

(1993) 03 KL CK 0055

In the High Court Of Kerala

Case No : W.A. No's. 1045 of 1991 and 25 of 1993C (O.P. No. 9711 of 1989-F)

Executive Engineer, Attappady Valley Irrigation Project, Agali and Others APPELLANT

Vs

Environmental and Ecological Protection Samithy, Agali and Another RESPONDENT

Date of Decision : 31-03-1993

Acts Referred:

Constitution of India, 1950 — Article 226, 48A, 51A

Citation : AIR 1993 Ker 320 : (1993) 3 ILR (Ker) 482

Hon'ble Judges : M. Jagannadha Rao, C.J.;K. Sreedharan, J

Bench : Division Bench

Advocate : M.C. John, Govt. Pleader, for the Appellant; A.X. Varghese and K. Ramakumar, for the Respondent

Final Decision : Allowed

Judgement

Jagannadha Rao, C.J.—These two writ appeals are connected and can be disposed of together. W.A. 1045 of 1991 is filed by the State of Kerala, the Chief Conservator of Forests and the Executive Engineer, Attappady Valley Irrigation Project, Agali P.O., Mannarkad. They were respectively respondents 3,4 and 1 in the writ petition. In W.A. 25 of 1993, appellant is Sri O. Elamkovan, a contractor, who was the successful bidder for cutting the bamboo clusters. The contesting respondent in both the appeals is the writ petitioner, called the "Environmental and Ecological Protection Samithy", Agali, represented by its Convener, one K. Rajan.

2. The relief claimed by the respondent-writ petitioner in the writ petition is for the issue of a writ of prohibition, prohibiting the appellants (in particular the appellant in W.A. 25 of 1993, who is the contractor) from cutting the spread bamboo reed forest in Attappady area, allegedly 4 kilometres long. The writ petition was filed on 17-11-1989.

3. The writ petitions, unfortunately, is bereft of any details whatsoever. A picture

is presented as if bamboo reeds are spread over a long tract of 4 kilometres and are being allowed to be indiscriminately felled from their roots and that bamboo worth Rs. 15 lakhs are sold away for Rs. 4,60,000/- in favour of the contractor. It is revealed from the counters that the bamboo clusters are only in an area of 7.016 hectares and that the land was acquired by the State much earlier after paying heavy compensation under the Land Acquisition Act. The land was, in fact, acquired for the Attappady Valley Irrigation Project. No details of the Project are referred to in the writ petition.

4. The right to cut the bamboo was auctioned initially on 5-1-1989 for Rs. 2,01,000/- in favour of another person. There were higher offers later. Therefore, a re-auction was conducted, then the original bidder filed writ petition, OP 645 of 1989 and the same was dismissed on 7-4-1989. Then the present re-auction was notified by notice, Ext. R2(B) dated 26-7-1989 and the re-auction was held on 6-9-1989 and the appellant in WA 25 of 1993 became the highest bidder. He paid Rs. 4,00,000/- towards the bid amount and Rs. 61,000/- towards the taxes, in all Rs. 4,61,000/- (see receipt Ext. R2 (F) dated 7-9-1989), He had to cut and remove the bamboo within 60 days from the date of getting possession, i.e., 8-11-1989 after executing Ext. R2(E) Agreement. He started cutting the bamboos and continued the same up to 2-12-1989 on which date the copy of the present writ petition was served on him. On 2-12-1989 cutting was stopped. The contractor says he spent about Rs. 1,86,000/- for the cutting operations by the time.

5. This would mean that the respondent-writ petitioner Samithy, waited till the land occupied by the bamboo clusters was acquired by the Government for the purpose of the Project and huge compensation was paid to the land owners. Auction of bamboos --after some dispute about the bid amount went to High Court -- was concluded on 6-9-1989 and the present writ petition was filed for Writ of Prohibition on 17-11-1989 after the contractor had paid Rs. 4,61,000/- and cut the bamboo for more than two months and had spent about Rs. 1,86,000/- for such cutting.

6. The learned single Judge directed appointment by the Government of an expert committee to go into the question of environmental degradation and the three-member Committee appointed by the Government submitted a report, Ext. CI on 19-2-1990. Arguments were heard on various dates and judgment was delivered on 22-3-1991 allowing the writ petition, directing the appellants (respondents in the writ petition) in both appeals to "forbear from cutting and removing bamboo clusters and other vegetation standing on Surveys Nos. 1318/4, 1343/3 and 1352/5 of Agali village on the banks of Siruvani. Ext. R2 (B) notification for re-auction dated 26/7/1989 was quashed.

