

Case Note: Case related to the power of Panchayat to regulate groundwater use in designated industrial areas.

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IN THE HIGH COURT OF KERALA

WP(C) No. 27334 of 2003(D)

Decided On: 10.04.2007

Appellants: **Pepsico India Holdings Pvt. Ltd.**

Vs.

Respondent: **State of Kerala and Ors.**

Hon'ble Judges:

K.S. Radhakrishnan, Acting C.J. and M.N. Krishnan, J.

Counsels:

For Appellant/Petitioner/Plaintiff: A.L. Somasryaji, Sr. Adv. and E.K. Nandakumar, A.K. Jayasankar Nambiar, Priya Mahesh and Priya Manjooran, Advs.

For Respondents/Defendant: M. Pathros Mathai, Sr. Adv., T.B. Hood, GP, Saji Varghese, Mariam Mathai, Kallada Sukumaran and K. Vijayamma, Advs.

Acts/Rules/Orders:

Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999 - Sections 2, 3, 4(1), 5, 5(2), 6, 7 and 10; Companies Act; Kerala Panchayat Raj Act, 1994 - Sections 1, 1(2), 4, 166, 182 and 243C; Constitution (73rd Amendment) Act, 1992; Constitution (74th Amendment) Act; Gujarat Industrial Development Act, 1962 - Sections 2 and 16; Gujarat Municipalities Act, 1963 - Section 264A; Gujarat Municipalities Act, 1964; Gujarat Municipalities (Amendment) Act, 1993; Kerala Ground Water (Control and Regulation) Act, 2000; Constitution of India - Articles 21, 243A, 243G and 243Q

Cases Referred:

Solapur MIDC Industries Association v. State of Maharashtra and Ors. (1996) 9 SCC 621; Manjapra Grama Panchayat v. State of Kerala 1996 (2) KLT 719; Action Council v. Benny Abraham 2001 (2) KLT 690

JUDGMENT

K.S. Radhakrishnan, Acting C.J.

1. The cardinal question to be considered in these cases is whether the second respondent Panchayat has got jurisdiction either to issue or cancel the licence granted to the petitioner for setting up the factory at Kanjikode situated in an industrial area

notified as Integrated Industrial Township, Palghat by the Government of Kerala vide SRO No. 730/ 01 issued by notification G.O. 672/2001/AD dated 24-7-2001 in exercise of the powers conferred by Clause (f) of Sections 2 and 5 of the Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999 (Act 5 of 2000), in short Development Act.

2. Petitioner is a private limited Company registered under the Companies Act engaged in the manufacture, bottling and sale of soft drinks like Pepsi, Mirinda. Seven Up etc., the factory of which is set up in the industrial area, Kanjikode. The petitioner company had made an application for the issue of licence for setting up of a factory in an industrial area through the Kerala State Industrial Development Corporation Limited (K.S.I.D.C.) to the Single Window Clearance State Board constituted under the Kerala Industrial Single Window Clearance Boards and Industrial Township Area Development Act, 1999 (in short "the Development Act"). The State Board after considering the application preferred by the petitioner directed the second respondent to grant necessary permission/industrial license to the petitioner for putting up the factory in the industrial area. The second respondent on receiving the recommendation from the State Board issued a license in favour of M/s ABMC for a period of five years from 2000-2001 to 2004-2005 evidenced by Ext. P4.

3. Petitioner has been carrying on the manufacturing process complying with all the statutory requirements and at no point of time they have violated any of the conditions in Ext. P4. Due to some public agitation against the functioning of the factory the petitioner had to move this Court for police protection and protection was granted by this Court as per order dated 20-01-2003. The second respondent later issued a notice No. A4 262/2000 to show cause why the licence should not be cancelled due to the allegation of over exploitation of ground water by the petitioners and the consequent shortage of drinking water. Ext. P5 is the notice dated 20-05-2003 served on the petitioners. Petitioner submitted a reply denying the allegation and also submitted that the Panchayat has no jurisdiction either to issue or cancel licence issued to the petitioner since the power to grant licence or to cancel the licence vests with the Board constituted under the Development Act, 1999. Petitioner also referred to the notification, G.O. No. 672/2001/AD dated 24-7-2001 notifying the area as an Integrated Industrial Township, Palghat and the petitioner's factory is situated in that area. Further it was also stated that the Government have constituted a Single Window Clearance Board for the said area known as "the Integrated Industrial Township Single Window Clearance Board", Palghat and powers are vested in that Board under the provisions of the Development Act.

