

BEFORE THE NATIONAL GREEN TRIBUNAL**SOUTHERN ZONAL BENCH, CHENNAI**ORIGINAL APPLICATION NO...1 1 7.....of 2021

BETWEEN

Kottayam Nature Society.....**Applicant**

AND

State of Kerala and others..... **Respondents****BRIEF ARGUMENT NOTES**

1. The application has been filed mainly to protect the *Attuvanchi*, Bamboo and other trees/plants on the banks of *Meenachil* River . It is alleged that it is is being cut indiscriminately without any Project Report and conducting any environmental impact assessment. Under the guise of silt removal sand is being extracted causing serious damage to the river bed which has full of microorganisms. Such activities have far reaching adverse effect on the said river ecology which cater the needs of many. The tree cutting activities are still going immediate action is required.
2. The main objection is raised by the 3rd respondent, Executive Engineer, Major Irrigation Department, due to extreme high rain fall in August, 2018, 2019 and 2020. It is stated that width of the river is reduced due to formation of deltas



and accumulation of silt. The naturally growing vegetation obstructs the free flow of water. They state that they have arranged a scheme for doing the works, the details of which are given, which can be summarised as follows; -

- a. Desilting of the *Meenachil* river from Chungam to Kanjiram in Kottayam Municipality and Thiruvapur Panchayat
- b. Cleaning obstructions and desilting in *Meenachil* river from Neelimangalam feeder canal and repair of *Kumarakom* boat route canal
- c. Rejuvenation works of *Meenachil* river from *Ettumanoor* to Kottayam Municipal area.

The main work is desilting of the said rivers. In addition, they also stated about cleaning obstructions and rejuvenation works, the terms of which are not defined.

3. It is stated by the 3rd respondent that dredging of river bed is not done and there is no disturbance of microorganisms. It is stated by the 3rd respondent that no trees were cut or removed from the banks of the river, only hanging branches of trees and hanging portions of the bamboo bunches obstructing the flow of water alone were cut and they were deposited on the banks itself. The intention of the work is to further deepen and widen the river so that the water can flow if it rains and which will avoid flooding in the Kottayam District.
4. **The main question to be considered is whether the proposal for desiltation and the proposed cutting of hanging branches of trees is environmentally benign?**



5. A river has got water and a river bed. In between in minerals accrues and in certain rivers clay accrues. Sometimes a mixture has to accrue. It all depends on the nature of accumulation. In *Meenachil* River sand mining was being carried out from time to time. In so far as Kerala is concerned the Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 has been enacted 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. Sec.28 of the said Act mandates that sand audit to be conducted on every year to ascertain the availability of sand. The relevant portion is extracted below: -

*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.*

In so far as *Meenachil River* is concerned the Centre for Rural Management has conducted a sand audit on behalf of the Revenue Department during 2013-15 covering 39.43 km out of the total 76 km length of the river. The study calculated the total volume of sand in the study area of the river, the volume of sand is two meters below the summer water level. The sand audit report contains all the details of the said river and found that none of the *Grama* panchayats and the four municipalities has mineable sand deposits. (AnnexureA.13). It is on that basis the Government has issued G.O.(MS)No. 316/16/RD, dated 24-05-2016 (**Annexure-IX**) directing the District Collector, Kottayam not to allow any sand mining for the next three years. Thus, sand mining is prohibited in the said river till 23-05-2019. After the said date no study is conducted to ascertain what is accumulated in



the Meenachil river. So, the attempt is to remove sand illegally under the guise of removal of silt.

6. Clay beds are made up of a deposit of fine particles. To accumulate a thick body of clay, it is necessary that muddy water, water with clays in suspension, be allowed to settle out depositing the clay. The statement that deltas are formed in the waterway which obstructs the natural path of the river will have to be removed along with the desiltation itself is indicative of the fact that no environmental assessment has been done by them.
7. No scientific material has been produced to show that the deepening and widening of the *Meenachil* river will avoid flood in Kottayam town area. Though the cost of the scheme is above ten lakhs the Irrigation Department has not obtained the opinion of the Environment Department. In this regard it is profitable to note that in Kerala State from 13-01-1978, environmental clearance is made mandatory from the State Committee on Environmental Planning and Co-ordination for all development schemes the cost of which is above ten lakhs. The Government of Kerala, Health Department, has issued G.O.(P)No.13/78/HD, dated 13-1-1978 (Annexure A.11) mandates reference to the Committee on Planning and Co-ordination for review and assessment of environmental implications in order to integrate environmental concerns and the clearance of the committee must be obtained before the schemes are sanctioned and taken up for execution. This notification has been issued in