7. No direction was given in respect of the refund of the sum of Rs. 4,60,000/- paid by the contractor under Ext. R2(F) nor in respect of the expenditure of Rs. 1,86,000/- said to have been incurred by the contractor during the period of two months and odd of his cutting. The expert committee had stated in its report,

Ext. CI dated 19-2-1990 (p. 5):

"The stacked bamboo poles may be roughly about 40 lorry loads, i.e., about 400 metric tonnes. The collected bamboos have dried and deterioration will set in shortly. Hence it is advisable to remove this produce at the earliest."

Even so, no directions were given in the judgment dated 22-3-1991 for removal of these 40 lorry loads of bamboo.

8. When the contractor filed CMP 5993 of 1991 in WA 1045 of 1991 filed by the State for disbursement of certain amounts due to him, the respondent-writ petitioner opposed the same on the ground that the contractor, not having by then filed any appeal could not be given any relief in the appeal preferred by the State. The CMP was dismissed by us without prejudice to any appeal being filed by the contractor. Then the contractor filed WA 25 of 1993, we condoned the delay in CMP 80 of 1993. In CMP 494 of 1993 filed in WA 25 of 1993, we passed an order on 22-3-1993 allowing the contractor to remove the cut bamboo for whatever it is worth, after getting its present condition recorded by any officer of the Forest Department, should the "contractor desires to seek recompense for any loss incurred by him from such persons as may be responsible for such loss".

9. then the writ appeals were immediately heard on 22-3-1993 and on 22-3-1993 respondent-writ petitioner was directed to produce any material to show the membership of the Samithy, its activities as disclosed by its minutes book etc. The matter was adjourned to 25-3-1993 and taken up on 26-3-1993. Respondent-writ petitioner filed CMP 1095 of 1993 giving some papers relating to meetings allegedly held by the Samithy. No other documents were produced as required. Arguments were heard on 26-3-1993. The learned Government Pleader placed before us certain standard books and articles from Journal, on bamboos. We heard Mr. K. Ramakumar for the Contractor and Mr. A.X. Varghese for the respondent-writ petitioner and reserved judgment on 26-3-1993.

10. The points for consideration in these appeals are:

(1) What is the scope of the jurisdiction of this Court in matters pertaining to environmental protection in public interest litigation?

(2) Whether a Writ of Prohibition or other similar direction could be issued when the writ petition, as a public interest case is filed at a belated stage ?

(3) Is the Committee report, Ext. CI dated 19-2-1990 fundamentally defective and is Ext. C2 report relevant?

(4) Whether interference by this Court is called for and if so, in what manner ?

(5) How are the equities to be worked out particularly when the contractor had paid Rs. 4,60,000/- as per Ext. R2(F) on 7-9-1989 and claims to have spent Rs. 1,86,000/- for cutting the bamboo for more than two months out of the three-month-period allotted for cutting ?

11. Points Nos. 1 and 2:-- It is true that Article 48A lays down a Directive Principle and Article 51A(g) imposes a fundamental duty to protect environment. These provisions were introduced in 1976. Article 48A reads thus:

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

Article 51A(g) reads thus :

"Art. 51 A:-- Fundamental Duties -- It shall be the duty of every citizen of India:

(A).....,

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

Parliament has enacted various statutes such as the Forest (Conservation) Act, 1980, the Water (Prevention and Control of Pollution) Act, 1979, AIR (Prevention and Control of Pollution) Act, 1981 and the Environment (Protection) Act, 1986 etc.

12. Learned counsel for the respondent-writ petitioner conceded before us that neither the provisions of the Forest (Conservation) Act, 1980 nor the provisions of the Environment (Protection) Act, 1986 nor any other provision of the above statutes applies. His contention is that Art. 21 alone is attracted to the facts of the case.

13. It is also to be noticed that the bamboo clusters in question were lying in the land which is plain land privately owned by" various persons and was acquired for purposes of the project under the Land Acquisition Act, 1894. Learned counsel for the respondent-writ petitioner conceded that these clusters are not located in any reserve forest land or other land to which the Forest (Conservation) Act, 1980 could apply. He contends that the bamboo clusters are described, may be inaccurately, as looking like a forest.

