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# LEGAL IMPLICATIONS OF PLACHIMADA

## A CASE STUDY

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## INTRODUCTION

Plachimada is often cited as a prime example of corporate aggression over natural resources and the consequent denial of the rights of the people. It has also been portrayed as the fight against a multi national corporation by a small section of the local population in order to protect basic human rights, such as the right to drinking water and the right to livelihood. What happened in Plachimada is often raised in discussions about the state's actual record (as opposed to the position that the state ought to take) in the 'fight for basic human rights.' Plachimada, a small village in Kerala, became the centre of controversy after The Coca Cola Company set up a bottling plant there. The village became more famous (or infamous) after incidents of pollution and over extraction of groundwater by the Company, were reported by various organisations and the popular media.

Those who campaigned against Coca Cola's presence in Plachimada allege that the over-exploitation of groundwater by the company had caused the deterioration of groundwater, both in quality and quantity. These are very serious issues in a place like Plachimada where people depend extensively upon groundwater for domestic and agricultural purposes. In this context, the Plachimada controversy raises several legal questions.

Briefly, the case involves the question of right to life, the right to livelihood and the emerging jurisprudence of environmental law. But a micro level analysis reveals that the relevant legal framework is rendered complex due to the co-existence of some statutes, constitutional provisions and principles.

The first part of the paper briefly describes the geography and the socio-economic background of Plachimada. The second part analyses the legal and institutional framework applicable to the case. This part also examines how the government approached the case, which has already been presented before the Kerala High Court. The third part is an analysis of the case law. The Kerala government enacted the Kerala Ground Water (Control and Regulation) Act in 2002 but the Act was notified only in 2003. By this time the matter had already come before the Kerala High Court and therefore, this Act has not been applied by the High Court and is not applicable to the case now pending before the Supreme Court of India. Hence, in anticipation of the future of the case, the fourth part examines the arguments presented before the Supreme Court. Since the Kerala Ground water (Control and Regulation) Act is the statutory framework to prevent and control the situations like Plachimada in the future, an analysis of the Act is also included in the fourth part.

## I. THE BACKGROUND

Palakkad district in Kerala State where the Coca Cola plant is situated, is an important agricultural region for the state and is popularly known as the 'rice bowl of Kerala'. The whole area requires large quantities of water for irrigation purposes and depends heavily on canal irrigation and groundwater. Unfortunately, Palakkad district is in the rain shadow area of the Western Ghats and is a drought-prone area. The Hindustan Coca Cola Company set up a plant in this district in the year 2000. The plant occupies an area of around 34 acres of land. This land had been classified 'arable' by the Government of India. Quite naturally, the site of the plant is surrounded by a number of water reservoirs and canals built for irrigation.<sup>1</sup>

Plachimada village of Perumatty panchayat in Chittoor taluk is a small hamlet in Palakkad district. It is also home to several scheduled caste and scheduled tribe populations. The villagers are predominantly landless, illiterate, agricultural labourers. Almost 80 per cent of the population depends upon agriculture for their livelihood. Hence, it is most likely that, the location of an industrial plant, which consumes water heavily, in a socially and economically backward, in a region that is agricultural but drought prone would result in serious adverse implications to the life and the environment.

The people of Plachimada started to suffer adversities within six months after the Company started its activities. It was reported that the salinity and hardness of the water had risen. Apart from the increase in salinity and hardness, the water from some open wells and shallow bore wells nearby was alleged to have an extremely

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1 The site is located barely three kilometers to the north of the Meenakkara Dam reservoir and a few hundred meters west of the Kambalathara and Venkalakkayam water storage reservoirs. The Moolathara main canal of the Moolathara barrage passes less than ten metres north of the factory compound and the main Chittoor River runs very close to the Coca Cola plant.

unpleasant strong bitter taste. The people who used this brackish, bitter water complained of a variety of illnesses such as a burning sensation in the skin of the face; greasy, sticky hair; stomach disorders and skin deformities. It was also reported that a few wells in the nearby area had become dry due to the over extraction of groundwater by the Company. The insufficiency of water had also resulted in the decline of agricultural production. Consequently the local economy and life in the area was alleged to have been ruined.

The local people started their agitation against the Company within a year of the setting up of the Company's plant. Mylamma, a tribal woman, had organised the local community against the Company. Later, several non-governmental organisations and other sections of the mainstream society joined the agitation. Due to this hue and cry the Perumatty Grama Panchayat passed a resolution on 7 April 2003 refusing to renew the license given to the Company. This was the beginning of the legal battle. The matter came before the High Court of Kerala on two occasions and is now pending before the Supreme Court of India.

## II. LEGAL AND INSTITUTIONAL FRAMEWORK

This part of the paper focuses on the analysis of the statutory framework and the authorities constituted under the statutes applicable to the case. Often, law is seen as the solution to almost all problems in the society. But the Plachimada case study reveals that the mere existence of law is a very blunt-edged weapon. Equally important is the efficient implementation of the laws. This part of the paper examines the legal and institutional framework, which was in operation since the beginning of the problems in Plachimada. This part also examines the implementation of the legal framework and the flaws in it.

The Coca Cola Company started their operation in the year 2000 and the people's agitation against the Company began in 2002. Meanwhile, the Kerala legal system underwent a major change in 2002 through the enactment of the Kerala Ground Water (Control and Regulation) Act. But the said Act was not applicable as it was notified only in 2003. In the absence of a specific statutory framework, principles such as the public trust doctrine and the common law rule of uncontrolled right of the landowner over groundwater prevailed in the Plachimada case. These principles are discussed as part of the case law analysis.

### A. Analysis of Pollution Control Laws

This part of the paper examines how the laws (as they existed then) addressed the Plachimada issue and further, how and where did the laws go wrong? The object of this section is to analyse the pollution control laws and the way in which these laws have been implemented. An in-depth research is not necessary to come to the conclusion that there were quite a few legal provisions to prevent and control the pollution problems in Plachimada. The government and its agencies have failed to exercise their legal powers impartially and according to the newly emerging jurisprudence and the needs of contemporary society.

It has been rightly pointed out by the Supreme Court that the law is not always the problem. Often, it is the implementation of the law.<sup>2</sup> The Plachimada problem could have been solved with the existing laws. If the powers as per the legal provisions (as they existed) had been used in a proper and in a pro-environment manner, the Plachimada problem could have been avoided. The delay on the part of the government to notify the Ground Water Act of 2002 and its irresponsible approach to the implementation of the pollution control laws together resulted in grave injustice, the denial of the fundamental human rights of the people of Plachimada and irreparable damage to the environment.

The Water (Prevention and Control of Pollution) Act, 1974 (hereafter 'The Water Act'), the Environment Protection Act, 1986 (hereafter 'The EP Act') and the Hazardous Wastes (Management and Handling) Rule, 1989 as amended in 2003 (hereafter 'The Rule') are the main components of the legal framework that has been in operation since the beginning of the Plachimada problem. These legislations envisage mechanisms to ensure the quality of the water. Here 'quality' encompasses the quality of water for all its uses such as the domestic, agricultural and industrial.

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<sup>2</sup> *Research Foundation Science Technology Natural Resource Policy v Union of India*, Supreme Court of India, Writ Petition No. 657 of 1995, Order dated 14 October 2004, Paragraph 7, available at [http://www.scmc.info/sc\\_orders/supremecourtorder.rtf](http://www.scmc.info/sc_orders/supremecourtorder.rtf).

The central government enacted the Water Act with the object of the 'prevention and control' of water pollution and to 'maintain or restore' the 'wholesomeness' of water. The preamble of the Water Act gives an indication that the Act is meant for protecting and preserving the water in the larger interest of living and non-living organisms. The EP Act also sets forth the same philosophy in a comprehensive manner to cover whole ecosystems. It is expressly stated that the object of the EP Act is the 'protection and improvement' of the environment. Hence these environmental legislations provide the framework for the protection and preservation of the environment.

The word 'pollution' under the Water Act is defined broadly to include all the direct and indirect actions, which can render water harmful or injurious to the public health, safety or to the life of other organisms.<sup>3</sup> The authority constituted under the Water Act, the Pollution Control Board, is equipped with sufficient power to carry out the objectives of the Act, that is, the prevention and control of water pollution. The Water Act prescribes a two-tier institutional mechanism, one at the central level (hereafter 'central board') and the other at the state level (hereafter 'state board'). The EP Act also confers powers on the central and the state board to implement the Act. Therefore the powers and responsibilities of the pollution control board are very wide and it is the primary agency responsible for taking care of the environment as a whole.

