Ramesh J. Tharkan and Arundhati Nayar Vs. State of Kerala and Ors.: 2007

by admin — last modified 2007-11-14 15:25

IN THE HIGH COURT OF KERALA AT ERNAKULAM

WP(C) No. 21006 of 2003(S)

Decided On: 09.01.2007

Appellants: **Ramesh J. Tharkan and Arundhati Nayar Vs.** Respondent: **State of Kerala and Ors.**

Hon'ble Judges:

V.K. Bali, C.J. and M. Ramachandran, J.

Subject: Environment

Acts/Rules/Orders:

Environment (Protection) Act, 1986 - Section 3(1) and 3(2); Kerala Panchayat Raj Act, 1999 - Section 218; Development Act; Constitution of India - Article 21; Coastal Zone Regulations

Cases Referred:

M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors. 1999 (6) SCC 464

JUDGMENT

M. Ramachandran, J.

1. The present writ petition had been preferred on 01-07-2003. Petitioners, who are residents of Konthuruthy, are pursuing profession as Architects. They are occupying

independent residential buildings in a serene and picturesque surrounding, facing backwaters, as the claim goes. The writ petition is filed espousing public interest, as according to them, indiscriminate and illegal reclamation and encroachment of Kayal lands in the adjoining Maradu Panchayat and other vantage points, if not prevented, may ultimately sound the death-knell to tourism and is likely to ecological imbalance irretraceable. They complain that the reclamation, mostly unauthorised, is there not only at Maradu, but almost in every other places surrounding the city, as persons have a fancy for encroachment of Kayal lands for a variety of reasons. It is their submission that at least after the notifications had been issued by the Ministry of Environment and Forests on 19-02-1991, coastal areas could not have been reclaimed except for permitted activities, and it is submitted that the named authorities have a duty for enforcement of the Regulations. But strangely they themselves are engaged in violating the norms, at times unknowingly, and on certain occasions, on extraneous considerations. Accordingly, it is prayed that necessary directions to prohibit the illegal reclamation of land and backwaters in the Cochin city and suburbs are to be directed to be issued.

2. Mr. Bechu Kurian Thomas, on behalf of the petitioners, had invited our attention to the circumstance in which the writ petition came to be filed. On the opposite bank of the backwaters, the petitioners could see during June, 2003 very hectic activities, and truck loads of sand and gravel were being dumped night and day. They had thereupon alerted the district administration about the reclamation process, as well as police authorities, the Corporation of Cochin as also the Grama Panchayat. Averments in the writ petition show that they were under the impression that these activities were at the instance of persons, who might be land-grabbers.

3. The picture given in the writ petition does indicate that they were unaware of the

identity of persons, who were engaged in such busy work and perhaps this was the reason for the petitioners to aver in paragraph 6 of the writ petition that:

the person who is mainly responsible for the reclamation has carried out several illegal reclamations in various parts of Cochin where he owns lands....These illegal activities are being carried out blatantly in collusion with the civic authorities....Reclamations are going on illegally in various areas of Konthuruthy, Maradu etc., and none of the respondents budge an inch even if they are intimated about the illegal activities.

Again in Ground D, it is stated that:

Clause 2(viii) of the notification prohibits reclamation of land other than for those purposes which are expressly provided arbitrary private reclamation of the backwaters is illegal and would result in degenerating the existing ecological balance of the region.

4. The petitioners have substantially relied on the notifications issued by the Ministry, issued under Section 3 (1) and 3(2)(v) of the Environment (Protection) Act, 1986. Referring to prohibited activities as coming under Clause 2, Mr. Bechu Kurian Thomas had invited our attention to Sub-clause (viii) thereof. Land reclamation, bunding or disturbing the natural course of sea water was objectionable, except those required for conservation or modernisation or expansion of ports, harbours, jetties, wharves, quays, slipways, bridges and sea-links and for other facilities that are essential for activities permissible under the notification or for control of coastal erosion and maintenance or clearing of waterways, channels and ports or for prevention of sandbars or for tidal regulators, storm water drains or for structures for prevention of salinity ingress and sweet water recharge. The permissible activities

