
(2010) 07 AP CK 0093

In the Andhra Pradesh High Court

Case No : Writ Petition No. 9360 of 2009

Forum for Sustainable Development and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226

National Environment Appellate Authority Act, 1997 — Section 11, 11(1), 11(2), 11(3)

Societies Registration Act, 1860 — Section 6

Citation : (2010) 5 ALD 210 : (2010) 5 ALT 189

Hon'ble Judges : Nisar Ahmad Kakru, C.J.; Vilas V. Afzulpurkar, J

Bench : Division Bench

Advocate : K.S. Murthy, for the Appellant; Asst. Solicitor General for Respondent No. 1, Addl. Advocate Genral for Respondent Nos. 2 and 3 and P.P. Rao, for the Respondent

Judgement

Nisar Ahmad Kakru, C.J.—Claiming to espouse public interest, the environmental clearance accorded by the Ministry of Environment and Forests New Delhi (Respondent 1) vide F.No.J-13011/36/2008-IA.II(T), permitting Respondent 4 to set up "2640 Megawatts (4 x 660 MW) Thermal Power Project at Village Srikakulam, District Kakarpalli Andhra Pradesh, (clearance for short) is sought to be set at naught by the writ petitioners on the ground of alleged violence with the ecology and the relief so prayed for is founded on the assertion that the entire area, earmarked for the project site is the Forest and swamp land which is refuted by the respondents giving rise to several questions of fact which will be analyzed a bit later. At the outset we would like to address the preliminary objections, raised by Mr. P. P. Rao learned senior Advocate appearing for the respondent 4, at the very beginning of his arguments, one being that the writ petition is liable to dismissal because petitioner is not competent to file the writ petition. To appreciate the argument relevant it is to reproduce Section 6 of the Societies Registration Act, 1860 hereunder:

6. Suits by and against societies. Every society registered under this Act may sue

or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such persons as shall be appointed by the governing body for the occasion:

2. A plain reading of the section would show that it is for the rules and regulations to determine as to in whose name from amongst the President, Chairman, Principal Secretary or trustees, the society may sue or be sued and if the rules and regulations are silent, it is for the governing body to appoint the persons for the purpose. It is by adherence to Section 6 that Regulation 10 was brought on rules and regulations book which is extracted for ready reference hereunder;

10. Legal Proceedings: The society may sue and/or be sued in the name of the President as per provisions laid down u/s 6 of the Societies Registration Act, 1860.

3. Sri K.S. Murthy learned Counsel for the petitioner has no answer to the lack of competence of the petitioner to file the writ petition because of his handicap, apparently traceable to Regulation 10 itself which envisages commencement of a legal action for and against the society through the President of the society. There being no denying about the application of the regulation, the power to represent the society in a litigation is vested in the President and Regulation 10 does not admit competency of any other office bearer or a member of the society for purposes of initiation of a legal action on behalf of the society. Thus we rule that under Regulation 10 of the rules and regulations framed u/s 6 of the Societies Registration Act 1860, the society can maintain legal proceedings in the name of the president only and none-else.

4. Reverting to the facts of the case, it needs to be noticed that writ petition has been filed by two petitioners, society and an individual viz. petitioner No. 2. How far joinder of 2nd petitioner in the array of petitioners, helps the maintainability of the writ petition, apposite it is to extract paragraphs 1 & 2 of affidavit filed by 2nd petitioner;

1. Capt. J. Rama Rao...do hereby solemnly affirm and state as follows.

2. I respectfully submit that I am the Adviser & Convener of Committee on Water Bodies & Wetlands of the first Petitioner Organization and as I am well acquainted with the facts of the case and I am authorized to file this writ petition on behalf of the first petitioner organization in public interest. I am also the second petitioner and as individual filing this PIL.

5. ...As FSD, in pursuance of its aims & objectives has identified some focus area of concern which include Water Bodies & Wetlands, coastal areas and oceans, Industry Watch etc. it has got locus standi to file this writ petition in public interest....

5. There is a feeble mention in the writ affidavit of the 2nd petitioner that it is a

public interest writ petition in his own individuality but by styling it so he is not absolved of the obligation to explain his credentials, locus and bona fides satisfactorily to the court and is also supposed to show that the petition is backed up by sufficiency of public interest which is an essential requirement to be discharged by an individual, desirous to maintain a public interest litigation which requirement is wanting. As a matter of fact the writ petition is filed by 2nd writ petitioner in the capacity of an authorized agent, projecting the grievance of the society as is evident from the averments extracted from the writ affidavit therefore, we are loath to treat it as a petition in the individual capacity of the 2nd writ petitioner in view of mandate of Regulation 10 supra because he is not the President of the society. To avoid any unnecessary controversy about the maintainability of a fresh petition by a person having competence to initiate legal proceedings, let it be paced on record that our refusal to intervene in a public cause because of incompetency of the writ petitioner shall not debar the competent person to invoke the jurisdiction of this Court, of-course, if otherwise maintainable.