4. Petitioner was however served with Order No. A4-353/2003 dated 22-08-2003 by the Panchayat cancelling the license. Aggrieved by the same petitioner has approached this Court by filing W.P.C. No. 27334 of 2003 seeking a writ of certiorari to quash ExtPIO order passed by the second respondent Panchayat and also for a direction to the second respondent to refrain from imposing any condition/restriction to the licence issued to the petitioner without the directions from the Single Window Clearance State Board constituted under the Development Act, 1999. Petitioner has also filed I.A. No. 3089 of 2007 seeking a declaration that the provisions of the Kerala Panchayat Raj Act, 1994 are not applicable to the Kanjikode unit of the petitioner and that the second respondent Panchayat does not have any administrative jurisdiction over the affairs of the Kanjikode unit of the petitioner.

5. Panchayat had accepted sanction to the petitioner company, vide order No. 242/2000 dated 5-5-2000 for the construction of building and installation of 2000 HP electric motor on the basis of application submitted by the company on 12-03-2000. The Company accordingly constructed the building for its factory and installed 2000 HP electric motor at the site. While so, the petitioner unit situated at Kanjikode was notified as an industrial area under the Integrated Industrial Township, Palghat with effect from 24-07-2001 by notification dated-24-07-2001. Since the area was declared as an industrial area, the provisions of the Kerala Panchayat Raj Act cease to have application to the industrial area in question by virtue of Sub-section (2) of Section 1 of the Kerala Panchayat Raj Act 1994 though at the time when the factory was set up the area was not declared as an industrial area. Petitioner submits that with effect from 24-07-2001 the second respondent Panchayat ceased to have any jurisdiction over the Kanjikode unit of the petitioner company by virtue of the express provisions of Section 1(2) of the Kerala Panchayat Raj Act, 1994. Petitioner was however served with Ext. P4 notice dated 20-04-2004 to show cause why steps shall not be taken to cancel Ext. P1 order granting permission to the petitioner to install 2000 HP electric motor on the ground that the petitioner has been indiscriminately extracting huge quantity of ground water thereby drying up a number of wells in and near the locality causing scarcity of drinking water in the Panchayat area. Petitioner replied to the said notice pointing out that the question as to whether Panchayat has got jurisdiction to proceed against the petitioner is already pending consideration before this Court in W.P.C. No. 27334 of 2003. Objection raised by the petitioner was however repelled and the Panchayat passed Ext. P6 order dated 15-09-2004 in exercise of the powers conferred under Section 182(iii) of the Kerala Panchayat Raj Act, 1994 cancelling the order according sanction for the installation of 2000 HP electric motor and direction was given to the Plant Engineer to dismantle the same. Aggrieved by the said order petitioner has filed W.P.C. No. 27736 of 2004 seeking a writ of certiorari to quash Ext. P6 and also for other consequential reliefs.

6. Panchayat has filed a detailed counter affidavit in both the cases maintaining the stand that it has got jurisdiction to cancel the license already granted and to revoke the sanction to install 2000 HP electric motor. Panchayat has maintained the stand that the Development Act, 1999 would not take away the rights of the Panchayat under the Kerala Panchayat Raj Act in the matter of issuance or cancellation of license. Further it was pointed out that Section 166 of the Kerala Panchayat Raj Act provides authority for the Panchayat for maintenance of traditional drinking water sources in the Panchayat as one of its mandatory duties to safeguard public interest. It is stated that the Panchayat Raj Act was enacted by the State Legislature consequent on the Constitution (Seventy third Amendment) Act, 1992 for securing a greater measure of participation of the people in planned development and under Article 243-G the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government. Further it is also stated that under Section 243C of the Kerala Panchayat Raj Act, the Panchayat is vested with the powers to implement and maintain water supply and sewage schemes within the Panchayat area. Panchayat pointed out that one of the important functions required to be discharged by the Grama Panchayats under the provisions of the Constitution of India read along with the Panchayat Raj Act is to ensure and maintain supply of pure drinking water to the people in the Panchayat area.

