IN THE HONOURBLE HIGH COURT OF KERALA

HON'BLE MR.JUSTICE M. RAMACHANDRAN

Reported in 2004 (2) KLT 938

Rukhiya Beevi Vs. State of Kerala

J U D G M E N T

M.RAMACHANDRAN, J:-1. The second respondent, who is the Secretary of the Marady Grama Panchayat, had issued a notice to the petitioner on 25-2-2004 asking her to show cause as to why the industrial activities carried on by her in the 6th ward (Ward No.2) of the Panchayat should not be stopped and the licence cancelled, since she had not obtained the No Objection Certificate (consent) from the Pollution Control Board, as stipulated in the licence. The petitioner, by Ext.P.4 had given a detailed reply, but by Ext..5 dated 4.3.2004, she had been advised that since the complaints were subsisting, she was obliged to produce a certificate from the Pollution Control Board, latest by 10-3-2004. The Writ Petition had been submitted by the petitioner pointing out that even though there was no pollution as alleged, a certificate had been applied for from the Pollution Control Board, and in the meanwhile enforcement of Exts.P3 and P4 orders should be interdicted. During the pendency of the Writ Petition, the Pollution Control Board, by Exts. P.8 and P.12, had passed orders on 3-5-2004 and 2-6-2004 refusing to give consent to operate the unit. These also have been subjected to challenge. The colour of the Writ Petition as also reliefs prayed for have thereon changed substantially.

2. The petitioner submits that a lawful industry, which was being carried on from December, 2001 by a woman entrepreneur giving direct employment to 7 persons and indirect employment to 20 persons will have to be closed down, notwithstanding the circumstances that heavy investments have been made and the establishment has been authorised to function by the competent authorities. It is submitted that the steps for preventing her from conducting the business is engineered by the 5th respondent without any jurisdiction and this Court should come to her rescue exposing arbitrariness practised by the Pollution Control Board in dealing with such matters.

3. Smt.Santhamma Issac had appeared for the petitioner, Sri.Philip Mathew had entered appearance for the second respondent - Panchayat, Mr. Vijai Mathews had represented the cause of the 5th respondent, who was a resident of the panchayat, close to the industrial unit, and I had also heart Sri.Babu Joseph, Karuvathazha for the third respondent - Pollution Control Board. Statements and affidavits had been filed by the parties in support of their respective stand. The Panchayat to a certain extent, Pollution Control Board and the private respondent have joined together for contending that the illegality of running of the unit is plain and it is absolutely essential that its functioning is to be stopped forthwith.

4. However, I find it difficult to accept the contentions as above, and according to me, the petitioner has made out a case for interference, as her industrial activity cannot be learned as

me which is irregular, unauthorised and against public interest.

5. Though the 5th respondent, who has been spearheading the movement, has not specifically referred to details, it has come out that he is in the process of putting up a residential house near to the industrial unit now. To suit his case, he has also submitted that the industrial activities had started on the basis of a temporary licence during the year 2003-04. These also assume relevance, when we examine the totality of the situation.

6. By Ext.P1, the Industrial Department had granted registration to the petitioner for carrying on a tiny enterprises. The petitioner was using a 5 HP motor in her premises and the Panchayat had granted licence for "manufacturing, stock and sales of Bituchem chemicals using 5 HP Electic Motor".

7. According to the petitioner, she has started functioning the unit since 11-12-2001. She had also produced a copy of the licence issued earlier, dated 5-1-2002 is Ext.P.7. It is not as if therefore that the petitioner had commenced activities recently, as alleged by the 5th respondent. The statement filed by the third respondent - Pollution Control Board also refers to the circumstance that at the time of inspection on 12-3-2004 the officer had met the 5th respondent had he had disclosed to him that he was constructing a new house about 5 meters away from the boundary. Therefore, there are materials to show that the unit had been functioning at-least from 5-1-2002, and the 5threspondent, aware about the existing unit, was carrying an construction of his residential building in the adjacent plot. These are realities. However, I am not for a moment suggesting that a polluting industry has a right to go on with pollution, making the surroundings uninhabitable. We have to strike a balance in between.

8. Along with the Writ Petition, the petitioner had produced Ext.P.2 licence, which was obviously a renewal licence dated 8-12-2003. Pointing out that this was only the first page of the licence and the petitioner had not made available the licence conditions, the Panchayat has produced Ext.R2(b). Conditions had been imposed, one of them being that in case there was air pollution. No Objection Certificate from the Pollution Control Board was required to be produced. However, the petitioner's case is that the activity did not produce any air pollution. The unit was producing rain guarding compound (for plantations), rubber coats, bitumen paints, etc. According to the petitioner the process requires only 10 minutes time for mixing. There will be mixing done three to four times on a day. The rest of the work was packing the compound and transporting of the same. It is asserted by the learned counsel that the process only involved melting the compounds to form the product. There was not even boiling and the motor was for pumping water, a might be required for washing and cleaning. In other words, it was argued that there was no activity of pollution involved and the 5th respondent had been carrying out the crusade for an bona fide reason. With reference to the mass petition relief or by him, it was stated that this was misleading one and all, as there was no objections from anybody in the area. Stopping of the activity will only result in colossa loss to her and loss of employment opportunity at least to 20 persons.

