

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

FRIDAY, THE 21ST DAY OF AUGUST 2015/30TH SRAVANA, 1937

WP(C).No. 27960 of 2011 (S)

PETITIONER(S):

- 1. YASH THOMAS MANNULLY, ADVOCATE,
S/O.THOMAS MANNUALLY, MANNUALLY HOUSE,
CHILAVANNOOR, COCHIN-682 020.**
- 2. V.N.HARIDAS, ADVOATE,
S/O.LATE V.T.NARAYANAN NAMBOODIRI, VADEKADATTHU,
THAMARAPPALLY MANA, MANALUR P.O., THRISSUR-680 617.**

**BY ADVS.SRI.V.M.SYAM KUMAR
SMT.KRIPA ELIZABETH MATHEWS**

RESPONDENT(S):

- 1. UNION OF INDIA, REPRESENTED BY THE CABINET
SECRETARY, GOVERNMENT OF INDIA, NEW DELHI-110 001.**
- 2. DEPARTMENT OF ATOMIC ENERGY,
REPRESENTED BY ITS SECRETARY,
DEPARTMENT OF ATOMIC ENERGY,
ANUSAKTHI BHAVAN, CSM MARGE, MUMBAI-400 001.**
- 3. ATOMIC ENERGY REGULATORY BOARD,
REPRESENTED BY ITS CHARIMAN, NIYAMAK BHAVAN,
ANUSAKTHI NAGAR, MUMBAI-400 094.**
- *4. NUCLEAR POWER CORPORATION OF INDIA LTD,
REPRESENTED BY ITS CHAIRMAN & MANAING DIRECTOR,
ANUSAKTHI NAGAR, MUMBAI-400 094.**

***R4 IS REMOVED FROM PARTY ARRAY VIDE SUO MOTU
ORDER DATED 21.10.2011 IN WP(C).**

R1 TO R3 BYSRI.N.NAGARESH, A S G

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 21-08-2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

mbr/

WP(C).No. 27960 of 2011 (S)

APPENDIX

PETITIONERS' EXHIBITS:

EXT. P1 : COPY OF THE CONVENTION ON SUPPLEMENTARY COMPENSATION
 FOR NUCLEAR DAMAGE OF 1997.

RESPONDENTS' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

mbr/

ASHOK BHUSHAN, CJ

&

A.M.SHAFFIQUE, J.

W.P.C.No.27960 of 2011

Dated this the 21st day of August 2015

J U D G M E N T

Shaffique, J

This public interest litigation is filed challenging the constitutional validity of Sections 3(1), 4(2) and proviso, 4(4), 5, 6, 9(2), 15(2), 16(5), 18(b), 19, 20, 32(10), 35 and 38(1) of the Civil Liability for Nuclear Damage Act, 2010 (hereinafter referred as the Act).

2. Petitioners submit that the provisions aforementioned are ultra vires the Constitution of India as the same interfere with the right to life of the citizens guaranteed under Article 21 of the Constitution, violative of Article 14, being arbitrary and unreasonable and the provisions vest with the authorities unbridled powers without appropriate checks and balances.

3. It is contended that by virtue of Section 3(1) of the Act the duty of notifying a nuclear incident under the Act is vested with the third respondent, the Atomic Energy Regulatory Board (hereinafter referred to as the 'Board') which is constituted under

the Atomic Energy Act, 1962. It is contended that the Board being the sole regulator and enforcement agency for the use of atomic energy in India and the agency for giving consent for siting, construction, commissioning, operation and the decommissioning of nuclear and radiation facilities, it does not have the required independence as it comes within the organisational framework of the Department of atomic energy. It is stated that majority of the members of the Board are drawn from the Department of atomic energy under Government of India and there is conflict of interest arising from its various function, related to the use of nuclear energy in India. It is stated that substantial powers have been vested in a body without any checks and balances as the proviso to Section 3 indicates that no notification need be made regarding the nuclear incident if the board is satisfied that the gravity of risk involved in the nuclear incident is insignificant. It is stated that since no parameters are laid down by the Act as to how the satisfaction is to be exercised, such vesting of powers is per se arbitrary and contrary to the settled principles of rule of law which is a basic structure of the Constitution. Reference is also made to Section 9(1) of the Act to contend that no claim can be preferred

unless a notification is made by the Board which also indicates the arbitrary and unreasonable power conferred on the Board.