7. The third respondent, the Kerala State Single Window Clearance Board, has filed a detailed counter affidavit. It is stated therein that the petitioner's factory is established within the industrial area of the Integrated Industrial Township, Palakkad in exercise of the powers conferred by Clause (f) of Section 2 and of Section 5 of the Single Window Clearance Act. Consequently provisions of the Kerala Panchayat Raj Act are not applicable to the industrial area in question since it falls outside the purview of Section 1(2) of the Kerala Panchayat Raj Act. The power to grant license is exclusively conferred on the State Board by virtue of the Development Act, 1999 and the authorities are bound to act according to the Board's function under the Development Act, 1999.

8. We heard Senior Counsel Sri. A.L. Somayaji for the petitioners Sri. Kallada Sukumaran for the Panchayat, Senior Government Pleader Sri. T.B. Hood for the State and Senior Counsel Mr. M. Pathrose Mathai for the third respondent. Senior Counsel appearing for the petitioners has raised various contentions regarding the matters raised in the writ petitions and highlighted the various functions of the authority functioning under the Development Act. Counsel also referred to the decision of the apex court in Solapur MIDC Industries Association v. State of Maharashtra and Ors. Counsel appearing for the Panchayat Raj Act and stated that the reasons stated for cancellation of license do not justify the fact that there has been over exploitation of ground water by the petitioner company. In support of this contention counsel also made reference to the decision of this Court in Manjapra Grama Panchayat v. State of Kerala 1996 (2) KLT 719 and Action Council v. Benny Abraham 2001 (2) KLT 690.

9. Article 243-G states that subject to the provisions of the Constitution, the Legislature of a State may, by law, endow the Panchayats with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats at the appropriate level, subject to such conditions as may be specified therein with respect to the preparation of plans for economic development and social justice, the implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to the matters listed in the Eleventh Schedule. Eleventh Schedule contains 29 entries. Entry 3 relates to minor irrigation, water management and watershed development, drinking water and so on. By virtue of Article 243G the State enacted the Kerala Panchayat Raj Act, 1994. The Legislature in its wisdom excluded the areas which are within the limits of the Cantonments, Nagar Panchayats, Municipal Councils, Municipal Corporation and the Industrial areas of the State. We may extract the exclusion provision for easy reference.

(1) This Act may be called the Kerala Panchayat Raj Act, 1994.

(2) It extends to the whole of the State of Kerala except the areas which are within the limits of the Cantonments, Nagar Panchayats, Municipal Councils, Municipal Corporations and the Industrial areas of the State. Section 4 of the Act states that the Government shall, by notification in the gazette, constitute with effect from such date as specified in the notification, a "municipal councillor a smaller urban area and a Municipal Corporation for a larger urban area. Proviso to Section 1 of the Kerala Panchayat Raj Act states that it extends to the whole of the State of Kerala except the

areas which are within the limits of the Cantonments, Nagar Panchayats, Municipal Councils, Municipal Corporations and the industrial areas of the State. The term "industrial area" has not been defined in the Kerala Panchayat Raj Act and has been excluded from the purview of the Panchayat Raj Act. "Industrial area" has been defined in the Development Act (Act 5 of 2000). The Development Act was enacted to provide special provision for speedy issue of various licence clearances and certificates required for setting up of industrial undertaking in the State of Kerala and for the Constitution of Industrial Township Area Development Authorities and for matter connected therewith. Preamble of the Act says that it is necessary to make special provision to promote and assist the orderly establishment and rapid growth and development of industries in the State. For that purpose it is necessary to establish Single Window Clearance Boards at the State District and Industrial area level. Preamble of the Act also refers to Clause (1) of Article 243Q of the Constitution. Statement of objects and reasons states that the Government have given emphasis to a cluster based approach for the industrial growth of the State and have been taking a series of steps for establishing both general and sector specific Parks in the State with all necessary infrastructure. It is stated that it is hence vital that empowered Single Window Clearance Boards be set up in all such industrial areas so that the entrepreneurs can get a comprehensive package of assistance to set up units in the identified industrial areas. "Industrial area" has been defined in Section 2(f) of the Development Act, which reads as follows:

Industrial Area means any area in the State declared to be an industrial area by the Government by notification in the Gazette from time to time and includes industrial estates, development areas, development plots, mini industrial estates, industrial parks and growth centres.