The state board under the Water Act is empowered to enter and inspect any premises, conduct investigation and advise the state government with regard to the prevention, control or abatement of water pollution.<sup>4</sup> Moreover the state board has also the power to issue any order, which includes the order requiring any person concerned to construct sufficient mechanisms for the disposal of sewage and trade effluents or to modify, alter or extend any such existing system or to adopt such remedial measures as are necessary to prevent, control or abate water pollution. It also has the power to issue an order of closure, prohibition or regulation of industries.<sup>5</sup> The Water Act makes it mandatory for any industry likely to pollute water to obtain a license under the Act.<sup>6</sup>

Hence, the state board is responsible for taking all measures to prevent water pollution and provide appropriate remedies in cases of the occurrence of the pollution. The term 'appropriate remedy' includes compensation too. The Supreme Court in *Vellore Citizen's Welfare Forum v. Union of India* held that the polluter pays principle is implied in the environmental legislations of India.<sup>7</sup> In this context, the state board has also the power to take measures to compensate the victims of pollution and also to redress the environment.

The Water Act also provides a 'super power' to the central government and the central board. The central government and the central board are empowered to give direction to the state board and the latter is bound by such orders.<sup>8</sup> This is a form of 'reassurance' to make the state board exercise its powers under the Act. Hence, there are enough provisions to deal with issues such as Plachimada, if the authority or the government has a positive attitude towards the implementation of these laws.

The Rule has been enacted under the EP Act to specifically address the alarming problem of hazardous wastes. The Rule lays down detailed schedules containing the list of hazardous wastes to be treated as per the Rule. The hazardous wastes are also classified into different categories of toxicity and the Rule prescribes maximum allowable limit for comparatively less dangerous wastes.

The Rule requires only authorised dealers to deal with the hazardous wastes. The generator of the hazardous wastes is duty bound to give the authority (the Pollution Control Board) all the details about the waste. The generator is also required to obtain permission from the authority to handle, treat, transport and dispose of the waste.<sup>9</sup> The authority will grant the permission after examining whether the facilities are in compliance with the Rule or not. It is the duty of the authority to make sure that the concerned industry has sufficient mechanisms to treat the hazardous wastes so as to avoid harming public health, public safety and the environment. In the event that pollution does occur, the rule expressly places the liability upon the polluter to reinstate or restore the damaged element(s) of the environment. If the polluter fails, the authority has the power to order the polluter to deposit an estimated amount that will be adjusted towards the expenses.<sup>10</sup>

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3 The Water (Prevention and Control of Pollution) Act, 1974, Section 2(e), available at <http://www.ielrc.org/content/e7402.pdf>.

4 *Id.* Section 16(h).

5 *Id.* Sections 16(l) & 33A.

6 *Id.* Section 25.

7 (1996) 5 SCC 647, Paragraphs 11-13.

8 *See* The Water Act, note 3 above, Section 18.

9 Hazardous Wastes (Handling and Management) Rule, 1989, Rule 5, available at <http://envfor.nic.in/legis/hsm/hsm1.html>.

10 *Id.* Rule 16(2).

The legal framework gives the government the necessary powers to take appropriate actions in situations such as the Plachimada case. However the Pollution Control Board has acted in a very irresponsible manner in this case. The legal provisions have not been implemented properly. The inefficient and irresponsible responses of the Pollution Control Board are explained in the next section of the paper.

## B. Institutions: Powers and Failures

Mainly, there are two statutory bodies capable of dealing with issues such as Plachimada: the Kerala Pollution Control Board (state board) and the Kerala Groundwater Authority. The latter is the body created under the Kerala Ground Water (Control and Regulation Act), 2002 (hereafter the Ground Water Act). Unfortunately, the Ground Water Act was not in operation when the Plachimada issue raised its head. The Ground Water Department of the Kerala state has conducted some studies with regard to the groundwater depletion in Plachimada. Apart from that, the Panchayat also have powers to protect and preserve the water resources in order to safeguard the basic rights of the people.

Various non-governmental and governmental institutions have also conducted a number of studies regarding the problems of pollution and groundwater depletion in Plachimada.<sup>11</sup> As a part of governmental responses, the efforts taken by the Central Ground Water Board (CGWB), the Central Pollution Control Board (CPCB), the Kerala Pollution Control Board (KPCB), and the Kerala Ground Water Department (KGWD) are examined in detail. There are substantial differences between the nature, constitution and powers of the Panchayat and those of other institutions. Therefore, the powers of the Panchayat is analysed separately.<sup>12</sup>

The allegation of the Plachimada people was that there was a decline of water level in the wells and a decline in the quality of groundwater. The reports of the KGWD and CGWB concluded that the quality of groundwater in Plachimada does not require immediate governmental intervention. The KGWD report said that the water quality does ‘...not show an alarming result’.<sup>13</sup> But a close examination of the report presents a different picture. The KGWD report is very clear that three wells out of the 20 examined reveals problems with the quality of water. The CGWB report also contains similar observations, for instance: ‘...chemical constituent and EC of two wells have increased from 2890 to 4290 which are located in Vijayanagaram in the close vicinity of the plant’.<sup>14</sup> However, in the conclusion of both the reports, these observations (that three out of 20 wells were significantly polluted) were analysed as being negligible! At the same time the report expansively praised the water harvesting mechanisms in the premise of the Company. Though the reports found, at the least, a ‘few’ problems in quality, the reports concluded by saying that there was nothing to link the Company and the pollution.<sup>15</sup> In the meantime, the Primary Health Centre, Perumatty tested the water in the three wells and reported it as unsuitable for drinking purposes.<sup>16</sup>

Similar ‘irresponsibility’, if not criminal negligence, is apparent in the report regarding the decline of water level in the wells situating near to the Company. The CGWB came to the conclusion that there was no instance of the complete drying up of wells. At the same time the KGWD reported the number of dry wells as three.<sup>17</sup> Although the KGWD report says that while the reason for the decline of the groundwater level could be the ‘overdrafting’ of wells by the Company, it concluded that the major reason was low rainfall in the region. The expert committee

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11 The studies in Plachimada conducted by various non-governmental organisations are persuasive. Their work has proved to be very effective in creating international social mobilisation.

12 The Panchayat is a local governing body and its members are elected representatives of the people. The Pollution Control Board or the Groundwater Authority is a technical body and its members are mainly scientists and the bureaucrats.

13 Kerala Ground Water Department, Report on the Monitoring of Wells in and Around the Coca Cola Factory in Plachimada, Kanimari, Palakkad district (Kerala Ground Water Department, September, 2003).

14 Central Ground Water Board (CGWB), A Report on the Groundwater Conditions in and Around Coca Cola Beverages Private Limited Company, Plachimada Village, Palakkad District, Kerala (Thiruvananthapuram: CGWB, 2003).

15 After analysing the CGWB’s report, *Keraleeyam*, a Malayalam magazine pointed to the presence of high TDS, hardness, EC and high chloride content in the wells situated within hundred meter circumference from the Company. This element should have been an important one to decide the connection between the Company and the groundwater pollution in Plachimada. But CGWB has neglected this fact.

16 Letter dated 13-05-2003 by Medical Officer, Primary Health Centre, Perumatty to President, Grama Panchayat, Perumatty.

17 Both the studies were conducted in almost same period.

appointed by the Kerala High Court also shares this opinion. The expert committee, on the other hand, stated in its interim report that it was the excessive extraction of groundwater by the Company was responsible for adversely affecting the availability of the drinking water and the water for agricultural purposes. The interim report also stated that that certain health hazards and the environmental pollutants were also caused by the Company. But the expert committee turned round about by neglecting the facts of pollution problems in the final report. Even if the opinion of KGWD and CGWB is taken into account, several questions arise. How did the Company get the permission to operate in a low rainfall, drought prone, agricultural area? Why didn't the authorities consider the possible impact of the plant on the local people, local economy and the environment? Why didn't the authorities take actions immediately after finding incidents of pollution in Plachimada?