exercise of the powers under Art. 48A of the Constitution of India as a commitment to protect environment . Hon'ble Supreme Court has interpreted the above order and held that a Project cleared without environment impact assessment is illegal and the building constructed in violation is directed to be demolished. [Association for Environment Protection Vs. State of Kerala. (2013) 7 SCC 226: 2013 (3) KLT 201]. In a state like Kerala, which is described as God own Country for the reason that it has natural resources in abundance, no activities which has got the effect of tampering the nature is allowed to be carried out without environmental clearance. The Irrigation Department has deviated from the said commitment to protect the environment.

8. In so far as the above projects are now intended to desilt the *Manimala* river are concerned no such environmental clearance has been obtained from the Environment Department. The 'Environment Department' came into existence in the year 2006 by delinking the subject Environment from the Science, Technology & Environment Department. The primary concerns of the Department are implementation of policies and programmes relating to conservation of the State's natural resources, its biodiversity and the prevention and abatement of pollution. While implementing these policies and programmes, the Department is guided by the principle of sustainable development and enhancement of human well-being. The Directorate of Environment and Climate Change (DoECC) under Environment Department was



constituted in December, 2010. The Directorate is the nodal agency in the administrative structure of Environment Department for the planning, promotion, co-ordination and overseeing the implementation of Central and State environmental protection and conservation policies and programmes. The Directorate also serves as the nodal agency in formulating climate change related schemes, plans, programmes and their execution. The main functions of Directorate are:

- a. Take up State level environment development programmes and implement them in collaboration with appropriate agencies;
- b. Coordinate the programmes for the revision and implementation of State Action Plan on Climate Change (SAPCC), set up Climate Change Cell at various sectors;
- c. Exercise administrative control of all environmentally related authorities / institutes being established in State;
- d. Conduct environmental appraisal at planning level related to the development schemes of the State Government;
- e. Coordinate the environmental awareness and incentives programmes in education institutes and society to evoke the responsibility of individuals to respect, protect, and preserve the environment.

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- f. Encourage the environmental research and development to broaden the knowledge and to develop new sustainable novel technologies.

(Extracted from the web site < <https://envt.kerala.gov.in/introduction/> > <accessed on 3-12-2021>).

9. It has been categorically held by the Hon'ble Supreme Court that a Project cleared without environment impact assessment as required by GO. 13-01-1978 is illegal and is to be demolished. [*Association for Environment Protection Vs. State of Kerala. (2013) 7 SCC 226: 2013 (3) KLT 201*]. Thus, the scheme without environmental clearance is arbitrary and illegal.
10. Under the guise that there was flood in 2018, 2019 and 2020 and in order to avoid another disaster of flood the desilting activities are being carried out could not be accepted. The Disaster Management Act, 2005 does not empower them to do so.
11. There is nothing to show desilting will solve the entire problem of flooding and will not adversely affect the river ecology. Therefore, the Tribunal is being duty bound to protect the nature is bound to protect the *Meenachil* river from the so called illegal and arbitrary action being carried out under the guise of disaster management.
12. A perusal of the Sand Audit report (page 53-54) will show that several constructions are made encroaching on the river. Every construction in the river will obstruct the natural flow of water. Such constructions can be done only after conducting the environment impact assessment. It may be noted that in the famous Span Hotel Case Supreme Court has held the hotel in that case was



constructed which has interfered with the natural flow of river and thus disturbed the environment and ecology of the area. [*M.C.Mehta Vs. Kamal Nath and others. (1997)1 SCC 388*]. It is due to such constructions the river flow is obstructed and deltas are formed.

13. It may also be noted that It is respectfully submitted that the Hon'ble High Court of Kerala has the occasion to consider the issue of environmental degradation of *Kallada* River. It called for reports from the Kerala State Pollution Control Board and they reported that it is due to excessive sand mining the river ecology degraded. The Government of Kerala opposed the same and the court has issued certain directions in O.P.No. 14764 of 1997 as per its order 22th July, 1998. The Court made the said directions to the State Government which is applicable to all the rivers in Kerala. The relevant portion of the directions is extracted below: -

i to clearly define the river bank referred to in the conditions imposed by it and to fix permanent marks so as to enable the clear determinations of the river bank on either side.

ii. to earmark the prohibited area on either sides of bridges, dams and other structures so as to implement the 300 metre ban.

lii to specify the normal sand bed level for the respective rivers and after such demarcation, to mark the level with some permanent bench mark on the river banks.