6. Next preliminary objection to the maintainability of the petition is based on availability of an alternative efficacious remedy of appeal, envisaged by the statute before the National Environment Appellate Authority. Responding to the contention Mr. Murthi on the strength of judicial decisions, contended that in spite of availability of such remedy, writ petition is maintainable because respondents have failed to consider the relevant material. It is a settled proposition of law that non-consideration of material on vital issues would constitute a cause for interference by the court, therefore reference to judgments is not necessary but principle of law cannot be attracted unless averment of non consideration of material is established. In that background it becomes imperative to examine the pleadings of the parties but perusal thereof unveils a categorical stand of the State - Respondent to the effect that clearance emanated from consideration of material only. Going by the stand so taken in the counter and additional counter, filed by the functionaries of the State, besides material relied upon by them, referable to the discharge of their official work which has to be believed because law attaches presumption of correctness thereto, it appears that decision to accord clearance to the site for construction of power project was taken on the basis of opinion of experts. That being so a view to the contrary cannot be taken in imagination but on the foundation of cogent and legally admissible evidence which opportunity petitioners may avail of before the appropriate forum, therefore, we choose to refrain from expression of opinion on the stand taken by the Government.

7. Maintainability of the writ petition is also challenged on the ground of pendency of three separate appeals bearing Nos. 16/2009, 17/2009 and 32 of 2009 before the National Environment Appellate Authority which has the power to decide the controversy. Thus a question;

when a statutory authority empowered to pass effective and suitable orders, is

seized of the controversy, is it still obligatory upon the writ court to exercise its discretionary power".

The question calls for deliberation by reference to Section 11 of the National Environment Appellate Authority Act, 1997 which reads;

Section 11. Appeals to Authority.- ...(3) which is, "On receipt of an appeal preferred under Sub-section (1), the Authority shall, after giving the appellant an opportunity of being heard, pass such orders, as it thinks fit.

8. Notwithstanding the above said provision of law, the High court has the power by dint of Article 226 of the Constitution to issue the writs but it has to be borne in mind that availability of power would not necessarily mean that court has to exercise the power because it is clothed with such power but exercise of power depends on factual situations of each case and if facts of a case do warrant issuance of a writ, nothing can prevent the writ court from issuing it. Nonetheless court is not bound to exercise its discretionary jurisdiction when a statutory forum, having competence to grant the relief effectively and adequately, is seized of the subject matter of the writ petition, as is evidenced by expression "pass such orders, as it thinks fit" employed in Sub-section (3) of Section 11 of the Act, which unfolds conferment of wide powers on the appellate authority for disposal of an appeal, making availability of an efficacious alternative remedy manifest. Accordingly question is answered in the negative.

9. Faced with the challenge to the maintainability of the writ petition on account of availability of efficacious alternative remedy, Mr. Murthy referred to observations of Delhi High Court, commenting adversely on the functioning and composition of the appellate authority. It is a million dollar question as to whether such observations could deprive the appellate authority of the powers conferred upon it by the statute which area we need not embark upon because of the direction of the Supreme Court staying operation of the judgment of Delhi High Court, rendering the judgment relied upon inoperative.

10. Another ground to escape the fall out of availability of efficacious alternative remedy put forward by Mr. Murthy, attracts reference to Clause (a) Sub-section 2, Section 11 of the National Environment Appellate Authority Act, 1997 (Act for short). To appreciate the contention, Section 11 in its entirety is reproduced;

Section 11. Appeals to Authority.- (1) Any person aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes or class of industries, operation and processes shall not be carried out or shall be carried out subject to certain safeguards may, within thirty days from the date of such order, prefer an appeal to the Authority in such form as may be prescribed.

Provided that the Authority may entertain any appeal after the expiry of the said period of thirty days but not after ninety days from the date of aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the

appeal in time.

(2) For purposes of Sub-section (1), "person" means-

(a) any person who is likely to be affected by the grant of environmental clearance;

(b) any person who owns or had control over the project with respect to which an application has been submitted for environmental clearance;

(c) any association of persons (whether incorporated or not) likely to be affected by such order and functioning in the field of environment;

(d) the Central Government, where the environmental clearance is granted by the State Government and the State Government, where the environmental clearance is granted by the Central Government; or

(e) any local authority, any part of whose local limits is within the neighborhood of the area wherein the project is proposed to be located.

