

(2013) 01 CAL CK 0032

In the Calcutta High Court

Case No : Writ Petition No. 22619 (W) of 2012

Sandhya Barik and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-01-2013

Acts Referred:

Constitution of India, 1950 — Article 48, 48A, 51A(g)
Criminal Procedure Code, 1973 (CrPC) — Section 144(2)

Citation : (2013) 1 CALLT 410 : (2013) 3 CHN 157 : (2013) 3 EFLT 448 : (2013) 3 WBLR 860

Hon'ble Judges : Arun Mishra, C.J.;Joymalya Bagchi, J

Bench : Division Bench

Advocate : A.B. Chatterjee and Balai Lal Sahoo, for the Appellant;Shyamal Sanyal, Counsel for the State, Sudip Ghosh and Gazi Faruque Hossain, for the Respondent

Final Decision : Disposed Off

Judgement

Arun Mishra, C.J.—The petition has been filed by way of Public Interest Litigation praying for relief to remove construction over the canal situated at Mouza Amtala, Khatian No. 494, J.L. No. 73, Plot No. 694 within Police Station Bishnupur in the District of South 24-Parganas. Appropriate order or direction requiring the respondents forbearing from obstructing the public canal from draining out the refuses and rainwater in the locality and direct the respondents to stop construction over the public canal in question by the respondent.

It is averred in the petition that the canal is used by general public at large for draining out the wastage water as well as water in the rainy season. There is entry of the canal in the records of the Land Reforms Department. The marked portion of the said Mouza regarding canal in the map has been filed as Annexure TV to the petition. The Record of Rights also records the same as canal for public use for draining out water and the same is connected with river Diamond Harbour. Record of Rights is annexed as Annexure "P2" to the petition. There is

big water pipe under the land which carries drinking water and with the said water pipe there is a valve which has been installed over the said canal for draining out the water which are coming out from the said valve and water of the canal is used not only by the petitioner but also by the people at large of the locality. The canal is still in existence which is apparent from the photographs taken out on 23rd September, 2012 and 3rd October, 2012. The private respondent has erected pillars and has taken steps for construction of a house over the canal. The petitioners approached the local Panchayat authorities as well as police authorities but no action has yet been taken. An application u/s 144(2) of the Code of Criminal Procedure was also filed before the 2nd Executive Magistrate, Alipore, who directed the police authority to submit a report on 21st August, 2012 and to see that no breach of peace and tranquility occurs in the area. The documents in this regard have been placed on record. Police submitted a report on 14th September, 2012. It has been submitted that the respondent No. 14 without obtaining any permission from the competent authority trying to make illegal construction over the suit land, that is water canal. As needful has not been done the petition has been preferred in this Court.

It is submitted by the private respondent that though he is covering part of the canal, however, he claimed plea of negative equality, that large number of similar construction over the canal have been made by AXIS Bank, HDFC Bank, Indusind Bank, Union Bank, Kotak Mahindra Bank, Reliance Bank, ICICI Bank and also Government office, namely, Block Krishi Adhikarik Building. There is also foreign liquor shop which was sanctioned by the department of excise upon holding enquiry. Besides various residential multistoried buildings are there as like the construction of the respondent No. 14. Gram Panchayat has sanctioned plan for construction which is being made. Existence of the canal has not been denied in the Return. The dispute is a private dispute. The petitioner No. 1 wants to grab the property and hence, has filed the petition.

2. We have heard the learned Counsel for the parties. It is not disputed by any of the learned Counsel for the respective parties that the canal is in existence as recorded in the Record of Rights and documents, which are annexed as Annexures "P1" and "P2" to the petition. The case of the respondent No. 14 is that Gram Panchayat has granted permission. On being specifically told to point out where the permission of the Gram Panchayat in respect of the coverage of the canal. The learned Counsel appearing on behalf of the respondent No. 14 has stated before us that it is not possible to find out from the sanctioned plan that any permission has been granted to cover the canal. Whatever that may be, canal is in existence and it is for the public use, the same is held by the Panchayat in trust. Nobody can be permitted to raise construction over the said property.