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lv to prevent and / or ban the removal or extraction of sand from such rivers where the present sand bed level is below the required level as fixed by the State.

v. To locate the areas where the sand deposits is less and declare such areas as prohibited areas before taking up the work of extraction for the relevant year.

vi. to construct retaining walls along the river banks where there exist chances of land slide, wherever possible

14. In appeal filed by the State of Kerala and others a Division Bench of the Kerala High Court by judgement in W.A.No. 1854 of 1998, dated 23-11-1999 limited the direction No.4 to that particular *Kadavu* in *Kallada* river. [*Charadrasekhara Pillai vs State of Kerala*, 1988 (2) Kerala Law Journal 195.

15. Kerala High Court has held in a land mark case that only after conducting the sand audit, sand mining could be permitted. It is the settled proposition of law that 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 failure, lapse or refusal the Court steps in issuing appropriate directions. [*Paristhithi Samrakshna Samithi vs State of Kerala*. 2009 (2) KLT 272.

16. It is most respectfully submitted that the present proposal by the Irrigation Division to do desilting in *Meenachil* River in three places as shown in the statement, is thus illegal and arbitrary and will have adverse effect on the environment and ecology. The irrigation department in their project proposed



the cutting of trees which are found growing along the banks of *Meenachil* river. The river side vegetation or the riparian vegetation (*Aattuvanchi* in Malayalam) is very unique and is a major component of the riverine ecosystem. Riparian zones are an interface between terrestrial and aquatic ecosystems and also play a critical role in supporting biota and therefore biodiversity. These plants create a very special atmosphere in the river and also along the river bank. This system is home for many types of fishes, birds, butterflies, dragon flies and damsel flies and other aquatic animals. This vegetation protects the river banks, controls the flood, lower water temperature and also remove impurities from water. The riparian vegetation is under threat all over the world due to human intervention. Studies showed that the riparian vegetation of *Meenachil* river consists of many IUCN (International Union for Conservation of Nature and Natural Resources) categorized plants and endemic (Only in this geographical area) plants. So, this vegetation should be conserved. Destruction of riparian vegetation cause irreversible environmental problems in the riverine ecosystem. The Kerala State Biodiversity Board and Kerala Forest and Wildlife Department in their reports recommended the conservation of riparian vegetation of *Meenachil* river. The present activities of Irrigation Department, without conducting any environmental impact assessment under the guise of disaster management will have damage the river ecology. The principle of sustainable development has been ignored while doing the said activities.

Dated this the 10th day of January, 2022.

Counsel for the Applicant



1997 KHC 1313
Supreme Court
***Kuldip Singh; S. Saghir Ahmad, JJ.**

M. C. Mehta v. Kamal Nath and Others
Parallel citation(s) : 1997 KHC 1313 : 1997 (1) SCC 388
CaseNo : W. P. (C) No. 182 of 1996
Date : 13/12/1996

Constitution of India -- Art.21, Art.32 -- Compensation -- In September 1995 the swollen Beas engulfed some part of the land in possession of the motel -- Effort on the part of the motel was to create a new channel by diverting the river flow -- Span Resorts management had deployed heavy earth moving machinery to reclaim their land and to divert / channelise the course of river to its course which it was following prior to 1995 floods: by dredging and raising of earthen and wire crated embankments -- This resulted in degradation of environment -- Span Motels interfered with the natural flow of the river by trying to block the natural relief or spill channel of river -- Our legal system based on English Common Law - includes the public trust doctrine as part of its jurisprudence -- State is the trustee of all natural resources which are by nature meant for public use and enjoyment -- Lease quashed -- Held, Motel to pay compensation by way of costs for restitution of environment and ecology of the area

Important Para(s):13, 15, 34, 39

Referred: Vellore Citizens' Welfare Forum v. Union of India, 1996 (5) SCC 647 : JT 1996 (7) SC 375; Indian Council for Environmental Legal Action v. Union of India, 1996 (3) SCC 212 : JT 1996 (2) SC 196; Illinois Central Railroad Co. v. People of the State of Illinois, 146 US 387 : 36 L Ed 1018 (1892); Gould v. Greylock Reservation Commission, 350 Mass 410 (1966); Sacco v. Development of Public Works, 532 Mass 670; Robbins v. Deptt. of Public Works, 244 NE 2d 577; Prievev v. Wisconsin State Land and Improvement Co., 93 Wis 534 (1896); Crawford County Lever and Drainage Distt. No. 1, 182 Wis 404; City of Milwaukee v. State, 193 Wis 423; State v. Public Service Commission, 275 Wis 112; National Audubon Society v. Superior Court of Alpine County, 33 Cal 3d 419; Marks v. Whitney, 6 Cal 3d 251 United Plainsmen v. N. D. State Water