14. Another important fact to be noticed is that in the bamboo clusters, only those which have become ripe are to be cut and not the tender ones. Even the ripe ones, which are nearly 30 years old now, are to be cut leaving the stumps. Paragraph 4 of the counter affidavit of the Government states that what was auctioned was:

"the felling of bamboo clusters (excluding uprooting of stumps) for a total purchase amount of Rs. 4 lakhs."

Taxes are an additional Rs. 60,000/-, Admittedly Rs.4,60,000/- was paid by the contractor.

15. The Supreme Court, in Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others, had occasion to consider a writ petition belatedly filed by a person alleging environmental damage. While ultimately observing (see

paragraph 62) "Is there something more than what meets the eye in this case?", the learned Judges referred to the duty of Courts in the context of Article 48A and Article 51A(g). After referring at length to the importance of environment and maintenance of ecological balance, Chinnappa Reddy, J., added words of caution to the Courts as follows:

"Where an administrative action or order of the Government involves the problem of environment and the Government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for the Court to interfere in the absence of mala fides. On the other hand, if relevant considerations were not borne in mind and irrelevant considerations influence the decision, the Court may interfere in order to prevent a likelihood of prejudice to the public."

The Court also observed, referring to problems of ecology,

"Whenever a problem of ecology is brought before the Court, the Court is bound to bear in mind Article 48A of the Constitution, the Directive Principle.....and Article 51A(g) which proclaims the fundamental duty the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy making authority. The least that the Court may do is to examine whether appropriate considerations are borne in mind and irrelevances excluded. In appropriate cases, the Court may go further but how much further must depend on the circumstances of the case. The Court may always give necessary directions. However, the Court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the authority."

Khalid, J. made the following profound observations regarding the Public Interest Cases:

"I wish to delineate the parameters of public interest litigation concisely, against the background of the facts of the case. Today public spirited litigants rush to the Courts to file cases in profusion under this attractive name. They must inspire confidence in Court's and among the public. They must be above suspicions. See the facts of this case and the end result."

The learned Judge observed that the petitioners therein "did not take any steps to get the matter heard expeditiously, after they obtained an interim order to get all the work stopped; two, that the State Government made available to the Court all the materials to prove that its decision was taken after mature consideration at all levels".

16. The Court pointed out (see paragraph 54) that during the course of the arguments, "we soared high along with the migratory birds into the realms of ecology, environmental protection, public interest, natural justice, arbitrariness, eminent domain and the like and

"ultimately, from these ethereal regions descended on the terra firma faced with the reality that this case is devoid of any merits and has only to be dismissed."

Khalid, J. observed (paragraphs 58, 60) that he only intended "to highlight the need for restraint on the part of the public interest litigants when they move the Courts. But one is led to think that it poses a threat to Courts and public alike. Such cases are now filed without rhyme or reason.....If Courts do not restrict the free flow of such cases in the name of Public Interest Litigation, the traditional litigation will suffer and the Courts of Law, instead of dispensing justice, will have to take upon themselves administrative and executive functions..... It is necessary to have some self imposed restraint on public interest litigants."

17. Much earlier, Pathak, J. (as he then was) warned in *Bandhua Mukti Morcha Vs. Union of India (UOI) and Others*, that (paragraph 62), in Public Interest Litigation, there is always the possibility "of succumbing to the temptation of crossing into territory which properly pertains to the Legislature or to the Executive Government." The Court can "easily find itself involved in policy making of a quality and to a degree characteristic of political authority, and indeed run the risk of being mistaken for one. The following passage is a classic (paragraph 63):

"An excessively political role identifiable with political governance betrays the Court into functions alien to its fundamental character and tends to destroy the delicate balance envisaged in our constitutional system between its three basic institutions. The Judge, conceived in the true classical mould, is an impartial arbiter, beyond and above political bias and prejudice, functioning silently in accordance with the Constitution and his Judicial conscience."

and finally, Pathak, J. (as he then was) stated (para 65) that examples cases in other countries can afford little support if there are no Indian precedents. An activist court (see para 66) must move with a degree of judicial circumspection. In that task, "the Court must even be conscious of the constitutional truism that it possesses the sanction of neither the sword nor the purse....."