3. The Courts in India, considering Articles 48, 48-A, 51-A (g) of the Constitution of India have issued directions from time to time with respect to natural resources, process of distribution to private persons, doctrine of public trust was

evolved as part of Indian Jurisprudence, polluter-pay-principle was developed in *M.C. Mehta Vs. Kamal Nath and Others*, and has been followed in *Jamshed Hormusji Wadia Vs. Board of Trustees, Port of Mumbai and Another*, *The Apex Court* in the case of *Centre for Public Interest Litigation (supra)* referred to the decision in *Fomento Resorts and Hotels Ltd. and Another Vs. Minguel Martins and Others*, and has laid down that the public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. It has also been observed that public has special interest in public land water etc. It is the duty of the State not to impair such resources. The Apex Court emphasized that there is obligation to use such resources in such a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources. The Apex Court in *Fomento Resorts and Hotels Limited v. Minguel Martins (supra)* has laid down thus:

53. The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.

54. The heart of the public trust doctrine is that it imposes limits and obligations upon Government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e., public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property

or resource, including down slope lands, waters and resources.

4. In *M.C. Mehta Vs. Kamal Nath and Others*, the Apex Court has laid down that the river is a public property. It cannot be given for private use, Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. The public trust doctrine is a part of law at present. Even in absence of legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. Large area of the bank of River Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. The area being ecologically fragile and full of scenic beauty should not have been permitted to be converted into private ownership and for commercial gains. The Apex Court held that the Government of Himachal Pradesh has committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. The lease transactions are in patent breach of the trust held by the State Government. Therefore, the Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The Apex Court has laid down thus:

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on Governmental authority.

Three types of restrictions on Governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

33. It is no doubt correct that the public trust doctrine under the English Common Law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake* case clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake* case to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the

public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In *Phillips Petroleum Co. v. Mississippi* 108 USCC 791 , the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying no navigable tidal areas. The majority judgment adopted ecological concepts to determine which land can be considered tide lands. Phillips Petroleum case assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.

34. Our legal system-based on English Common Law-includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasing complex society, find it necessary to encroach to some extent open lands heretofore considered in-violate to change. The resolution of this conflict in any given case is for the Legislature and not the Courts. If there is a law made by Parliament or the State Legislature the Courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. The esthetic use and the pres time glory of the natural resources, the environment and the eco-systems of our country cannot be permitted to be eroded for private, commercial or any other use unless the Courts find it necessary in good faith, for the public good and in public interest to encroach upon the said resources.

36. Coming to the facts of the present case, large area of the bank of river Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease-transactions are in patent breach of the trust held by the State Government. The second lease granted in the year 1994 was virtually of the land which is a part of river-bed. Even the board in its report has recommended delousing of the said area.

5. In *Intellectuals Forum, Tirupathi Vs. State of A.P. and Others*, , the Apex Court

has laid down that the Government is bound to protect historical tanks qua concept of "sustainable development" and "public trust doctrine". Destruction of local ecological resources is not permissible. Property subject to trust must not only be used for a public purpose, but it must be held available for use by general public. Property must be maintained for particular types of use (i) either traditional uses, or (ii) some uses particular to that form of resources. Principle of "Inter-Generational Equity" also to be applied for protecting natural resources has also been taken into consideration by their Lordships of the Apex Court. The Apex Court has held that the "tank is a communal property" and State authorities are "trustees" to hold and manage such properties for benefits of community. State cannot be allowed to commit any act or omission which will infringe right of community and alienate property to any other person or body. Fact that the party has spent money on developing land is immaterial. The Apex Court has laid down thus:

67. The responsibility of the state to protect the environment is now a well-accepted notion in all countries. It is this notion that, in international law, gave rise to the principle of "state responsibility" for pollution emanating within one's own territories Corfu Channel ICJ Reports (1949) 4 case. This responsibility is clearly enunciated in the United Nations Conference on the Human Environment, Stockholm 1972 (Stockholm Convention), to which India was a party. The relevant Clause of this Declaration in the present context is Paragraph 2, which states:

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Thus, there is no doubt about the fact that there is a responsibility bestowed upon the Government to protect and preserve the tanks, which are an important part of the environment of the area. Sustainable Development

68. The respondents, however, have taken the plea that the actions taken by the Government were in pursuance of urgent needs of development. The debate between the developmental and economic needs and that of the environment is an enduring one, since if environment is destroyed for any purpose without a compelling developmental cause, it will most probably run foul of the executive and judicial safeguards. However, this Court has often faced situations where the needs of environmental protection have been pitched against the demands of economic development. In response to this difficulty, policy makers and judicial bodies across the world have produced the concept of "sustainable development". This concept, as defined in the 1987 report of the World Commission on Environment and Development (Brundtland Report) defines it as "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". Returning to the Stockholm Convention, a support of such a notion can be found in Paragraph 13,

which states:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

69. Subsequently the Rio Declaration on Environment and Development, passed during the Earth Summit at 1992, to which also India is a party, adopts the notion of sustainable development. Principle 4 of the declaration states:

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

73. In light of the above discussions, it seems fit to hold that merely asserting an intention for development will not be enough to sanction the destruction of local ecological resources. What this Court should follow is a principle of sustainable development and find a balance between the developmental needs which the respondents assert, and the environmental degradation, that the appellants allege. Public Trust Doctrine

74. Another legal doctrine that is relevant to this matter is the Doctrine of Public Trust. This doctrine, though in existence from Roman times, was enunciated in its modern form by the US Supreme Court in *Illinois Central Railroad Company v. People of the State of Illinois* (1892) 146 US 537 where the Court held:

The bed or soil of navigable waters is held by the people of the State in their character as sovereign, in trust for public uses for which they are adapted.

[...] the state holds the title to the bed of navigable waters upon a public trust, and no alienation or disposition of such property by the State, which does not recognize and is not in execution of this trust is permissible.

What this doctrine says therefore is that natural resources, which includes lakes, are held by the State as a "trustee" of the public, and can be disposed of only in a manner that is consistent with the nature of such a trust. Though this doctrine existed in the Roman and English Law, it related to specific types of resources. The US Courts have expanded and given the doctrine its contemporary shape whereby it encompasses the entire spectrum of the environment.

75. The doctrine, in its present form, was incorporated" as a part of Indian law by this Court in the case of *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*, . In *M.C. Mehta, Kuldeep Singh, J.*, writing for the majority held:

[our legal system] includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources which are by nature meant for public use and enjoyment. [...] The state as a trustee is under the legal duty to protect the natural resources.

76. The Supreme Court of California, in the case of *National Audubon Society v. Superior Court of Alpine Country* 33 Cal. 419 also known as the Mono Lake case summed up the substance of the doctrine. The Court said:

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands., surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust.

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the state holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny upon any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinize such actions of the Government, the Courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources, [Joseph L. Sax "The public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", *Michigan Law Review*, Vol. 68 No. 3 (Jan. 1970) PP. 471-566)]. According to Prof. Sax, whose article on this subject is considered to be an authority, three types of restrictions on Governmental authority are often thought to imposed by the public trust doctrine [ibid]:

1. the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;
2. the property may not be sold, even for fair cash equivalent;
3. the property must be maintained for particular types of use. (i) either traditional uses, or (ii) some uses particular to that form of resources.

77. In the instant case, it seems, that the Government Orders, as they stand now, are violative of principles 1 and 3, even if we overlook principle 2 on the basis of the fact that the Government is itself developing it rather than transferring it to a third party for value.

79. Further the principle of "Inter-Generational Equity" has also been adopted while determining cases involving environmental issues. This Court in the case of *A.P. Pollution Control Board Vs. Prof. M.V. Nayadu (Retd.) and Others*, held as under:

The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations.

Principle 1-Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations....

Principle 2-The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.

89. The set of facts in the present case relates to the preservation of and restoration of status quo ante of two tanks, historical in nature being in existence since the time of Srikrishnadevaraya, The Great, 1500 A.D., where the cry of socially spirited citizens calling for judicial remedy was not considered in the right perspective by the Division Bench of the High Court of Andhra Pradesh despite there being overwhelming evidence of the tanks being in existence and were being put to use not only for irrigation purpose but also as lakes which were furthering percolation to improve the ground water table, thus serving the needs of the people in and around these tanks. The Division Bench of the High Court, in the impugned order, has given precedence to the economic growth by completely ignoring the importance and primacy attached to the protection of environment and protection of valuable and most cherished fresh water resources.

91. It is true that the tank is a communal property and the State authorities are trustees to hold and manage such properties for the benefits of the community and they cannot be allowed to commit any act or omission which will infringe the right of the Community and alienate the property to any other person or body.