4. With reference to Section 4(2) it is contended that the provision reduces the liability of each operator from what has been specified under Section 6 of the Act, in cases where more than one operator causes nuclear damage. This provision by which liabilities of different operators are clubbed together in such a way that each offending operator need not pay to the highest extend of the limit fixed and all the operators together need only pay to the extent of the limit as fixed for a single operator, violates the rights guaranteed under Part III of the Constitution. Petitioners rely upon the judgment of the Supreme Court in **M.C.Mehta v. Union of India** [AIR 1987 SC 1086] in which the Supreme Court lays down the principle that when an enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost or any other expenditure arising on account of such a hazardous or inherently dangerous activities as appropriate item of its overheads. It is also contended that Section 5 of the Act, to the

extent it provides that the operator shall not be liable in certain circumstances and the limitation of liability specified in Section 6 is also unconstitutional.

5. Petitioners further point out that the time limitation under Sections 15(2) and 18(b) takes away the rights of future generations to obtain compensation for damages caused from a nuclear incident as the impact on future generations will not be known immediately.

6. Yet another contention is that there is no independence to Claims Commissioner as provided under Chapter III of the Act. The argument is that as per Section 10, it is possible for the Central Government to appoint an officer of the Government having specified qualifications as a Claims Commissioner. When the Government appoints a Government servant as Claims Commissioner it will amount to arbitrariness and also violates the doctrine of judicial independence, which is part of the basic structure of the Constitution of India as held in **P. Sampath Kumar v. Union of India** [(1987) 1 SCC 124]. It is stated that neither the Chief Justice of India nor Chief Justice of the respective High Courts is consulted in appointing Claims

Commissioner in terms of Chapter V of the Act and Section 38 (1) provides that if the Central Government considers it necessary or expedient to do so, it may dissolve the Commissioner. The argument is that there is no fixity of tenure for the Claims Commissioner and there is no independence as envisaged under law.

7. Another ground taken is regarding the finality to an award made by the Claims Commissioner and Nuclear Damage Claims Commissioner, excluding jurisdiction of the civil courts. It is contended that it violates the basic structure of judicial review.

8. Further Section 38(1) providing for untrammelled powers to Central Government for dissolving the Nuclear Damage Claims Commissioner is violative of Article 14 of the Constitution.

9. Statement is filed by the Assistant Solicitor General of India on behalf of the third respondent. They supported the vires of the Act. It is stated that the Board was established by President of India in exercise of the powers conferred by Section 27 of the Atomic Energy Act, 1962 to carry out certain regulatory and safety functions envisaged under Sections 16 (control of radioactive substances), 17 (special provisions to safety) and 23

(administration of the Factories Act), of the Atomic Energy Act, 1962. The Board is an ISO 9001-2008 certified organisation. The respondents also narrate the functions and responsibilities of the Board. It is stated that the Board has a full-time chairman, a full-time ex officio member and four part-time members. The Board has a full-time Secretary as well. The Board formulates the regulatory policies and decides on all important matters related to consent, the renewal of consents, enforcement actions, major incidents etc. The secretariat of the Board comprises of seven technical divisions and it has a safety research Institute at Kalpakkam. The Chairman of the Board has been identified as the competent authority under the rules framed under the Atomic Energy Act, 1962. Further it is stated that the Board has issued nearly 140 codes, standards, guides and manuals under various rules which are mandatory as per Atomic Energy (Radiation Protection) Rules, 2004. It is therefore submitted that the Board is a legally constituted regulatory body empowered to enforce safety-related provisions under the Atomic Energy Act and the Rules framed thereunder and it has been carrying out the mandate as per the stipulations in the code and the standards.

