
(1986) 04 KL CK 0005
In the High Court Of Kerala
Case No : O.P. No. 253 of 1985-Y

Joseph Antony

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 09-04-1986

Acts Referred:

Constitution of India, 1950 — Article 19(1), 19(6)
Kerala Marine Fishing Regulation Act, 1980 — Section 4

Citation : AIR 1986 Ker 238

Hon'ble Judges : T. Kochu Thommen, J; M.M. Pareed Pillay, J

Bench : Division Bench

Advocate : T. Ravi Kumar and T.K. Ramaswamy, for the Appellant; M.M. Cheriyan, Ashok M. Cheriyan, Thomas Kocherry and A.G., for the Respondent

Final Decision : Allowed

Judgement

Kochu Thommen, J.—The petitioner owns a fishing vessel equipped with purse-seine nets. He challenges Exts. P1, P2 and P3 notifications principally on the ground that they impose an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution. The challenge is now pressed only as against Exts. P1 and P2. Ext. P3 specifying the area u/s 2(h) of the Kerala Marine Fishing Regulation Act, 1980 (Act 10 of 1981) (the "Act") is innocuous in so far as it has not been followed by a notification u/s 4 imposing fishing regulations. Exts. P1 and P2 are G.O. (P) 136/84/PW. E & PD dt. 30-11-1984 and G.O. (P) 138/84/PW. F & PD dt. 30-11-1984 issued respectively u/s 2(h) and Section 4(1)(d) of the Act. Notifications almost identical in scope to Exts. P1 and P2, namely, G.O.Ms. 143/80/F & PD dt. 29-11-1980 and G.O.Ms. 144/80/F & PD dt. 29-11-1980 had been challenged in O.P. Nos. 2243 of 1983 and 5344 of 1984. Those notifications were struck down by a Division Bench of this Court in Babu Joseph v. State of Kerala ILR (1985) Ker 402 on the ground that they represented an arbitrary exercise of power under the Act and imposed restrictions on the fundamental rights of the petitioners. The validity of the Act, though challenged, was upheld by this Court. However, striking down the

notifications, this Court stated :

"..... This will not, we hasten to clarify, prevent the Government from re-examining the whole question and exercising their powers in accordance with law. And in view of the circumstance that some demarcation of an exclusive zone for the traditional crafts was in force for quite sometime, either under executive orders or under interim orders of this Court, we further direct that till a fresh decision is taken by Government, mechanised fishing vessels shall be allowed to operate only beyond 10 Kms. from the shore."

Ext. P1, impugned in the present proceeding, reads as follows :

" Government of Kerala Public Works, Fisheries and Ports (M)

Department

Notification

G. O.(P) 136/84/PW. F & PD

Dated, Trivandrum, November 30, 1984

S.R.O. No.....In exercise of the powers conferred by Clause (h) of Section 2 of the Kerala Marine Fishing Regulation Act, 1980 (10 of 1981), the Government of Kerala hereby specify the area in the sea along the entire coast line of the State, not beyond the territorial waters, as specified area for the purpose of Clause (d) of Sub-section (1) of Section 4 of the said Act.

By order of the Governor, Sd/- R.C. Choudhury. Secretary to Government.

Explanatory Note :-- (This note is not part of this notification but is intended to indicate its general purport).

Under Clause (h) of Section 2 of the Kerala Marine, Fishing Regulation Act, 1980 (10 of 1981) the Government have been empowered to specify any area as a specified area for the purpose of the Act. This notification is intended to notify such a specified area for the purpose of Clause (d) of Sub-section (1) of Section 4 of the said Act."

Ext. P2 reads as follows :

" Government of Kerala Public Works, Fisheries and Ports (M)

Department

Notification

G.O.(P) 138/84/PW. F & PD

Dated, Trivandrum November 30, 1984.

S.R.O. No..... Whereas Government are convinced of the need to protect the interests of the persons engaged in fishing using traditional fishing crafts such as

catamarans, country crafts and cancos in the area specified in the sea along the entire coast line of the State but not beyond the territorial waters;

And whereas, there is need to preserve law and order at sea.

