

(1998) 01 KL CK 0007

In the High Court Of Kerala

Case No : O.P. No's. 10185 of 1996 (K) and 926 of 1997 (S)

Jacob Vadakkancherry and etc.

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 08-01-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Environment (Protection) Act, 1986 — Section 6
Travancore-Kochi Town Planning Act, 1108 — Section 55

Citation : AIR 1998 Ker 114

Hon'ble Judges : S. Krishnan Unni, J;C.S. Rajan, J;B.M. Thulasidas, J

Bench : Full Bench

Advocate : P.B. Sahasranaman, K. Jagadeesh, M.C. Mehta and Seema Midha, for the Appellant; George C.P. Tharakan, SCGSC, K.K. Venugopal M.K. Damodaran, General, K. Jayakumar, Sr. Govt. Pleader, B. Raghunandanan and Manju Komath in person, for the Respondent

Judgement

Thulasidas, J.—We heard these Original Petitions together since common questions are involved.

2. W.P. (Civil) No. 664 of 1993 was filed by the Indian Council for Enviro Legal Action, a registered voluntary organisation, before the Supreme Court seeking orders or direction regarding the protection of ecology and for preventing irreversible ecological damage of the coastal areas of the country. The main grievance was that the Notification dt. 19-2-1991 which regulated the activities in coastal regulation zones had not been implemented or enforced, that has resulted in continued degradation of ecology in coastal areas. There was also a challenge to the validity of the Notification dt. 18-8-1991, whereby the earlier notification dt. 19-2-1991 was amended resulting in relaxation of certain provisions, which it was said, would defeat its scope and purpose. It was alleged that coastal areas have abundance of natural endowments, are highly complex and have dynamic eco-systems sensitive to development pressures if unchecked would cause serious irreversible damage of the flora and fauna, public health and

environment. Several other grounds were also urged, which have been dealt with in the judgment of the Supreme Court dt. 18-4-1996, in which certain comprehensive directions were given for compliance. The Supreme Court also specifically directed enforcement of the C.R.Z. Notification issued under the Environment Protection Act, 1986, by the Central Government. LA. Nos. 21, 22 in Writ Petition (Civil) No. 664 of 1993 was filed by Smt. Menaka Gandhi in which she referred to five projects which were coming up in the country, which it was alleged, were not in conformity with the environmental law of the land. It was submitted that there has to be sustainable developments, which should not be at the cost of ecology. The matter came up before the Supreme Court on different occasions and interim orders were passed. In the order dt. 7-11-1996 it was observed that:

"The contention raised by Mr. Mehta is that the 5 projects, namely Goshree Project in Kerala, Cogentrix Project in Karnataka, Sinarmas Pulp & Paper Project in Maharashtra, Bandra-Kurla Complex in Maharashtra and Sanghi jetty/cement Project in Kutch may be referred to an independent expert body for environmental clearance. In other words, what is stated is that Environmental Impact Assessment regarding these Projects should be got done through an Expert Body. We have no doubt that the States concerned must have already consulted Expert Bodies in the respective States before clearing the Projects. It was brought to our notice that even the Ministry of Environment and Forest, Government of India has given clearance to these Projects, subject to certain conditions.

So far as Goshree Project is concerned, one of the conditions indicates that the NEERI has to give its opinion regarding carrying capacity of the Project. Be that as it may, we are of the view that it would be in the interest of justice that all these Projects are examined by NEERI from the environmental point of view. Needless to say that the development projects must go on in the country, but at the same time -- based on the principle of "Sustainable Development" -- the viability of the Projects from environmental point of view has to be examined. We, therefore, direct NEERI through its Director, Dr. P. Khanna, to appoint necessary Teams of NEERI Scientists, who may visit the projects on the spot and after examining all the necessary aspects, including the conformity of the Projects with various Notifications issued by the Government of India regarding Coastal Zones Regulations, give its opinion and recommendations to the States concerned. Copies of the Report shall also be filed in this Court.