With reference to the challenge to Section 3 of the Act, it is stated that the Board prescribes the dose limits in India for occupational and radiation workers. The limit for annual dose limit for occupational worker is stricter than that recommended by International Commission of Radiological Protection. It is also stated that all nuclear incidents may not lead to situations where exposure from radiation can be considered as unacceptable. Therefore the regulatory body has been entrusted with the responsibility to judge the nuclear incident which can cause unacceptable radiation damage and accordingly those incidents will be notified. It is stated that currently there are around 217 Scientists and Engineers in the Board. All of the them have high academic qualifications and professional training. Over 50 of them have more than 15 years of experience in critical areas of nuclear and radiation technology. The Board's Advisory Committees have members from academic and research institutions, industries and Government agencies such as the Ministry of Environment and Forests, Central Electricity Authority, Central Boilers board. Among others the Board has eminent specialists as members and a final decision is taken after

considering the recommendation of the advisory committees. Board is also empowered to invite independent specialists for safety review. The technical support organisations such as Bhaba Atomic Research Centre analyse the scientific and engineering issues referred to them. It is therefore stated that the Board has adequate competence to review any analysis. It is also stated that a Bill has been placed in the Parliament for setting up of Nuclear Safety Regulatory Authority, which will subsume the existing activities of the Board. The respondent in the statement denied the fact that the provisions are unconstitutional and that absolute powers had been vested with the Central Government to interfere with the process of adjudication of liabilities as well.

10. Heard the learned counsel appearing for the petitioners and the Assistant Solicitor General of India appearing on behalf of the respondents.

11. In order to consider the issues raised by the petitioner it will be useful to refer to the respective provisions of the Act.

12. From the preamble, it is clear that the Act is promulgated to provide for civil liability for nuclear damage and prompt compensation to the victims of a nuclear incident through

a no-fault liability regime channeling liability to the operator, appointment of Claims Commissioner, establishment of Nuclear Damage Claims Commission and for matters connected therewith or incidental thereto.

13. Nuclear damage, nuclear incident and nuclear installation are defined in the Act as under:

"2(g) "nuclear damage" means-

(i) loss of life or personal injury (including immediate and long term health impact) to a person; or

(ii) loss of, or damage to, property, caused by or arising out of a nuclear incident, and includes each of the following to the extent notified by the Central Government;

(iii) any economic loss, arising from the loss or damage referred to in sub-clauses (i) or (ii) and not included in the claims made under those sub-clauses, if incurred by a person entitled to claim such loss or damage;

(iv) costs of measures of reinstatement of impaired environment caused by a nuclear incident, unless such impairment is insignificant, if such measures are actually taken or to be taken and not included in the claims made under sub-clause (ii);

(v) loss of income derived from an economic interest in any use or enjoyment of the environment, incurred as

a result of a significant impairment of that environment caused by a nuclear incident, and not included in the claims under sub-clause (ii);

(vi) the costs of preventive measures, and further loss or damage caused by such measures;

(vii) any other economic loss, other than the one caused by impairment of the environment referred to in sub-clauses (iv) and (v), in so far as it is permitted by the general law on civil liability in force in India and not claimed under any such law, in the case of sub-clauses (i) to (v) and (vii) above, to the extent the loss or damage arises out of, or results from, ionizing radiation emitted by any source of radiation inside a nuclear installation, or emitted from nuclear fuel or radioactive products or waste in, or of, nuclear material coming from, originating in, or sent to, a nuclear installation, whether so arising from the radioactive properties of such matter, or from a combination of radioactive properties with toxic, explosive or other hazardous properties of such matter;

2(i) "nuclear incident" means any occurrence or series of occurrences having the same origin which causes nuclear damage or, but only with respect to preventive measures, creates a grave and imminent threat of causing such damage;

(j) "nuclear installation" means-

(A) any nuclear reactor other than one with which a means of transport is equipped for use as a source of power, whether for propulsion thereof or for any other purpose;

(B) any facility using nuclear fuel for the production of nuclear material, or any facility for the processing of nuclear material, including re-processing of irradiated nuclear fuel; and

(C) any facility where nuclear material is stored (other than storage incidental to the carriage of such material).