Now, therefore, in exercise of the powers conferred by Clause (d) of Sub-section (1) of Section 4 of the Kerala Marine Fishing Regulation Act, 1980 (10 of 1981), read with Rule 4 of the Kerala Marine Fishing Regulation Rules, 1980, the Government of Kerala hereby prohibit the use of purse-seine, ring seine, pelagic trawl and mid water trawl gears for fishing in the specified area mentioned in the notification No. G.O.(P) 136/84/PW. F & PD dt. 30th November, 1984.

Sd/ Secretary to Government.

Explanatory Note :-- (This note is not part of this notification, but is intended to indicate its general purport).

Section 4(1)(d) of the Kerala Marine Fishing Regulation Act, 1980 (10 of 1981), empowers the Government to regulate, restrict or prohibit the use of such fishing gear in any specified area. This order is intended to prohibit the use of purse-seine, ring seine, pelagic trawl and water trawl gears for fishing in the territorial waters in the sea along the entire coast line of the State. The use of above mentioned gears will lead to (1) large scale depletion of pelagic fishery resources in the territorial waters; (2) to impoverishment of traditional fishermen; and (3) law and order problems in territorial waters and hence this notification."

Ext. Pi specifies the area as defined u/s 2(h) for the purpose of Section 4(1)(d). Section 2(h)reads:

"2. Definition. -- In this Act unless the context otherwise requires, --

.....

(h) "specified area" means such area in the sea along the entire coast line of the State, but not beyond territorial waters, as may be specified by the Government, by notification in the Gazette.

....."

The entire territorial waters are included in Ext. P1 as a specified area for the purpose of exercising the power u/s 4(1)(d). In exercise of such power, Ext. P2 regulates fishing in the specified area by imposing the notified prohibition for the objects stated therein. Section 4 reads :

"4. Power to regulate, restrict or prohibit certain matters within specified area. -- (1) The Government may, having regard to the matters referred to in Sub-section (2), by order notified in the Gazette, regulate, restrict or prohibit --

(a) the fishing in any specified area by such class or classes of fishing vessels as may be prescribed; or

(b) the number of fishing vessels which may be used for fishing in any specified area; or

(c) the catching in any specified area of such species of fish and for such period as may be specified in the notification; or

(d) the use of such fishing gear in any specified area as may be prescribed.

(2) In making an order under Sub-section (1), the Government shall have regard to the following matters, namely :--

(a) the need to protect the interests of different sections of persons engaged in fishing, particularly those engaged in fishing using traditional fishing craft such as catamaran, country craft or canoe;

(b) the need to conserve fish and to regulate fishing on a scientific basis;

(c) the need to maintain law and order in the sea;

(d) any other matter that may be prescribed."

2. The prohibition imposed by Ext. P2 is avowedly for the accomplishment of the objects stated in Clauses (a) and (c) of Section 4(2), namely, (1) to protect the interests of the persons engaged in fishing using traditional fishing craft such as catamarans, country craft and canoes in the area specified in the sea along the entire coast line of the State, but not beyond the territorial waters; and, (2) the need to preserve law and order in the territorial sea. Purportedly having regard to these objects, and in exercise of the power u/s 4(1)(d), the use of purse-seine, ring seine pelagic trawl and mid water trawl gears for fishing in the territorial sea is prohibited by Ext. P2.

3. The notifications struck down by this Court in Babu Joseph ILR (1985) Ker 402 were issued with reference to Section 4(2)(a) and (b), i.e. to protect the interest of fishermen using traditional fishing craft, and, to conserve fish and to regulate fishing on a scientific basis. The present notifications have no reference to Clause (b), but only to Clauses (a) and (c) of Section 4(2).

4. In Babu Joseph, this Court found that the Government had no material to support the prohibition imposed with reference to Section 4 (2)(a) or (b). This is what this Court stated:

".....In substance, the entire territorial waters were declared out of bounds for purseseine boats.