6. The Apex Court in Jagpal Singh and others v. State of Punjab and others (Civil Appeal No 1132/2011, decided on 28.1.2011) has held in the context of village "pond" which was being used for the common purposes by villagers that if appellants have built houses on the land in question, they must be ordered to remove their constructions and possession of the land in question must be handed back to the Gram Panchayat and regularizing such illegalities must not be permitted because it is a gram sabha land which must be kept for the common use of the villagers of the village. Reliance was placed upon the decision in M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, in which Apex Court ordered restoration of a park after demolition of shopping complex constructed at the cost of over ` 100 crores. In Friends Colony Development Committee Vs. State of Orissa and Others, the Apex Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. This principle applies with greater force in cases of encroachment of village common land. The Apex Court noted that in many States, the Government orders have been issued permitting allotment of gram sabha land to private persons and commercial enterprises on payment of some money and such Government orders are held to be illegal and should be ignored. In Hinch Lal Tiwari Vs. Kamala Devi and Others, the Apex Court held that land

recorded as a "pond" must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land which they occupied" illegally after taking away the material of the house. The Apex Court has also noted that over the last few decades, most of these ponds in our country have been filled with earth and built upon by greedy people thus destroying their original character and this has contributed to the water shortages in the country. Many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials and even such money collected from these so called auctions are not used for the common benefit of the villagers, but misappropriated by certain individuals. The Apex Court in Jagpal Singh's case (supra) has laid down thus:

14. In M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others, the Supreme Court ordered restoration of a park after demolition of a shopping complex constructed at the cost of over ` 100 crores. In Friends Colony Development Committee Vs. State of Orissa and Others, this Court held that even where the law permits compounding of unsanctioned constructions, such compounding should only be by way of an exception. In our opinion, this decision will apply with greater force in cases of encroachment of village common land. Ordinarily, compounding in such cases should only be allowed where the land has been leased to landless labourers or members of Scheduled Castes/Scheduled Tribes, or the land is actually being used for a public purpose of the village e.g. running a school for the villagers or a dispensary for them.

15. In many States Government orders have been issued by the State Government permitting allotment of gram sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal and should be ignored.

16. The present is a case of land recorded as a village pond. This Court in Hinch Lal Tiwari Vs. Kamala Devi and Others, (followed by the Madras High Court in L. Krishnan Vs. State of Tamil Nadu and Others, held that land recorded as a pond must not be allowed to be allotted to anybody for construction of a house or any allied purpose. The Court ordered the respondents to vacate the land they had illegally occupied, after taking away the material of the house. We pass a similar order in this case.

18. Over the last few decades, however, most of these ponds in our country have been filled with earth and built upon by greedy people, thus destroying their original character. This has contributed to the water shortages in the country.

19. Also, many ponds are auctioned off at throw away prices to businessmen for fisheries in collusion with authorities/Gram Panchayat officials and even this money collected from these so called auctions are not used for the common benefit of the villagers, but misappropriated by certain individuals. The time has come when these malpractices must stop.

7. The Apex Court in the case of Jagpal Singh (supra) has further held that long

duration of such illegal occupation or huge expenditure in making constructions thereon or political connections must not be treated as a justification for condoning this illegal act or for regularizing the illegal possession.

8. It is very shocking and surprising that the respondent No. 14 is claiming equity in the matter of making encroachment towards the canal. Such plea not only is impermissible but highlights illegal action taken by others of encroaching the same. As a matter of fact no right can be created by raising illegal construction over such property of public use like canal. There is bounden duty of the Panchayat and other authorities to prohibit such construction and such property cannot be alienated or permitted to be destroyed in any manner. No construction can be permitted over such canal. Construction, if any, which have been made by any person, the respondent No. 14 cannot claim equity. The respondent authorities are also bound to take action for removal of such encroachment and in case any encroachment has been made as alleged in the reply filed by the respondent No. 14 by above stated banks and other authorities, we direct the concerned authority to remove any construction made by the aforesaid incumbents and if it is found that they have encroached any of the portion of the canal, let appropriate action be taken in accordance with law for clearing the encroachment made over the canal in any manner whatsoever.

9. Let appropriate action be taken for removal of the construction of the respondent No. 14 within a period of fifteen days from today and with respect of others as mentioned in the order as above, let proper enquiry be conducted and action be taken in accordance with law after giving them opportunity of hearing within a period of three months from today and compliance report be submitted before this Court. Let District Magistrate also ensure compliance of the order and to submit compliance report this Court.

10. The learned Counsel appearing for the petitioners submits with respect to the plan relied upon by the petitioners that no date and no sanction number have been given in the plan. Whatever that may be, even if sanction is granted, it is illegal and void with respect of the area of the canal. The petition stands disposed of.

Urgent Photostat certified copy of this order, if applied for, be furnished to the learned Counsel for the parties on priority basis.