

(2016) 12 BOM CK 0110

In the Bombay High Court

Case No : Public Interest Litigation No. 154 of 2015

Hiralal Motilal Desarda

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 6

Citation : (2017) 2 AIRBomR 114 : (2017) 1 ALLMR 663 : (2017) 2 BCR 87

Hon'ble Judges : A.S. Oka and A.A. Sayed, JJ.

Bench : Division Bench

Advocate : Hiralal Motilal Desarda, Petitioner in person, for the Petitioner; Shri A.B. Vagyan, Government Pleader along with Shri P.G. Sawant, AGP and Ms. Tintina Hazaria, AGP, for the Respondent Nos.1 to 7 and 9; Shri A.A. Kumbhakoni, Senior Advocate appointed as

Final Decision : Disposed Off

Judgement

A.S. Oka, J.—The submissions were heard in the afternoon on 27th October 2016 which was the last working day before Diwali Vacation. We have perused the orders passed in this Public Interest Litigation from time to time. Today, the matter was listed for two purposes. One was for dealing with the challenge to the order dated 28th January 2016 passed by the Chief Secretary of the State of Maharashtra. The second was to consider certain issues raised by the Petitioner appearing in person.

2. Essentially, this PIL was filed for inviting attention of the Court to the decision of the State Government of releasing water from Gangapur Dam Complex in the river Godavari for the purposes of Kumbhmela which was held in the year 2015. The contention raised in the Petition was that the said action was completely illegal.

3. The Petitioner is a Professor of Economics who is associated with Gokhale Institute of Politics and Economics at Pune and is involved in several social projects. The Petitioner has been activist who has raised various issues

concerning environment and water management. He has been espousing the cause of drought prone areas in the State of Maharashtra for the last several years.

4. The first effective order which is passed in this Petition is of 14th September 2015. The State Government was directed to revisit the entire issue of diversion of water for shahi snan (holy baths) during Kumbhmela. In the order dated 22nd September 2015, this Court noted shocking state of affairs that for washing away the dirt created in the river by holy baths during the Kumbhmela, a substantial quantity of water was to be released from Gangapur Dam. It is under this order that this Court directed the Chief Secretary of the State of Maharashtra to inquire into the legality and validity of the decision taken to release the water from Gangapur Dam Complex only for the purposes of facilitating Shahi snan. The Chief Secretary of the State of Maharashtra was directed to examine the legality of the decision taken by the Collector and other officers for releasing the water for Shahi snan. He was directed to examine whether the decision was contrary to the existing policy and the Government Resolution dated 7th September 2015 in light of the severe drought conditions. We may note here that the Government Resolution dated 7th September 2015 is to the effect that considering the current situation, storage of water in all areas shall be preserved and top priority should be given to its use as a drinking water. The Chief Secretary of the State of Maharashtra passed an order dated 28th January 2016 holding that the action of release of water for Kumbhmela was lawful and was not contrary to the policy of the State Government.

5. It is to be noted here that by an order dated 22nd September 2015, the State Government was restrained from releasing the water from Gangapur Dam Complex for the purposes of facilitating Shahi snan and holy bath in Kumbhmela without seeking leave of the Court. On 22nd December 2015, this Court appointed Shri A.A. Kumbhakoni, Senior Advocate, as Amicus Curiae. By an order dated 18th January 2016, this Court passed a specific order directing the State Government to ensure that no further water is released from Gangapur Dam Complex for the religious purposes or for religious festivals without seeking leave of this Court. Under the order dated 18th January 2016, a direction was issued to the State Government to make a statement regarding the outer limit within which the exercise of framing Rules under the Maharashtra Water Resources Regulatory Authority Act, 2005 (for short "MWRRA Act") will be completed. The order dated 30th March 2016 directs the State Government to prepare a framework of a policy for resolving the water crisis in the State. On 12th April 2016, further order was passed by a Division Bench of this Court observing that the State Government has to address itself to the problem of water scarcity. Thereafter, there were certain orders regarding release of water with which we are not concerned. There were certain directions issued by this Court for dealing with the situation arising at a relevant time.