..... Except stating that unchecked fishing in the sea would cause damage to the fishing industry and that traditional fisherman require protection as people belonging to the weaker sections of the society, the first counter-affidavit makes no attempt to explain how the restrictions in question would advance the cause of conserving fish and regulation of fishing on scientific basis, as claimed in the notification. No material is also relied on.

.....The plea that purse-seine nets are responsible for over-exploitation and depletion of any species of fish or the fish stock in general, is not supported by the data even now available for scrutiny.

As for the allegation that purse-seines, by reason of their mesh-size, have a tendency to destroy juveniles and eggs, the assertion of the petitioners that they are using only approved nets is not even disputed. Nor is it suggested that the mesh-size of nets used by traditional crafts is larger. On the other hand, paras 6-13 to 6-16 of the Babu Paul Report point out that in the opinion of the UNDP/FAO Pelagic Fishery Project, it is the traditional method which is more harmful to the stock of Sardines and mackerels, because the young ones of these species move closer to the coast during the first year of their life and move out to off-shore waters as and when they grow in size. The traditional method is described as "wasteful utilisation of resources" and purse-seining, as "a more rational method of harvesting the resources".

".....Considering that there were only 37 purse-seine boats in Kerala in 1979, how can any one suggest, with any sense of responsibility, that the State Government had formed an honest opinion that purse-seining was harmful to the conservation of fish and the regulation of fishing on scientific lines?....

There is also nothing on record to suggest, that purse-seining is responsible for the fall in the average catch of the traditional fishermen. A recent study undertaken on behalf of the CMFRI (Central Marine Fisheries Research Institute) also seems to have reached the conclusion that "the effect of purse-seining at the present level of exploitation and availability, is not tangibly felt on the indigenous fishery off the coast of Kerala".

In the context of Article 19(6) "interests of the general public" need not necessarily coincide with the interests of those engaged in a particular occupation or trade. That is why the Majumdar Committee had taken care to point out, in more than one place in its report, that delimitation of fishing zones should not lead to a "fall in fish production" or adversely affect "optimum exploitation of fisheries resources". Babu Paul Committee had also noticed that unlike inland fisheries, the level of exploitation in the coastal waters was low. Of the estimated yield potential of 12 to 13 lakh tonnes for the Kerala coast, actual landings were usually in the region of 4 lakh tonnes. It is obviously in the public interest that the available resources are better exploited. At any rate, that is a matter which should have been taken into consideration along with the sectional interests of the producers while attempting to strike a balance between the extent of the restrictions and the interests of the general public. The counter-affidavits do not disclose that any such attempt was made at any time,"

This Court accordingly found that a complete ban on purse-seine boats on the strength of the material relied on by the Government was an unjustified and unreasonable restriction on the fundamental right of the purse-seine operators to fish in the territorial sea. It was, however, held that demarcation of a zone not

exceeding 10 Kms. from the shore exclusively for the traditional craft would be a reasonable restriction. It was in such circumstances that this Court directed that machanised fishing vessels including purse-seine boats should be allowed to operate beyond 10 Kms. from the shore.

5. Since this Court specifically stated that it was open to the Government to re-examine the whole question with reference to the relevant material and impose such restrictions as it thought reasonable and appropriate, the present notifications have been issued by the Government purportedly on the strength of the relevant material.

6. The decision in Babu Joseph ILR (1985) Ker 402 (supra) remains to this day unchallenged. Neither the Government nor the additional third respondent representing the Kerala Swathanthra Malsya Thozhilali Fishermen's Federation, who were parties to the earlier proceeding, chose to challenge that decision. The findings in that case are accordingly final and conclusive, in so far as the parties to that case are concerned, but without prejudice to the right of the Government, as stated by this Court, to re-examine the question in the light of fresh material. The question, therefore, is whether the present notifications have been issued on the strength of fresh material which can be regarded as a reasonable foundation for the imposition of the prohibition imposed thereunder.

