

Arun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
PUBLIC INTEREST LITIGATION NO. 106 OF 2021

1. **VANASHAKTI,**
A Public Trust, registered under the provisions of the Bombay Public Trust Act 1950 having its office at Nandkumar Pawar House, Opp. Shri Jagannath Darshan Building, MD Kini Marg, Bhandup Village (East), Mumbai 400 042.
PAN No.: AECPD7849E
Email ID: stalin.vanashakti@gmail.com
Contact No.: 98202 32302
Yearly Income: Rs.15,81,401/-
2. **STALIN DAYANAND,**
Age 54 years, Project Director, Vanashakti, and having its office at Nandkumar Pawar House, Opp. Shri Jagannath Darshan Building, MD Kini Marg, Bhandup Village (East), Mumbai 400 042.
PAN No.: ABTV1057H
Email ID: stalin.vanashakti@gmail.com
Contact No.: 98202 32302
Yearly Income: Rs.9,00,000/-

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PETITIONERS

~ VERSUS ~

ARUN
RAMCHANDRA
SANKPAL

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ARUN
RAMCHANDRA
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1. **REVENUE AND FOREST DEPARTMENT,**
State of Maharashtra,
Through the Secretary (Forests), &
having its office at Mantralaya,
Mumbai 400 032.
2. **ADDITIONAL PRINCIPAL CHIEF CONSERVATOR OF FOREST AND MANGROVE CELL HEAD, MUMBAI,**
Office of the Addl. Principal Chief Conservator of Forests & Mangrove State of Maharashtra, having its office at Room No. 302, 3rd Floor, Wakefield House, Near Britannia Restaurant, Ballard Estate, Fort, Mumbai 400 001.
3. **MAHARASHTRA COASTAL ZONE MANAGEMENT AUTHORITY,**
Through its Chairperson, having its office at Environment Department, Room No. 217 (Annex), Mantralaya, Mumbai 400 032.
4. **DISTRICT COLLECTOR,**
Raigad District,
Office of the District Collector and Magistrate, Raigad, Near Heera Court Lake, Police Line, Alibaug, Maharashtra 402 201.
5. **OFFICE OF PRINCIPAL CHIEF CONSERVATOR OF FORESTS,**
MS Nagpur,
3rd Floor, Van Bhavan Ramgiri Road, Civil Lines, Nagpur 440 001.
6. **OFFICE OF CHIEF**

CONSERVATOR OF FORESTS,
Near Microwave Tower, Bara Bungalow
Area, Krishna Borker Marg, Kopri,
Thane (East),
Maharashtra 400 603
Mumbai 400 021.

7. **NATIONAL BOARD FOR
WILDLIFE,**
Through the Chairperson, Having its
office at Indira Paryavaran Bhavan,
Jorbagh Road,
New Delhi 110 003.
8. **MAHARASHTRA STATE
WILDLIFE BOARD,**
Office of the Principal Chief
Conservator of Forests (Wildlife),
MS Nagpur, 3rd Floor, Van Bhavan,
Ram Giri Road, Civil Lines,
Nagpur 440 001.
9. **NAVI MUMBAI SEZ PVT LTD,**
a company incorporated under the
Companies Act 1956 and having its
registered office at NMSEZ House,
Sector 10-B, Koper-Nahva Road, Near
Shivaji Nagar, Ulwe (West),
Navi Mumbai 410 206.
10. **CITY AND INDUSTRIAL
DEVELOPMENT CORPORATION
OF MAHARASHTRA LIMITED,**
Through its Managing Director &
having its office at CIDCO Bhavan,
CBD Belapur,
Navi Mumbai 400 614.
11. **UNION OF INDIA,**
Through the Ministry, Environment

and Forests & Climate Change & having
its office at Indira Paryavaran Bhavan,
Jorbagh Road,
New Delhi 110 003

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RESPONDENTS

APPEARANCES

FOR THE PETITIONERS	Mr Akash Rebello , <i>with Nupur Jalan, Zaman Ali, i/b Zaman Ali.</i>
FOR RESPONDENT NO 9	Dr Milind Sathe , Senior Advocate , <i>with Saket Mone, Rubin Vakil, Amey Nabar, Rishit Badiani, Ketan Dave & Gaurav H Gangal, i/b AS Dayal & Associates.</i>
FOR THE RESPONDENT- CIDCO	Mr Ravi Kadam , Senior Advocate , with GS Hegde , Senior Advocate , <i>Rohan Kadam, i/b PM Bhansali.</i>
FOR RESPONDENT- MCZMA	Ms Jaya Bagwe.
FOR RESPONDENT- UNION OF INDIA	Mr Parag Vyas , <i>with Ashutosh Mishra.</i>
FOR RESPONDENT- STATE	Ms MP Thakur , AGP.