We further direct the State concerned to furnish copies of their Project/(s) along with all the Expert Opinions in support of the Projects to the NEERI either at Nagpur or in the Regional offices at Kochi and Bombay. This may be done within one week from today. Keeping in view the importance and urgency of the Projects, NEERI shall complete the investigation within 4 weeks from today.

Mr. Venugopal appearing for the State of Kerala states that NEERI may have the assistance of Central Water & Power Research Station, Pune, and various other

Expert Bodies in the State of Kerala. This is a matter for NEERI to consider. We have no doubt, that the NEERI shall have Expert-assistance needed in examining the Projects Needless to say that NEERI can take into consideration the reports and opinion of all the Expert Bodies in all the States which have assisted in the finalisation of the Project from environmental point of view. Cost of the NEERI Inspection shall be borne by the respective State Governments."

Pursuant to this NEERI submitted its report dt. 6-12-1996 and by order passed on 11-9-1996 the Supreme Court observed that the matter should be dealt with at the High Court level, particularly since connected matters were pending and accordingly directed the High Courts "to treat these matters as petitions under Article 226 and to deal with them in accordance with law". Following this direction I.A. 21-22 filed in Writ Petition 664 of 1993 of the Supreme Court was numbered as O.P. No. 926 of 1997 by this Court. The question involved in the Original Petition is in regard to Goshree Project and the petitioner had prayed for the following directions :

"to the Ministry of Environment, Govt. of India, to constitute a National Coastal Management Authority and State Coastal Management Authorities in coastal States within a time-bound period.

to the Govt. of India to constitute an independent "National Environmental Impact Assessment Authority" under the Chairmanship of a retired Supreme Court Judge with two technical experts and at least one renowned environmentalist to examine all the conditional clearances given by the Ministry of Environment & Forests to various projects in the past and to further examine whether the "conditions" imposed have actually been implemented by the project authorities or not.

direct the Ministry of Environment & Forests not to grant any further environmental clearances. All environmental clearances should be granted by the "National Environmental Impact Assessment Authority" to be set up under the order of this Hon"ble Court, after considering comprehensive impact assessment and providing sufficient opportunity of hearing to aggrieved/ concerned citizens/ NGOs.

direct the Govt. of India to set up an "Ecological Sciences Research Group" consisting of independent and competent experts to assist the Courts for dealing with the environmental cases as well as the Environment Protection Authorities and Coastal Authorities to be constituted under the orders of this Hon"ble Court.

direct the Ministry of Environments Forests, Govt. of India, and the State of Kerala, Karnataka and Maharashtra to revoke permissions granted to all such projects (including Goshree Project, Cogentrix Thermal Power Plant, Sinaramas etc.), which have been cleared without comprehensive Environment Impact Assessment, without appraisal of environmental carrying capacity of the regions, without formulation of Coastal Management Plans, and in violation of various environment protection laws, rules and notifications, including violation of CRZ

Notification of Feb. 19, 1991, and

for appropriate action against the Ministry of Environment and Forests for granting environmental clearances to projects to be located in coastal areas without formulation of Coastal Management Plans by the respective States as provided under the CRZ Notification of Feb. 19, 1991."

3. O.P. No. 10185 of 1996 is by the Chairman, Swasraya Vypeen, Malipuram. The challenge is against the Goshree Project as envisaged and he has prayed for the following directions

to the first respondent to take steps to prevent constructions and other activities up to 500 meters from the High Tide Line as per Ext. P1 notification in the State of Kerala;

to demolish all the construction carried out after 20-2-1991 in contravention of Ext. P1 notification; and

not to proceed with the Goshree Island and other projects mentioned in Ext.P3 representation till the Coastal Zone Management Plan is approved by the second respondent."

4. In the course of the submissions our attention was brought to the judgment in W.A. No. 1027 of 1994, where in another context it was said that "the prohibition in clause VIII of para 2 of the Notification dated 20-2-1991 will cover only such land reclamation as would disturb the natural course of sea water". A learned Judge had also doubted the correctness of the decision in O.P. No. 18097 of 1995, which, it was said, is pending before a Division Bench. We had indeed some reservation about the interpretation given to the expression "reclamation" in the above decision and felt that the matter deserves to be heard by a larger Bench for an authoritative pronouncement. It was in these circumstances that these cases came before us.