7. It is not, and cannot be, disputed that, apart from Exts. R 1 (a) and R 1(g), the State has not produced any fresh document in justification of the impugned notifications. In Babu Joseph v. State of Kerala, the present Exts. R 1(b) to R 1(f) had been either extracted at length in the pleadings or produced as exhibits. The Babu Paul Report dt. 21-7-1982 was also relied upon by the State at the time of the arguments in that case, although the report was submitted to the Government long after the notifications impugned there had been made. This Court found that none of those materials, including the Babu Paul Report, supported the total prohibition imposed under the notifications. The documents produced in the present case, in addition to the material already considered by the Division Bench in the earlier case, are thus Ext. R 1(a), which is a demi official letter of the Inspector Central of Police dt, 24th Oct. 1984 addressed to the Secretary to the Government, and, Ext. R 1(g), which is the report of the Expert Committee on Marine Fisheries in Kerala (hereinafter referred to as the "Kalawar Report"). This report was submitted on 19-5-1985 which was long after the notifications impugned in the present proceeding. Even in the counter-affidavit filed on behalf of the State there is a reference to the fact that Kalawar Report was awaited. This means that the only new material which was available to the State at the time of issuing the impugned notifications, besides the material already considered by this Court in the earlier proceedings, was Ext. R 1(a) letter of the Inspector General of Police.

8. Ext. R 1(a) is relied on by the State with reference to Clause (c) Section 4 (2). We shall deal with this letter last. The Kalawar Report, besides the other material considered in the earlier proceeding, is relied on by the State with reference to

Clause (a) of Section 4 (2).

9. The Advocate-General submits that the material referred to in the earlier proceeding had been considered by this Court from the point of view of Clause (b) of Section 4 (2), namely, the need to conserve fish and to regulate fishing on a scientific basis, and therefore any observation regarding such material has no effect when the very same material is considered with reference to Clause (a). We do not agree.

10. The principal submissions of the respondents in support of the prohibition imposed with reference to Clause (a) are : Fishing in the territorial sea should be reserved exclusively for fishermen engaged in traditional fishing. The use of purse-seine gear by persons like the petitioner depletes the stock of fish so drastically that the poor fisherman using traditional fishing craft, such as catamaran, country craft or canoe, will be deprived of their rightful share of stock of fish as a result of which grave injustice will be caused to them. Purse-seine boats are faster and purse-seine nets catch much larger quantity of fish than in the case of traditional craft using ordinary nets. Even motorised country craft carrying ordinary nets are no match to the purse-seine operators. Purse-seine boats being much larger and faster, and capable of going far out to the sea, should not be allowed to fish in the territorial waters, and such waters should be left exclusively for non-purse-seine operators. The purse-seiners have no right to complain by reason of the ban imposed within the territorial waters, for they are free to fish beyond those waters.

11. These contentions have as much relevance to Clause (a) as to Clause (b) of Section 4 (2), for the argument in substance is that fish must be conserved and fishing must be regulated so as to reserve enough stock for the traditional fishermen. It is only through conservation of fish that the interests of the traditional fishermen are protected. If the respondents rightly contend that the stock of fish is drastically depleted by reason of fishing by purse-seine nets, fishermen using traditional craft are then in danger of being deprived of their rightful share of fish, unless the territorial waters are exclusively reserved to themselves for fishing. .

12. It is important to remember that the notifications impugned in the earlier proceeding were issued specifically with reference to Clauses (a) and (b) of Section 4 (2). The observations of this Court in regard to the material produced in support of those notifications are binding on the respondents with reference to both Clauses (a) and (b).

13. This Court categorically stated that none of the documents relied on by the Government either at the time of issuing the notifications, or subsequently at the time of submitting arguments in defence of them, is relevant to either Clause (a) or Clause (b) of Section 4 (2).

It was categorically found that there was no evidence to support the contention that the purse-seine nets were responsible for over-exploitation and depletion of

any species of fish or the fish stocks in general. This Court referred to the opinion of the experts of the United Nations Development Project/Food and Agriculture Organisation that the traditional method of fishing was "wasteful utilisation of resources" and purse-seining was "a more rational method of harvesting the resources". This Court also stated that the study undertaken by the CMFRI showed "the effect of purse-seining, at the present level of exploitation and availability, is not tangibly felt on the indigenous fishery off the coast of Kerala". The Majumdar Report and the Babu Paul Report were also referred to by this Court as scientific evidence against the argument in support of total prohibition of purse-seine nets.