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 25th January 2024

ORAL JUDGMENT (Per GS Patel J):-

1. This order disposes of the Public Interest Litigation (“**PIL**”) that is assigned to this Court. However, for the reasons that will follow, this is, we make it clear at the outset, not an assessment on merits. That is to say, we should not be misunderstood to have rejected the Petitioners’ contentions, nor accepted nor rejected, the contentions of the Respondents.

2. The matter arises this way.

3. The 1st Petitioner is a Public Trust. It is an environmental Non-Governmental Organisation (“**NGO**”) of which the 2nd Petitioner is the project director. The focus of this Petition is an area called the ‘Panje-Dongri Wetlands’. This is a substantial tract of land of 124 hectares or thereabouts. The Petition proceeds on the basis, supported by much material, that this entire area is unique from several environmental and ecological perspectives. To begin with, it is a wetland and that has one level of protection on its own. But it is also argued by Mr Rebello that this is a unique bird habitat. It is also the habitat for marine species other than birds that are typically found in wetlands.

4. Our concern at this stage is about the frame of the principal reliefs sought by the Petitioners. Prayer clause (a) was amended and it now reads as follows:

“(a) That this Hon’ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondents to take immediate steps for the conservation and protection of Panje-Dongri Wetlands comprising of 124 ha. as a unique bird habitat and as a

‘Protected Area’ under the Wildlife (Protection Act), 1972 and till such steps are taken, this Hon’ble Court be pleased to direct complete protection and conservation of Panje-Dongri Wetlands.”

5. Then there are the additional prayer clauses (b), (c) and (d). These read as follows:

“(b) That this Hon’ble Court be pleased to issue a writ of mandamus or any other appropriate writ order or direction directing Respondents to rigorously conserve and protect the entire Panje-Dongri Wetlands and prohibit any kind of construction, landfilling, blockage of tide water and reclamation thereof;

(c) That this Hon’ble Court be pleased to issue a writ of Mandamus or any other appropriate writ order or direction directing Respondents to install adequate safety measures by restricting movement of vehicles in the area, provide 24X7 CCTV cameras and deploy or assign permanent forest rangers/create Forest protection watch towers to protect and preserve Panje-Dongri Wetlands from any further risk of destruction;

(d) That this Hon’ble Court be pleased to issue a writ of mandamus or any other appropriate writ order or direction directing Respondents to modify the Coastal Zone Management Plan (CZMP) Maps and Development Plan of Navi Mumbai to suitably reflect the status of the entire Panje Wetlands as a Bird Sanctuary and a CRZ area.”

6. In the course of arguments, Mr Rebello has placed his case thus. He says that there is on facts incontrovertible material in regard to the situation at the site, i.e., that it fulfils all the requirements necessary for protection under the Wildlife Protection

Act 1972 (“**the WLP Act**”). What form that protection takes may be a matter of moulding relief in the discretion of the Court, but it cannot be gainsaid, submits Mr Rebello, that there is an extensive proliferation and density of bird and other wildlife that demands protection and is under threat by development proposals.

7. The land in question is within the jurisdictional area of City and Industrial Development Corporation of Maharashtra (“**CIDCO**”), a special planning authority in whom the land is vested. There is a private developer who has rights in respect of a portion of the land (we are told in collaboration with CIDCO). It may well be that the contention of the person entitled to the land relates to property rights. In any such contestation, therefore, a Writ Court would be asked to decide which should prevail over the other.

8. Having carefully considered the prayers, and, without looking at the rival material, we believe that there may be a clear difficulty in granting relief in the manner in which the prayers are presently cast. Despite that, given the width and breadth of writ jurisdiction, could we possibly mould the relief? It is our understanding that the exercise of moulding relief cannot be undertaken by a Court to grant something that is not contemplated by the statute at all. The concept of “moulding the relief” really involves adjusting a matter of detail to make a resultant order effective.

9. To appreciate the question, we turn to certain provisions of the WLP Act. We will take for our purposes of discussion today only two Sections, i.e., Section 18 as amended and Section 36A

added by an amendment of 2003. We do so because it was our understanding that Mr Rebello's submission was that the form of protection did not in itself matter significantly so long as there was some form of protection of the area as a bird and wildlife habitat and preventing commercial or other real estate development on it.

10. Section 18 and Section 36A of the WLP Act read as follows:

“18. Declaration of sanctuary

(1) **The State Government may, by notification, declare its intention to constitute any area other than an area comprised** within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment.

