

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 20TH DAY OF NOVEMBER 2015/29TH KARTHIKA, 1937

W.A.No.2011 of 2014

AGAINST THE JUDGMENT IN W.P.(C).No.22377/2012-V DATED 23-09-2014
OF HIGH COURT OF KERALA.

APPELLANT(S)/ RESPONDENTS 1 TO 3 IN THE WPC:-

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO FOREST AND WILDLIFE DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.
2. THE DISTRICT COLLECTOR, PALAKKAD.
3. THE WILDLIFE WARDEN,
SILENT VALLEY DIVISION, MANNARKKAD, PALAKKAD.

BY SENIOR GOVERNMENT PLEADER SRI.P.I.DAVIS.

RESPONDENT(S)/ PETITIONER AND RESPONDENTS 4 TO 10 IN THE WPC:-

1. J & J MINERALS PRIVATE LIMITED,
REPRESENTED BY ITS DIRECTOR, SIMON K. FRANCIS,
CHINDAKI P.O., MUKKALI, ATTAPPADY, PALAKKAD - 678 582.
2. JANAJAGRATHA [THE PEOPLE'S VIGILANCE],
REG. NO. CA 234/2005, D-21, SEKHARIPURAM, PIN - 678 010,
REPRESENTED BY ITS SECRETARY.
3. KALIYAPPAM, S/O. PERUMAL,
HRUDHIK NIVAS, 1ST SIGHT CHINDAKKI P.O., PALAKKD - 678 582.
4. KARA. K., S/O. KUMARAN, 1ST SIGHT, CHINDAKKI P.O.,
PALAKKAD - 678 582.
5. SOLAVARAM, S/O. NANCHAN, 1ST SIGHT, DO. DO.

6. T.S.VINAYAN, S/O. SAUKARAN,
THEKKEDATH HOUSE, MUKKALI P.O., PALAKKAD - 678 582.
7. K.S.SALAM, S/O. MOHAMMED,
KOZHISSEERRY HOUSE, MUKKALI, DO.
8. S.CHANDRAN, S/O. SOMAN,
CHERIWIL HOUSE, CHINDAKKI P.O., PALAKKAD - 678 582.

R1 BY ADV.SRI.T.C.SURESH MENON
R2 BY ADV.SRI.M.P.PRAKASH
R3 TO R8 BY ADV. SRI.K.B.PRADEEP.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 20-10-2015,
THE COURT ON 20-11-2015 DELIVERED THE FOLLOWING:-

“C.R.”

Ashok Bhushan, C.J. & K.Vinod Chandran, J.

W.A.No.2011 of 2014

Dated this, the 20th day of November, 2015

JUDGMENT

Vinod Chandran,J:

The State is in appeal against the judgment in a writ petition in which the petitioner, who was running a unit manufacturing mineral water, was permitted to carry on such activity even without an environmental clearance. It was found that the petitioner, for carrying on the activity concerned, did not require an environmental clearance and the order of the District Collector [Exhibit P18] was set aside. It was also held that the remedy of the impleaded respondents, whose grievance was in respect to indiscriminate extraction of water, was independent of the issues decided in the writ petition and was left the remedy to move appropriate authorities to redress their grievances.

2. The parties are referred to as is their status in the writ petition.

3. The petitioner, a Private Limited Company [Exhibit P1], having SSI Registration [Exhibit P2], obtained Exhibit P3 Green Channel Clearance of the District Industries Centre, Palakkad for establishment of a factory carrying on the activity of manufacture of mineral water, which establishment was sanctioned by the Department of Factories and Boilers, by Exhibit P4. The petitioner is said to have been functioning from 1998 and the licence for the current period, issued by the Local Self Government Institution, is produced at Exhibit P5. The petitioner is said to be extracting water from two wells available in the petitioner's property. While Exhibit P8 stop memo was issued by the Wildlife Warden of the Silent Valley Division, Mannarkkad, the Village Officer by Exhibit P9 had affirmed the title of the petitioner over the property and also certified that the same is not Government land or puramboke. The petitioner's contention is that the Wildlife Warden has absolutely no authority to issue a stop memo and there was no restriction in the petitioner carrying on such industry, even if the same is carried on within 10 Kms. radius of the National Park.