14. In the circumstances, the only question is whether the Government have reasonably and rationally satisfied themselves on the basis of fresh material as to the need to reissue the present notifications with reference to Clause (a). It is true that Clause (b) is not referred to in the present notifications, but, as stated earlier, both Clauses (a) and (b) were attracted by the earlier notifications, and this Court struck them down as of no relevance to Clause (a) or Clause (b). Accordingly none of the documents placed before the Division Bench in the earlier proceeding is of any relevance to the consideration of the validity of the notifications from the point of view of Clause (a) of Section 4 (2). Then the further question is whether the present notifications can be justified in the light of the subsequently obtained material contained in the Kalawar Report which was submitted to the Government during the pendency of this Original Petition. The Advocate General places much reliance on this report.

15. In Babu Joseph ILR (1985) Ker 402 this Court frowned upon the contention that documents subsequently obtained by the Government justified the notifications issued earlier. The question as to the validity of the notifications has to be considered with reference to the relevant material, that means material which existed at the relevant time. If an authority is authorised under a statute to impose any reasonable restriction or prohibition on the fundamental rights of citizens, such authority must justify its action, when questioned in a court of law, on the basis of material which it had objectively considered before reaching the necessary satisfaction as to the need to impose the restriction or prohibition. If without any material the authority callously clamped down upon citizens prohibitory orders in derogation of their fundamental rights and subsequently searched for material in justification of their action, such belated material would not validate the earlier orders which at the time of their making lacked any reasonable or rational foundation. Such callous exercise of statutory power, unsupported by any material which a reasonable man, placed in the position of the authority, would accept as a rational foundation for the exercise of power, is manifestly unreasonable and therefore unsustainable. Such arbitrary exercise of power can have no reasonable nexus with the object sought to be achieved by the statute.

16. Is the prohibition imposed under the impugned notifications justifiable as a

reasonable restriction within the meaning of Article 19(6)? When a restriction is imposed on the fundamental right guaranteed under that Article, the burden to show that it is reasonable is on those who support it and not upon persons affected by it : Virajlal Manilal and Co. and Others Vs. State of Madhya Pradesh and Others, ; Saghir Ahmad Vs. The State of U.P. and Others, ; and Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, . In considering the question of reasonableness, the court has to bear in mind the principle stated by the Supreme Court in the following words as early as in State of Madras Vs. V.G. Row, :

"..... The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

The reasonableness of the restraint is judged by the magnitude of the evil which is sought to be curbed or eliminated : The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another, The facts and circumstances of the case, the character of the impugned statute or order, the nature of the restriction imposed, the object sought to be achieved, the evil sought to be remedied are all matters to be taken into account. The restriction may be partial or complete, permanent or temporary; but the question is whether it bears a rational nexus with the object sought to be achieved by the imposition of the restriction. The restrictions must be in public interest and a just balance must be struck between the deprivation of the right and the evil sought to be remedied : Laxmi Khandsari and Others Vs. State of U.P. and Others, . Although complete prohibition can be justified in exceptional circumstances, such prohibition, when subjected to judicial review, must be scrutinised with the utmost care to see whether it is justifiable as a reasonable restriction. This is particularly true when it is not limited in the duration. As stated by the Supreme Court in Narendra Kumar and Others Vs. The Union of India (UOI) and Others, , 436 :

".... It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

..... It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public."

See also Pathumma and Others Vs. State of Kerala and Others, and P.P. Enterprises and Others Vs. Union of India (UOI) and Others,

17. If the Government imposes a total ban on the use of purse-seine nets anywhere in the territorial waters, although the statute confers such power upon the Government, the Government must in exercising that power take into account the relevant material and satisfy itself as to the need for such drastic

restriction on the fundamental right of a person to fish. The restriction must have a rational nexus with the evil sought to be remedied. The Government must show that the material, with reference to which they formed their opinion that total prohibition warranted by the circumstances, reasonably justified such conclusion. In other words, the restriction, particularly when it tantamounts to total prohibition, must satisfy the test of reasonableness, and should not result in an over-kill or excessive blow. Any such disproportionate restraint is unreasonable and unwarranted by the evil sought to be remedied or the objects sought to be subserved.