as above itself were not to be carried out, if they were for a commercial purposes such as shopping and housing complexes, hotels and other activities. He had also referred to the absolute ban of construction activities in CRZ-1 except as specified in Annexure-I of the notification. With reference to Annexure-I, it is pointed out that Coastal Regulation Zones are classified. Among them, CRZ-1 Zones are specially protected being ecological sensitive. The site specifically referred to in Maradu Panchayat came within this zone. No new constructions were to be permitted excepting specified projects. The work therefore was objectionable, and they were expecting follow up action when the illegality had been brought to the attention of the District authorities.

5. Even otherwise, according to them, it was impermissible to denigrate water courses for private purposes and the conduct had to be viewed strictly and constructions were required to be prohibited/demolished. Writ Petition was filed thereafter finding inaction. When the matter came up for admission on 02-07-2003, counsel points out, this Court had directed the respondents to ensure that further reclamation activities are stopped. Interlocutory orders thereafter had been passed on other occasions, especially when the petitioners complained that the work of reclamation was going on unhampered. Further stringent directions were issued.

6. We may now note that during the course of adjudication it had come out that the reclamations specifically made the subject matter of the writ petition was not carried out at the instance of any private person. From the counter affidavits and statements filed, we find that it was a departmental work. But nevertheless we have to witness a situation where the governmental departments and the local bodies are functioning without even a semblance of co- ordination. It is not an encouraging situation.

7. In the affidavit filed by the 5th respondent-- Revenue Divisional Officer, Fort Cochi, it had been pleaded that they were not authorities under the Coastal Zone Regulations. Hence it may not be possible for them to take any action on the complaint lodged. Nevertheless, when this Court had issued interim orders, it is claimed that the Panchayat had been directed to stop the reclamation forthwith. It is further attempted to be illuminated that as per Section 218 of the Kerala Panchayat Raj Act, 1999 all public water courses, rivers, kayal (backwater) etc., and any land appurtenant thereto is vested and stood transferred to the Grama Panchayat. This apparently is suggested as a disclaimer as far as they are concerned. The reclamation of Kayal Puramboke does not require any permission under the provisions of the Kerala Land Utilisation Order, it is submitted. As per the report received, the Maradu Panchayat (third respondent) had already filled 3 cents of Kayal Puramboke as part of their Road Works Project. After the writ petition was filed, the Village Officer on 04-07-2003 had issued a letter to the Secretary of the Maradu Grama Panahayat requesting to stop any further works. The obvious attempt was to shunt away the responsibility.

8. The counter affidavit filed by the third respondent--Panchayat dated 26-09-2003 shows that the reclamation was not carried out on the instructions of the Panchayat. Their own enquiry revealed that the reclamation work is undertaken as included in the budget work of the State Government. It was for the purpose of formulating a bus terminal. Though 5 buses were plying on the route, for want of parking facilities buses were not reaching the terminal. It was on the basis of the representations submitted by the local public and the Panchayat Member, that the Government had sanctioned the widening of the PWD road, including construction of the terminal. The Panchayat had nothing to do with those works. The Superintending Engineer, Central Circle, PWD Aluva had called for tenders for the above work, and they had no hand

in any reclamation.

9. Further materials had come, in the form of a statement filed by the Assistant Executive Engineer, PWD Roads Sub Division, Ernakulam on 06-11-2006. For the first time, the responsibility of the work had been authored by somebody. It was stated as following:

It is submitted that the reclamation was necessitated due to lack of space available for the buses to turn back for return trip on the Nettoor-Panangad route and the administrative sanction for the work was obtained from the Chief Engineer, Thiruvananthapuram on 26-11-2002. The work was started on 4-3-2006 after hading over the site. The filling up for bus terminal was carried out at the north end of Nettoor and it was almost completed during July 2003. Stacking of rubble and dumping was also carried out for side protection of reclaimed land. The reclamation was proposed only up to the ground level of nearby land and this is only for turning and parking of the bus. No further constructions are proposed above the ground level and the work included in the budget provision for the year 2002-03 has been completed in all respects.