5. On behalf of the respondents counter-affidavits have been filed. We do not propose to set out the contentions raised, which we will consider in the course of the judgment.

6. By Notification dt. 19-5-1991 issued in exercise of the powers conferred by sub-section (1) Section 53-A of the Town Planning Act, 1108, the Government of Kerala constituted a Special Authority called "Goshree Islands Development Authority" for the integrated development of the Vypeen, Bolgatty, Vallarpadam, Mulavukad, Thanthonnithuruthu and Kadamakudy islands within the Cochin Port limits. The notification is Ext. P6 in C.M.P. No. 2021 of 1997 in O.P. No. 10185 of 1996. These islands are in Cochin backwaters, whose inhabitants will have to depend upon the main land for their basic needs and livelihood. The islanders have been agitating for a long time for the construction of bridges to connect the islands with the main land. A positive demand came after Mattancherry was connected with the main land in 1940 and the first proposal to link the islands with the main land was made in 1948 by the then P.W.D. Minister of the erstwhile

Cochin State. But then it did not fructify on account of unforeseen circumstances. Thereafter there had been incessant demands and agitations. Though successive Governments felt the need to link the islands with the main land with bridges, nothing was done on account of financial constraints. The issue however became a matter of concern and the Government responded by constituting the Goshree Islands Development Authority as a self-financing project. As originally conceived it envisaged reclamation of 250 hect. of land during Phase 1 at two locations around Thanthonnithuruthu and Bolghatty Islands and construction of four bridges connecting the main land and the four islands, viz. Thanthoonithuruth, Vallarpadam, Bogatty and Vypeen and also envisaged reclamation of 110 hect. of land around Vallarpadam in Phase II. Infrastructural facilities over the reclamation of land were also proposed. The estimated cost of Rs. 520 crores was to be met by selling the reclaimed land in public auction for commercial purposes. The project was given environmental clearance by the Ministry for Environment and Forests, Government of India on 10-5-1995 subject to certain conditions. A No Objection Certificate was also given by the Kerala State Pollution Control Board on 5-4-1995. Sidco Ltd., Bombay was entrusted with the designing of the bridges. The project however ran into rough weather. Several scientific bodies and environmental Scientists voiced their objections that received wide coverage in the media. Support to the project too came, but not in good measure. NEERI, which examined the project as directed by the Supreme Court, found it to suffer from several drawbacks. The report said that it was not environmentally viable, is bound to cause shrinkage of backwaters, affect its hydrological features, upset the aquatic ecology, and impair the life supporting systems of the most vulnerable population in the region violating the premises and pre-conditions for sustainable development. It was further observed that:

"The MOEF did not take cognizance of the gross violations of Coastal Zone Regulations (CRZ Notification, February 1991) involved in the proposed dredging, reclamation of land and commercial development on reclaimed land while according its conditional clearance to the project.

The MOEF recommended a study on identification of hydrological implications of the project in its conditional clearance (letter of May 10, 1995), whereas the availability of details on impacts on hydrology and aquatic ecology was critical for initiating the appraisal process.

The MOEF refers to the results of a "nonexistent" "on-going" study being carried out by NEERI (ordered by the MOEF) on carrying capacity of this region. A major urban development project in an ecologically sensitive area -- Cochin backwaters should be considered for evaluation and assessment only in the context of regional carrying capacity in keeping with the principle, premises and agenda for Sustainable Development as delineated in Section 2 of this report.

The facts that the application of GIDA to the Ministry of Environment and Forests (November 30, 1994) proceeded its application to the Kerala State Pollution Control Board (December 12, 1994) and the declaration on extension of area

under the Greater Cochin Development Authority in November 1995; which was already a part of the MOEF's clearance letter of May 10, 1995, for determining CRZ II/III areas, indicate that the environmental appraisal process has violated the existing norms, practices and rules."

