

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

MR.CHIEF JUSTICE MR.S.R.BANNURMATH

&

THE HONOURBABLE MR.JUSTICE KURIAN JOSEPH

MONDAY, THE 30TH MARCH, 2008/9TH CHAITHRA 1931

W.P.(C)NO. 3128 OF 2009 (S)

PARISTHITHI SAMRAKSHANA SAMITHI Vs. STATE OF KERALA

Counsel for the Petitioner: M/S. P.B.Sahasranaman, K.Jagadeesh and
T.S.Harikumar

Counsel for the Respondents: Smt. K.Meera (Govt Pleader), Adv. Praveen.H.,
Anwin Gopakumar, A.Jayasankar, and Manu Govind.

This writ petition (Civil) having come up for admission on 30/03/2009 the court on the same day delivered the following:

JUDGMENT

Kurian Joseph (J).

1. This is a public interest litigation filed by the Paristhithi Samrakshna Sangham, mainly with the following two prayers:

- i. To issue a writ, direction or order in the nature of mandamus commanding the respondents to conduct sand audit as contemplated under Sec.29 of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 in respect of Periyar River forthwith, before allowing sand mining in the said river;
 - ii. To issue a writ, direction or order in the nature of mandamus commanding the respondents not to allot any Kadavus within 500 meters from any Irrigation works as contemplated under Kerala Irrigation and Water Conservation Act, 2003.
2. When the writ petition came up for admission it was brought to our notice that sand audit as required under Section 29 of the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 has not been conducted since the last five years. The Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001, hereinafter referred to as 'the Act', is intended to protect river banks and river beds from large scale dredging of river sand and to protect their biophysical environment system and regulate the removal of river sand and for matters connected therewith or incidental thereto. It is stated in the preamble of the Act that Government had taken note of the indiscriminate and uncontrolled removal of sand from the rivers causing large scale river bank sliding and loss of property. The Government had also taken note of large scale dredging of river sand disturbing the biophysical environment system of the river and hence it was felt expedient in public interest to provide for regulatory measures for the protection of river banks and for removal of sand from rivers. Despite the stringent provisions prescribed under the Act introduced in the year 2001, there have been complaints that indiscriminate sand mining has been going on in various rivers. In the report of the CESS prepared in February, 2004, it is stated that 40 local bodies located on either side of the Muvattupuzha, Periyar and Chalakudy rivers are engaged in the mining of 4802 truck loads of sand per day. It is also stated in the report that "the quantity of sand mining is several folds

higher than the natural replenishments and hence imposes severe environmental problems in the river basin environments". In that background the CESS reported that sand auditing should be made mandatory atleast once in every three years and necessary changes applied in the resource allocation scheme for reviving the overall environmental quality of the river basins.

3. Viewed from the background of the legislation and the report of the expert body, we are afraid the contentions taken by the learned counsel appearing for the Pancyhayat that it is not mandatory that there should be a sand audit for every three years cannot be appreciated. Section 29 of the Act provides for sand audit which reads as follows:-

29. Sand auditing.--The Government may, with a view to ensure protection of every river, provide for periodical measurement of the quantity of sand available for removal by such method and in such manner as may be prescribed.

Rule 30 of the Kerala Protection of River Banks and Regulation of Removal of Sands Rules, 2002 reads thus:

"30. Sand Audit.- the Government shall conduct, every three years Sand Audit through Expert Committees such as Centre for Earth Science studies, Centre for Water Resources Development and Management, so as to ensure protection of rivers in each District and to assess the quantity of available sand.

(2) The expense required for Sand Audit shall be met from the River Management Fund.

(3) The Government shall, as soon as may be after the receipt of the report of sand audit under sub-rule (1) lay the same on the table of Legislative Assembly with an action taken statement thereof."