Explanation.- *For the purpose of this clause, several nuclear installations of one operator which are located at the same site shall be considered as a single nuclear installation;"*

14. Chapter II of the Act deals with the liability for nuclear damage. Section 3 relates to notification of a nuclear incident by the Board. Section 3 reads as under:

"3. Atomic Energy Regulatory Board to notify nuclear incident

(1) The Atomic Energy Regulatory Board constituted under the Atomic Energy Act, 1962 shall, within a period of fifteen days from the date of occurrence of a nuclear incident, notify such nuclear incident:

Provided that where the Atomic Energy Regulatory Board is satisfied that the gravity of threat and risk involved in a nuclear incident is insignificant, it shall not be required to notify such nuclear incident."

The first contention raised is regarding independence of the Board. The Board is vested with the power to notify a nuclear incident within a period of 15 days from the date of occurrence of such an incident. The Board is constituted under section 27 of the Atomic Energy Act, 1962, which reads as under:

"27. Delegation of powers.- *The Central Government may, by order, direct that any power conferred or any duty imposed on it by this Act shall, in such circumstances and subject to such conditions as may be specified in the direction, be exercised or discharged also by-*

(a) such officer or authority subordinate to the Central Government, or

(b) such State Government or such officer or authority subordinate to a State Government as may be specified in the direction."

The Board being a statutory authority constituted under the Atomic Energy Act, to exercise such duties and powers as may be conferred on it, there is no reason to doubt the independence of

the said organisation. In fact the power to be exercised by the Central Government under the Act is delegated to the Board.

15. Another contention urged is that there are no standards or an objective evaluation of the factors to be considered in notifying a nuclear incident and the Board is the sole regulator and enforcement agency. A perusal of the counter statement would clarify the position. The Board functions based on specific standards and codes which are internationally accepted. Being such an expert body, it can prescribe its own methodology for deciding existence of nuclear damage. Therefore there is no basis for the above contention.

16. According to the petitioners, a claim for nuclear liability can be preferred by a person under the Act only in case of a nuclear damage arising out of nuclear incident and the Board is given power to notify nuclear incident, only when it is satisfied that the gravity of the threat and risk involved in a nuclear incident is significant. This, according to the petitioners, is an arbitrary power as without an incident being notified as a nuclear incident, the right to claim damages is not available. We do not think that there is any arbitrariness in the aforesaid provision.

First of all the statute deals with providing a mechanism to compensate, civil liability. A claim for damages can arise only if actual damage is suffered by a person. Compensation is payable only for the damages suffered. In an incident where a party to a claim has not suffered any loss at all, the question of grant of compensation does not arise. As stated in the counter statement all nuclear incidents may not lead to situations where exposure from radiation can be considered unacceptable. It is therefore for the Board, which is an expert agency, to consider whether any nuclear incident can cause unacceptable radiation damage or not. Only those incidents which may cause radiation damage can give rise to a claim for compensation. Hence the challenge to Section 3 of the Act is unsustainable.

17. The next contention is with reference to the limitation of liability. The relevant statutory provisions read as under:

“4. Liability of operator

(1) The operator of the nuclear installation shall be liable for nuclear damage caused by a nuclear incident -

.....

(2) Where more than one operator is liable for

nuclear damage, the liability of the operators so involved shall, in so far as the damage attributable to each operator is not separable, be joint and several:

Provided that the total liability of such operators shall not exceed the extent of liability specified under sub-Section (2) of Section 6.

Where several nuclear installations of one and the same operator are involved in a nuclear incident, such operator shall, in respect of each such nuclear installation, be liable to the extent of liability specified under sub- Section (2) of Section 6.

(4) The liability of the operator of the nuclear installation shall be strict and shall be based on the principle of no- fault liability.

Explanation.-

5. Operator not liable in certain circumstances

(1) An operator shall not be liable for any nuclear damage where such damage is caused by a nuclear incident directly due to-

- (i) a grave natural disaster of an exceptional character; or*
- (ii) an act of armed conflict, hostility, civil war, insurrection or terrorism.*

(2) An operator shall not be liable for any nuclear damage caused to-

(i) the nuclear installation itself and any other nuclear installation including a nuclear installation under construction, on the site where such installation is located; and

(ii) to any property on the same site which is used or to be used in connection with any such installation; or

(iii) to the means of transport upon which the nuclear material involved was carried at the time of nuclear incident:

Provided that any compensation liable to be paid by an operator for a nuclear damage shall not have the effect of reducing the amount of his liability in respect of any other claim for damage under any other law for the time being in force.