The irresponsibility and the attitudes (biased in favour of the big multinational companies) of the Kerala Government is very clear in a recent report jointly prepared by the KGWD and CGWB, and titled 'The Dynamic Ground Water Resources of Kerala as on March 2004'. The report is a reassessment of the groundwater resources and its present utilisation (block-wise) and also classifies the blocks as 'safe', 'critical' and 'over exploited.' It is based on this report that the five blocks including the Chittoor block have been declared 'over exploited'. Plachimada falls in the Chittoor block. The astonishing fact is that the report has left out one block out of the 152 blocks in the state and that block is Malampuzha block. The Kanjikode Industrial Estate and Puthussery Panchayat are in Malampuzha block. This is the place where Pepsi and a number of other water-reliant firms are operating and where Coca Cola proposes to move to as a last resort.<sup>18</sup> The reason given in the report for this omission is that Malampuzha block is a 'new' one and hence the required data is not available. However, Malampuzha block was formed in 1990 and the unavailability of data is not a credible claim!

The problem of pollution due to solid wastes in Plachimada came to international attention through the British Broadcasting Corporation (BBC) report. On 25 July 2003, the BBC reported the presence of heavy metals, lead and cadmium, in quantities higher than the approved limit in the sludge supplied by the Company, which was at the time claiming the sludge was a fertiliser.<sup>19</sup> The BBC report has also alleged that the Company had clandestinely dumped the sludge in the nearby river-bed. The BBC study shows that sludge supplied by the Company is dangerous to the health and it had no value as manure.<sup>20</sup> It is most likely that the repeated application of the sludge containing these toxic metals will undoubtedly lead to the contamination of surface and groundwater resources in the vicinity. The heavy dumping of the sludge in the agricultural fields had been reported by Jananeethi, a non-governmental Organisation in Kerala, in 2002.<sup>21</sup> The report's credibility was raised by the BBC report. This shows that the Company has been doing this illegal activity for a long time. Hence, the chances of water contamination are very high.

A study in this respect conducted by the Kerala State Pollution Control Board (KPCB) concludes that: 'the concentration of cadmium and other metals were found to be below the limit prescribed under the schedule 2 of the Hazardous Waste (Management and Handling) Rules, 1989 as amended in 2003 and hence the solid wastes generated in the Company will not come under the said rules'. But it is also clearly stated in the report that the presence of cadmium in the common Panchayat well is *double* the permissible limit and touches the permissible upper limit in another well. The KPCB's comment about this is a dumbfounding one: '...in the common Panchayat well could a small quantity of cadmium be detected'.<sup>22</sup> Later the KPCB sent a letter to the President of the Grama Panchayat in Perumatty informing the Panchayat that the water in the Panchayat well should not be used for drinking purposes.<sup>23</sup> The presence of dangerously high quantity of heavy metals in Panchayat well is a serious public health issue. In an economically backward area like Plachimada, the majority of the population is likely to depend upon the common Panchayat well. It is very unfortunate that the KPCB had neglected this issue in its report.

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18 See P.N. Venugopal, Coca Cola Moving out of Plachimada?, INDIA TOGETHER, 27 January 2006. available at <http://www.indiatogether.org/2006/jan/env-cokesaga.htm#continue>.

19 The transcribed version of the BBC report is on file with the author.

20 See also Kerala State Pollution Control Board, A Study Report on the Presence of Heavy Metals in Sludge Generated in the Factory of M/s Hindustan Coca Cola Beverages Pvt. Ltd., Palakkad (Thiruvananthapuram: Kerala State Pollution Control Board, September 2003).

21 Jananeethi, Report on the Amplitude of Environmental and Human Rights Ramifications by the HCCBPL at Plachimada (Thrissur: Jananeethi, July 2002) and Yuvajanvedi, Report on the Environmental and Social Problems Raised due to Coca Cola and Pepsi in Palakkad District, (Thiruvananthapuram: Yuvajanvedi, November 2002).

22 See Kerala State Pollution Control Board, note 20 above.

23 Letter PCB/PLKD/W-217/2001 dated 31-10-2003.

Another study conducted by the Central Pollution Control Board (CPCB) two months after the KPCB study reveals that the sludge from Effluent Treatment Plant (ETP) and the sludge supplied by the Company to farmers for use as fertiliser contains heavy metals like lead and cadmium in more than permissible limits. The CPCB's report warrants the sludge to be treated as per the Hazardous Waste (Management and Handling Rules) 1989, as amended in 2003. Consequently, the KPCB directed the Company to close the factory until it complies with the provisions of the Hazardous Waste (Management and Handling Rules), 1989 as amended in 2003.

The order issued by the KPCB is not a final solution for the Plachimada people and the environment. The closure order stands alive until the Company complies with the Rule. Apart from the conditional closure order, no attempt has been taken so far to measure the impact of the solid waste pollution on the people and the environment and to remedy it. It is unfortunate that the facts of the pollution have not come up as a matter to be decided in the Court either. The pollution problem should have been the background against which the Plachimada case was presented in the Court. Now the 'fate' of the Plachimada people depends upon the Supreme Court decision.

The unsatisfactory, ineffective and biased approach and responses of the government authorities raise several important legal questions. The pollution control laws are meant for maintaining and protecting the quality of the environment. The laws provide the power and other resources to the authorities constituted for this purpose. More specifically, the prevention, control and abatement of water pollution are an important responsibility under the existing law. This being the legal position, why did the investigations and the reports of the government authorities conclude that the Company is not responsible for the pollution and decline of groundwater in Plachimada? Why has the pollution in Plachimada not been investigated and remedied by the agencies of the government constituted for this purpose? Unfortunately, the Kerala High Court has not discussed any of these points in the Plachimada case.

The only authority that exercised its powers in favour of the Plachimada people is the Perumatty Grama Panchayat. But the Court has disapproved its action. In this context, the powers of the Panchayat in the Plachimada issue and the necessity to respect and implement the decentralisation principle based upon which the Panchayat possess the powers are discussed in the next section.

### C. The Role of the Panchayat

The decentralisation policy, as it stands now, has been introduced as a result of the 73<sup>rd</sup> and 74<sup>th</sup> constitutional amendment in 1992. It envisages the constitution of the Panchayat and devolution of power by the state to enable the Panchayat to act as a micro level unit of local self-governance. Consequently, the Kerala government enacted the Kerala Panchayat Raj Act in 1994 (hereafter the PR Act). The Panchayat derives its power from Article 243 read with 11<sup>th</sup> Schedule of the Constitution of India and the Panchayat Raj Act, 1994. The legal framework casts duty on the Panchayat to manage and regulate the minor irrigation, water management and the water development. These powers are granted for the welfare of the residents of the Panchayat.

The power of the Panchayat over the water sources in its jurisdiction is well recognised in the Act. The subjects 'minor irrigation, water management and water shed development' and 'drinking water' has been included in the Schedule of the powers and functions of the Panchayat.<sup>24</sup> The Act provides that all water resources, except the one passing through more than one Panchayat, shall consider as 'transferred to and absolutely vests' in the Panchayat.<sup>25</sup> The Act requires the factories and industries to obtain license from the Panchayat.<sup>26</sup> Further, the PR Act empowers the Panchayat to abate the nuisance created by any factory or industries in its jurisdiction.<sup>27</sup> A combined reading of all these provisions makes it clear that the Panchayat is powerful enough to maintain the water resources and to take necessary measures to abate the pollution problems in its jurisdiction. These powers are granted to the Panchayat for the protection of the public health and welfare. Therefore, the Panchayat has the power to take necessary actions to protect the right of the people to clean and safe drinking water.

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24 P.M.Bakshi, *The Constitution of India* (Delhi: Universal Law Publishing Co., 2006), Article 243G, Eleventh Schedule, Entry 3 & 11.

25 The Kerala Panchayat Raj Act, 1994, S. 218.

26 *Id.* Section 233A.

27 *Id.* Section 233.