18. A statutory instrument, just as in the case of an administrative action, is liable to be declared invalid if it is ultra vires the governing Act or repugnant to constitutional principles or opposed to other laws of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it see the decisions catalogued in *Satheesan v. Chief Justice of Kerala* 1985 Ker LT 1103 : 1985 Lab IC 1301 . In *Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI)*, the Supreme Court stated ;

"Reasonableness, for purposes of judging whether there was an "excess of power" or an "arbitrary" exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power."

In *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, the Supreme Court stated :

"..... Even if (the statutory order) is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts."

19. The question therefore is whether the restrictions, imposed by the notifications bear a reasonable nexus with the evil sought to be remedied and whether the material relied on by the State in forming its opinion reasonably supported such restrictions.

20. Assuming that, as strenuously contended for by the Advocate-General, the subsequent material contained in the Kalawar Report can be legitimately employed in defence of the earlier action of the Government, the question still is whether that report is relevant to or warrants the imposition of the total ban with reference to Clause (a) of Section 4 (2). Are the purse-seine operators a threat to the interests of persons "engaged in fishing using traditional fishing craft" such as catamaran, country craft or canoe? These expressions in Ext. P 2 notification

are identical to the words used by the legislature in Clause (a) of Section 4 (2). On the face of it, therefore, Ext. P 2 seeks to protect the interests of persons using traditional craft. Ordinarily such craft can be understood only as non-motorised craft. The craft is described in the statute as well as in the notification by the following illustrations:

"..... Such as catamaran, country craft or canoe."

These illustrations indicate that what is referred to in Ext. P2 is a country craft in the traditional sense and not a motorised country craft. If that is the correct interpretation of Ext. P 2, it is common knowledge that non-motorised country craft do not generally fish beyond 5 Kms. and for their protection it is unnecessary to impose a total ban on purse-seiners from the entire territorial sea.

21. But it is contended by the Advocate General that the protection sought to be extended by Ext. P 2 applies not only to non-motorised traditional craft such as catamaran, country craft or canoe, but also motorised craft of the same description. The wording of Ext. P 2 does not seem to warrant such a wide construction as to include even motorised craft within the protection. Even if it did, the question still would be whether the Kalawar Report justified the prohibition imposed under Ext. P 2. This prohibition can be defended as a reasonable restriction of the fundamental right to fish only if the material contained in the report reasonably leads to the conclusion that the stocks of fish will be drastically depleted by purse-seine operators to the disadvantage of fishermen using traditional country craft. The prohibition can also perhaps be justified if, as a matter of fact, the purse-seiners can operate beyond the territorial waters as profitably and economically as they can within those waters.

22. It is not disputed that purse-seine operation is confined to pelagic fishing (surface fishing) and the only species of fish substantially available for this purpose are mackerels and sardines. Two fundamental questions, therefore, loom large : (1) Are there enough stocks of mackerels and sardines in the territorial sea so that competition by purse-seine operators would not deny persons engaged in traditional fishing with or without motorised craft their due share of fish? In other words, will prohibition of purse-seine fishing increase the catch of country craft operators? and, (2) Are mackerels and sardines equally available beyond the territorial waters as they are available within those waters? None of the documents made available to the Division Bench in the earlier proceeding threw any light on these two questions in support of the prohibition.

23. We have been carefully taken through the Kalawar Report. There is nothing in that report to suggest that purse-seine nets depleted stocks of fish in the territorial sea so as to deny the traditional fishermen their due share of fish or that pelagic fishing was feasible or profitable beyond the territorial sea. In fact Ext. R 3(m) which is the report of the Central Marine Fisheries Research Institute, Cochin, dt. Feb. 1986 (produced by the additional 3rd respondent) says :

"..... The traditional fishery of oil-sardine in India has been found restricted to a narrow strip of 3.20 Km. of the coastal sea....."