In exercise of the powers conferred by Clause (f) of Sub-section (2) of Section 5 of the Development Act, the Government declared the Integrated Industrial Township; Palakkad to be an industrial area of the State and constituted a Single Window Clearance Board for the said area to be known as "Integrated Industrial Township Single Window Clearance Board." In the counter affidavit filed by the Executive Officer of the Kerala State Single Window Clearance Board constituted under the Development Act, 1999 it has been specifically stated that the petitioner's factory is established within the industrial area of the Integrated Industrial Township, Palakkad to an industrial area of the State and has also constituted a Single Window Clearance Board for the said area to be known as the Integrated Industrial Township Single Clearance Board, Palakkad in view of the Government notification dated 24-07-2001. We may in this connection refer to Section 3 of the Act, which is extracted below for easy reference.

3. State Board - (1) For the purpose of speedy issue of various licences, clearances, certificates required under various State enactments for setting up of industrial undertakings in the State, the Government may, by notification, constitute Single Window Clearance Board for the State to be called the Kerala State Single Window Clearance Board.

Government therefore by notification dated 24-07-2001 constituted integrated industrial township. It is that authority which has to deal with the various licence clearances or certificates required under the several State enactments for setting up small

scale or large scale industrial Township, Palakkad. Integrated Industrial Township Single Window Clearance Board is a body corporate by name of the Industrial Area for which it is constituted having perpetual succession and a common seal. Every Industrial Area Single Window Clearance Board shall consist of Principal Secretary to Government, Industries Department or his nominee, Collector of the district, Chief Executive of the Agency owning or managing the industrial area, District Officer of the State Pollution Control Board, District Officer of the Town Planning Department, District Medical Officer, District Officer, Factories and Boilers Inspectorate, Divisional Fire Force Officer, Divisional Forest Officer and so on. Representative of the local Panchayat are absent in the composition evidently because industrial area has been taken out of the purview of the Kerala Panchayat Raj Act, 1994. We may also refer to Section 6 of the Development Act which states that notwithstanding anything contained in any law for the time being in force all industrial undertakings being established or proposed to be established in industrial area shall be exempted from obtaining permits from Municipalities or Grama Panchayats Town Planning Department or Development Authorities for construction of buildings for starting an industrial undertaking. Section 7 dealing with the powers and functions of Industrial Area Boards states as follows:

Notwithstanding anything contained in any law for the time being in force, every person intending to establish an industrial undertaking or a small scale industrial undertaking in any of the notified industrial areas shall submit the application in the prescribed form to the designated authority of that industrial area for clearances or licences or certificates required under various State enactments together with the fee if any to be paid, under the respective enactment.

(2) The Industrial Area Board shall after complying the procedure prescribed in this behalf and within thirty days from the date of receipt of the application take a decision as-

(a) to recommend to the authority concerned, the issue of the licence or permission applied for without any modifications or with such modifications as it thinks to fit to make; or

(b) to refuse clearance if it is of the opinion that the proposed construction, establishment or installation is objectionable.

(3) The decision taken by the Industrial Areas Board shall be communicated to the applicant and the authority concerned by the designated authority of the Industrial Area Board.

