Kerala High Court
Soman vs Geologist on 24 August, 2004
Equivalent citations: 2004 (3) KLT 577
Author: K B Nair
Bench: K B Nair
JUDGMENT K. Balakrishnan Nair, J.

W.P.(C) 1694/2004

1. The petitioners are challenging two conditions imposed by the Geologist, while granting the quarrying permits to them for quarrying ordinary sand and brick clay from their properties. The brief facts of the case, as stated by the petitioners, are the following:

2. The petitioners have been granted Ext.P1 series permits, to quarry ordinary sand/brick clay from various extents of land in Velloor Village in Vaikom Taluk. Those permits were issued with 18 conditions, subject to which the minor mineral can be mined. The petitioners are aggrieved by condition Nos. 2 and 15 in those permits. They are extracted below for convenient reference.

"2. No quarrying shall be done within 75 metres of railway line and 50 metres of public road, water course, residential building, boundary wall of place of worship, burial grounds or burning ghats, except under and in accordance with the previous permission of the State Government or the competent authority".

"15. No dewatering the mine pit using pump is permissible and mining has to be ceased once this becomes necessary and mining should be done manually".

3. The petitioners seek to quash the above said conditions. According to them, while issuing a permit under Rule 4 of the Kerala Minor Mineral Concession Rules, 1967, the Geologist is competent to impose only the conditions contained in Rule 8. Instead of that, certain conditions contained in Rule 29, concerning grant of quarrying lease, have been incorporated in Ext.P1 series quarrying permits. Therefore, it is submitted that the said conditions are clearly unauthorised by the provisions of the Kerala Minor Mineral Concession Rules, 1967. The stipulation contained in condition No. 2, regarding the distance of the quarrying pit from railway line etc., is unwarranted and irrational. The Geologist needs only to consider whether the lateral support of the neighbouring land is affected or not. The condition No. 15, restricting the use of pump for dewatering the pit, is also irrational and unsustainable. Except in Kottayam district, in all other parts of Kerala, dewatering, using pump, is permitted. So, the said stipulation violates the fundamental rights of the petitioners, guaranteed under Article 14 of the Constitution of India, it is submitted. It is further submitted that the above said conditions are imposed according to the whims and fancies of the Geologist. They are not authorised by any of the provisions of the Rules. Unless dewatering, using pumps is allowed, manual quarrying of sand or clay many not be profitable, it is submitted. It is also contended that none of the Rules prohibits the use of mechanical devices for quarrying. On the above grounds, the petitioners pray for issuing a writ of certiorari to quash condition Nos. 2 and 15 in Ext.P1 series permits. They also pray for the issuance of a writ of mandamus, directing the 1st respondent

Geologist to permit the use of pump for dewatering the quarrying pit. A direction is also sought against the 1st respondent to impose only the conditions contained in Rule 8 of the Kerala Minor Mineral Concession Rules, 1967, while granting a quarrying permit.