This narrow strip approximately coincides with the 12 nautical miles of the territorial sea. The same is the case in regard to mackerels. There two species of fish are "largely confined to the coastal waters and are not available in the deeper regions of the shelf": see page 97 of the Souvenir issued on the occasion of the Silver Jubilee Celebrations of the Integrated Fisheries Project, Cochin, India - October, 1977. The Kalawar Report also supports this. This report further says that oil-sardine stock is under-exploited (page 307). With regard to mackerels the same is the position.

24. Shri. Kochery, appearing for the additional third respondent, submitted his arguments with much skill and knowledge. He contended that the interests of the traditional fishermen were threatened by purse-seine operators. We agree that there might be justification in the apprehension that unregulated purse-seine operation would be a potential threat to the interests which he represented. But he was not in a position to point out how fishing by purse-seine nets if well regulated could be a threat to the interests of traditional fishermen.

25. Having considered the various documents relied on by the respondents, and having heard arguments on both sides, we are satisfied that purse-seine nets can be employed only for pelagic fishing and such fishing in the Indian waters is basically confined to sardines and mackerels which are concentrated in the territorial sea. No pelagic fishing of any kind appears to be capable of being profitably carried on beyond those waters. There is no evidence in any of the documents, including the Kalawar Report, to warrant the conclusion that purse-seine fishing, if (not?) properly regulated, is a threat or a potential threat to the economic interests of the traditional fishermen. On the other hand, the material on record indicates that it would be helpful and profitable if the traditional fishermen are encouraged and assisted by the Government to take increasingly to pursuing and other modern methods of fishing. In fact there was such a scheme, although, for reasons not clear to us it was not pursued. In licensing fishing boats, it would be helpful and beneficial if the Government extended to the traditional fishermen, or co-operative societies or other bodies representing them, all legitimate and reasonable encouragement and preferences which will facilitate modernisation of their fishing technique and further their economic progress. These are all matters for the Government to consider with particular reference to the need for optimum utilisation of the living resources of our territorial waters.

26. This does not, however, mean that unlimited or unregulated operation by purse-seiners can be permitted within the territorial waters without endangering the interests of all concerned. It would indeed be necessary and well within the power of the Government to regulate the seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used. The age and size of fish and other species which can be caught will

have to be regulated. The Government may thus prescribe the mesh-size, prohibit, fishing by purse-seine nets during the breeding season from June to August, limit the number of purse-seine boats which can be licensed for operation within the territorial waters, restrict the number of boats which may be allowed to fish in a particular area of the territorial waters, and other matters which are essential for healthy fishing by different sections of persons. It would equally be within the power of the Government, in view of the circumstances mentioned by this Court in Babu Joseph ILR (1985) Ker 402 to prohibit purse-seiners in a zone of 10 Kms. extending from the base line from which the breadth of the territorial sea is measured. But to prohibit the purse-seine operators from the territorial sea altogether is a drastic restriction on their fundamental right, and no material so far available to the Government appears to justify such total prohibition as a reasonable restriction.

27. We have so far examined the position mainly from the point of view of Clause (a) of Section 4 (2). But the impugned notifications have been issued with reference to Clause (c) as well. This clause requires that in imposing the restriction or prohibition, the Government shall have due regard to "the need to maintain law and order in the sea". Ext. R1 (a) is a demi official letter dt. Oct. 24, 1984 addressed by the Inspector General of Police to the Secretary to the Government, Fisheries Department, This letter nowhere refers to threat to "Law and order in the sea". It does not refer to any threatened agitation at sea. Clause (c) of Section 4 (2) is attracted only when such a threat existed "in the sea". Ext R 1(a) is, therefore, irrelevant to the matters which are required to be considered when regard is had to Clause (c). The opinion of the Fishermen's Union that the case (Babu Joseph v. State of Kerala) was not well argued on behalf of the Government, or their dissatisfaction with the judgment of this Court in that case, or their threat to start direct action to influence the Government, is not relevant to the matters to be taken into account with reference to Clause (c) of Section 4 (2). It is significant to note that the Government have no case, and no supporting material has been produced on the side of the respondents, that the purseseine operators have at any stage, apart from exercising their fundamental right to fish, indulged in any action which can be described as a violation of law and order at sea. There is no case that they have provoked lawlessness at sea.