(3) On receipt of an appeal preferred under Sub-section (1), the Authority shall, after giving the appellant an opportunity of being heard, pass such orders, as it thinks fit.

(4) The Authority shall dispose of the appeal within ninety days from the date of filing the appeal.

Provided that the Authority may for reasons to be recorded in writing, disposed of the appeal within a further period of thirty days.

11. Contention of Mr. Murthy is that petitioners are not competent to file an appeal in terms of Clause (a) because they are not affected by impugned clearance. Although maintainability of appeal is not directly in issue before us, yet a word on our part to avoid multiplicity of litigation. The words "any person aggrieved" employed in Section 11(1) of the Act are on the face of it required to be widely interpreted since the environmental clearance is a matter concerning general public, which includes not only the residents of the area but persons indirectly affected as well, apart from association of persons falling under Clause (c) of Sub-section (2) of Section 11, which widens the scope of intervention, permitting institution of an appeal by an association, provided such association satisfies the requirements laid down in Clause (c) itself, those are, it is an association of persons which is functioning in the area that is affected by environmental clearance. Testing the petitioner's cause on the touch stone of Clause (c), it emerges that it is a society and being a society it means an association of persons which is functional and involved in environmental activities within the area earmarked for project in question and averments thereof receive credence from the record available on the file. Thus petitioner-society has locus to file an appeal on the strength of Clause (c).

12. There is something more that calls for our consideration that is the interim

direction passed by the appellate forum in the appeals aforementioned which is extracted hereunder;

...The following activities shall not be carried out pending hearing of matter on merits or until further orders.

- (i) Filling and raising of the said site beyond 1000 acres.
- (ii) Any activity inside 1050 acres of identified wetland and
- (iii) Construction of jetties....

13. A bare perusal of the interim direction reveals that the appellate forum has not only taken cognizance of the appeals but has also placed restrictions on the beneficiary of the clearance. The order of clearance questioned before us being the same which is challenged before the appellate forum, having competence to decide the controversy, coupled with the fact that one of the members of the first writ petitioner - society namely Dr. E.A.S. Sarma has already filed an appeal No. 32/2009 before the National Environment Appellate Authority, there appears no justifiability to deal with the similar controversy simultaneously in the writ petition.

14. Shri Rao, learned Senior Advocate, also contended that eight hundred objectors had registered their grouse against the proposed Thermal Power Project, but no objection was filed by the petitioner-society. Contention is urged to make a point that having failed to avail of the statutory remedy, the writ petition is liable to dismissal. Cases are conceivable where court may refuse to exercise the extra ordinary jurisdiction directing the petitioner to approach the statutory authorities before approaching the writ court but dismissal of a writ petition filed in public interest petition because of omission to respond through objections, is something near hyper technicality which cannot come in the way of the court in issuing a writ, for, such a hyper-technical objection if accepted, the very purpose of public interest litigation which aims at the enforcement of public interest or general interest would be defeated, resultantly curtailment of scope of legal action in a court of law for determination of a fair and genuine public cause which cannot be allowed, therefore such attempts have to be foiled as untenable. We may hasten to add that we don't mean to say that an unscrupulous litigant styling a writ petition as "Public Interest Litigation" has to be welcomed by taking cognizance of his personal dispute or a cause aimed at personal gain, or for a roving probe, or to wreck vengeance, or for achievement of a purpose other than the public interest but our observation is applicable only to a real and genuine public interest litigation by persons acting bona fide and having sufficient interest in the cause.

15. Now a cursory glance at the pleadings, perusal whereof gives rise to a series of questions and a few may be summarized;

- (i) Whether project site has grown vegetation and trees to the extent of bringing it within the ambit of the provisions of the Forest (Conservation) Act, 1980.

- (ii) What is the aerial distance between the nearest plant boundary and Naupada Swamps.
- (iii) What is the aerial distance between the nearest plant boundary and Teleneelapuram Bird Habitat.
- (iv) Whether there are conservation sites near the project site.
- (v) Whether mangroves are within the project site.
- (vi) Whether project site is swamp and wetland.
- (vii) Whether project site is declared as conservation site.
- (viii) Whether power project site is a part of Naupada Swamp.
- (ix) Whether project site is forest/swamp lands.
- (x) Whether project site falls in the vicinity of the areas notified under the provisions of the Wild Life (Protection) Act, 1972 as ecologically sensitive.
- (xi) What is the legal status/classification of the project site.
- (xii) Whether project site is foraging ground/nesting ground for large size migratory birds.
- (xiii) If questions are answered in the affirmative what would be its impact on the ecology.