The Perumatty Grama Panchayat has exercised the above mentioned powers against the Company in Plachimada and refused to renew the license granted to the Company. The action taken by the Panchayat has been questioned by the Company in the Kerala High Court. The single bench of the Kerala High Court had approved the powers of the Panchayat. But the division bench of the Kerala High Court has not discussed the circumstances in which the Panchayat had taken the questioned action. Moreover, the object of the decentralisation principle has been completely neglected by the division bench of Kerala High Court.<sup>28</sup>

The division bench of the Kerala High Court in the Plachimada case has neglected the ongoing legal transformation to empower the people on the basis of decentralisation principle. The High Court rejected the arguments based on the Panchayat's power and considered the private property rights as sacrosanct. Instead of giving decentralization a shot in the arm the High Court (the division bench) reverted to old principles and concepts in the legal system. The property rights of private companies have been given due respect by placing the right to clean drinking water and the right to livelihood of the public in peril. The way in which the Kerala High Court has approached the Plachimada issue is discussed in the next part.

### III. PLACHIMADA IN THE KERALA HIGH COURT

The Plachimada issue came before the Kerala High Court twice. But, the Kerala High Court decisions failed to take into account the major issues collectively. The Kerala High Court has neglected the important problems of pollution and violation of the right to drinking water and the right to livelihood of the people. These issues should have been addressed to provide the legal remedy to the Plachimada victims. This part of the case study concentrates on the case law discussion, which shows how the Plachimada issue had been presented in the Court and how the Kerala High Court had approached the case.

#### A. Background of the Case

The legal battle began when Perumatty Grama Panchayat (hereafter the Panchayat) decided not to renew the license of the factory by its resolution on 7 April 2003. In the light of the resolution, the secretary of the Panchayat issued an order dated 15 May 2003 cancelling the license granted to the Company. Excessive exploitation of the groundwater by the Company, consequential environmental problems and the drinking water scarcity were the reasons for the action taken by the Panchayat. The Company filed an appeal before the government against the decision of the Panchayat. The government, on appeal, ordered the Panchayat to constitute a team of experts from the departments of Ground Water and Public Health and the State Pollution Control Board to conduct a detailed investigation into the allegation and to take a decision based on the investigation report. The Panchayat filed a writ petition against the order of the government on the ground that the protection and preservation of the water resources is the mandatory duty of the Panchayat and the government has no authority to interfere with it. Hence the core question came before the High Court was with regard to the power of the Panchayat to protect and preserve the water resources in its jurisdiction. The pollution and its impact were not produced and discussed in the Court.

#### B. Principles in the Case

The power of the Panchayat to control the water resources (groundwater) in its jurisdiction was questioned before the Court. More specifically, the question is, whether the Panchayat has the power to control the use of groundwater existing in private property. As a matter of theoretical support, the Court discussed two principles, public trust

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<sup>28</sup> The object of the decentralisation principle is to empower the people. The vision of the principle is the people's participation in all levels and the consequent efficiency and accountability in governance. Therefore the devolution of power shall not, in any way, end up in empowering Panchayat, because Panchayat is also a part of the state. The transfer of power from one organ of the state to another does not make much difference and obviously the object of the decentralisation principle is not to make the state more and more powerful. The decentralisation principle supports respect for people's needs and their power instead of the traditional approach of the 'grand fathering' of the state. This underlying philosophy should be respected and followed in any question of allocation of natural resources like water.

doctrine and the common law rule of absolute proprietorship. In the first instance, the single bench of the Kerala High Court relied upon the public trust doctrine and decided in favour of the power of the Panchayat to control the use of the groundwater by the Company. The single bench upheld the action taken by the Panchayat for protecting the fundamental rights of the people. But the division bench in appeal decided in favour of the Company's right to extract groundwater from its property. The division bench denied the power of the Panchayat to control the right of the Company, as a property owner, to extract the groundwater from its property. A brief discussion of these principles is carried out here to avoid the explanation of the doctrine in the case law discussion.

### 1. *Public Trust Doctrine*

The basis of the doctrine emanates from the property relationship. By considering natural resources as a property, the doctrine describes the right of the State and the individuals over it. The preliminary object of the doctrine was to impose a restriction upon the power of the government to transfer certain common properties to private hands.<sup>29</sup> It can be assumed that the doctrine was rooted in ancient values and inherited from a line of principled economic reasoning. The origin of the concept was to provide public access to the waterways for commercial benefit, and their preservation was viewed as a factor to facilitate trade and establish communication lines among the states.<sup>30</sup> In result, the doctrine acted as a restriction upon the state in the dissipation of the common property. It was an effort to recognise and respect the people's common law right to access waterways (usufructuary right). Gradually, the scope of the doctrine expanded from 'access to all' to the 'preservation of all natural resources'.<sup>31</sup>

The public trust doctrine denotes the state's relationship with certain 'common property' and its citizens. The doctrine, as it stands now, relates to the nature of title, protection and use of the essential natural and cultural resources. The doctrine put a control over the government's power to transfer the natural resources to private hands. This theory is based on the notion of trusteeship. In this doctrine the state's title has not been interpreted as one of ownership but as a trustee. This means the state is duty bound to protect and use the natural resources by respecting the natural right of the individuals. Thus the principle can be defined as follows: 'the state which holds the natural waters as a trustee, is duty bound to distribute or utilise the waters in such a way does not violate the natural right to water of any individual or group and safe guards the interest of public and of ecology'.<sup>32</sup>

The public trust doctrine can be a basis of the power of the state to control the use of groundwater by the private individuals. It can also be a basis of the duty of the state to take measures for the protection and preservation of the natural resources for the present and future generations. The legal regulation of the use of the natural resources is necessary in the present context of environment that is deteriorating in quality and quantity. Hence, a discussion on whether the legal regulation of the use of the natural resources is valid or not, is irrelevant. What is relevant is the extent of the legal regulation, that is, the ways and means to ensure the sustainable use of the groundwater.

The single bench of the Kerala High Court in the Plachimada case has upheld this doctrine and held that the groundwater does not belong to any person. No one can claim the ownership over the groundwater and extract as much as s/he can merely because s/he is the owner of the land. It was also held that the state is duty bound to protect and preserve the groundwater for and on behalf of the general public. The decision of the single bench has been reversed by the division bench by relying upon the common law rule of absolute proprietorship, which is discussed in the next section.

### 2. *Common Law Jurisprudence on Ground Water*

One of the peculiar facts in the history of water law is the separate development of the doctrines governing the surface water sources-such as lakes and rivers- and that governing the groundwater. While land ownership is critical to both surface water and groundwater, the riparian rights in the case of surface water are usually subject

<sup>29</sup> *Illinois Central Railroad Company v Illinois*, 146 U.S. 387, 452 (1892).

<sup>30</sup> George Smith and Michael Sweeny, 'Public Trust Doctrine and Natural Law: Emanations within a Penumbra', 33 *Boston College Environmental Affairs Law Review* 307-344 (2006).

<sup>31</sup> For detailed discussion on origin and development of public trust doctrine see Joseph L. Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', 68 *Michigan Law Review* 471 (1970) and Carole M. Rose, 'Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age', 66 *Law and Contemporary Problems* 89 (2003); Cynthia L. Koehler, 'Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy', 22 *Ecology Law Quarterly* 541-589 (1995).

<sup>32</sup> Chhatrapati Singh, *Water Rights and Principles of Water Resource Management* 76 (Bombay: N.M.Tripathi Pvt. Ltd., 1991).

to the doctrine of reasonable use whereas groundwater has always been governed by the freewheeling rule of capture. Common law considers groundwater as part of the soil in which it exists. It is founded on the idea that a landowner should have dominion over the percolating groundwater that underlies his/her land in the same way that s/he has dominion over the other elements in his/her subsoil. Therefore, the common law rule permitted the landowner to extract any extent of groundwater, even though it is dangerous to his/her neighbours. The common law dismisses the problems caused by one person's extraction of the groundwater with the curt observation that such a result is '*damnum absque injuria*'.<sup>33</sup>

The historical reason for such an evolution of the rule is the lack of knowledge about groundwater hydrology.<sup>34</sup> When the mechanisms for tapping groundwater were not advanced, the chance of extraction of too much groundwater did not exist and as such was unlikely to cause any serious social problems which required mediation through the law. These reasons have now become obsolete. The science of hydrology is well-developed and now the processes involved in the recharge and discharge of groundwater and the quantity of water available in a region are matters within the realm of human knowledge. The existence and characteristics of groundwater is no longer a mystery. The availability of the powerful mechanical devices for drawing groundwater has also resulted in tilting the balance. The quality and quantity of groundwater have deteriorated due to the indiscriminate exploitation. This situation supports the need for mediation through law to regulate the use of groundwater.