These two cases referred to above have again been followed by the Supreme Court in *Ramsharan Autyanuprasi* and another *Vs. Union of India* and others, by Sabyasachi Mukerjee, J. (as he then was).

18. We are referring to the above observations of the Supreme Court for two reasons. One is that we are here dealing with a case of a belated resort to Court under the garb of public interest litigation. The other reason is to remind ourselves, that in view of the continuous and increasing number of public interest cases coming up now before us, we should act with great restraint and circumspection.

19. Summarising the position, environmental protection cases coming under the class of Public Interest Litigation must be handled carefully by the Courts both at

the stage of granting interim orders and when the matters are finally disposed of. If stay is granted against the State or other public bodies, care must be taken to see that public monies or public funds or public property is not put in jeopardy. Nor can the private parties whose rights are affected be made to suffer. If possible, conditional orders could be issued and if there was no alternative, the main case could itself be taken up. The Court must ensure that the petitioner is public interest litigation is a bona fide litigant really interested in public welfare and not a mere busybody seeking publicity. Courts must see that there are proper pleadings and that adequate facts" are set out in the petition. Interference in writ jurisdiction in environmental matters can be resorted to only if the Court is satisfied that the Government or other body has not taken note or considered the relevant factors or parameters or if they have omitted to notice or failed to consider relevant factors. Courts must note that they can go only up to a limit and not beyond that. What that limit should be would depend upon the facts and circumstances of the case. The Court cannot itself attempt to nicely balance relevant considerations. Ultimately, if the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the concerned authority. While the Courts could do a lot in this area within their true limits, they should not allow themselves to be abused by publicity --interested persons or those who attempt to blackmail and try to make some pecuniary gain. There may be cases where there is more than what meets the eye.

20. If Writ of Prohibition or Mandamus is asked belatedly, the Court must also see, before any orders are passed, as to the causes for the delay, whether granting a stay or stopping a scheme or work would, while not helping public interest, night cause financial loss to the State or body or other individuals. Points Nos. 1 and 2 are held accordingly.

21. Point No. 3:-- So far as Ext. C1 Committee Report is concerned, it must be stated that they have not gone into the question as to what is the ecology existing in the area and as to how the cutting of the bamboo clusters in about 15 acres will affect the said ecology. The report, if we may say so, with great respect, is very short and does not give reasons backed by scientific data. The age of the mature bamboos estimated as 25 years in 1990 is based, according to them, on hearsay and no effort has been made to receive the statement of the erstwhile landowners, whose lands were acquired, to find out even approximately the age of the bamboos. After all, the age of 32 years given in some books is also an approximation. As on today, even on the finding of the Committee, the mature bamboos must be at least 28 years in age. If specific evidence of those who planted these bamboos is taken, it is likely that the age of the clusters will be more. Another aspect on which emphasis was placed by the Government Pleader and the counsel for the contractor is that the stumps of the bamboo plants are not going to be removed as stated in the Government's counter. The Committee has assumed that the clusters will be uprooted from their roots and this appeared to us to be one of the relevant factors omitted to be considered by

the Committee. Above all, if the environment in the neighbourhood is all barren -- as per the photographs produced by learned counsel for the respondent-writ petitioner, we do not know how the cutting and removing of the bamboos is going to affect the ecology adversely. If the stumps are not removed whether soil erosion will occur is also a matter to be considered. The only point urged before us being one based on Article 21 of the Constitution of India which deals with dangers to human life and we do not know how the cutting of the bamboo cluster is to affect human life in an area which is already barren all around. Further, the Committee appeared to us to have come to its conclusions without having the benefit of the material on which the governmental decision to have the bamboos cut was itself based. Admittedly, the bamboo clusters are not in any area which is a reserve forest or such other land which can come under the provisions of the Forest (Conservation) Act, 1980. Learned counsel for the writ petitioner conceded before us that neither the said Act nor the Environment (Protection) Act, 1986 is attracted to the facts of the case. The Committee did not find that the governmental decision to have the bamboos cut was based upon irrelevant considerations or upon omission to take into account relevant considerations. Nor has the Committee given enough and cogent reasons as to which particular ecological system will be protected if the bamboos are not cut.