16. State Respondent and its functionaries have answered all the questions elaborately supported by documents and one being letter No. 5477/CZMA/2007 dated 09-02-2009 of the Special Chief Secretary to Government of Andhra Pradesh, Environment, Forests, Science and Technology Department addressed to the Ministry of Union of India, Environment and Forests New Delhi (Respondent 1) which reveals that entire plant facility is located beyond CRZ as per approved Coastal Zone Management Plan, stating further that opinion so expressed is founded on the certification of the Principal Chief Conservator of Forests, Andhra Pradesh to the effect that there are no national parks, sanctuary, elephant/tiger reserve/migratory path within 10 kms. radius of the proposed project site and there are no mangroves within project site, certifying further that as per the records of the Forest Department, site of the project does not fall under unreserved/reserved forest land. Communication also reveals that there are no notified ecologically sensitive areas under the provisions of the Wild Life (Protection) Act, 1972 in the vicinity of the proposed project site, revealing further that the project area is neither a foraging ground nor nesting ground for large size migratory birds such as Pelicans and Storks and as per the revenue records, the legal status of the said quarry site is classified as "hill waste land konda poramboke" and the area is devoid of any vegetation and trees and does not attract the provisions of the Forest (Conservation) Act, 1980. Government of Andhra Pradesh has also filed counter affidavit and additional counter affidavit through its Chief Secretary giving details of the material to show that the writ

petition is filed on untenable and unfounded facts, a few relevant paragraphs whereof may be noticed;

It is submitted that as per the field verification, the aerial distance between the nearest plant boundary to Naupada Swamps is found to be 3.25 km. and the aerial distance between the Teleneelapuram Bird Habitat to the nearest plant boundary is found to be about 3.80 km. to 4.00 km. The distances are indicated on the scaled map. It is also submitted that there are no other conservation sites near the proposed project area (counter page 459, para 6).

...The Forest and Fisheries Departments were very much consulted and the view of the Forest Department were obtained prior to the handing over of the land to the R4.... Based on the reports of the Divisional Forest Officer, Srikakulam and the Chief Conservator of Forests, Visakhapatnam, the Principal Chief Conservator of Forests, who is also the head of the Forest Force furnished the No Objection Certificate (NOC). It was clearly stated in the NOC that there were no mangroves within the plant site allotted to the R4.

...It is submitted that the facts on the classification of the land as per the Revenue Records (Fair Land Register) were brought to the notice of this Hon'ble Court at para 4 of the Additional Counter Affidavit dated 12-11-2009. At the cost of repetition, it is submitted that there is no other swamp or wetland area apart from the Naupada Swamps in the vicinity of the proposed power project site allotted to the 4th respondent.

...As per the records maintained by the Forest Department, Naupada Swamp is not declared as protected area by the Government at any point of time. Neither the project site nor its vicinities are declared as conservation sites and as such all the allegations made in Para 8 are denied too.

...It is amply clear that the Power Project area is not part of Naupada Swamp and as such bereft of any ecological importance. (additional counter, pages 491, 492 and 494).

17. A plain reading of the reproduction from the counter of the Respondent-State makes it clear that clearance was granted by the State after due deliberation and application of mind, reversal whereof or otherwise depends on the findings of fact in respect of issues, spelt out hereinabove on the strength of elaborate oral and documentary evidence which is not possible in the writ petition because of technicalities and complexities of the issues. In addition to that there is no denying that clearance has already become subject matter of three appeals which are pending disposal before the appellate authority, a forum competent to try and investigate the issues. Examining from any angle it is not a fit case for grant of a writ under Article 226 of the Constitution, accordingly we refuse to exercise extra ordinary writ jurisdiction and leave the petitioners free to approach the appellate authority, be it for impleadment in the pending appeals or by medium of a separate appeal. Should the writ petitioners opt for institution of an appeal within one month, to be reckoned from the first working day of week

following next, the appellate authority while considering the question of condonation of delay, shall have to keep in view that the petitioners were prosecuting the writ petition before this Court and the fact, that one of the grounds on which we have refused judicial indulgence is pendency of appeals against the clearance impugned herein. We have nothing more to say to the advantage of the writ petitioners which would mean that consideration and disposal of appeal shall be in accordance with law. Needless to say that nothing prevents the appellate authority to subject the petitioners herein to strict adherence to all other legal requirements. Disposed of alongwith miscellaneous petition without any order as to costs.