(3) Where any nuclear damage is suffered by a person on account of his own negligence or from his own acts of commission or omission, the operator shall not be liable to such person.

6. Limits of liability

(1) The maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights or such higher amount as the Central Government may specify by notification:

Provided that the Central Government may take additional measures, where necessary, if the

compensation to be awarded under this Act exceeds the amount specified under this sub-Section.

(2) The liability of an operator for each nuclear incident shall be-

(a) in respect of nuclear reactors having thermal power equal to or above ten MW, rupees one thousand five hundred crores;

(b) in respect of spent fuel reprocessing plants, rupees three hundred crores;

(c) in respect of the research reactors having thermal power below ten MW, fuel cycle facilities other than spent fuel reprocessing plants and transportation of nuclear materials, rupees one hundred crores:

Provided that the Central Government may review the amount of operator's liability from time to time and specify, by notification, a higher amount under this sub-Section:

Provided further that the amount of liability shall not include any interest or cost of proceedings.

7. Liability of Central Government

(1) The Central Government shall be liable for nuclear damage in respect of a nuclear incident,-

(a) where the liability exceeds the amount of liability of an operator specified under sub-Section (2) of Section 6, to the extent such liability exceeds such liability of the operator;

*(b) occurring in a nuclear installation owned by it; and
(c) occurring on account of causes specified in clauses
(i) and (ii) of sub-Section (1) of Section 5:*

Provided that the Central Government may, by notification, assume full liability for a nuclear installation not operated by it if it is of the opinion that it is necessary in public interest.

(2) For the purpose of meeting part of its liability under clause (a) or clause (c) of sub-Section (1), the Central Government may establish a fund to be called the Nuclear Liability Fund by charging such amount of levy from the operators, in such manner, as may be prescribed."

The first contention urged is with reference to the sharing of liability in terms of Section 4(2) of the Act. Such a situation arises only when there are more than one operator in the facility and the damage attributable to each operator is not separable. The proviso to Section 4(2) indicates that the liability of different operators shall not exceed the extent of liability specified under Section 6(2). Petitioner submits that the restriction of such liability is against the law laid down by the Supreme Court in **M.C.Mehta** (supra). Reference is made to Section 4(4) which indicates that the liability of the operator shall be strict and shall be based on

the principle of no-fault liability. Reference is also made to Section 5 of the Act which provides that the operator shall not be liable in certain circumstances. Apparently, as far as the claim for damages is concerned, there is no limitation of liability. Restrictions had been imposed only when several operators are involved and it may not be possible to find out as to which operator is responsible for the nuclear incident. Under such circumstances alone certain limits had been specified so that an unerring operator shall not become liable for the whole compensation. The rationale behind Section 5 also cannot be questioned, as such provisions are incorporated as force majeure clause which is incorporated in various enactments. Further limits of liability as mentioned in Section 6 of the Act is based on certain index which could be modified by the Central Government. That apart Section 7 clarifies the doubt expressed by the petitioners, in so far as the Central Government had undertaken the liability to pay any compensation over and above what is liable to be paid by the operator/ operators. Hence the said apprehension is baseless. We do not think that providing such statutory measures in the matter relating to circumstances which are not deducible

presently, can be called arbitrary or being in violation of Article 14 of the Constitution.

18. The next contention is in regard to appointment of Claims Commissioner, the finality attached to such orders. Section 9(2) of the Act, provides for appointment of Claims Commissioner for adjudicating a claim under the provisions of this Act. Section 9(2) reads as under:

“9(2): For the purposes of adjudicating upon claims for compensation in respect of nuclear damage, the Central Government shall, by notification, appoint one or more Claims Commissioners for such area, as may be specified in that notification.”