The division bench of the Kerala High Court has not considered the reasons for the evolution of the proprietorship rule under the common law. The Court had relied upon the age-old and irrelevant principles and put the fundamental right to drinking water and the right to livelihood at peril. The Court has not considered the adverse impacts upon the environment because of its decision. The irrationality of the decision of the division bench is discussed in the next part of the paper.

## C. Case Law Analysis

The Plachimada Coca Cola case came before the High Court of Kerala questioning the authority of the Panchayat to order the closure of the factory on the ground that the Company's activities (over exploitation of groundwater and pollution due to the effluents) have resulted in an acute shortage of drinking water and in other environmental problems. Hence, the major question addressed by the Court was, whether the Grama Panchayat has the power to regulate the right of a private individual or a company to extract the groundwater from her or its land or not. The issue knocked the door of the Kerala High Court twice. The writ petition at first instance was decided by the single bench of the Kerala High Court and the appeal was decided by the division bench.

### 1. Single Bench Decision

The question considered by the single bench of the Kerala High Court was whether the decision of the Panchayat to cancel the license of the industrial unit and order its closure on the ground of excessive extraction of groundwater was legal and whether the intervention of the government in its appellate jurisdiction is sustainable.<sup>35</sup> The single bench mentioned the arguments raised by the Panchayat before the government, regarding the allegation of pollution caused by the industrial wastes generated by the company and the impurity of the products of the company. But the Court, while framing issues, had rejected these allegations. The Court reasoned its approach on the ground that: 'the panchayat is not competent to go into the quality of the beverages produced. It is for other appropriate

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33 The meaning of the maxim '*damnum absque injuria*' is damage without injury. The implication of the maxim is that the damage without any legal injury is not actionable. In the context of groundwater, even though the over extraction by one person cause damage to others, it does not amount to a legal injury and therefore it is not actionable.

34 *Roath v Driscoll*, 20 Conn. 533, 540 (1850) that, 'Each owner has an equal and complete right to the use of his land, and to the water, which is in it. Water combined with the earth, or passing through it, by percolation or by infiltration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless in the earth, is not, in the eye of law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights, and moves collaterally, by influences beyond our apprehension. These influences are secret, changeable and uncontrollable, we cannot subject them to the regulations of law, or build upon them a system of rules, as has been done with streams upon the surface.'

35 *Perumatty Grama Panchayat v State of Kerala*, High Court of Kerala, India, W.P. (C) No. 34292 of 2003, Judgement dated 16 December 2003, Paragraph 10.

authorities to look into such allegations. Regarding the pollution caused by industrial effluents, the panchayat can look into and take appropriate action in consultation with expert bodies under section 233 A of the Act (Kerala Panchayat Raj Act).<sup>36</sup>

In this context, the Panchayat and the Company had presented their parts in the Court. It has been argued on behalf of the Panchayat that the Panchayat is authorised to preserve water resources in its jurisdiction as per the Kerala Panchayat Raj Act. Therefore the closure order issued by the Panchayat was legitimately in the interest of the general public. Further, it was argued that the government could not dictate to a licensing authority as how it should work. On the whole, the Panchayat argued mainly on the basis of the discretionary and exclusive power of the Panchayat under the Constitution of India and the Kerala Panchayat Raj Act.

The Company presented its counter arguments on the basis of two points. First, it was argued that the government is the appellate authority under the Kerala Panchayat Raj Act and therefore the government is empowered to cancel the direction of the Panchayat. It is not proper for the Panchayat to challenge it. The company also justified the government's decision by arguing that the order against the company was a non-speaking order. The order was not supported by any authoritative reports or investigations. Secondly, it was argued that there was no statutory prohibition on digging of bore-wells at the time when the Company started production. Therefore, legally, there was no restriction upon the company to extract groundwater from its land.

In the light of the arguments raised by both the parties, the Court had invalidated the closure order issued by the Panchayat. It was held that the Panchayat was not authorised to issue a closure order on the basis of finding excessive extraction of groundwater by the Company. It was further held that, at best, the Panchayat could ask the company to stop the extraction from its jurisdiction and direct the company to find alternative sources.<sup>37</sup> Hence, the Court upheld the interference of the government to the extent in which it has disapproved the closure order issued by the Panchayat.

At the same time the Court answered the second question, that is, whether the Panchayat has the power to restrict or prohibit the extraction of groundwater, affirmatively. The Court has disapproved the argument made by the Company that in the absence of law the Company can extract any quantity of groundwater from its land by saying that these contentions are incompatible with the emerging environmental jurisprudence around Article 21 of the Indian Constitution.<sup>38</sup> It was held that:

Even in the absence of any law governing the groundwater, I am of the view that the Panchayat and the State are bound to protect the groundwater from excessive exploitation. In other words the groundwater under the land of second respondent (the company) does not belong to him. Normally, every landowner can draw a reasonable amount of water, which is necessary for his domestic use and also to meet the agricultural requirements. It is a customary right.<sup>39</sup>

The single bench has strongly relied upon the public trust doctrine as highlighted by the Supreme Court in the *M.C. Mehta* case.<sup>40</sup> It was held that being the trustee of the great wealth of the natural resources, it is the duty of the state to protect the groundwater resources against overexploitation. The inaction of the state in this regard will tantamount to the infringement of the constitutionally guaranteed right to life under Article 21 of the Constitution of India. The Court also found basis in the Kerala Panchayat Raj Act. It was held that 'the duty of the Panchayat can be correlated with its mandatory function No. 3 under the third schedule to Panchayat Raj Act namely, 'maintenance of traditional drinking water resources'.<sup>41</sup>

Based upon the above findings, it was decided that the Company should be restrained from excessive extraction of groundwater from its land. It was further held that the Company, like any other landowner, should be permitted to extract the groundwater, which must be equivalent to the water normally used for irrigating the crops in 34 acres of plot. The Panchayat was given the power to monitor and inspect the groundwater consumption of the Company.

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<sup>36</sup> *Id.* Paragraph 8.

<sup>37</sup> *Id.* Paragraph 12.

<sup>38</sup> *Id.* Paragraph 13.

<sup>39</sup> *Id.* Paragraph 13.

<sup>40</sup> *M.C.Mehta v Kamal Nath* (1997) 1 SCC 388.

<sup>41</sup> See Perumatty Grama Panchayat, note 35 above, Paragraph 13.

Summing up, the groundwater was held as national wealth and as a resource that belongs to the public. The Panchayat was held as the custodian of all natural water resources in its jurisdiction. The right of the individual to use the groundwater was made subject to the restrictions imposed by the State. In result, the decision is in tune with the present water law reforms through which the groundwater is being shifted from the individual to the governmental control.<sup>42</sup> The single bench decision also recognises the fundamental right (the right to life and the right to livelihood) of the individuals likely to be infringed by the over extraction of groundwater by a person or a company. Unfortunately, this decision has been reversed by the division bench of the Kerala High Court in *Perumattay Grama Panchayat v. State of Kerala*.<sup>43</sup> The division bench decision is discussed in the next section.

## 2. Division Bench Decision

Being aggrieved by the single bench decision, both the Panchayat and the Company had filed appeals. Apart from that there were other appeals in connection with the license issuing power of the Panchayat. Since all these matters are interlinked, the division bench considered and decided all the appeals together.<sup>44</sup>

In appeal, the Panchayat presented that it had no issues with the Company and was merely anxious about the miseries of the people. It was presented on behalf of the Panchayat that, if there are proper solutions for the scarcity of water and other environmental problems, the Panchayat would never object to an industry capable of providing employment and other development. At the same time the Company argued that the single bench had been wrong in saying that the groundwater in a piece of land does not belong to the owner of the land but the public.

The division bench accepted the contentions of the Company and stated that in the absence of a specific statute prohibiting the extraction of groundwater, a person has the right to extract the groundwater from his/her land. Such an extraction could not be considered illegal. In this context, the division bench stated that 'we do not find justification for upholding the finding of the learned judge (single bench) that the extraction of groundwater is illegal...we cannot endorse the finding that the company has no legal right to extract his wealth'.<sup>45</sup> The division bench also disapproved the reasoning of the single bench based on public trust doctrine and said that the abstract principles could not be the basis for the Court to deny basic rights.