6. Firstly, we deal with the issue of legality and validity of the order dated 28th

January 2016 passed by the Chief Secretary of the State of Maharashtra.

7. The learned senior counsel Shri A.A. Kumbhakoni, who is appointed as Amicus Curiae, has invited our attention to the order dated 28th January 2016 passed by the Chief Secretary of the State Government as per the directions issued on 14th October 2015. He has pointed out that the decision taken by the Chief Secretary which is specifically impugned by amending the Petition is completely contrary to the Government decision dated 7th September 2015 as well as the State Government's Water Policy. He relied upon the judgment and order dated 23rd September 2016 passed by a Division Bench of this Court in PIL No. 173 of 2013 and other connected matters. He invited our attention to the finding recorded in Paragraph 188 of the said judgment and order which holds that if sufficient water cannot be allocated to the usages in higher categories (a) to (d) in Clause 4.0 of the Maharashtra State Water Policy, 2003, there cannot be any allocation of water for Kumbhmela and other religious purposes. He urged that by no stretch of imagination, the release of water for Kumbhmela can fall in category (a) of Clause 4.0 of the Maharashtra State Water Policy, 2003. He submitted that apart from the fact that the interpretation put to Clause (a) is completely erroneous, the impugned order of the Chief Secretary is contrary to the judgment and order passed by a Division Bench of this Court in Public Interest Litigation No. 173 of 2013 and other connected matters. The learned Government Pleader supported the impugned order of the Chief Secretary of the State of Maharashtra.

8. We have carefully considered the submissions. A Division Bench of this Court in the aforesaid judgment in PIL No. 173 of 2013 and other connected matters had an occasion to consider all the relevant laws regarding regulation of water supply in the State. In the said judgment, in Paragraph 188, the Division Bench has referred to Clause 4.0 of the Maharashtra State Water Policy, 2003. Clause 4.0 of the Maharashtra State Water Policy, 2003 reads thus:

"4.0 Priority of Water Usage Water resources shall be allocated in accordance with the following general principles:

- (a) Domestic use for drinking, cooling, hygiene and sanitation needs including livestock;
- (b) Industrial, commercial use and agro based industrial use;
- (c) Agriculture and hydropower;
- (d) Environment and recreation uses;
- (e) All other uses."

9. In Paragraphs 190 and 191, the Division Bench proceeded to observe thus:

"190. At highest, the use of water for Kumbhmela and for other religious purposes will be covered by the last category "e". Therefore, according to the Water Policy of the State Government, if sufficient water cannot be allocated for usages in categories (a) to (d) in that order of preference, there cannot be any

allocation of water for Kumbhmela and other religious purposes. In the National Water Policy of 2012, in Paragraph 1.2, it is noted that large parts of India have already become water stressed as the issues related to water governance have not been addressed adequately. It is noted in the said policy that the mismanagement of water resources has led to a critical situation in many parts of the country.

191. Needless to add that in case of scarcity or hydrological drought, in view of Clause (c) of Section 11 of the said Act of 2005, the water cannot be released from the reservoirs by the State for religious ceremonies or religious objects without the Regulatory Authority deciding the issue of priority of equitable distribution of water. Therefore, in case of scarcity or hydrological drought, the State is not entitled to release water from the reservoirs for such purposes without adjudication being made by the Regulatory Authority under Clause (c) of Section 11 of the said Act of 2005."

(emphasis added)

10. The Division Bench has categorically held that if sufficient water cannot be allocated for usages in Categories (a) to (d) in that order of preference, there cannot be any allocation in those categories of water for Kumbhmela or for other religious purposes. Further, it is held that in case of scarcity or hydrological drought, the State is not entitled to release water from the reservoirs in the State for such religious purposes without an adjudication being made by the Regulatory Authority under Clause (c) of Section 11 of the said Act of 2005.