9. However, the learned counsel submitted that since the Panchayat had insisted for No Objection Certificate from the Pollution Control Board, they had been approached in the matter. but who what was shown and received from them was only unhelpful attitude and unhealthy treatment. Experts had zone for inspection of the premises and she had been assured that there were no objectionable features and permission could be granted. But, thereafter they had turned turtle and stated that the application for consent will be rejected as there were complaints about the functioning of the unit there was an ommission in not

securing the consent before the activities commenced, there is a court case pending now and also that the fee remitted was found short. But, the grievance is that she has not been advised as to the short falls from her side in the running of the unit or the nature of the pollution that was found as existing. The whole approach was negative in character and for strangulating entrepreneurship.

10. It appears that the Panchayat was concerned because of the complaints from the residents of the locality. Even the present stand is that if there are no legally objectionable features, the petitioner may be permitted to carry on the activities. This of course is a healthy approach and one cannot blame them, especially when it is stated that production of No Objection Certificate in case of pollution was essential as a condition of the licence.

11. The fact remains that the petitioner was continuing the industry for over two years, without objections from any quarter and as authorised by the Industries Department and the Panchayat. It is stated to be a 24 cent plot, secured by compound walls, and with green belt protection. Even now she is kept in the dark about the alleged pollution. She has been constrained to run from pillar to post rather than in concentrating on her projects, which it s sorry state of situation.

12. We may examine the rival contentions in the above background. Now that the principal dispute concerns about the necessity for a certificate from the Pollution Control Board, it could be enquired as to whether there was requirement for a No Objection Certificate, and whether there has been a proper examination of the issue by the Pollution Control Board. The justifiability for the direction that the industry has to put down its shutters permanently also could be looked into.

13. On the complaint of the 5th respondent, the Panchayat had required the Health Inspector of the Primary health Centre, Marady to give them a fact finding report by letter dated 8-3-2004. Report furnished dated 17-3-2004 is Ext.R2(a). He visited and had seen the functioning of the unit as per the report, on 9-3-2004. He states that there are three Chimneys, but its height was deficient. Emissions from boilders come through own of them, and the third carries the smoke from the kiln, when firewood is burnt. The crucial part of the report could be functionally transilated as following:

"The smoke emanating till boiling point of chemicals reached may create bad smell and pollution in nearby areas. The reason for this is that the height of the Chimneys is insufficient".

As pointed out by the petitioner, this was thoroughly insufficient to hold that was pollution. Though he had referred to the version of local residents, he had not entered a definite finding that there was pollution as existing.

14. On 12-3-2004, the Chief Environmental Engineer of the Pollution Control Board also visisted the premises, as could be seen from the statement filed by him, in these proceedings, dated 26-3-2004. I amy extract verbatim from the statement as following:

"It is respectfully submitted that based on the complaint received in this office, inspection was conducted to the unit on 12-3-2004. This is a unit manufacturing rain guarding compounds, rubber kots, bittumen paints etc. The raw materials used are (as informed during the time of inspection) bittumen, tarl kerosene, chalk powder and some glue. Bittumen and

tar are melted by the addition of kerosene, chalk powder and glue are added, mixed well and packed in time. Firewood is used as fuel.

A chimney of about 7M height from the ground level is provided. Vent pipes are provided fopr the tanks in which tar and bitmen are melted.

Met the complainant. he is consstrcting a new house near the unit which is about 5M from the boundary. There are 4 hourses within 15 to 20 M from the boundary of the unit. The nearby resiodents complained about the problems such as smell, smoke, itching of eyes etc. due to the functioning of the factory.

As this is a unit in which petroleum products are processed, the unit comes under most polluting industry ie., under red category. Even if control measures are provided in the industry, there will be still pollution problems.

The unit has not obtained the consent to establish of the Board before starting the industry. Even if they have applied consent to establish will not be issued since this is a highly polluting industry and houses are nearby".

Show cause notice issued is produced along with as Ext.R12. It states that as the entire State is declared as Air Pollution Control Area, under S.21 of the Air (Prevention o& Control of Pollution) Act hereinafter referred to as Air Act) previous consent is necessary to establish or operate any industrial plant in air pollution control area, and as there was failure to apply for consent under R.24(5) and as it comes in the red category, petitioner was to show cause as to why it was not to be directed to be closed down, with further liberty to take proceedings for the violation already committed. The order stated that 'there are houses very near to the industry and lots of complaints are existing regarding the smell, smoke, tching of eyes, etc., and the siting conditions are not satisfactory for setting up such an industry which involves processing of petroleum products".