The division bench also discredited the powers of the Panchayat under the Kerala Panchayat Raj Act that had been relied upon by the single bench. It was said that: 'even reference to the mandatory function referred to in the third schedule of the Panchayat Raj Act, namely 'maintenance of traditional drinking water resources' could not have been envisaged as preventing an owner of a well from extracting water there from as he wishes'.<sup>46</sup> The division bench recognised groundwater as a 'private water resource' and accepted the proposition of law that the landowner has 'proprietary right' over it. Based upon this premise it was held that 'the Panchayat had no ownership over such private water resources and in effect denying the proprietary rights of the occupier and the proposition of law laid down by the learned judge (single bench) is too wide for unqualified acceptance'.<sup>47</sup>

The division bench also considered and rejected the allegation of pollution and the quality problem of the cola. It was held that the Panchayat is ill equipped to examine the technical matters like that of pollution and the purity of the product of the Company. The division bench also rejected the Joint Parliamentary Committee (JPC) report on the purity of the cola on the ground that the JPC report had not referred to any samples collected from the factory in Plachimada.<sup>48</sup>

The division bench accepted the decision of the government regarding the constitution of an expert committee to investigate the matter. As a result an expert committee was constituted to study and investigate the problems. The expert committee submitted an interim and a final report before the Court. By accepting the facts of water scarcity in the area, the expert committee concluded that the reason could be the declining rainfall in the last several years. The committee had recorded the opinion that the unregulated withdrawal of groundwater from the wells within the factory complex and also outside had aggravated the water shortage but the report concluded by stating that the

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42 Philippe Cullet, 'Water Law Reforms- An Analysis of Recent Developments', 48 *Journal of Indian Law Institute* 206, 218 (2006).

43 Writ Appeal No. 17600 of 2004 (Y) per M.Ramachandran and K.P.Balachandran JJ (hereafter the division bench).

44 Writ Appeal No. 2125 of 2003, W.A. No. 215 of 2004, W.A. 1962 of 2003 and W.A. No. 12600 of 2004 decided on 7 April 2005.

45 *Id.* Paragraph 35.

46 *Id.* Paragraph 35.

47 *Id.* Paragraph 35.

48 *Id.* Paragraph 50.

annual groundwater requirement of the company, at the average rate of five lakh litres per day, could be allowed, if average rainfall was available. The report also suggested that the consumption should be reduced proportionately to the decrease in rain fall, for example, if rainfall was less by ten per cent the exploitation of water is to be reduced to four lakh litres per day. The expert committee report has been accepted as such by the division bench by saying that 'it appears to be authentic, based on data collected, mature and therefore acceptable'.<sup>49</sup>

The landowner's right to extract the groundwater from his/her land was held as a basic right. It was held that the abstract principles like public trust doctrine could not be used to curtail the 'basic right' of the individuals. It was further held that in the absence of express statutes, the landowner is free to extract the groundwater from his/her land without any permission from the Panchayat or the State. The powers of the Panchayat under the Panchayat Raj Act over the groundwater resources were totally disapproved by the division bench. In effect, the division bench has upheld the proprietary right of the occupier of the land over the underlying groundwater. The division bench has not considered the reasons based on which the Panchayat had taken action against the Company.

The division bench failed to recognise the emerging jurisprudence based upon Article 21 of the Constitution of India. The Supreme Court of India, in a number of cases, have decided that the natural resources (groundwater in this case) are public trust. The state, as the trustee, is duty bound to protect and preserve such resources for the present and future generations. The overexploitation of such resources due to state action or inaction would amount to the violation of fundamental right(right to life under Article 21 of the Indian Constitution). The division bench has also failed to understand groundwater hydrology and the natural process through which the recharging of groundwater occurs. The groundwater in one person's land need not always be the water percolated through his land or the water that falls upon his land. Moreover the overexploitation of groundwater by one person would have adverse impacts upon even land far away. Therefore it is not proper to consider groundwater as a 'private property' that can be extracted by the landowner by treating it as his/her 'wealth'. It is unfortunate that the division bench did not appreciate these important facts.

The Plachimada case had been very badly produced before the High Court. The power of the Panchayat was the only matter discussed in the High Court. The serious problems of pollution had been completely neglected. The Division Bench of the Kerala High Court had not considered the legal framework of the pollution control laws and the underlying principle of the decentralisation policy. The property right of the Company has been given more importance than the basic human rights of the people of Plachimada and the environmental degradations caused by the Company.

Being aggrieved by the decision of the division bench of the Kerala High Court, the Panchayat has approached the Supreme Court. The case is now pending before the Supreme Court. Hopefully, the Supreme Court will consider all the facts and the legal framework in its true spirit and meaning.

## IV. THE FUTURE: AN ANALYSIS

The issue in Plachimada remains unsettled. The victims are waiting for the Supreme Court decision for remedial action. Therefore an analysis of the possible future solutions is made in this section. It points out the future of the Plachimada victims in the Supreme Court, that is, the possibility of getting appropriate remedy for the Plachimada victims. In this milieu, the arguments submitted on behalf of the Panchayat in the Supreme Court are analysed. This part also discusses the Kerala Ground Water Act as the major legal framework supposed to address the incidents like Plachimada in the future.

### A. Plachimada in the Supreme Court: The Future

The problems in Plachimada still remain unsettled, though the Company had stopped its activities. The Plachimada people and the Panchayat need to wait for the Supreme Court verdict for remedies. In this juncture, this section analyses the important issues and the arguments submitted in the Supreme Court on behalf of the Panchayat.

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<sup>49</sup> *Id.* Paragraph 46; the expert committee report has been strongly criticised on the ground that it had relied upon the unrealistic and unscientific data. See K. Ravi Raman, 'Corporate Violence, Legal Nuances and Political Ecology: Cola War in Plachimada', *Economic and Political Weekly*, 18 June 2005.

The root cause of the Plachimada case is the Panchayat's refusal to renew the license of the Company on the grounds that the Company's overdrafting of the groundwater has caused an acute shortage of drinking water and has caused other environmental problems in the Panchayat. Therefore, the major arguments presented in the appeal before the Supreme Court seeks to justify the Panchayat's action against the Company. The Panchayat justified its action on the grounds that there had been insufficient water for agricultural purposes and this shortage had resulted in popular protests in the Panchayat. The Panchayat argued that the action taken against the Company is its duty under the Kerala Panchayat Raj Act and in conformity with the underlying philosophy of the 73<sup>rd</sup> amendment to the Constitution.

It has been contended on behalf of the Panchayat that the power to control or restrict the groundwater extraction comes under the mandatory duty of the Panchayat. The same is the case of the licensing power of the Panchayat. The objects sought to be achieved through all these provisions or powers are the public safety and public welfare. By relying upon this legal background, it has been strongly contended in the Special Leave Petition (SLP) that the High Court was wrong in directing the Panchayat to renew the license. The High Court did not consider the powers of the Panchayat as envisaged under the Panchayat Raj Act and the Constitution of India. It was also submitted that the High Court has no power under article 226 to give such a direction to a licensing authority.

It has been submitted that the overdrafting of the groundwater by the Company has resulted in the drying up of the wells in the Plachimada area and also the contamination of water. These 'ground realities' have been ignored by the division bench of the High Court. The Panchayat has also submitted the arguments based upon the 'right to life' jurisprudence. It has been presented that there is an acute scarcity of drinking water in the area and therefore the action taken by the Panchayat is in the larger interest of public health and safety. Otherwise it would have been the violation of the right to life and the right to livelihood under article 21 of the Constitution.

The priority principle, the duty of the state to protect and preserve the environment and the right to livelihood are the arguments presented by the Panchayat to support its part. But these arguments have not been presented in a convincing manner with adequate emphasis. Hopefully the Supreme Court would consider these matters seriously. At the same time, the SLP placed more emphasis on the liability principles under the tort law. It is argued that the property rights vested in the Company does not extend beyond the four boundaries of its property. Any activity even though carried out in their property if adversely affecting the life as well as the proprietary right of the owners of the adjoining property, then it is the duty of the authority to interfere with such activity and to ensure the maintenance of rights and basic amenities to its citizens. The SLP continues the submission with the arguments that when the enjoyment of property by one person causes harm to the life and property rights of the adjoining owner, the liability under tort arise and the victim is entitled to compensation.