4. The 1st respondent has filed a statement. It is submitted that the said respondent held a personal inspection of the areas, in relation to which quarrying permits were applied. The allegation that conditions are attached to the permits, according to the whims and fancies of the said respondent, is denied. All the conditions attached to Ext.P1 series quarrying permits, except condition Nos. 15 and 16 are uniformly applicable to the grant of permits in the whole of the State of Kerala. It is submitted, in the light of the geological parameters of the area, the competent authority is empowered to impose other conditions also. The difference between quarrying permit and quarrying lease is only regarding the period of quarrying and the quantity of minor mineral, to be quarried. For all other purposes, there is no difference between them. So, quarrying permits, and quarrying leases are granted, addressing the hazards and mitigating measures. Otherwise, they will amount to an encroachment on the rights of the people, living near the quarries. The petitioners evaluation of the dangers posed by the quarrying, is a very shortsighted version, exposing their inadequacy in the concept of mining and its impact on the environment. The distance to be maintained for lateral support to a nearby structure varies, according to the geological properties of the subsurface, the slope, earthquake vulnerability, possibility of landslides etc. Taking into account, the geological parameters and other scientific components involved, a distance of 50 metres has been stipulated under the Kerala Minor Mineral Concession Rules 1967. The possibility of instability of earth equally exists in quarrying, irrespective of whether the same is done under a permit or lease. It is reiterated that the conditions imposed are essential in public interest. The petitioners have raised the objections to subserve their vested interests, without adverting to critical factors like distance, cohesion of the subsurface etc. It is submitted that to avoid dangers of lateral collapse in the sand mining pit, the use of pump is prohibited. It is also submitted that the purpose of prohibition in using pump, is to ensure that the mining operation is stopped at the level of occurrence of ground water. If the mine pit is dewatered and the mining continued, it will result in the collapse of boundaries, adversely affecting the safety of adjacent lands and structures. Further, draining of potable ground water from the mine pit has a deleterious effect on the level and quality of ground water, which will lead to ground water scarcity. If more pumps are used, the same will affect the safety and drinking water availability of neigbouring land owners. It is also submitted that the prohibition of pumping, in the instant case, has been introduced, as the area is an unstable sedimentary flood plain. Such conditions are not imposed in geologically stable areas like Idukki. Further, the intensity of mining in the area, is far greater than in Idukki. The non-profitability of sand mining manually, is also denied. Condition No. 2 was imposed to safeguard the interest of third parties and also to safeguard the environment. The distance barrier is maintained in all the mines throughout the country and safety aspects cannot be compromised. Whether the authority for mining is quarrying permit or quarrying lease, the impact of extracting minerals from the subsurface is the same. The contentions of the petitioners regarding lack of power in the 1st respondent to impose the impugned conditions, are denied. For the above reasons, the 1st respondent prays for dismissing the Writ Petition.

5. Though no reply affidavit is filed in this case, a reply affidavit has been filed in the connected W.P.(C) 35771/2003, meeting similar contentions in the counter affidavit filed in that Writ Petition. As requested by the learned counsel for the petitioners, the reply affidavit in that case is treated as the reply affidavit in this case.

6. Heard Mr. Jobi Jose Kondody, learned counsel for the petitioners and Mr. K.I. Abdul Rasheed, learned Government Pleader for the 1st respondent Geologist.

7. The learned counsel for the petitioners reiterated the contentions raised in the Writ Petition. It is submitted that the Geologist can impose only the conditions contained in Rule 8, while granting a permit for quarrying. The conditions contained in Rule 29, concerning quarrying lease, cannot be imposed in a quarrying permit. These impugned conditions are ultra vires and unauthorised, it is contended. It is also submitted that no environmental degradation is caused by the use of pumps. The ground water is not pumped out, but it is used for washing the sand and it is being collected back in the very same pit. The contentions raised in the counter affidavit are untenable, it is submitted.

8. The learned Government Pleader strongly supported the impugned conditions. It is submitted, they are necessary for environmental protection and also for preserving ground water. The mining should be stopped at the level of ground water. Further, the distance condition is imposed to safeguard the interest of the neighbouring land owners. He also submitted that the Geologist is competent to impose the impugned conditions under Rule 8(2)(c), which says that every quarrying permit granted under Rule 4 shall be subject to such other conditions, as the competent authority or the officer granting the permit, as the case may be, may deem necessary, in regard to the matters enumerated therein, which includes the restriction of surface operations in any area prohibited by any authority.

9. Admittedly, Ext.P1 series permits have been issued under Rule 4 of the Kerala Minor Mineral Concession Rules, 1967. For such quarrying permits, the conditions enumerated in Rule 8 can be imposed. For quarrying leases, the conditions contained in Rule 29 are liable to be imposed. It is common case that the impugned conditions could be imposed under Rule 29, while granting a quarrying lease. But, as contended by the learned counsel for the petitioners Mr. Jobi Jose Kondody, such conditions are not expressly authorised by the provisions of Rule 8. It is evident that mining, whether it is done under a lease or a permit, makes the same environmental impact and therefore, the 1st respondent claims, he is competent to impose necessary conditions, irrespective of what is granted is a permit or a lease. From the statement filed by the said respondent, it is obvious that both the conditions are imposed in public interest and are necessary to safeguard public interest. Condition No. 2, regarding prohibited distance for mining, safeguards the interest of the neighbouring land owners. The Geologist, who is the competent authority, after visiting the area in relation to which, permits are granted and having regard to the nature and strength of the soil, has decided to impose the condition regarding the distance for quarrying. So, the same should be presumed to have been introduced on valid grounds, addressing valid parameters. The petitioners have not produced any material to show that the distance condition is irrational. Therefore, the only point to be considered is whether the Geologist is competent to impose that condition in public

interest.