15. On the consent application filed, Ext.P8 came to be passed on 3-5-2004, and it was in the following terms:

"Whereas enquiry on the consent application wasconducted on 17-4-2004 from the Regional Office, Ernakulam.

Whereas it has been observed that you have not obtained consent to Establish;

Whereas you have not provided adequate air pollution control measures;

Whereas you have not remitted adequate consent fee;

Whereas the Board intend to refuse the consent;

Now therefore, you are hereby directed to show cause within fifteen days why the consent applied for shall not be refused".

The final order has come to be passed on 2-6-2004, as Ext.P.12 and the consent was refused by the following observations;

"The 'Consent to Operate' applied for the industry by name M/s.Royal Bittuchem Chemical Company, Muvattupuzha, Ernakulam is hereby refused as:

1. You have not obtained Consent to Establish before setting up of the industry.

2. You have not provided adequate air pollution control measures.

3. Complaint and court case existing.

The operation of industrial plant without the consent of the Board is ac culpable offence and is punishable as per the provision of the Air Prevention and (Control of Pollution) Act, 1981",

16. Now we may examine the justifiability of the orders as above vis-a-vis the stand of the petitioner that there is no pollution requiring consent to the obtained. Reliance is placed by the Board on S.21 of the Air Act read with R.24.

17. Under Sec.21 of the Air (Prevention and Control of Pollution) Act, no person, without the previous consent of the State Board is to establish or operate any industrial plant in an air pollution control area. Kerala is declared as control area in its entirety from 1993 onwards, S.22 of the Act also might be relevant. It prescribes that no person operating any industrial plant shall discharge any air pollutant in excess of the standards laid down by the State Board.

18. Therefore, the governing expressions appear to be industrial plant and or pollutant. 'Air pollutant' is defined as any solid, liquid or gaseous substance present in the atmosphere in such concentration as may be or tends to be injuries to human beings or other living creatures or plants or property or environment. Under sec.2(b), "air pollution" means the presence in the atmosphere of any air pollutant. Industrial plant, under S.2(k) of the Act, is a plaint used for any industrial or trade purposes and emitting any air pollutant into the atmosphere. R.24 of the Kerala Rules prescribes the modalities of making an application for consent.

19. Bearing in mind the above, we may examine the manner in which the petitioner's case has been dealt with by the Board. They refer to complaints from local persons. An inspection has been held, as made reference of the statement dated 26-3-2004. After seecing the process employed in the establishment, the officer has jumped to the conclusion that as petroleum products are processed, the unit comes under the 'most polluting, red category'; therefore there was no question og granting consent.

20. The Standing Counsel for the Pollution Control Board could not explain the expression of 'red category', which is used by the Board. I had opportunity to see Rules published by the Central Government, as GSR 712(E) dated 18-11-1982 and Rules relating to Union Territories GSR 6(E) dated 21-12-1983. Kerala State Rules of 1984 also had not used the expression 'red category' anywhere. Perhaps the petitioner is right when she says that it is incorporated, out of context, for buffing an entrepreneur. I could find in Annexure III to Schedule IV appended to the Environment (Protection) Rules, that while dealing with emission standards of motor vehicles, when it dealt with production confirmity tests in respect of 87 Octane. the requirement of colour is stated as orange. As for 93 Octane, it is red. But the above is totally inapplicable here. Apart from the above, I could not find even a similar expression.

21. Definitely, it is not as if the Act is applicable to every category of industrial activities. Emission of air pollutant, in quantities, assessed of such concentration, as may be injurious to living organisms etc., is a condition essential for categorizing it as in industry which requires consent for installation/operation. I do not find any authority for the Board to call any industry to be called as an 'industrial plant' under S.2(k) for the pleasure of it. They have to necesarily do home-work, before that, in abundance and a lot of materials of course could be gathered if an application for consent is filed. But an application does not in any way eases their responsibility. There cannot also be any presumption that any particular industry is an 'Industrial Plant' coming under Sec.2(k) of the Act. It is a restrictive provision and strict interpretation appears to be essential for being followed as the guideline.

22. This leads, according to me, to the position that the petitioner's stand has to be considered as acceptable. The Health Inspector did not refer to any actual polution, and excepting as a layman, he could not have been an acceptable authority. When the statement of the Board refers to only one Chimney as present, he has described the two vents also as Chimmeya. That exposes his lack of exposure to such assignments. Counsel for the 5th respondent referring to the report, statement of the Board and Ext.R1 and pointed out that they recorded about the smell. But this by far cannot be a safe yardstick. Opinions may vary as to whether the smell of bitumen, kerosene or chalk powder may be acceptable or offensive to the sniff. One is reminded of a story, referring to subtle principle of perceptions, which may not be out of context.