We may in this connection refer to the definition of "District Board" contained in Section 2(c) of the Development Act. "District Board" means the District Single Window Clearance Board constituted under Sub-section (1) of Section 4 of the Act. District Boards have been constituted under various other State enactments. Every District Board shall consist of Collector of the District, General Manager, District Industries Centre of the District concerned, President of the Grama Panchayat concerned or Chairperson of the Municipality concerned in cases where license is required from the local bodies, District Officer of the State Pollution Control Board and so on. The Integrated Industrial Township, Palakkad has been declared as an

industrial area in exercise of the powers conferred by Section 5, which falls outside the purview of the Kerala Panchayat Raj Act, 1994. Consequently Panchayat cannot exercise any power to cancel the licence issued to the petitioner's factory, a power which is exclusively vested on the Board functioning under the Development Act.

10. Section 10 of the Development Act authorises the State Board, District Board or the Industrial Area Board to issue the clearances, licenses or certificates applied for in accordance with the recommendations of the State Board, District Board or Industrial Area Board. Panchayat has no say in the matter of issuing licence. Panchayat has passed a resolution on 15-5-2003 to cancel the licence to the petitioner company but it may be noted that the industrial establishments put up in the new industrial area are governed by the Development Act. Shortage in the availability of drinking water is a perennial problem, says the Panchayat. Panchayat can always bring this to the notice of the authorities constituted under the Development Act and that authority can also examine whether the industrial units are consuming excess water depleting water sources affecting the people.

11. Panchayat it may be noted has approached this Court by filing W.P.C. No. 8897 of 2004 challenging the constitutional validity of Section 1(2) of the Kerala Panchayat Raj Act, 1994 to the extent it excluded Nagar Panchayats, Municipal Council etc. and the petitioner company got impleaded as additional seventh respondent in the writ petition which was subsequently dismissed as withdrawn. Reference in this connection may be made to the decision of the apex court in Sali Gram Panchayat's case supra. That was a case where Grama Panchayat impugned the notifications as well as the resolutions issued by the State Government under Section 2(g) of the Gujarat Industrial Development Act, 1962 declaring certain lands of Village Saiji as Kalol Industrial Area. Section 16 gives power to the Government to issue notification by which it can declare that an industrial area as defined in the Gujarat Industrial Development Act, 1962 would also be a deemed notified area under the Gujarat Municipalities Act, 1963. With effect from 1-6-1993, the Constitution 73rd and 74th Amendments came into effect as a result of which parts IX and IX-A were introduced in the Constitution. Gujarat Municipalities Act was amended on 20-8-1993 in view of the insertion of Parts IX and IX-A in the Constitution, as a result of which an industrial area under the Gujarat Industrial Development Act, which is notified under Section 16 of the Gujarat Industrial Development Act, would become a notified area under the new Section 264-A of the Gujarat Municipalities Act and would mean an industrial township area under the proviso to Clause (1) of Article 243-A of the Constitution of India. Grama Panchayat contended that the notification issued under Section 16 of the Act is contrary to Parts IX and IX-A of the Constitution brought into force by the 73rd and 74th Amendments. The apex court held that once the area is deemed notified area under the Gujarat Municipalities Act, 1964 it is equated with an industrial township under Part IX-A of the Constitution where municipal services may be provided by industries. Hence the court took the view that there is no violation of any constitutional provisions of the Scheme. Facts of the above mentioned case may not directly apply to the instant case but the principle laid down by the apex court would support the plea of such exclusion as has been done in Sub-section (2) of Section 1 of the Kerala Panchayat Raj Act.

12. Panchayat in this case has raised a contention that excessive use of groundwater by the petitioner is creating acute water shortage in the area and under such

circumstances the Panchayat has taken steps to cancel the licence. Panchayat, in our view, has no jurisdiction in the matter of issue or renewal of licence to the petitioner's factory since the legislature in its wisdom has excluded the area in question from the purview of the Panchayat Raj Act. Courts cannot be blamed for this predicament, the legislature and the executive in their wisdom excluded the industrial area from the purview of the Kerala Panchayat Raj Act, with the result that the Panchayat cannot take steps under the Panchayat Raj Act.

13. 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 groundwater 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.

14. We have already found that the second respondent Panchayat has no jurisdiction under the Kerala Panchayat Raj Act in the matter of issue or cancellation of licence. Petitioner's industry is situated in an industrial area as notified by the Government in the

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