All the submissions above stated basically meant to establish the power of the Panchayat to manage and develop the water resources in its jurisdiction. In a way, the arguments presented in the Supreme Court are an attempt to establish the state's control over the natural resources. Instead of that, the human right of the public should have been asserted in the Court strongly. Such a human right approach would only result in the accountability of the state and would bring the norms of accessibility and equity in the existing groundwater legal regime.

The Plachimada case addresses two issues primarily, first the pollution problem; secondly the question of control over the private person/company's groundwater extraction from their property. The first issue would help to provide a specific remedy to the Plachimada crisis and the second one may clear the way to arrive at a viable pro-environment groundwater legal regime.

The pollution problem, from the very beginning, has not been produced before the Court properly. Though it was produced eventually, the Kerala High Court disposed it without any discussion by saying that the pollution is not a main question to be decided in the case brought before the Court. As a result the case lost its strength and an opportunity to provide relief to the Plachimada victims. In the present SLP too, the pollution problem has not been highlighted sufficiently. Instead of giving more emphasis to the compensation principle available under the tort law, it would have been better to rely upon the Polluter Pays Principle, an implied part of our environmental legislations as per the Supreme Court decision. The pollution is a strong argument given the fact that the pollution caused due to the solid wastes is already a proven fact. Therefore, the violation of the right to life and right to livelihood due to the pollution caused by the Company, and the duty of the state to protect and preserve the environment ought to be the core points of the arguments in the Supreme Court.

The second issue, addresses the broader question, who owns the groundwater? This case could be an ‘opportunity’ for the Court to discuss the validity of the traditional absolute proprietorship under the common law. The groundwater cannot be considered as a property confined to one’s boundary walls of the property. The overextraction of the groundwater by a person from his property might results in undesired impact, even on individuals faraway. Moreover, the groundwater available in one’s property would not necessarily be the water percolated through one’s own land. Therefore, the groundwater resource ought not to be made private property. The absence of statutory provision, as justified by the Kerala High Court, is not a wise and reasonable justification to uphold the private property right over groundwater, especially in the time where acute scarcity of water exists and more sophisticated devices are available to extract the groundwater from deeper and deeper aquifers.

It would be a welcome decision if the Supreme Court denies the notion of groundwater as private property and gave more preferential attention to the violation of the human rights in Plachimada. It would also be proper for the Supreme Court to invoke the Polluter Pays Principle implied in the environmental law jurisprudence in India and give direction to ensure that the victims get sufficient compensation from the Coca Cola Company.

## B. The Ground Water Act

The Ministry of Water Resources has circulated a Model Bill for Regulation of Ground Water to all States and Union Territories in 1970, which was revised in 1992 and 1996. The Model Bill was again reviewed in 2005. The state governments have so far responded to the model bill very slowly. The Kerala government enacted the Ground Water Act in 2002 by following the scheme of the model bill. The Act was in a dormant stage when the problems started in Plachimada. Although the Act was notified later, it was too late to apply the regulatory framework envisaged in the Act in the Plachimada case. Since this is the major legal framework supposed to manage similar issues in the future, the scheme of the Act is explained and analysed in this part of the paper.

### 1. *Introducing the Act*

The Kerala government has enacted the Kerala Ground Water (Control and Regulation Act), 2002 for the conservation of groundwater and for the regulation and control of its extraction and use.<sup>50</sup> The Act has explicitly considered the fact that groundwater is a critical resource of the state and the undesired environmental impacts of the indiscriminate extraction of the groundwater in the state. Hence the state government considered it as necessary to regulate the use of groundwater in the public interest.<sup>51</sup> The schemes envisaged in the Act aims to control and regulate the extraction and use of groundwater by the private individuals and companies.

The Act provides for the constitution of the State Ground Water Authority as an institutional mechanism for implementing the Act.<sup>52</sup> The authority is responsible and empowered to fulfil the objectives of the Act. This is the competitive body to advise the government to initiate policy actions to protect and preserve the groundwater resources in the state.

The Act is not applicable to all users of groundwater or to all geographical areas in the state. The application of the Act is limited by the quantitative and geographical restrictions. First, the term ‘user of groundwater’ includes only the persons using groundwater from a pumping well.<sup>53</sup> The definition of the term ‘pumping well, expressly excludes open wells fitted with pumps driven by an engine or motor of horse power up to 1.5 and bore wells and dug-cum bore wells fitted with pumps driven by an engine or motor of Horse Power up to 3.<sup>54</sup> The provisions make it clear that the small scale users, most likely the domestic users, are exempted from the application of the Act. Secondly, the Act is only applicable to the notified areas. The government, on the recommendation of the authority, is entrusted with the power to declare a particular area as a notified area, if it is necessary in the public interest to regulate the groundwater use in that area.<sup>55</sup> Here it is left to the discretion of the government and the role of the authority is only advisory.

<sup>50</sup> Hereafter referred as ‘the Act’.

<sup>51</sup> See the preamble of the Act.

<sup>52</sup> Here after referred as the ‘authority’.

<sup>53</sup> Kerala Ground Water (Control and Regulation Act), 2002, Section 2 (h), available at <http://www.ielrc.org/content/e0208.pdf>.

<sup>54</sup> *Id.* Section 2 (f).

<sup>55</sup> *Id.* Section 6.

The Act provides permit and registration system as a tool of regulating the groundwater use. The Act makes it mandatory for every person who desires to dig a well or to convert his or her existing well into a pumping well to seek permission from the authority.<sup>56</sup> The Act further gives some guidelines for the authority to consider before accepting or rejecting the permit applications. It includes the purpose of digging wells, the quality and quantity of groundwater of the area, the potential danger to the existing users, distance from the existing wells etc.<sup>57</sup> The rules made under the Act makes it mandatory that a groundwater scientist deputed by the Authority should visit the concerned place and after studying the geology and existing groundwater conditions of the area give an investigation report with recommendations. If necessary, geophysical survey may also be done in addition to the hydrogeological survey.<sup>58</sup> The Act also requires the existing users of the groundwater in a notified area to register their wells.<sup>59</sup> Here also the authority can accept or reject the application on reasonable grounds. The guidelines for accepting or rejecting the application for registration are more or less same as that required for the permit.<sup>60</sup>

The Act provides special provision to protect public drinking water resources. It requires permission from the authority to dig wells within 30 meters from any public drinking water resources.<sup>61</sup> The authority is authorised to grant permission, if the digging of a well is not likely to affect the public water resources, for the purposes of drinking or agriculture. Here the power of the authority to grant the permission is restricted by the express term 'drinking purpose or for agriculture'. This means there is no question of other competing uses like commercial or industrial purposes within 30 meters from the public drinking water resources. In the absence of express provisions dealing with the priorities, this provision can be used as a guide for the authority to set priorities before granting a permit or certificate of registration or to put conditions in the permit or certificate of registration.

The authority is empowered to grant the permit or certificate of registration upon the conditions necessary for implementation of the Act.<sup>62</sup> The authority is also empowered to change the conditions upon which the permit or certificate of registration is granted.<sup>63</sup> The authority can cancel the permit or certificate of registration on the grounds such as non-compliance with the conditions or the procurement of permit/certificate based on false facts. The authority can also use this power if the groundwater situation in the area demands a higher degree of restriction.<sup>64</sup>

Though the Act provides the legal framework for the protection and development of the groundwater resources in the State, the provisions in the Act are not sufficient to achieve the objects of the Act. There are some drawbacks in the Act that need to be corrected to strengthen the statutory framework. The loopholes in the Act are explained in the next part, which highlights the necessary changes to be made in the Act to tackle the instances like Plachimada in the future.

## 2. Critical Analysis of the Act

The Kerala government introduced the Kerala Ground Water (Control and Regulation Act) in the year 2002. The Kerala government took one year to bring the Act into force.<sup>65</sup> Further it took two more years to notify the Plachimada area. Therefore the statute is not applicable to the Plachimada case. Had the government implemented the Act in time, it would have been a subject of discussion in the Court. It is quite strange that when the people of Plachimada were fighting against the groundwater pollution and depletion, when various NGOs were publishing reports regarding the pollution and connected problems, the Act was 'sleeping' in the files. This shows the irresponsibility of the government. Being a legal framework supposed to control the groundwater use in future, it requires a responsible approach on the part of the government and some necessary amendments in the Act.