28. We are indeed surprised that Ext. R 1(a) has been relied on by the Government in support of the notifications. In the first place it contains a totally incorrect and uncharitable reference to counsel who appeared on behalf of the State in the earlier proceeding before the Division Bench. The decision in that case, as in any other case, turned solely on the merits, and to attribute the final outcome of the proceeding to counsel's failure is, to say the least, improper. In this connection, we wish to place on record our appreciation for the excellent assistance rendered to us by the Advocate General who argued the case on behalf of the State with the utmost thoroughness, learning and skill

29. Ext. R 1(a) further says that the judgment of the High Court "if allowed to stand, will be strongly resented by the fishermen's organisations and used as a spring board for launching average scale agitation". The Government ought to realise that the answer of the aggrieved party to the judgment of a court is not agitation, but an appeal to the higher court. The judgment of this Court in Babu Joseph ILR (1985) Ker 402 was not challenged by anyone of the respondents. To agitate against a judgment by violating law and order, instead of having recourse to the procedure laid down by the law for appeal, is a course of conduct which cannot be countenanced in any well-ordered society; and, for the Government to rely upon such illegal conduct to prohibit persons, who have successfully vindicated their right in this Court, from exercising such right through further prohibitory orders, is a blatant attempt to overcome the decisions of this Court otherwise than by recourse to appeal. Such conduct on the part of the Government is manifestly unreasonable and amounts to an abuse of the statutory power vested in them.

30. The Coast Guards Act, 1978 was enacted by the Parliament precisely for enforcing law and order in our territorial and other waters. It is, of course, for the concerned authority to take necessary steps to safeguard life and property at sea.

31. To sum up : No relevant material has been placed before us to reasonably indicate that purse-seine operation will result in depletion of stocks of fish in such a way that the traditional fishermen will be denied what they would otherwise be in a position to catch if total prohibition operated against the purse-seiners. The scientific information brought to our notice indicates that pelagic fishing in respect of mackerel and sardine cannot be profitably conducted beyond the limit of the territorial sea. To impose a total prohibition on the purse-seiners would be an unreasonable restriction on their fundamental right to fish. Reasonable restrictions, such as those we have indicated earlier, can be validly imposed without affecting the interests of the purse-seiners, and much to the advantage of the State, from the point of view of conservation of fish, and of the fishermen themselves, from the point of view of their special interest. It would be in the common interest of the traditional fishermen as well as the purse-seine operators, and particularly the consumers of fish, if exploitation of the living resources is conducted in a healthy manner, within the permissible limits, in such a way that sufficient stocks of fish will always be available to the consumers at reasonable prices, particularly in the case of pelagic fish such as mackerel and sardine which are in great demand amongst a large section of the ordinary people of this State who cannot afford the more expensive species of fish. Shortage of fish caused by unhealthy rivalry amongst persons engaged in fishing, if allowed , to continue unabated, will exorbitantly inflate the price of fish, as it has in the recent past, denying the ordinary consumers a very valuable source of protein. This fundamental fact, we trust, will be borne in mind by those who are concerned with fishing. If lawlessness should still occur at sea, the answer is to enforce law and order, and not to prohibit the optimum utilisation of the living

resources to the prejudice of the general public at large.

32. In the circumstances we hold that the material on record does not justify the impugned notifications, Exts. P 1 and P 2, in so far as they totally prohibit the use of purse-seine nets beyond 10 Kms. from the base line from which the breadth of the territorial sea is measured. Accordingly we declare that Exts. P 1 and P 2, in so far as they totally prohibit the use of purse-seine nets in the territorial waters beyond the said 10 Kms. impose an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution, and shall therefore be unenforceable and of no effect whatever except within the said limit of 10 Kms. The Original Petition is allowed to the extent indicated above. The parties will bear their respective costs.