now. Though I do not propose to rest my case on

the basis of such reports and text books, some weight and credence has to be given to the letter written by the Joint Secretary to the Government,

Forests and Fisheries Department to the Chief Conservator of Forests under letter No. 54872/FRV/84-1 which relies on the said report of the

World Wild Life Fund and gives the following instructions:

This area of about 1 1/2 sq. miles in extent is the mouth of the river Adyar where its meets the sea and comprises of a shallow backwater and mud

flats. About 175 species of birds of which 73 are migrants (some from such distant countries as Siberia) and 52 are breeding species. The Port

Trust Management Training Institute which was proposed to be situated on the beach at the Estuary has been shifted further south along with the

coast to Uthandi, thus saving the estuary from Great disturbances and possible destruction, but there is always the chance of something else being

located here. The way to prevent this is to have the area declared a sanctuary for the birds so that further possible dangerous developmental

activity may be prevented.

In this case, it is admitted in the counter-affidavit dated 31.12.1993 that the notification u/s 37(1) of the Wild Life (Protection) Act, 1972 has been

issued in respect of the subject area and that notification is meant for affording

protection to migratory birds visiting this area and to protect the remaining mangroves species. Therefore, the respondents cannot escape the dictum of the Supreme Court as laid down in *Tarun Bharat Sangh, Alwar Vs. Union of India and others*, to which I have made a reference.

22. I will now come to the argument advanced on behalf respondents 7 and 8. Reference is made to AIR 1991 420 (SC) . That was a writ

petition seeking to restrain certain authorities from discharging slurry/sludge into the Bokaro river. That was also a public interest litigation. The

Apex Court has looked at the case from the view point of Article 21 of the Constitution of India, Observes the Apex Court:

Right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution free water and air for full

enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the

Constitution for removing the pollution of water or air which may be determined to the quality of life.

Ms. Naga Shila learned Counsel for the 7th respondent refers to Schedule I of the notification issued under the Wild Life Protection Act and says

that the common birds mentioned therein are referred to in the report of the World Wild Life Fund as Serial Nos. 28, 39 and 79. She further

argues that the prevention of hunting or shooting in the area means and that the notification prevents the destruction of such migratory birds from

the area, altogether. The proposed development, as already stated will certainly cause such kinds of noise and air pollution that will certainly

prevent migratory birds from visiting the area.

23. The last of the decisions which is relied on both the sides is *Rural Litigation and Entitlement Kendra v. State of U.P.* (1988) 4 J.T. 710 : AIR

1989 S.C. 594. There is an interesting passage quoted by the Apex Court from a reply given by the wise Indian Chief of Seattle"" to an offer made

by the ""Great White Chief in Washington in respect of sale of a land. The Apex Court had thought it fit to quote the entire reply, but it is sufficient

to refer to one passage in the reply which appeals to me:

Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every clearing and

humming insect is holy in the memory and experience of my people. The sap

which courses through the trees carries the memories of the red man.

No doubt in that case after weighing the pros and cons, the Apex Court found that the Government was alive to the ecological considerations and

all other related matters and had in a bona fide manner allotted an extent of four acres to a Five Star Hotel. The important point to be noticed in

this decision is that the Government of West Bengal did not fail to take into account the relevant considerations. I have already referred to the fact

that in the case before me there has been no such deliberations or considerations by respondents 1 to 6. In fact, I have already referred to the fact

that even the question of transfer of the five acre plot to the sixth respondent has not yet been finalised. I have also referred to the confusion

remaining in the minds of respondents 1 to 6 as to the manner in which the proposed development area either as memorial or as an auditorium. I

have referred to this aspect of the case while dealing with the two counter-affidavits one sworn to on 31.12.1993 and the other on 14.2.1994.

24. In answer to the above arguments learned Advocate General apart from raising the preliminary objections, which I have already dealt with,

says that the scheme formulated by the Government and the sixth respondent are historically noteworthy. He refers to the life and ideals of Dr.