The Act can be considered as a 'late comer' with 'some defects'. It is very impressive that the object of the Act is to promote the conservation of groundwater and regulate the use of groundwater. The Act recognises the existing indiscriminate exploitation of the groundwater in some areas of the state of Kerala and its negative environmental

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56 *Id.* Section 7 (1).

57 *Id.* Section 7 (7).

58 Kerala Ground Water (Control and Regulation) Rules, 2004 available at [http://www.kerala.gov.in/dept\\_irrigation/gopno.17-2004.pdf](http://www.kerala.gov.in/dept_irrigation/gopno.17-2004.pdf).

59 *Id.* Section 8 (1).

60 *Id.* Section 8 (5).

61 *Id.* Section 10.

62 *Id.* Sections 7(4) and 8(3).

63 *Id.* Section 11.

64 *Id.* Section 12.

65 Notification No. 6997/GW/1/03/WRD, S.R.O. No. 1155/2003 (Kerala Gazette, 19 November 2005).

impact but the schemes envisaged in the Act are not enough to achieve the stated objectives. Hence the defects need to be rectified to equip the statute to avoid a Plachimada like situation in future.

First of all, the schemes of the Act are applicable only to the 'notified areas' under the Act. The power to notify a particular area is vested with the government on the recommendation of the authority constituted under the Act. The water-scarce areas should be declared as notified areas after scientific studies. At least the areas being commercially utilised by the water based industries should have been deemed to be notified areas. This type of 'operation of law' is necessary especially when the government and its institutions are passive. This will, at the least, help responsible individuals to approach the Court for the enforcement of their rights. Such a framework will act as a check and balance in achieving the object of the Act.

The Act is not well crafted to include the principle of prioritisation. The Act is silent on the priorities among the competing uses to be taken care of by the Authority before accepting or rejecting the application for the permit or certificate of registration. The priorities, as envisaged in the National Water Policy, 2002, should have been included in the Act explicitly.<sup>66</sup> The statute failed to differentiate between the competing uses of the groundwater. Different grade of regulation should have been envisaged under the statute for different uses like drinking water and other domestic purposes, agricultural purposes and commercial uses. Since the agricultural and commercial fields are the big users of the groundwater, the grade of the regulation and penalties for the violations ought to have been prescribed separately. But the statute has drawn up a single procedure, framework and penalties for all the uses. This is very a very relevant issue when the number water industries and the instances of pollution are increasing constantly. Moreover, the penalty as prescribed under the statute is 'nothing' for the companies like Coca Cola.<sup>67</sup> The cancellation of the permit or registration should have been made as a punishment in addition to the fine or imprisonment for the second offence.

The Polluter Pays Principle is considered to be an important part of the environmental jurisprudence. The Supreme Court of India has incorporated the Polluter Pays Principle as a part of the Indian legal system.<sup>68</sup> The principle requires the polluter to pay the compensation for the damages caused to the people and ecology. Unfortunately the Act prescribes only the traditional penalties of nominal fine and imprisonment. The legislatures spoiled a good opportunity to initiate a progressive legal change by omitting the Polluter Pays Principle.<sup>69</sup> Hence, it is necessary to include the Polluter Pays Principle expressly in the Act.

The conservation of any natural resource becomes effective only when there is public participation in all levels of planning and implementation. The Kerala Act did not consider the participatory form of management in the resource utilisation and management. The Act prescribes a centralised planning and management strategy. The role of the local communities and the local bodies has been completely neglected in the Act. It is most unlikely that the protection and preservation of the natural resources like groundwater become effective without the participation at the local level. It would be better to give more power and responsibility to local communities and local bodies with central bodies and institutions as the facilitating and advisory bodies. Though the Act points out conservation as a major objective, it failed to prescribe any measures for the resource augmentation. It would have been better to give the augmentation responsibility to the local community and the local bodies. It would also be advisable to make rainwater harvesting structures a mandatory condition for the construction of buildings.

Absence of base data regarding the quantity and quality of the groundwater in the Plachimada aquifer has been the major defense of the Coca Cola Company. This necessitates the importance of a detailed study of the aquifers and a groundwater impact assessment before allowing any activities likely to cause adverse impacts on the groundwater. The results of the study should be made available to the public for scrutiny. It is also necessary to make it mandatory for the authority to monitor the groundwater condition periodically. This will help the authority to take proper actions in right time. It is also necessary to make the polluter liable, civil and criminally.

Hence, the Kerala Act is a 'weak' weapon. It can be considered as a beginning of the development of a new groundwater legal regime in India. But it needs to go very far from the present stage to achieve the required results of the sustainable use of groundwater.

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<sup>66</sup> See National Water Policy, 2002, Section 5, available at <http://www.ielrc.org/content/e0210.pdf>.

<sup>67</sup> See The Ground Water, note 53 above, Section 21.

<sup>68</sup> *Vellore Citizen's Welfare Forum v Union of India* (1996) 5 SCC 647, Paragraphs 11-13.

<sup>69</sup> A better approach can be seen in Andhra Pradesh Water, Land and Trees Act, 2002, available at <http://www.ielrc.org/content/e0202.pdf>.

## V. CONCLUSION

The deterioration of groundwater in quality and quantity and the consequential public health problems and the destruction of the agricultural economy are the main problems identified in Plachimada. The activity of the Coca Cola company has caused or contributed a great deal to these problems. The people living in the vicinity of the Company have been suffering these problems for the last few years. The availability of good quality water for drinking purposes and agriculture has been affected dangerously due to the activity of the Company. Apart from that, the Company had also polluted the agricultural lands by depositing the hazardous wastes. All these points to the gross violation of the basic human rights, that is, the right to life, right to livelihood and the violation of the pollution control laws. The case study exposes the failure of the state, which is supposed to be the protector of the human rights, in its duty. An examination of all these issues exposes several lacunae in the legal regime such as the absence of a specific and comprehensive groundwater laws, an efficient implementation of the pollution control laws or any desire in the judiciary to appreciate the legal transformation of decentralisation of power.

Despite of the existence of the more competitive authority, that is, the Pollution Control Board, the Panchayat was the only authority that took some actions against the Company. The Panchayat has refused to renew the license of the company by exercising its power under the Kerala Panchayat Raj Act, 1994. Unfortunately, the power of the Panchayat has not been approved by the division bench of Kerala High Court. The division bench has not recognised the argument that the groundwater belongs to the public and the state (Panchayat) has the power to control the groundwater use in the public interest. The case is now pending before the Supreme Court of India. At this juncture, the remedy for the victims depends upon how the Supreme Court acknowledges the right of the public over the groundwater resources, the power of the state to control the groundwater use by the private parties and also the principles of modern environmental law jurisprudence such as the Polluter Pays Principle.

The case study reveals the necessity of a comprehensive groundwater statutory regime, which recognises the human rights implications of the uncontrolled use of groundwater and de-links the groundwater right from the land ownership rights. The absence of such a legal regime has helped the Company to win the legal battle in the Kerala High Court. The division bench of the Kerala High Court acknowledged the right of the landowner over the groundwater by highlighting the absence of any statutes to the contrary. Therefore, the results of the case study suggest the immediate enactment of groundwater legislations by all the states in India. The legislation should give importance to the notion of human rights and the principles of environmental law such as the precautionary principle, Polluter Pays Principle, and conservation philosophy. Otherwise the use of groundwater will be ruled by the principles such as the common law rule of proprietorship, which have been proved to be insufficient and inconsistent in the contemporary context.

In Kerala, the absence of the statutory framework has been solved by the enactment of the Kerala Ground Water (Control and Regulation) Act, 2002, which came into application in 2003. An analysis of the Act reveals several drawbacks in the Act. The Act does not contain the provisions for the priority principle, Polluter pays Principle, mandatory preparation of groundwater data of the state, periodic monitoring of the groundwater situation etc. The lack of above mentioned principles in a statutory form is the main reason which has placed the remedy to the victims of Plachimada at peril. Therefore, the attention of the legislatures is needed urgently to incorporate the necessary additions to avoid similar crises in Kerala.

To sum up, the victims of Plachimada have to wait for the Supreme Court decision for legal remedies. At the same time the case study suggests the strengthening of the legal framework and the efficient implementation of the laws as the viable methods to regulate the groundwater use in the future and to avoid 'another Plachimada'.

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