23. A fisher woman on a day had particularly good business, and by nightfall, not able to find her way back, sought asylum is an Asram. Jasmine flowers collected were kept in the room allotted to her. Our character could not get a wink of sleep as to her nostrils, the smell of the flowers appeared as highly irritating. Exasperated, she pulled her empty fish basket from underneath the cot, sprinkled some water on it, and placod it near her pillow. Relaxation was instantaneous, and she was totally refreshed in the morning. Therefore, version of the 5th respondent or his friends on the strength of olfactory capabilities have to have its own limitations, and is of little assistance for measurement of pollution as defined under the Act.

24. Wide powers are given to the Board for inspection, drawing of samples, and subjecting the products for appropriate test, to find out whether there is presence of offending pollutants. Therefore, in cases of application for consent, the measures should necessarily include all such procedural deliberations. If, in a particular case, as the present one, when the stand is that there is no air pollution as visualized under the Act, the Board has to adopt the prescribed procedure, and in case it is found that the claim of the industrialist is misconceived, follow up actions are to be pursued. After prescribing remedial measures for satisfactory resolution of the offending processes, the application for consent will have to be examined on merits.

25. Though it may not be strictly, in view of my earlier finding, I may clarify one aspect. The Pollution Control Board has stated that as the industry had commenced after 1993 notification, seeking of consent was a prerequisite, and in its absence, offence is committed, and there cannot be any rarification or consent or consent ever thereafter. This approach may be too rigid. Though the relevant secions do not deal with this aspect. I do not think, consent in appropriate cases, even after the unit has become functional is impossible or that there is no jurisdictional power for examining the issue at all. This may affect the workability of the statute itself, in appropriate cases, request for consent, at any stage, could be entertained, and the direction of the Board for remittance of consent fee itself indicates that this was the practice which was being followed:

26. The statment filed by the Pollution Control Board, and the proceedings issued by it as Exts.P.1, P8 and P12 are therefore pedestrian in style and content, and cannot be considered as issued by an expert body constituted under the Act. The above proceedings cannot be sustained. The second respondents should consider the application for licence submitted by the petitioner in its own merits, notwithstanding Ext.P.5, as a unit cleared by the Industries Department. It is the fundamentalright of the petitioner to claim equal protection of laws, and for engagement in trade and business of her choice. The restrictions, if imposed, definitely have to stand the test of constitutionality. It is to be noticed that in the earliest enactment itself, viz., Environment (Protection) Act, 1986, under sec.7, the prohibition is against a person carrying on an industry, or a process, discharging pollutant in excess of such standards as may be prescribed. Under Schedule I, emissions from small boilders could be 1500 mg/m3 per hour. The petitioner's operational time is stated as 10 to 15 minutes. The powers have obviously been misused, a sledge hammer is employed for killing a mosquito.

27. The cumulative circumstance therefore, which has come out, is that a small scale industrial unit (tiny unit) has been put to considerable difficulties in the matter of its functioning and coercive methods are employed to see that it is closed down. Perhaps the difficult task of the Court is that it is called up to reconcile the conflicting claims of common man's right to pollution free atmosphere vis-a-vis the right of an individual to carry on a trade or business, which is a fundamental right. What is necessary might be a sustainable development and awareness. The allergy as against the petitioners establishment should not be simpoly pshychological, but only in case it is found that this is much more than a nuisance, as laid down by statutory parameters, prohibitory measures could be enforced. In exercise of powers conferred by Ss.6,8 and 28 of the Environment (Protection) Act, 1986 rules have been framed in matters of manufacture, storage and import of hazardous chemicals. "Hazardous chemical", is defind by R.2(2). It is pertinent to notice that the petitioner has not been using any chemicals which satisfy the criteria laid down in Part I or II of Schedule I. Nor are there any chemicals described by Schedules2 and 3. These being the factural position, determent measures taken by the Board were totally unjustified. The burden of proof is on the Board to show that the pollution is excessive, in any given case.

28. I quash Exts.P5, P8 and P.12. The petitioner will be entitled to continue, the industrial activities referred to in Exts.P.1 and P.2, provided the petitioner submits an application for licence to the Panchayat appropriately. I think the circumstances justify the petitioner to claim costs from the third respondent - Pollution Control Board. At least as a token, the third respondent should pay Rs.500/- (Rupees Five Hundred Only) as costs to the petitioner. They should also refund to her the money received towards consent fee, forthwith.

This Writ Petition is allowed.