Ambcdkar. He also says that the memorial is to be constructed only in an extent of Order 75 acres and the balance will be utilised as Parks, lawns

and approach roads. But unfortunately, in the second counter-affidavit filed on 14.2.1994 a totally different story is given. The main object of the

proposed development is to construct a Centenary Memorial Auditorium and not as a Memorial of sanctity. Learned Advocate General says that

the affidavit of the petitioner makes no reference to the availability of wet lands and the argument addressed by Mr. Sriram Panchu, learned

Counsel for the petitioner, cannot be entertained. He also says that the affidavit of the petitioner does not proceed on the basis that there has been

any violation of the Development Control Rules or the Environment Protection Act. He relies on the judgment of the Apex Court in Shri

Sachidanand Pandey and Another Vs. The State of West Bengal and Others, and says that there has been a conscious decision and the

respondents were not actuated by any mala fide considerations. According to him, the object of the proposed development is to propagate the

ideals of Dr. Ambedkar and perpetuate his memory by building a fitting monument. As against this public purpose the protection of environment as

adumbrated by the petitioner and respondents 7 and 8 could not have precedents or preference. It is here that I must make it clear that the

petitioner has no objection for the erecting of a memorial or a monument in the memory of Dr. B.R. Ambedkar in an area of Order 75 acres. But

such a development should be in a place which is least in convention to the migratory birds or the preservation of the environment of the area.

25. Having regard the rival submissions, having perused the text books and the authorities cited at the Bar I have given my anxious consideration to

the issues involved in this case. What is the best way of perpetuating the memory of Baba Saheb Dr. Ambedkar and what is the best way of

propagating his ideals? No doubt a filling monument or memorial is one way of remembering the great son of India. But in my opinion if really

respondent 1 to 6 are interested in serving the cause of the down-trodden people and the people belonging to the Adi Dravidar Scheduled Caste

and Scheduled Tribes, the best way is to create a fund or endowment and run a free hostel for the students belonging to the Scheduled Castes and

Scheduled Tribes. They can show a series of concessions by granting scholarship to as many students as possible. If the sixth respondent has so

much money to invest in a big auditorium of the size proposed in the counter-affidavit, I can easily visualise the flow of interest if such amount of

money is invested in a proper manner. The fact that the sixth respondent is mobilising the huge amount for the construction of the Auditorium dining

hall, kitchen, car parks, etc., can easily be seen from the fact that for the purpose of spreading sand on the five acre plot. They claimed to have

spent already a sum of Rs. 22 lakhs. The filling up of the five acre plot has been done only upto an extent of 75% of the plot or roughly 4 acres.

When I asked the learned Advocate General as to how a sum of Rs. 22 lakhs has been spent for this purpose, because the sand has been brought

only from the mouth of the Coovam river where it flows into the sea. Learned Advocate General on instructions says that the statement in the

counter-affidavit to this effect may not be correct and that only a sum of Rs. 6 lakhs has been spent and that probably the counter-affidavit refers

to the total amount allotted for the purpose of filling the area. Whatever it may be, it is clear that a huge amount is set apart for the proposed

construction and if diverted, it will beneficiary reach the down-trodden, the poor Scheduled Castes and Scheduled Tribes students or other

aspirants for jobs, etc. That is the only substantial and proper way of helping the people belonging to the Scheduled Castes and Scheduled Tribes

community. What is the use of pomp and show? As I have already stated a memorial or monument is no doubt necessary as an outward

expression of our gratitude to the great son of India. We have seen enough memorials in the City of Madras and there can be no objection to the

building of such a monument or memorial. There was some argument about building only a monument and not a memorial. This only reflects the

confusion in the minds of the respondents 1 to 6. There is no big different between a monument and a memorial. A monument is a structure such as

a building or tower erected as a memorial. A memorial is defined as a monument designed or established to serve as a remembrance of a person

or an event. Therefore, as claimed in the counter-affidavit of the sixth respondent dated 31.12.1993, the memorial can be allowed in an extent of

Order 75 acres. I am in fact willing to concede an extra Order 75 acres to have a lawn or park around the memorial. I am thus inclined to conceal

an extent of 1.50 acres for the building of memorial or monument in the very area allotted to the sixth respondent. But I propose to demorgate the

area upto an extent of 1.50 acres, so that it will cause least inconvenience to the maintenance of the wet land and the preservation of the

environment and habitat for the migratory birds.