4. Section 9 of the Act provides for fixing the total quantity of sand that can be removed from a kadavu or river bank having due regard to the guidelines of the expert agencies like CESS and CWRDM. The said provision reads as follows:-

9. *Power and Functions of the District Expert Committee.*-- Subject to the other provisions of this Act and the rules made thereunder, the District Expert Committee shall have the following powers and functions, namely:--

(a) to identify the Kadavu or river bank in a district in which sand removal may be permitted;

(b) to fix the total quantity of sand that can be removed from a Kadavu or river bank giving due regard to the guidelines of expert agencies like the Centre for Earth Science Studies and Centre for Water Resources Development and Management;

(c) to control the transportation of sand from a Kadavu or river bank to another area;

(d) to close a Kadavu or river bank opened for sand removal;

(e) to ensure the protection of river banks and keep them free from encroachment;

(f) to consider the opinion of the Kadavu Committee and take suitable measures to achieve the objectives of this Act;

(g) to ensure that the Kadavu Committees of the District are performing their powers and functions conferred on them by this Act;

(h) to advise the Government on the measures to protect the biophysical environmental system of the river banks;

(i) to recommend to the Government the necessity to ban sand removal from any river or Kadavu during any season of the year;

(j) to carry out the Directions given by the Government, from time to time;

(k) to exercise such other powers and perform such other duties as are conferred on it by this Act and rules made thereunder;

(l) to advise on any other matter to carry out the provisions of this Act.

5. Learned counsel appearing for the additional third respondent, Keezmad Grama Panchayat, submits that Section 9 of the Act has already conferred jurisdiction on the expert committee and this Court may not sit in appeal over the decision taken by the expert committee. It is also submitted that sand mining is one of the income generating sources of the Panchayat. Still further it is submitted that sand mining to some extent takes care of the rural unemployment. The intention of the Legislature is to be understood by reading both Sections 9 and 29 of the Act and Rule 30 of the Rules conjointly. It is clear that without due regard to the opinion of the expert bodies, namely, the CESS and CWRDM, the expert committee under Section 9 of the Act cannot fix the quantity of sand that can be removed from the kadavus or the river bank. For the expert committee to exercise its power under Section 9 of the Act, the report of the expert body, namely the CESS or CWRDM is absolutely necessary and without which the sand mining cannot be permitted. Rule 30 of the Rules having prescribed the mode of sand audit, it is mandatory that the audit contemplated under Section 29 of the Act is conducted before taking any action for sand mining after the expiry of the report period.

6. We find that the Supreme Court in the case of M.C.Mehta vs Union of India and others reported in AIR 2004 SC 4016, had occasion to go into the issue of sustainable development and its impact on environmental problems. In paragraph 48 of the judgment of the Supreme Court has held as follows:-

48. The development and the protection of environments are not enemies. If without degrading the environment or minimizing adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable

development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, series of orders have been passed by this Court in T.N. Godavarman's case regulating the felling of trees in all the forests in the country. Principle 15 of Rio Conference of 1992 relating to the applicability of precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straight jacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment.

This is the complete answer to the issue. In a conflicting situation of irreparable injury to the environment and severe damage to the economic interest, protection of environment would have precedence over the economic interest. And, towards such protection, anticipatory action on precautionary principles is also necessary and it is the duty of the State to take such action. Only when there is a failure, lapse or refusal as in the instance case, the Court steps in issuing appropriate directions.

7. Admittedly sand audit is long overdue since 2004. The report period expired in 2007. It is shocking that without conducting the mandatory sand audit, sand mining permits have been issued from the year 2007-08. It is a violence not only for the legislation but also to the environment as such. In such circumstances, this Court has a duty to protect public interest. Therefore, in public interest, we deem it necessary to issue a direction that unless sand audit is conducted in

respect of the Periyar river flowing through Ernakulam District, the expert committee shall not issue any new sand mining permits, the expert committee shall not issue any new sand mining permits. In other words, only after the audit report from the expert body, namely CESS or CWRDM, and giving regard to the said report only, the expert committee under Section 9 of the act shall fix the quantity of sand that can be removed from the kadavus or river bank. As far as the on going collection of sand is concerned, for the present season ending by June, 2009, we direct the expert committee headed by the District Collector to ensure that there is no sand mining within the prohibited distance of bridges, river banks, bathing ghats, irrigation projects, etc. Steps should also be taken to see that the river basin is protected. The mining shall only be by permissible methods without affecting the river basin. We deem it our duty to issue such a direction also in view of the tragic deaths due to drowning which have been taking place owing to the pitfalls formed by the indiscriminate mining of sand during the past several years using unauthorized methods.

Sd/-

S.R.Bannurmath, Chief Justice.

Sd/-

Kurian Joseph, Judge.

True copy

Sd/-

Examiner.