(2) The notification referred to in sub-section (1) shall specify, as nearly as possible, the situation and limits of such area.

Explanation: For the purposes of this section it shall sufficient to describe the area by roads, rivers, bridges or other well known or readily intelligible boundaries.

36A. Declaration and management of a conservation reserve

(1) **The State Government may, after having consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat:**

PROVIDED THAT where the conservation reserve includes any land owned by the Central Government, its prior concurrence shall be obtained before making such declaration.

(2) The provisions of sub-section (2) of section 18, sub-sections (2), (3) and (4) of section 27, sections 30, 32 and clauses (b) and (c) of section 33 shall, as far as may be, apply in relation to a conservation reserve as they apply in relation to a sanctuary.

11. This throws into focus the difficulty in our way. As we read it, Section 18(1) which deals with sanctuaries as part of Chapter IV of the WLP Act is purely within the remit of the executive. The Section says that the State Government *may* notify and thus declare its intention to constitute an area (except the excluded areas) as a sanctuary if it considers that such an area is of adequate ecological, faunal, floral, etc significance.

12. The two words here that will inform our discussion are the words “*may*” and the expression “*if it considers*”. Both speak to the subjective satisfaction of the State Government in exercise of its executive powers but on objective criteria. This branch of the law is well settled. That decision cannot be arbitrary. It cannot be whimsical. It cannot ignore relevant material. It cannot take into account irrelevant material. But whether the concerns or commercial concerns of a landholder are or are not material is perhaps an argument for another day. The point that Mr Rebello makes is, in our view, one that is best made before the decision-making authority.

13. To complete this part, Section 36A operates in a slightly different manner. It deals with a conservation reserve but here while the word used is still “*may*”, what is required is consultation with local communities and the purpose is slightly different, that is to say, to ensure contiguity with areas that are otherwise protected as national parks, sanctuaries, etc. These may provide what are known as wildlife corridors, buffer zones, and so on so that while these conservation reserves may not enjoy the full weight of national park or sanctuary protection, they are at the same time not entirely unprotected. Again, this is a factual determinant. The Petitioners would have to show that the Panje-Dongri Wetlands do fall and meet the requirements of Section 36A.

14. The most fundamental point, to our minds, is that we do not see how we can direct the State Government to take a decision, i.e., to exercise its discretion, *in a particular way* no matter how compelling the material before us might be. There may be treaties. There may be surveys. There may be studies. But these are surely factors that will weigh with the executive decision-making authority. They may weigh with the Court as well but that depends on the decision that is ultimately taken. This dividing line between what a Writ Court can do and what an Executive Court can do is well known to our jurisprudence. There are any number of judgments that deal with this.

15. Now, we do not have a decision by the State Government. The Petitioners have made representations. There is at least one school of thought that suggests that the exercise of such

discretionary power includes the power not to decide at all. In other words, it is always permissible to an executive to simply file a representation and not act on it.

16. We must address ourselves to at least this much. The reason is that we cannot and do not question the locus or bona fides of these Petitioners. They have over a period of several months brought before us in the form of compilations and other documents of very large amount of material. A quick overview in a few sentences will suffice. There is, to begin with, a reference to domestic statutes in regard to wetlands, wildlife, etc. Then there is a reference to international treaties and conventions to which India is a party or a signatory. The submission is that international treaty and convention obligations do not permit an executive to refuse to act. Those international obligations compel the executive to take a decision in such matters. That branch of the law is also well settled, and it has been applied in a range of situations including, perhaps most vividly, cases involving the protection of human rights, indigenous peoples, and so on. There is no real reason to see why international treaty/convention obligations in regard to biodiversity, ecology, environment, and so on should be less compelling for the purposes of a decision being taken. In another manner of speaking, we do not believe that doing nothing is an option.

17. Factually also, the Petitioners have brought before the Court a significant amount of material from what they say are reliable third-party sources such as the Bombay National History Society and others engaged with wildlife and bird protection. But Mr Rebello has

been at some pains to point out that it is not just the voice of outsiders. There is also an expression of support for this proposal that comes from within the Government itself and takes the form of an Affidavit filed by the Additional Principal Chief Conservator of Forests and Mangrove Cell Head at the time, the Principal Chief Conservator of Forest in Nagpur, and the Chief Conservator of Forests in Thane in reference to these very lands. What weight is to be attached to these, is again an issue on which we are expressing no opinion ourselves.