11. We have carefully perused the findings recorded by the Chief Secretary. In Paragraph 15 of the impugned order, the Chief Secretary has referred to the categories (a) to (e) which are quoted above. In Paragraph 16, he observed that 60 to 70 lakhs pilgrims were likely to participate in Shahi snan in the Kumbhmela on 29th August 2015, 13th September 2015 and 18th September 2015. Therefore, 4.50 TMC water was proposed to be released from Gangapur Dam. He observed that if the water was not released, there might have been a possibility of epidemic and serious hygiene problems. He has, therefore, come to a conclusion that the case was governed by category (a). In our view, even assuming that there was a possibility of law and order problem being created if sufficient water was not released for the Kumbhmela, by no stretch of imagination, the release of water to prevent such law and order situation was covered by any of the categories (a) to (d) of clause 4.0 of the State Water Policy. Though it is claimed that the water actually released for Kumbhmela for Shahi snan (holy bath) was less than what was planned, the fact remains that in the year 20152016 when there was a hydrological drought, the water was released by the State Government for the benefit of Shahi snan in breach of its own water policy. We are not on the issue of release of water for drinking purposes for the benefit of pilgrims as it covered by category (a). By no stretch of imagination, the release of water for Shahi snan will be covered by Category (a). Therefore, release of water for Shahi snan was completely illegal. The State

was bound by its own water policy and the State could not have acted contrary to its own binding policy. We are not able to accept the strong justification tried to be offered by the learned Government Pleader for supporting the impugned order.

12. Therefore, for the reasons which we have set out above, the order passed by the Chief Secretary on 28th January 2016 will have to be set aside and it will have to be held that the release of water from Gangapur Dam Complex only to facilitate Shahi snan (holy bath) was contrary to the policy of the State Government and therefore, the same is illegal.

13. Now the question is what are the other issues which need to be gone into. As regards the implementation of the provisions of the MWRRA Act and the Maharashtra Management of Irrigation Systems by Farmers Act, 2005 very detailed directions have been already issued in PIL No. 173 of 2013 and other connected matters. Directions have been issued for preparation of a Draft Integrated Water Plan. Directions have been issued to formulate a State Water Resources Plan. This Court has held that the water flowing through rivers and stored in reservoirs vests in the State.

14. There is an affidavit filed by the Petitioner which is dated 1st May 2016 raising several issues by the Petitioner appearing in person. There is a note submitted by the learned senior counsel appointed as the Amicus Curiae on Jalyukta Shivar Scheme and the so called River Rejuvenation Scheme adopted by the State Government. Paragraphs 1 to 10 of the said note read thus:"

1. The geographical area of State of Maharashtra is about 308 Lakh hectares. The State has five major river basins and 25 sub-basins. As per the classification of Ground Water Survey and Development Agency (GSDA) there are 1505 mega watersheds which in turn are divided into micro water sheds. In all there are 60000 micro water sheds of which 44000 are located in cultivated area.

2. The long-term average annual precipitation of the state is 1150 millimetre mm). of course there is a vast temporal and spatial variation ranging from 4004000 mm. Nearly 7rd of the State's Geographical area is under cultivation. About 51 Lakh hectares land is officially under the jurisdiction of forest department, albeit there is no worthwhile tree cover on more than 50% of this area. In fact, out of total 35 districts in State of Maharashtra, 20 districts have tree cover of less 5%. Notably the good density forest area for State as a whole is not more than 2%. For ecological stability and conservation of land and water resources, at least 7rd of the geographical area has to be under the forest cover as per the internationally recognised density tree and vegetation cover. As a matter of fact, this is the root cause of the water scarcity and hydrological water famine that Maharashtra is facing in the recent years. Unless and until, we clearly grasp this fact, we will not be able to address various issues relating to scarcity of water in the State and have a holistic view about the same.

3. As referred earlier, the water endowment of Maharashtra is very sizable. The

State receives through the precipitation 380 billion cubic meter (BCM) of water annually which is adequate to meet all the needs of the present population and ensure food, nutrition security and well being including that of humans. Hence, the State Government's effort to blame the water scarcity on rainfall deficit or truant played by monsoon is factually incorrect. It needs to be grasped that even if the precipitation is as low as 300 mm, which even this relatively very deficient rainfall year has provided to the majority of the 355 talukas in Maharashtra. This means at 300 mm there is as much as 3 million liter (30,00,000 ltrs.) water per hectare; and taking into account the average density of population in rural areas there are 2 or 3 persons per hectare. In short, there is at every place at least a million litre water per person and 3 million ltr. water per hectare everywhere across the length and breadth of the State of Maharashtra. As such, the present water scarcity cannot be blamed (as the State Government is trying to make believe) on niggardliness of the nature but is a failure of water resources management, policies and programs perpetrated by the successive Governments which is solely responsible for "the policy induced water scarcity" that is causing havoc to the life of millions of people and which is manifested in the tragic farmer suicides.