Serious exception was taken to many of the findings and observations in the report, it was said, did not represent a correct appraisal of all that was relevant and material. There was also an allegation that it was either misinformed or was deeply committed to canvass its own views on environmental and ecological matters, which are far off from ground realities. We do not wish to say upon the merits or otherwise of the objections, since the report is with respect to the project as originally envisaged that has now been given up for the one that would only require reclamation of 25 hect. of land abutting the sea wall in a continuous stretch from the existing Marine Drive. The number of bridges has been reduced to three and the estimated cost also brought down to Rs. 52 crores. In other words, the project profile is substantially different from the original one that therefore it seems to be not necessary to examine the report of the NEERI in detail. We are however unable to agree that the project as conceived and given shape to was without the necessary in depth study of the various aspects by competent Scientists and Scientific bodies.

7. O.P. No. 6428 of 1991 was filed by the Institute of Social Welfare mainly for halting the reclamation in the Cochin Port area for the Goshree Projects on the ground that it would cause irreparable damage to the eco-system in the area and affect the fishing industry. It was dismissed with a direction to the authorities to consider the pros and cons of the project before taking a final decision. The judgment was challenged in W.A. No. 1027 of 1994 before a Division Bench, where it was argued that all that was relevant about the project was not stated by the authorities, who also had kept quite about the CRZ notification, under which reclamation as envisaged fell within the scope of prohibited activities. The Writ Appeal was dismissed by judgment dt. 30-8-1994 in the first instance on the submission made by the Government Pleader that reclamation was limited to construction of bridges and for the purpose of putting up of necessary posts for the same. On 10-5-1995 the Ministry of Environment and Forests granted clearance for the Project subject to compliance of 21 conditions, one of which was that there shall not be violation of the Environment (Protection) Act, 1986, and the Rules and the Notification issued there under. The State Government filed a review petition to appraise the Court that the reclamation work could not be limited to construction of bridges and the submission to that effect was made wrongly. The review petition was allowed and the Writ Appeal was heard afresh. By judgment dt. 15-3-1996 the appeal was dismissed. It was observed that the proposed reclamation would not take place within the coastal regulation zone "described as the coastal stretch influenced tidal action" up to 500 meters from the High Tide Line (HIL) and the land between the Low Tide Line (LTL) and the HIL, which, in appropriate cases would include estuaries, creeks, rivers and backwaters which are influenced by tidal action. In order to fix up the farthest line

an idea of what is meant by HTL is necessary. The Central Government brought an amendment to the earlier notification and had declared that:

"the High Tide Line means the line on the land up to which the highest water line reaches during the spring tide and shall be demarcated uniformly in all parts of the country by the demarcating authority so authorised by the Central Government in consultation with the Surveyor General of India."

But then the learned Judges were of the view that:

"No material has been made available to us regarding the said demarcation, if any, made by the demarcating authority. Without fixing HTL it is difficult to decide whether the proposed reclamation is within the prohibited area. Third respondent has a case that the proposed reclamation would be in the backwaters situated at a distance of 4.2 to 4.5 kilometres from the mouth of the sea."

They found themselves not in a position "to find that the proposed reclamation would come within the CRZ until it is established that the High Tide Line had been demarcated in accordance with the procedure prescribed by the Central Government in the notification mentioned above". In regard to the land reclamation the learned Judges made a distinction between sea water and brackish water in estuarine basins and observed that "Only such land reclamation as would disturb the natural course of sea water would fall within the area of prohibition", that there was nothing to show that the proposed land reclamation would interfere with the natural flow of sea water and accepting the stand of the Government, dismissed the Writ Appeal. It was after this, no doubt, the Supreme Court rendered the judgment on 19-6-1996 in Writ Petition No. 664 of 1993 we have already noticed. Again all these were in relation to the origin (sic) project that involve large scale land reclamation, which would have its impact upon hydrological and aquatical eco-system in the ecologically fragile Vembanad Lake and estuary. It had been considered by the Ministry for Environment and Forests, which has again stipulated that the reclaimed area should not be used for commercial purposes. In view of the amendment to the CRZ Notification made in July, 1997. But it was submitted that the Goshree Project had been cleared by the Ministry way back in 1995 and that the amendment to the CRZ Notification in 1997 will have therefore no application. It was further said on behalf of the State that it will take up the matter again with the MOEF for clarification and clearance before the project is taken up for implementation. We record the submissions and leave the matter there.