4. The petitioner also has a contention that Exhibit P17 report finds the petitioner's industry to have no impact much less any adverse effect on the environment. At the outset, it is to be stated that Exhibit P17 is of no consequence and no reliance can be placed on the same. It is not clear as to what prompted the author of the said report to conduct an inspection and file such a report. Definitely neither the employer of the author nor the Government requested such a report nor is the author's credentials to make such report disclosed. The report is said to have been initiated on the request of one Sri.Vinayan, whose identity is not revealed. The report can only be found to a self-serving one obtained by the petitioner, which cannot at all be relied upon.

5. The Forest Department, however, relies on Exhibit P12 Buffer Zone notification to contend that the authorities of the Forest Department is empowered to restrict the carrying on, of such industry within the Buffer Zone declared, which is in the interest of the National Park and to ensure the protection of environment and to avoid any manner

of disturbance of wildlife in the National Park. The respondents claim that, within the Silent Valley National Park; especially the area within which the petitioner is carrying on the industry, is a rain shadow region where there is severe shortage of rainfall. The petitioner's property is said to be just 250 meters adjacent to the Bhavani River, which caters to the wildlife in the area as also the tribal settlement, which has around 30000 inhabitants. The Silent Valley National Park is said to be declared as World Heritage Site. The Government seeks to sustain Exhibit P18 order of the District Collector.

6. Exhibit P18 order of the District Collector, which is impugned herein, has been passed pursuant to a direction in W.P.(C). No.32883 of 2010 filed by the petitioner. The petitioner was aggrieved with the proceedings taken by the Wildlife Warden and the District Collector was directed to consider the representation made against the stop memo issued by the Wildlife Warden. The District Collector convened a meeting of the Heads of Ground Water Department, District Industries Centre, the Grama Panchayat and the Revenue Department

with participation of the petitioner to decide the issue as per Exhibit P18. It has to be noticed that Exhibit P18 discloses no reasons and after referring to the different versions of the petitioner and the Wildlife Warden and noticing the various permissions and licenses obtained by the petitioner, merely rejects the representation on the ground that the Forest and Wildlife Department has submitted that the petitioner's unit is situated in the Buffer Zone.

7. The reliance, hence, is on Exhibit P12 notification, which declared a Buffer Zone around the National Park, carving out 109 square kilometres area from Mannarkkad Division and 39 square kilometres from Nilambur South Division. It is stated that such Buffer Zone has been created on the basis of the guidelines of the Central Government for declaration of ecologically sensitive zone along the National Parks and Wildlife Sanctuaries as has been delineated in Exhibit P11. The State has a further contention, relying on Exhibit R3 (b) produced along with the counter affidavit filed by the 3rd respondent, that, activities within 10 Kms. from the boundaries

of National Parks and Wildlife Sanctuaries require an environmental clearance for all projects that fall within the said boundary. This is also said to be in pursuance of the order of the Hon'ble Supreme Court in W.P.(Civil) No.460 of 2004.

8. The order dated 04.12.2006 of the Hon'ble Supreme Court in Writ Petition No.460 of 2004, is reported in [2011] 15 SCC 791 [*Goa Foundation v. Union of India*]. Therein there was merely a direction to the Ministry of Environment and Forests [MoEF] to give an opportunity to all States or Union Territories before the decision taken on 21.01.2002 was implemented. The decision dated 21.01.2002 is produced at Exhibit P11, which is the "Guidelines for Declaration of Eco-sensitive Zones around National Parks and Wildlife Sanctuaries". The said decision is taken at the XXI meeting of the Indian Board for Wildlife held on 21.01.2002, wherein the "Wildlife Conservation Strategy-2002" was adopted. The said strategy envisaged that lands falling within 10 Kms. of the boundaries of National Parks and Sanctuaries should be notified as eco-fragile zones under Section 3(v) of the

Environment (Protection) Act, 1986 and Rule 5 sub-rules (viii) and (x) of the Environment (Protection) Rules, 1986.

9. It is to be immediately noticed that the afore-cited order of the Hon'ble Supreme Court does not speak of implementation as such; but, however, merely directs the Ministry to give a final opportunity to the States/Union Territories to respond to the proposal. Obviously the States had objected to the same; but the matter was pending consideration before the Central Government; and the Hon'ble Supreme Court had merely stated that if a decision was not taken, then Their Lordships would consider passing orders for implementation of the said decision.