Qualifications for appointment as Claims Commissioner is provided under Section 10, which provides that the Claims Commissioner shall be or has been, a District Judge, or a person in the service of the Central Government and has held the post not below the rank of Additional Secretary to the Government of India or any other equivalent post in the Central Government. Sub section (4) of section 10 provides that the Claims Commissioner have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit. Section 16(5)

indicates that every award made under sub-Section (1) shall be final.

19. The contention is with reference to the independence of the Claims Commissioner. When a person is appointed as claims Commissioner he performs a statutory function and is expected to carry out the statutory duty in accordance with law and it cannot be stated that he might be acting to the dictates of the Central Government. Whether an order passed by the Claims Commissioner is justifiable or not can be decided only at the relevant time and it cannot be stated that the legislation is bad. That apart such orders passed are subject to judicial review by the High Court under article 226 of the Constitution of India. Hence this ground also fails.

20. Section 15 deals with the procedure for making application before Claims Commissioner. Petitioners impugn Section 15(2), in so far as it provides a period of limitation. Section 15(2) reads as under:

“15(2): Subject to the provisions of Section 18, every application under sub-Section (1) shall be made within a period of three years from the date of knowledge of

nuclear damage by the person suffering such damage.”

Further Section 18 states that the right to claim compensation for nuclear damage shall extinguish, if such claim is not made within a period of ten years, in the case of damage to property and twenty years, in the case of personal injury to any person, from the date of occurrence of the incident notified under sub-Section (1) of Section 3. Even in the absence of such a provision, the law of limitation applies to suit filed before a civil court. The same limitation period is specified under the present statute. In regard to the extinguishment of the claim, either 10 years or 20 years as the case may be, from the date of notifying the nuclear incident. The claim in fact has to be preferred within 3 years from the date of knowledge of the nuclear damage. Therefore sufficient flexibility has been provided under the Act, to prefer the claim. Law of limitation is a well accepted procedure, which is prescribed to ensure that claims are filed within a specified time. There is no infirmity to the said provisions warranting a declaration as prayed for.

21. It is argued that bar of jurisdiction of civil courts has

virtually taken away the valid right to approach the civil court. When a special Tribunal has been constituted and special rights had been given to persons who suffer damage on account of a nuclear incident, constituting such Special Tribunal cannot be stated to be arbitrary. Further civil courts may not be equipped to decide such complicated questions and a specialized tribunal may be required. The Supreme Court has upheld constitution of Special Tribunals for various purposes and in different enactments and therefore there is no reason to impugn the constitution of the Tribunal.

22. Section 19 provides for establishment of Nuclear Damage Claims Commission at the instance of the Central Government, in public interest if it is felt that such claims for such damage be adjudicated by the Commission instead of a Claims Commissioner. Sub section (10) states that every award made under sub-Section (6) shall be final. Section 35 deals with exclusion of jurisdiction of civil courts which reads as under:

“Save as otherwise provided in Section 46, no civil court (except the Supreme Court and a High Court exercising jurisdiction under articles 226 and 227 of

the Constitution) shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the Claims Commissioner or the Commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

By virtue of Section 38 Central Government is given the power to dissolve of Commission in certain circumstances. It is stated that if the Central Government is satisfied that the purpose for which the Commission established under Section 19 has served its purpose, or where the number of cases pending before such Commission is so less that it would not justify the cost of its continued function, or where it considers necessary or expedient to do so, the Central Government may, by notification, dissolve the Commission. It is evident from the above provision that, the Commission is appointed in public interest to consider specified claims, its functioning, therefore, is always subject to the decision of the Central Government. But, in so far as statutory powers are vested in the said Commission and the procedure is regulated by

the statute, there is no reason to doubt the independence of the Commission. Further, appointment of the Commission is in addition to the Claims Commissioner.

For the aforesaid reasons, we are not satisfied that the impugned enactment suffers from any infirmity, arbitrariness or that it violates Part III of the Constitution. Hence there being no merits in the writ petition, we dismiss the same.

(sd/-)
(ASHOK BHUSHAN, CHIEF JUSTICE)

(sd/-)
(A.M.SHAFFIQUE, JUDGE)

jsr