26. As I was reading the text books on Wetlands especially the Book by Edward Malt by on ""Waterlogged Wealth"", I started to indulge in a little

bit of a day dreaming. If only the odd construction in Survey No. 4309/2, in the farm Fisheries Training Centre, is shifted to some other place, the

respondents 1 to 6 will have a large and compact extent of low-lying lands available for development as a pond or lake with walk-ways all round

and a Children's Park, more or less in the manner set out in paragraph 7 of the counter-affidavit of the fourth respondent. Leaving apart the

existing buildings and the extent of 1.5 acres which I propose to allot for the construction of the memorial, the respondents can still have a chance

of developing a large tract of low lying wet lands in the manner suggested by the World Wild Life Fund and the letter of the Government dated

5.11.1984 addressed to the Chief Conservators of Forests, Madras-6. The heart of the City is already blocked in many places. Even now it is not impossible for the respondents 1 to 6 to do a by pass surgery and give a fresh lease of life to the residents of the Madras City. Let us preserve the few open spaces and wet lands which are available in the city. Let us plan things properly and in doing so let us not be adverse to consult private agencies who are well-versed in the subject. My dream can easily be translated into a reality if only the respondents 1 to 6 include this Scheme in the proposed ""Madras Vision-2000"".

27. Before reducing my conclusions into specific directions, I must record with appreciation the steps taken by the petitioners and their counsel in promoting and preserving the environment of the City. Equally I record with appreciation the steps taken by the seventh and eighth respondents. All of them have taken pains to study the issue thread bare and have assisted the court to the maximum extent. I also thank the Advocate General who has presented the case in a fair and reasonable manner. It is particularly gratifying to note that the petitioners have approached the court at the earliest point of time without allowing other equities to set in. For instance, there are cases and cases where people come to Court after the mischief is done the buildings are completed. No court will be inclined to direct the demolition of a building unless the circumstances warrant the same.

28. I give below the following directions in the writ petition:

(i) The sixth respondent (the Adi Dravida Housing Development Corporation), is permitted to construct a memorial or monument in an extent of 1.5 acres (a little more or little less) at the eastern end of the five acre plot allotted to them under G.O.Ms.No.293, Rev. dated 8.4.1993, within the following boundaries:

The extent on which the construction of a memorial is permitted will be the land bounded on the north by existing Temple View Apartments, on the east by Beach Road, on the south by Greenways Road and on the west by an imaginary north-south straight line drawn from the western tip of the Temple View Apartments to the Greenways Road (by the shortest distance).

(ii) Respondents 1 to 6 are directed to remove the sands spread on the western side of the said five acre plot and restore the said area to its

original position. It is open to the sixth respondent to retain the sand spread on the eastern side of the five acre plot upto an extent indicated by the

boundaries in Clause (i) above.

(iii) Respondents 1 to 6 are restrained by an order of injunction from constructing an Auditorium or any other type of building other than what is

permitted under Clause (i) above, in any place of Survey No. 4309 and its sub-divisions.

(iv) The entire low-lying wet land in Survey No. 4309 and its sub-divisions which are vested with the fourth respondent under G.O.Ms. No. 2186,

Revenue, dated 16.10.1990 shall be maintained and preserved as low-lying wet lands. If at all any development is sought to be made by the

respondents it shall be only as per paragraph 7 of the counter-affidavit of the fourth respondent. They shall not permit or authorise construction of

any type be it an Office Complex or a Commercial Complex.

(v) In future, if some unexpected need arises, it is open to the parties to seek for appropriate directions from this Court after serving notice to all

the parties to this writ petition.

29. The writ petition is ordered in the above terms. There will be no order as to costs.