10. Further, subsequently the Hon'ble Supreme Court had disposed of the case by decision reported in *Goa Foundation v. Union of India* [2014] 6 SCC 590], wherein the afore-cited order of the Hon'ble Supreme Court was specifically referred. In paragraph 42 of the said judgment, the Hon'ble Supreme Court found that even by order dated 04.08.2006 in *T.N.Godavarman Thirumulpad v. Union of India* [(2010) 13 SCC

740], the Supreme Court, considering the question of grant of Temporary Working Permits for mining activities in National Parks, Sanctuaries and forest areas, directed that Temporary Working Permits shall be granted only where the conditions stipulated therein are satisfied. The order of the Supreme Court dated 04.08.2006 was found to clearly stipulate that Temporary Working Permits should not result in any mining activities being carried on within the safety zones around a National Park or Wildlife Sanctuary, which was declared to be 1 Km., as an interim measure. The order dated 04.08.2006 having not been varied, it was also found that the order dated 04.12.2006 in *Goa Foundation (supra)* did not prohibit any mining activity within 10 Kms. distance from the boundaries of the National Park or Wildlife Sanctuary. It was specifically found that the said order did not direct implementation of the decision taken on 21.02.2002 (Exhibit P11), to notify areas within 10 Kms. of the boundaries of National Parks or Wildlife Sanctuaries as eco-sensitive area. The Ministry of Environment was merely directed to take a final decision on the same after hearing the

States/Union Territories to respond to the proposal and also to refer the matter to the Standing Committee of National Board for Wildlife. The Central Government was found to have powers under Rule 5 of the Environmental Protection Rules, 1986 to prohibit carrying on of mining operations in areas which are proximate to National Parks or Wildlife Sanctuaries, after looking into the factors listed out in the said Rules. Unless the Central Government exercises its powers as provided in the Rules, it was found that no prohibition as such could be imposed to carrying on a mining activity beyond 1 Km. of the boundaries of the National Parks or Wildlife Sanctuaries.

11. It is also to be noticed that the Ministry of Environment and Forests has subsequently brought out a draft notification as S.O.733(E) dated 10.03.2014, specifically specifying the eco-sensitive area in the State of Kerala on the western ghats; as the Western Ghats Ecologically Sensitive Area. The ESA demarcation has been made by the Kerala Government itself and the same has been approved by the Ministry of Environment and Forests. With respect to the other

States, through which the western ghats traverse, being Gujarat, Maharashtra, Goa, Karnataka and Tamil Nadu, the Government has brought out a draft notification, S.O.2435(E) dated 04.09.2015. Paragraph 2(2) of both the said notifications read as under:

“2(2) The Eco-Sensitive Area in the State of Kerala is spread over of an area of 9993.7 sq.km., which includes 9107 sq.km. of forest area and 886.7 sq.km. of non-forest area and the boundary and description of Eco-Sensitive Area and the village-wise details of Eco-sensitive area proposed by the State Government are available on the website of the Kerala State Biodiversity Board”.

12. The said notifications also does not specifically prohibit the mineral water manufacturing industry and has provided for the “Red” category industries by Annexure D which are prohibited in the ecologically sensitive areas. The said notification also speaks of “Orange” category industries as specified by the Central Pollution Control Board or State Pollution Control Board, which are to be allowed with strict

compliance of environmental regulations. Hence, there are industries which are prohibited, which fall under “Red” category, and there are industries which are regulated, called “Orange” category. Though there is no specific reference to “Green” category industries, the categorisation has been based on the Rules brought out by the Ministry of Environment and Forests (MoEF) (now renamed as Ministry of Environment, Forests and Climate Change).