22. Further, the bamboos were auctioned on 6-9-1989. and the contractor had to cut and remove the cut bamboo within two months. The contractor had paid Rs. 4,60,000/- to government as per Ext. R2(F) dated 7-9-1989. According to him, he had employed hundreds of labourers and spent about Rs. 1,86,000/- by 2-12-1989 (4 days short of 3 months) for cutting, when the cutting was stopped under stay orders from this Court. If perhaps the mature or ripe clusters had already been cut -- in fact 40 lorry loads as found by the Committee -- whether there was any point in directing the contractor to stop his work, was also a matter for serious consideration. Unfortunately, though in its report dated 19-2-1990 the Committee said that the cut bamboo could be allowed to be removed by the contractor, no interim order were granted therefore in the writ petition nor in the final judgment dated 22-3-1991 and we could pass an order in that behalf in the present writ appeal only in March 1993. Ext. C1, for all the above reasons must be held to be seriously defective. Point No. 3 is found accordingly.

23. So far as Ext. C2 report is concerned, it concerns the Silent Valley Project and does not deal with the bamboo clusters in these survey numbers. No effort was made by the Committee which submitted Ext. C1 report (in regard to these bamboo clusters) to rely on Ext. C2 report. Learned counsel for the writ petitioner has also not relied upon Ext. C2 before us.

24. Point Nos. 4 and 5 :-- The question is whether interference is called for by this Court and if so, in what manner and how to now adjust the equities ?

25. The learned single Judge has referred to various aspects of environment, ecology and forestry. That part of the judgment is highly academic and the

learned Judge has taken great pains to refer to various scientific methods and principles. We have no quarrel with that part of the judgment.

26. But, while allowing the writ petition, the learned Judge ought to have considered whether all factors relevant to the case were considered by the Government or whether some relevant factors were omitted from consideration before permitting the cutting of the bamboo clusters in these 15 acres. The learned Judge should have also considered whether any irrelevant factors were taken into consideration by the Government. If the Court felt that relevant factors or considerations were not properly adjusted, the Court should have remitted the matter to the Government. The Court should have, at the same time, permitted the contractor -- who had spent Rs.4,60,000/- plus (according to him) another Rs. 1,86,000/ - to remove the cut bamboo which was decaying even by the date of Ext. CI report dated 19-2-1990. Unfortunately, no directions were given pending the writ petition or while finally disposing of the writ petition on 22-3-1991. Further, the bamboos had been cut for 2 months 26 days and, in fact, under the agreement only 2 months time was given to cut and remove the bamboo. It is possible that a substantial part of the bamboo was cut. Even according to the Committee, the cut bamboo was about 40 lorry-load.

27. In view of our finding that Ext. CI is defective and a fresh look at the matter is necessary and the long lapse of time, we do not think it proper for us to take any final decision in the matter. The age of the bamboo has now gone up by another 3 years and it is to be examined whether the uncut bamboos can be allowed to be cut at least now. These are matters which, in our view, are to be left to the Government to decide, in the light of any further expert opinion the government might take into consideration. It will also be for the government to consider the relevance of the Attappady Valley Irrigation Project and it is not for this Court nor to the expert committee to think that that project will never materialise.

28. If Government is taking any opinion in favour of further cutting and removal of the bamboo clusters, it will be appropriate for the Government to issue a notice to the writ petitioner and to the contractor to make their submissions. It will be for the Government to consider whether a personal hearing is to be given or an opportunity to file a reply is to be given, to the said persons.

29. It will be for the Government to decide how to work out the equities that may be available in favour of the contractor -- for he has already paid Rs. 4,60,000/- apart from spending other "large amounts" (the exact amount, we do not decide), for cutting the bamboos.

30. In any event, it will be open to the contractor to seek such remedies by way of damages or otherwise against such persons, if any, who the contractor believes are responsible for any loss or losses incurred by him. We have, as stated earlier, permitted the contractor to remove the cut bamboo, whatever be its present condition. It will be for the contractor to have the present condition

01 the cut bamboo to be noted by Forest authorities, if he so desires, so as to enable him to pursue further remedies.

31. As considerable delay has already occurred, the Government shall complete the entire exercise within four months from the date of this Judgment. Points Nos. 4 and 5 are held accordingly.

32. For all the aforesaid reasons, the writ appeals are allowed, the judgment of the learned single Judge is set aside and in the place of the orders issued by the learned single Judge, the above orders shall issue. No costs.