10. We may, at this juncture, also refer to an order passed by this Court on 15-11-2006, which could be extracted herein below:

We have heard arguments at some length. Considering the totality of the facts and circumstances of this case, we direct the learned District Collector, Ernakulam to give a report as to how much of land would be necessarily required for turning of the buses where reclamation of backwaters has already been done. The report shall be filed within three weeks from today.

11. Consequent to the above, a report is filed by the District Collector dated 01-12-2006. Reportedly the Assistant Executive Engineer and the Motor Vehicle Inspector had conducted a joint inspection and the total land required for terminal area for use of stage carriages was assessed as 21.201 cents.

12. The petitioners, after the above order, have filed an affidavit on 15-12-2006 pointing out that the affidavit filed by the 5th respondent dated 12-08-2003 would indicate that only 3 cents of Kayal alone had been reclaimed, but the subsequent reports showed that larger areas had been reclaimed. This obviously might be after the initial order was passed by this Court. The reclaimed area admeasures about 23 cents. This was also in violation of the orders passed by this Court. It had also been submitted that 'an area of more than 1 to 2 acres or more' have been reclaimed by private parties adjoining the reclamation site. Counsel for the petitioners submits that when the Government itself was prepared to violate the Regulations and go on with reclamations, it was perhaps natural that adjacent land owners also would be emboldened to engage in similar activities with a bit more zest. To substantiate their averments, petitioners have made available Ext.P5 series of photographs. They are claimed to be the additional reclamations carried out. However, the ownership details in respect of such investments and land filling were not possible to be obtained. It is asserted that the entire area reclaimed requires at least to be appropriated, and the course to be adopted would be to bring about status quo ante, in public interest.

13. Since we had averted to the essential contentions of the petitioners as well as the contesting respondents, we do not think it is necessary to go to any further details, but would attempt to dispose of the writ petition taking note of the scenario that is presented. Although I.A. No. 7953 of 2005 had been filed for impleading

additional respondents, notice was not taken to them. Likewise, a private person had got himself impleaded, claiming to be representative of the local interest, but at the time of final hearing there was no representation forthcoming from him.

14. When we examine the notifications issued from time to time by the Ministry of Environment and Forests, we have to observe that the petitioners are indeed on strong grounds. After the notification of 1991, we find that an expert committee had been constituted and on their reports, modifications were made in 1994 and 1997. This was also taking into account the difficulties faced by the local people and also for facilitating putting up of essential facilities, including structures, in the coastal zone. However, in the matter of reclamation from water logged area or kayal, no substantial change had been brought about. The notifications subsequently issued on 29-12-1998 and 12-04-2001 also could not have authorised reclamation excepting for essential needs. The activities permissible under the notification were for the control of coastal erosion and the like. The minutes of the meeting held on 19-06-1996 by the Task Force recorded that as far as the Kerala State was concerned, no reclamation of kayal would be permissible within CRZ areas.

15. In the present case, it is evident that as a routine developmental programme, reclamation work had been authorised by the Chief Engineer on 26-11-2001 forgetting and overlooking the above prohibition. Although there is a submission made on behalf of the petitioners that ignoring the prohibitory orders reclamation had been carried out, and the respondents have to be taken to task for such violation as well, we do not think the respondents herein were guilty of such lapses at least. The affidavit of the second petitioner dated 30-05-2005 reads as following:

It can be seen from the counter affidavit of the Panchayat that as reported by the

Tahsildar 3 cents of Kayal Puramboke land. As a matter of fact, about 12 cents of land would have been reclaimed earlier and now additionally about 10 to 15 cents would have been in all possibility be reclaimed.

16. Evidently, the report of the Village Officer that as on the date of the order only 3 cents had been reclaimed is a mistake. Existence of a mistake as pleaded by the Government Pleader cannot be overruled. Plus, the photographs, produced as Ext.P4 series appended to the writ petition, may lead us to conclude that an area far in excess of 3 cents had been filled up by gravel, and it was the position available well before the filing of the writ petition. Therefore, the question is how the matter has to be dealt with, since reclamation had come to be made by the time the writ petition was filed.