8. As already stated, the new project would involve reclamation of 25 hect. near the Marine Drive and it was submitted that the entire water front abutting it, where reclamation is to be made, is retained by a rubble wall, as a result of which when the tides recedes no land is exposed. It was said that high tide and low tide lines would both practically coincide as the water level against the rubble wall will merely go down to a lower level without touching the bed of the backwaters and therefore the land to be reclaimed would be outside the CRZ.

Indeed it was not brought to our notice that there was a demarcation of HTL as required and directed and what had been set out in the Minutes of the Task Force held on 19-6-1996 and 20-6-1996, that the HTL position as on February, 1991 is to be taken into consideration for demarcating the CRZ areas and that reclamation of Kayals will not be permitted within the CRZ areas, could not be taken to have said the last word. In our view, what was said by the Division Bench in the above Writ Appeal could not be faulted. Taking all aspects of the matter into account, we find it difficult to hold prima facie that the land proposed to be reclaimed will fall within the CRZ. We do not agree with the correctness of the submissions made in 4A of the counter-affidavit filed on 13-12-1997 in O.P. No. 926 of 1997. The other objections too seem to be based upon considerations, which were relevant vis-a-vis the original proposal and not now in regard to the new project in its truncated form as to reclamation, cost and the number of bridges. Serious impairment to aquatic resources, ecology and environment are unlikely to result by reclamation of a small strip of land along the existing Marine Drive, that would not also involve violation of CRZ Regulations. The apprehensions, difficulties and dangers have been magnified out of proportion, that we do not wish to countenance, having regard to the public purpose the Project will subserve. We are of the view that the objection to the reclamation of 25 hect. of land on the grounds stated do not deserve to be upheld.

8A. We should however remind the Government that it is its duty to ensure that the islanders are provided basic infrastructural facilities and amenities and that their demand for bridges across the backwaters can ill-afford to be ignored, postponed or delayed. We do not doubt the bona fides of the Government, that has happily shed its lukewarm attitude and became more responsive. We agree that it was on account of sheer financial and other constraints and for no other external reasons that it decided that the project be implemented with resources of its own. The concept of self-financing is nothing new and has been widely accepted.

9. Though we do not prohibit reclamation of 25 hect. of land, we should put a caveat that it should be resorted to only after all attempts to implement the Project otherwise than by reclamation have failed to materialise. Indeed several agencies had come forward with their proposals, that should receive serious consideration by the Government. It is on record that an application for obtaining Japanese grant-in-aid was submitted to the Ministry of Surface Transport, that was forwarded to the Japanese Embassy through the Ministry of Economic Affairs, Government of India. The State Government shall make earnest efforts to obtain grant-in-aid from the Japanese Government. We are told that a Japanese Team had already visited the Islands for an on the spot study of the Project from various angles. The State Government shall take necessary follow-up action as soon as the views of the Japanese team are made known. There are also proposals by KITCO, HUNDCO, Infrastructure and Leasing Co. Ltd. besides one that is submitted by Ajit Associates Pvt. Ltd. The Government and GIDA

must consider and let us know the outcome of the discussions, which should be completed expeditiously. Necessary steps will be taken in this regard by the GIDA and the Government at once. In any event, the work on the project should start by first week of March and we shall have a report before that within six weeks from now. Before reclamation is proposed to be resorted to as now permitted, they should satisfy that the alternate proposals have failed to materialise not on their account, but either because they are not economically viable or otherwise unsuitable and would involve the Government in substantial financial commitments it can ill-afford to bear.

Await report of the Government and GIDA and post the Original Petitions on 16-2-1998.