4. It need not be emphasized that water is a renewable natural resource in as much as, after the rainfall, the runoff water recharges the aquifer. This basic hydrological principle is not known to the common people, particularly the agriculturists, because in our country there is a lack of water literacy. This has been the main cause for ecological imbalance that has brought to our door steps the situation in which we find ourselves today. Unfortunately, the State Government which is supposed to be the custodian of these principles and hydrological cycle, in recent times has taken steps to destroy rather than preserve, if not enhance, the ecological balance by taking such steps which are more in the nature of knee-jerk reactions rather than long term policies.

5. Indisputably, "drought" is a part of the meteorological cycle but when it leads to "hydrological famine" it is man-made and more directly caused by the erroneous water resource management policies and water project planning process. By now, it is well known in the public domain that the State of Maharashtra has 35% of the large dams of the country. The State has sunk nearly one Lakh Crore rupees in building irrigation and other water-use projects during the past 50 years. Interestingly, alleged multi-crore scam is being currently investigated by the Government agencies in the State. This has led to very inefficient systems of water use but it has been justified in the name of providing drinking areas and industries. Undeniably, this is the harsh reality adversely affecting the rural and urban poor population in Maharashtra.

6. Scientifically, to prevent erosion of the soil caused due to faster runoff of the rain water, a watershed is required to be treated starting with ridgeline. All over the world in such cases treatment starts from ridges by putting in place trenches to prevent runoff of the rain water from carrying with it huge quantity of soil.

Thereafter steps are required to be taken down streams in the direction in which such runoff water flows not only to prevent erosion of the soil but also squander rain water.

7. The present state government has initiated a program called as Jalyukt Shivar which is designed to be executed in 5000 villages each year. After the first year in 20142015 the Government has chosen the next batch of the nearly 6000 villages in the subsequent year. This brief note tries to underline the need for appropriate intervention by this Hon. Court and direct the State to appropriate steps in the light of the various aspects submitted hereunder so that said Scheme is implemented in a scientific and holistic manner.

8. The time tested method of designing and implementing this program is known as a "ridge-to-valley approach". Instead of that, the present Government is implementing the scheme in a haphazard manner without having proper Detailed Project Reports (DPR"s) at the micro water sheds levels or at a river valley basin level or a master plan as such. Indeed, the scattered and single line activities are perpetuated without any integration in which the very purpose of undertaking the soil and water conservation on sound hydrological principles is given a go-by.

9. The said Scheme is being implemented by taking steps in down streams FIRST, which ought to have been at the last. What is being done inter alia is dredging the river beds and rivulets, that too in a most unscientific manner. To add to it, Cement Nala Bunds (CNBs) are being put across such rivers/rivulets as an attempt to arrest the runoff (of rain water) by creating artificial CNBs are being constructed in order to inflate the expenditure that goes into the pockets of the contractors who receive more kickbacks. Even in this regard instead of adopting a holistic approach, implementation is "contract driven."

10. This Petitioner who has been studying these issues for the past 40 years and has been over the years associated with the policy planning bodies of the State and Union Government undertook an intensive tour of 16 drought affected districts of Maharashtra during the month of February & March, 2016. To his utter dismay he found that in the name of Jalyukt Shivar and another scheme launched (with a great political fanfare and patronage) known as "River Rejuvenation program" is being craftily pushed in the name of drought proofing and providing water to the people who are in dire need of great relief. Even these works are undertaken in a scattered manner committing breach of geo-hydraulic principles instead of applying innovative ideas in that regard. As the matter of the fact, it is leading to total ecological destruction and will result in a destruction of riverian ecosystems and natural watersheds which are evolved through the ages and this kind of invasion by heavy machinery will cause most phenomenal destruction to the integrity and harmony of soil, water, biomass and biodiversity resources. Surprisingly, there is no "perspective plan" prepared or contemplated for execution of such work. Hence, there is urgent need to put a halt to this ruthless ecological and ethical damage which is being inflicted in the name of finding an answer to the recurrent drought."