10. Condition No. 15 relates to prohibition in the use of pumps for mining. From the statement of the Geologist, it is evident that the said condition has been imposed in public interest. The intention of the competent authority is that mining should be stopped when the pit reaches the ground water level. The same will prevent unnecessary wastage of ground water. Though the petitioners have contended that they are not pumping out water, but the same is cycled for washing the sand, the said contention cannot be accepted. There is always the possibility of pumping out ground water. Thus, the prevention of use of pumps to safeguard ground water is evidently, a step taken in public interest. There is no underground boundary, dividing the ground water under the petitioners' land with that of the neighbouring land owners. So, any pumping of ground water will affect the water level in the neighbouring lands. In view of the shortage of drinking water, any step taken to protect ground water, should be deemed to be done in public interest.

11. As stated earlier, the point to be considered is whether the conditions, imposed by the Geologist, should be condemned as unauthorised restrictions. I think, the rights of the people of the locality to have a decent environment, flowing from Article 21 of the Constitution of India, will save the restrictions imposed. The new concept of sustainable development, which is, now, part of the law of the land, will definitely help in deciding whether the impugned conditions should be sustained or not. The World Commission on Environment and Development has observed that sustainable development aims to meet the needs and aspirations of the present generation, without compromising the ability to meet those of the future generations. Any developmental activity without - considering the rights of future generations, is not a sustainable use of land. Natural resources cannot be extracted at a rate faster than the nature's capacity to re-generate them. It is absolutely necessary that the basic qualities of the land have to be maintained for the succeeding generations. The Apex Court has explained the concept of "sustainable development" in the decisions in State of H.P, v. Ganesh Wood Products ((1995) 6 SCC 363), Vellore Citizens' Welfare Forum v. Union of India ((1996) 5 SCC 647), M.C Mehta v. Union of India ((1997) 2 SCC 353), M.C Mehta v. Union of India ((1997) 3 SCC 715), Delhi Transport Department, Re ((1998) 9 SCC 250), Consumer Education & Research Society v. Union of India ((2000) 2 SCC 599), Narmada Bachao Andolan v. Union of India ((2000) 10 SCC 664), M.C. Mehta v. Union of India ((2001) 4 SCC 577), Bittu Sehgal v. Union of India ((2001) 9 SCC 181) and M.C. Mehta v. Union of India ((2002) 4 SCC 356).

12. In Vellore Citizens' Welfare Forum v. Union of India ((1996) 5 SCC 647)) the Apex Court has held as follows:

"10. The traditional concept that development and ecology are opposed to each other is no longer acceptable. 'Sustainable Development' is the answer. In the international sphere, 'Sustainable Development' as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987, the concept was given a definite shape by the World Commission on Environment and Development in its report called 'Our Common Future'. The Commission was chaired by the then Prime Minister of Norway, Ms. G.H. Brundtland and as such the report is popularly known as 'Brudtland Report'. In 1991 the World Conservation Union, United Nations

Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for Sustainable living. Finally, came the Earth Summit held in June, 1992 at Rio, which saw the largest gathering of world leaders ever in the history - deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio, 'Sustainable Development' has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. 'Sustainable Development' as defined by the Brundtland Report means 'Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs'. We have no hesitation in holding that 'Sustainable Development' as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

11. Some of the salient principles of 'Sustainable Development' as culled out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Co-operate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that The Precautionary Principle' and The Polluter Pays Principle' are essential features of 'Sustainable Development'. The 'Precautionary Principle' - in the context of the municipal law - means:

(i) Environmental measures - by the State Government and the statutory authorities must anti

(ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

(iii) The 'onus of proof is on the actor or the developer/industrialist to show that his actio is environmentally benign.