13. In the present case, the activity carried on is not a mining activity and the same is an industry manufacturing mineral water, which, according to the petitioner, is a “Green Category” industry, which does not require any environmental clearance. The specific clause in Exhibit R3(b), relied on by the Government, refers to an Office Memorandum dated 02.12.2009. The same has been produced before this Court, across the Bar, by the petitioner. The Office Memorandum dated 02.12.2009 is concerned with “procedure for considering of proposals for grant of environmental clearance under EIA Notification, 2006, which involve forest land and or wildlife

habitat". After referring to the order of the Supreme Court dated 04.12.2006, it is noticed in the Office Memorandum that:

"However, while granting environmental clearance to projects involving forest land, wildlife habitat (core zone of elephant/tiger reserve etc.) and or located within 10 Kms. of the National Park/Wildlife Sanctuary (at present the distance of 10 Km. has been taken in conformity with the order dated 4.12.2006 in writ petition No.460 of 2004 in the matter of Goa Foundation Vs. Union of India, a specific condition shall be stipulated that the environmental clearance is subject to their obtaining prior clearance from the forestry and Wildlife as applicable".

14. The reliance placed on the order of the Hon'ble Supreme Court dated 04.12.2006 is not tenable since the subsequent final judgment has found that the said order did not direct implementation of the general guidelines at Exhibit P11. Hence, the 10 Km. radius cannot be said to be operative as a statutory measure or even as a guideline. Again, even a reading of the Office Memorandum, as extracted above, would indicate that the environmental clearance from the National Board for Wildlife would be required only in cases where it is

applicable. The MoEF of the Central Government as per order dated 20.12.1999 brought out Rules called “the Prevention and Control of Pollution (Uniform Consent Procedure) Rules, 1999, wherein Rule 12, Categorisation of Industries, is referred to. Such categorisation has to be made into 'Red', 'Orange' and 'Green' categories as given in Schedule-VIII for the purposes of consent management. In Schedule-VIII, Clause III category ‘B’ deals with “all those industries or processes which are not covered under the “Red” and/or “Orange” category. The illustrative list, containing almost 55 industries, includes “mineralised water” at item No.5. Hence, it has to be found that the Regulations, as presently exist, exempts industry concerned with mineralised water from an environmental clearance certificate. It is also to be found that, by Annexure-I of Exhibit P11 “commercial use of natural water resources, including ground water harvesting” has been included as item No.8, identifying such activity to be “regulated” as distinguished from “prohibited” and “permitted”. But, however, as noticed above, the guidelines were not implemented and draft

notifications as cited above have been brought out for the specific area around Western Ghats. The notification at Exhibit P12, declaring the area around the Silent Valley Park as a Buffer Zone cannot hence be relied on to interdict the operation of the industry carrying on production of mineral water. The notifications, S.O.733(E) and S.O.2435(E), now brought out also does not prohibit the operation of a “Green Category” industry in the ESA.

15. The additional respondents, however, have a further contention with respect to the extraction of ground water, which cannot be permitted unless otherwise than under the Kerala Ground Water (Control and Regulation) Act, 2002. The specific case of the petitioner is that the Ground Water Act does not have any application, since Company uses only an open well with 1.5 H.P. motor, which is also endorsed by Exhibit P15 order of the Director of Industries and Commerce. Against this, Exhibit P4 order of the Factories and Boilers is pointed out, to contend that the petitioner has been granted permission to use 19.75 HP for the manufacturing activities carried on in the

factory. It is also to be noticed that even Exhibit P21, which is said to be a permission granted by the Ground Water Department, speaks of the capacity of the pump operated in the unit to be 2 HP and that too by three pumps of such capacity. In such circumstance, the additional respondents contend, it cannot at all be said that the petitioner could carry on the extraction of water, for commercial use, though for the manufacture of packaged mineral water without permission under the Act. Despite this Court having found that the Forest authorities cannot interdict the petitioner from carrying on such activity, which activity is carried on admittedly within 10 Kms. radius of the National Park, the grounds projected by the additional respondents assume some significance with respect to extraction of ground water.

16. As was noticed, the river passing adjacent to the petitioner's property, is within about 250 meters and caters to the wildlife in the National Park as also the tribal settlement. The area is also said to be afflicted with severe shortage of rainfall and, receiving far less rain than that received in the

other parts of the National Park. The depletion of ground water, hence, has to be looked at seriously from that angle, if not in the angle of the environmental protection laws. In this context, the decision of a Division Bench of this Court in *Pepsico India Holdings Pvt. Ltd. v. State of Kerala* [2007 (2) KLT 835] at paragraph 14 assumes significance. The same is extracted hereunder:

“We may however point out that the apprehension voiced by the Panchayat cannot be lost sight of and calls for the attention of the authorities functioning under the Kerala Ground Water (Control and Regulation) Act, 2000 as well as the Board constituted under the Development Act. Ground Water (Control and Regulation) Act has been enacted to provide for the conservation of ground water and for the regulation and control of its extraction and use in the State of Kerala. Right to live enshrined under Article 21 of the Constitution implies right to food, water etc. Providing drinking water is the concern of the Panchayat as well as the State. Since they have expressed their concern of depletion of ground water the authorities functioning under the Ground Water Act have a duty to examine whether petitioner is using excessive ground water so as to deplete the water source affecting the people who are living in the

Panchayat area. Panchayat as well as the authorities functioning under the Ground Water Act are equally concerned with the welfare of the people who are residing in the Panchayat area, a matter which can always be taken up by the Panchayat before the authorities functioning under the Ground Water Act”.

17. In the above circumstances, while upholding the decision of the learned Single Judge that the petitioner's industry, as the law stands now, does not require an environmental clearance, definitely the same has to be examined in the perspective of the Ground Water Act. It is seen from Exhibit P18 order that the District Collector had convened a meeting of Heads of Departments/Offices noticed therein before a decision was taken. As was noticed earlier, but for extracting the different versions of the petitioner and the Wildlife Warden, there is no reasoning discernible in Exhibit P18, for rejecting the claim of the petitioner. The finding that the objection of the Wildlife Warden has to be sustained, in addition to it being bereft of reasons, has been found to be not tenable by this Court looking at the precedents and the notification

under the Environment (Protection) Act.

18. But still, the issue of ground water depletion is still alive and we are of the opinion that when the matter is seized of by the District Collector, it would have been appropriate for the additional respondents, who were impleaded in the writ petition, to be permitted to address their grievances before the District Collector himself.

19. The Ground Water Act, 2002 was brought into force, to provide for the conservation of ground water and for regulation and control of its extraction and use in the State of Kerala. Section 3 of the Act speaks of constitution of a State Ground Water Authority and Section 6 confers on the Government the power to notify in the Gazette such areas, on the recommendation of the Authority, where there should be regulation in the extraction and use of ground water as found necessary in public interest. The Government has also been granted power to withdraw such notification if on the recommendation of the Authority it is found that the availability of ground water has increased in such notified areas. The grant

of permit to extract and use ground water is a power conferred on the Authority constituted by the Act under Section 7. A reading of sub-section (1) of Section 7 would indicate that such permit can be granted only for own use or for social purposes. In such circumstances, the District Collector would have to first look at whether the area where the petitioner's industry is situated is a notified area under the Ground Water Act and if it is so notified, necessarily no extraction or use of water can be made other than for own use or for social purposes; that too only under a permit granted under the Act. If the area is not notified, then the Ground Water Act would not be applicable and the remedy of the additional respondents would be to approach the Ground Water Authority, constituted under the Act, to recommend notification of the area.

20. In such circumstances, while setting aside Exhibit P18 and affirming the judgment of the learned Single Judge to the extent it finds the petitioner's manufacturing activity to require no environmental clearance certificate, we relegate the matter to the District Collector for consideration of

the issue under the Ground Water Act, 2002. In this context, it is also to be noticed that there is a contention raised, as discernible from the records, that the petitioner, in addition to extraction of water, carries on the manufacture of plastic bottles also in the industry. The same is denied by the petitioner. However, we cannot but observe that such a manufacturing activity is not permissible, even on the basis of the various licenses and permissions produced by the petitioner in the writ petition. Further, there is also said to be a chance of emission of effluents, which has to be looked into by the Pollution Control Board. In such circumstance, the District Collector is directed to re-convene a meeting of the Heads of Offices of the Ground Water Department, District Industries Centre, Grama Panchayat, Revenue as also the Pollution Control Board and if necessary, carry out inspection by appropriate authorities and then take a decision on the matter finally. The petitioner and the additional respondents or their authorised representative(s) are directed to file a representation before the District Collector within a period of one month and

the District Collector shall, after convening the meeting as directed hereinabove and after hearing the petitioner and the additional respondents, pass orders as directed herein above.

The Writ Appeal is dismissed with the above observation. Parties are left to suffer their respective costs.

Sd/-
Ashok Bhushan
Chief Justice

Sd/-
K.Vinod Chandran
Judge.

vku/-

[true copy]