18. We return for a moment to Section 18, extracted above. It is true that this confers discretion on the State Government. But the discretion is by no means unfettered, unguided, or uncanalised. The Section itself tells us what are the factors that are to be borne in mind when considering whether an area should be notified as a sanctuary and when that process should be started. There has to be, in other words, substantial objective material to inform the decision one way or the other.

19. It is also, in our view, a question of balancing competing equities (we will not say interests because this is a PIL). There is the age-old debate of the conflict between development of any kind, i.e., a manual intervention and environmental protection. Many Courts have used the expression “balanced development”, but we dare say Mr Rebello would find it relatively easy to argue that the concept of balanced development is extremely malleable and changes from case to case. It is not an objective standard. Every intervention involves some form of environmental and ecological damage. The question is

what extent of intervention should be permitted or, conversely, how compelling a case for environmental protection needs to be made out to ensure statutory protection to the area in question.

20. We have little doubt that these are factors that any responsible decision-making authority will bear in mind. After all, this is not the first time that this Government is going about the business of considering an application or deciding what area should be a sanctuary, a tiger conservation area, or a national park. Maharashtra has its own complex of national parks, sanctuaries, and tiger conservation areas and the Government can surely be no stranger to the requirements or to the satisfaction necessary for such a declaration. But the point is that the satisfaction must be of the Government. We do not see, despite saying all of this, how a Writ Court can possibly compel the Government to decide this in a particular manner. We do not see how we can send a message to the Government that we are satisfied with the material and therefore the Government must now decide depending upon *our* satisfaction. That would literally put the administrative cart before the judicial horse. We are doing nothing of the kind.

21. Ms Thakur for the State Government tells us that a decision on a representation by the Petitioners (which we will clarify in the next few paragraphs) can be taken by the State Wetland Authority, and it will take the form of a recommendation. We make it clear that what we are concerned with is not whether this area is or is not a wetland. The authority is not concerned with this. The prayer of the Petition is much wider. We will take it at its broadest, that the area is

deserving of protection as a sanctuary. That necessarily involves an initial satisfaction in the Revenue and Forest Department (not the Wetland Authority). There will then follow a further decision making process but the initial satisfaction on the material by the Petitioners must be at least at the level of the Joint Secretary of Revenue and Forests if not higher in that Department.

22. As we said, we have only outlined some of the concerns of the Petitioners. We have not decided them. We should not be misunderstood to have expressed an opinion on the merits. We accept that there are contesting claims over this very area. It is for the Authority to decide how these are to be balanced and if so to what extent. To put this plainly, the claim of the Petitioners that this has a sufficient abundance of birds and other wildlife warranting its protection is seriously contested by CIDCO and by Navi Mumbai IIA Pvt Ltd.

23. We permit the Petitioners time of three weeks to submit an appropriately framed representation to the Joint Secretary of Revenue and Forests Department. That representation must be accompanied by a compilation of all relevant material. Copies must be sent to Navi Mumbai SEZ, IIA, and CIDCO through their present Advocates. Responses by CIDCO and Navi Mumbai SEZ, IIA will be filed within three weeks thereafter. The Joint Secretary (or any authority above), will consider those representations on merits. We do require that a brief hearing be afforded to both sides. We take the liberty of permitting concise written submissions for the convenience of the decision-making authority. We do not permit any

adjournments before the Authority except those that the authority itself thinks necessary.

24. But we do make it clear that since the matter comes to the authority from us it is not an acceptable answer to say that no decision can be taken. Either the representation must be accepted in whole or in part or it must be rejected. Inaction will not suffice. That is precisely what has brought the Petitioners here and it is to that limited extent that we believe our intervention is indeed called for. After all, as Mr Rebello puts it, what is being canvassed here is something far wider than the immediate commercial concerns of this or that entity or agency. There are larger overriding principles well established in our jurisprudence and recent developments in climate change, the principles of intergenerational equity and other established principles in environmental law, do not permit such representations to simply go unanswered. This is a submission we are inclined to accept. We believe it is our own jurisprudence that points in this direction. These decisions must be taken one way or the other.

25. We are not to be misunderstood as having directed any authority to decide these representations in a particular way. All contentions are expressly kept open. The decision is to be taken on merits without any regard at all to any previous orders that may have been passed in this Writ Petition. Obviously, the decision will have to be taken within a reasonable time. Having regard to the amount of material, we believe that the decision must be taken no longer than within eight weeks from the date of the last hearing before the

authority in question. All contentions of both sides in regard to the decision that follows are expressly kept open for appropriate proceedings.

26. The Public Interest Litigation is disposed of in these terms. In the facts and circumstances of the case, there will be no order as to costs.

(Kamal Khata, J)

(G. S. Patel, J)