15. It is contended by the Petitioner that on an average, 100 mm of rainfall generates 1 million litre water per Hectare which is enough to sustain the agriculture in the State. It is pointed out that both Jalyukta Shivar and River Rejuvenation Schemes are not adopted by following a systematic scientific and planned approach. It is pointed out by the Petitioner that the soil profile retains water in the form of moisture and the rest of it becomes ground water. It is pointed out that subsoil contains aquifer which is supposed to retain water and in turn recharge the ground water table. It is pointed out that even the soil is also a living system which is fertile on an average to an extent of 9 inches to 1 feet deep.

16. In the affidavit of the Petitioner, it is pointed out that the Government has not prepared a master plan for creating a drought free State by providing a planned budgetary allocations. It is pointed out that the funds are provided in ad hoc manner. It is urged that the State must manage the much needed micro water shed development programme. It consists the treatment being given to the lands so that the water instead of gushing down with a speed, seeps through the soil and enhances the soil moisture. Moreover, it holds and stores water in the subsoil which is used as ground water to meet various needs during the dry spells in monsoon. It is contended that if the water is made to walk instead of running down, it does not erode the top soil.

17. The specific case of the Petitioner is that Jalyukta Shivar Scheme in being implemented in most unscientific manner. The Petitioner is relying upon the note marked as Exhibit" ART1" and a document styled as "A policy planning approach to Water Resource Management in Maharashtra" which is marked as Exhibit" ARIII A". The specific stand of the Petitioner is that the arbitrary implementation of Jalyukta Shivar Scheme is leading to destruction. In short, the contention of the Petitioner is that the scheme of Jalayukta Shivar is being implemented by the State Government without adopting a systematic and scientific approach.

18. As far as Writ Court is concerned, it has no expertise in the matter of water conservation and water management. Nevertheless, the issues raised by the Petitioner regarding implementation of Jalyukta Shivar Scheme and the River Rejuvenation Scheme need to be looked into by the State Government. Appropriate Authority of the State Government will have to look into the said contentions. Ultimate aim should be to create a drought free State considering the fact that the sufficient natural resources are available in the State.

19. The State may consider of appointing a Committee of Experts for going into the contentions raised by the Petitioner. This is necessary as the schemes are being implemented though both the categories of water plans contemplated by MWRRA Act are not in existence. There is no overall and comprehensive policy decision taken by the State before starting implementation of the said two schemes. If the Petitioner is right, the consequences of implementing the schemes in an unscientific manner may be a drastic and devastating. The State may consider of referring the issue for consideration of the Regulatory Authority

under the MWRRRA Act which is a body of experts.

20. We may record here that the learned Amicus Curiae, the learned counsel appearing for the Regulatory Authority and the learned Government Pleader have assisted the Court as officers of the Court.

21. Hence, we pass the following order:

ORDER:

(a) The impugned order dated 28th January 2016 passed by the Chief Secretary of the State of Maharashtra is hereby set aside and it is held that the action of releasing water during Kumbhmela of 2015 for the purposes of Snan or Shahi snan (holy baths) from Gangapur Dam Complex in Godavari river was completely illegal being contrary to the State Water Policy of 2003;

(b) The State Government shall deal with the issues raised by the Petitioner in the affidavit dated 1st May 2016 and a brief note appended to the said affidavit. The State Government shall consider of appointing a Committee of Experts to look into the contentions raised by the Petitioner. If the State Government takes a decision to appoint a Committee of Experts, needless to add that either the Petitioner should be a part of the said Committee or that the Petitioner should be given an opportunity by the said Committee to put forward his views. Appropriate decision shall be taken by the State Government either on formation of a Committee of Experts or for reference to an existing body of experts on or before 31st January 2017;

(c) Place the Petition on 5th February 2017 for directions.