17. Learned Counsel for the petitioners thereupon invited our attention to the judgment of the Supreme Court in M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu and Ors. It was a case where the Court had found that the concerned Municipality had permitted unauthorised construction. The court had directed that the construction carried out required to be demolished. However, the question is whether such extreme steps require to be initiated. Mr. Bechu Kurian Thomas especially invited our attention to paragraph 44 of the judgment, where reference to other decided cases have been made, and the observations as shown below is seen to have been extracted:

The narrow consideration that a few crores of rupees have been spent on the construction cannot come into consideration when the construction is in clear violation of the Act, the Development Act and Article 21 of the Constitution. That crores of rupees have been spent is an argument which is advanced in every other

case of unauthorised construction.

There is no alternative to the construction which is unauthorised and illegal and is to be dismantled.

18. However, we find that the Court had made the observations on the basis that the Mahapalika could not be allowed to get the benefit from the illegality. The Court further found that the agreement of the Mahapalika with a private person was against the settled norms and was wholly illegal. It did not operate so as to benefit the public, as the building contractor was the prime beneficiary as they could have gained crores out of the deal.

19. But, that does not appear to be the case here, at least as far as the development carried out by the State Government. Certain amount of laxity requires to be applied, as may be permissible to be gathered from the judgment of the Apex Court. The works had been completed. There are no structures in the bus terminal and it is used as bus parking lot for general public purpose, which caters to primary needs. Of course the learned Counsel points out that if the need was so urgent, Government should have resorted to acquisition proceedings and should have kept away from resorting to reclamation. Normally, if the reclamation had not been carried out, the above course alone would have been permissible. Since developmental activities have been completed as early as in the year 2003 and it was intended to benefit the citizens of the underdeveloped area, in our discretionary jurisdiction, we think, the position available as on today requires to be maintained. Any directions for redoing the reclamation may lead to hazardous results and may be counter productive. Majesty of law requires to be upheld, but in that process realities cannot be altogether ignored. Commitment to the primary needs of the general public, at least

at certain occasions, compel the Court to adopt a course of conciliation, while adjudicating as to which course results in lesser evil. The land filling was irregular; we record our strong disapproval about it, but it was not a deliberate act of lawlessness. The authorities had not educated themselves about the legal provisions concerning the project. In the circumstances, we are of the view that although reclamation was in contravention of the regulations, at this point of time, demolition will not be in public interest.

20. But surely that is not the case with regard to the additional reclamations made and brought to our notice by photographs produced as Ext.P5 series. The decision of the Supreme Court, referred to earlier, squarely have application, as private enterprise should not be at public peril. It is strange to note that when prohibitory orders had been there even in respect of reclamation work carried at the instance of the State Government private persons have been able to stampede into area and do whatever they wished. It is equivalent to a situation where the watchful eye was constrained to confess that very pupil has been plundered away. Clause (4) of the Regulations provides that the State Government and such authorities, as may be designated for the purpose shall be responsible for monitoring the enforcement of the provisions of the notification in their respective jurisdiction. But interestingly it has turned out that the State authorities are ignorant of the provisions of the statute. They themselves have proceeded, as if a reclamation was normal and possible to be carried out, at their discretion without any proper consultation, authorisation or consent. An educative process ought to have been there and we leave it at that.

21. It might be essential that all reclamations after the notification of 1991 requires a proper accounting and scrutiny, especially done at the instance of private

individuals. Supreme Court has come to comment upon such conduct, condemning this as against public interest. The notified authorities, as among the respondents, are to ensure that reclaimed properties, as referred to in Ext.P5, at the instance of private individuals, are to be taken possession of and appropriately dealt with, after publishing a general notice. Nice principles of audi alteram partem may not be available to blatant violations of law, when public interest is at threat. No person will be entitled to enjoy or retain illgotten fruits obtained by violating the law of the land. The authorities also are to monitor activities of unauthorised constructions, encroachment or reclamation as required under the statute and come to prevent it by employing appropriate service as the situation might demand.

The Writ Petition is disposed of as above.