12. 'The Polluter Pays Principle' has been held to be a sound principle by this Court in Indian '.... we are of the opinion that any principle evolved in this behalf should be simple, practi

The Court ruled that: (SCC p. 246, para 65)

'..... once the activity earned on is hazardous or inherently dangerous, the person carryin

on such activity is liable to make good the loss caused to any other person by his activity irr

Consequently the polluting industries are 'absolutely' liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence. they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected area'. The 'Polluter Pays Principle' as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution, but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

13. The Precautionary Principle and the Polluter Pays Principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and personal liberty. Articles 47, 48A and 51 A(g) of the Constitution are as under:

'47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.- The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48A. Protection and improvement of environment and safeguarding of forests and wildlife.-The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.

51 A. (g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.' Apart from the constitutional mandate to protect and improve the environment there are plenty of post-independence legislations on the subject but more relevant enactments for our purpose are: The Water (Prevention and Control of Pollution) Act, 1974 (The Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (The Air Act) and The Environment (Protection) Act, 1986 (The Environment Act). The Water Act provides for the constitution of the Central pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. It also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Board constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act is the latter part of this judgment.

14. In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is a almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in A.D.M. v. Shivakant Shukla((1976) 2 SCC 521), Jolly George Varghese case ((l980) 2 SCC 360) and Gramophone Co. case ((1984) 2 SCC 534)."

13. In view of the above and other judgments, the principle of sustainable development and the doctrines of "polluter pays" and "precautionary principle" are part of our environmental law, which is built around Article 21 of Constitution of India. The conditions impugned in this Writ Petition are necessary to protect the environment. If every land owner, driven by profit motive, is to dig his land to win sand, no land except pits will be left for the future generations. So, the petitioners should stop mining, when it reaches the ground water level and immediately, all the pits should be filled up, as provided in condition No. 16, which reads as follows:

"All excavations have to be immediately filled and reclaimed."

The principle of sustainable development, now being part of the environmental jurisprudence, flowing from Article 21 of the Constitution of India, the State is bound to impose the impugned conditions, while granting the permit. Even if such conditions are omitted to be mentioned in the Kerala Minor Mineral Concession Rules, still the State can impose them, in view of Article 21 of the Constitution of India, In other words, even if condition Nos. 2 and 15 are unauthorised by the Rules, they are authorised by Article 21. Accordingly, the challenge against condition Nos. 2 and 15 in Ext.P1 is repelled.

14. On the strength of the interim orders of this Court, the petitioners have undertaken mining in the lands concerned, using pumps, going beyond the ground water level. So, the 1st respondent Geologist shall take immediate steps to stop mining from all the pits where the mining has reached the grounds water level. In the light of the principle "Act of Court can prejudice none", the petitioners are bound to fill the pits immediately, where the mining has been done beyond the ground water level, on the strength of the interim orders of this Court. This, they are bound to do under condition No. 16 of the permit also. The doctrine of "Polluter Pays" also obligates the petitioners to fill the pits. The 1st respondent shall ensure that all the pits where the mining has reached the ground water level, are filled as expeditiously as possible, at any rate, within a period of six months.

15. All the grantees of mining permits have executed agreements in stamp-papers worth Rs. 50/-, agreeing to fill the pits, after the mining of sand is over. The learned Government Pleader has pointed out that many of the licensees have abandoned the pits, after the mining is over. Not only,

going by the principle "Polluter Pays"; they are bound by the conditions of the permits and also by the agreements executed by them to fill the land. But, if any of the licensees, including the petitioners, does not fill the land once the mining is stopped, the Geologist shall prepare estimates or cause to prepare estimates, regarding the amount required for filling the pits. The said amount, including cost escalation, if any, shall be recovered from him, invoking the provisions of the Kerala Revenue Recovery Act and the pits shall be filled, using the said amount.

The Writ Petition is disposed of as above.

W.P. (C) Nos. 28521, 29084, 35771, 37323 & 38706/2003 and 2538, 3248, 6660, 8930, 9077, 10292 & 14167/2004:

16. The facts of these cases being identical, it is ordered that the directions issued in W.P.(C) 1694/2004 will govern these Writ Petitions also. They are disposed of accordingly.