Cons. Comm'n, 247 NW 2d 457 (ND 1976); Phillips Petroleum Co. v. Mississippi, 108 S Ct 791 (1988); Referred to

Advocates:

Party in person; For Appellant

H. N. Salve; M. S. Vashisht; Rajiv Dutta; Shiv Pujan Singh; J. S. Attri; L. R. Rath;
For Respondents

JUDGMENT

Kuldip Singh, J.

1. This Court took notice of the News item appearing in the "Indian Express" dated February 25, 1996 under the caption - "Kamal Nath dares the mighty Beas to keep his dreams afloat". The relevant part of the news item is as under:

Kamal Nath's family has direct links with a private company, Span Motels Private Limited, which owns a resort - Span Resorts - for tourists in the Kullu Manali valley. The problem is with another ambitious venture floated by the same company - Span Club.

The club represents Kamal Nath's dream of having a house on the bank of the Beas in the shadow of the snow capped Zanskar ranges. The club was built after encroaching upon 27.12 bighas of land, including substantial forest land, in 1990. The land was later regularised and leased out to the company on April 11, 1994. The regularisation was done when Mr. Kamal Nath was Minister of Environment and Forests. ...The swollen Beas changed its course and engulfed the Span Club and the adjoining lawns, washing it away.

For almost five months now, the Span Resorts management has been moving bulldozers and earth movers to turn the course of the Beas for a second time.

The heavy earth mover has been used to block the flow of the river just 500 metres upstream. The bulldozers are creating a new channel to divert the river to at least one kilometer downstream. The tractor trolleys move earth and boulders to shore up the embankment surrounding Span Resort for laying a lawn. According to the Span Resorts management, the entire reclaiming operation should be over by March 31, and is likely to cost over a crore of rupees.

Three private companies - one each from Chandigarh, Mandi and Kullu - have moved in one heavy earth mover (hired at the rate of Rs. 2000 per hour), four earth movers and four bulldozers (rates varying from Rs. 650 to Rs. 850 each per

hour) and 35 tractor trolleys. A security ring has been thrown all around. ... Another worrying thought is that of the river eating into the mountains, leading to landslides which are an occasional occurrence in this area. Last September, these caused floods in the Beas and property estimated to be worth Rs. 105 crore was destroyed, ... Once they succeed in diverting the river, the Span management plans to go in for landscaping the reclaimed land. But as of today, they are not so sure. Even they confess the river may just return.

Mr Kamal Nath was here for a short while two three months ago. He came, saw what was going on and left. I suppose he knows what he is doing", says another executive.

The district administration pleads helplessness. Rivers and forest land, officials point out, are not under their jurisdiction. Only the Kullu conservation of forests or the district forest officer can intervene in this case.

But who is going to bell, the country's former Environment and Forests Minister. Interestingly, a query faxed to Kamal Nath for his views on these developments fetched a reply from Mr. S. Mukerji, President of the Span Motels Private Limited. Admitting that the Nath family had "business interests" in the company since 1981, he said, "the company is managed by a team of professional managers and Mr. Kamal Nath is not involved in the management of activity of the company."

The Board comprises professionals, some of whom are friends and relatives of the Nath family", Mr. Mukerji said, he expressed surprise that a reference had been made to Rangri and Chakki villagers "since these villagers are at least 2/3 kilometers away and not even on the river side."

He said the Span Club was "not for the exclusive use of any one individual." "We would like to emphasize that we are only 'restoring the river' to its original and natural course and are restoring our land and or those or neighbouring villagers similarly affected by the flood.

He maintained that "Mr Kamal Nath has definitely not been to Span Resorts in the last two months and in fact, to the best of my knowledge, has not travelled to the Kullu Valley for quite some time now. In any case, we had never 'blocked' any channel in the vicinity of Span.

2. Mr. Kamal Nath filed one page counter affidavit dated June 8,1996. Paras 1 and 3 of the counter are as under:

I say that I have been wrongly arrayed as a respondent in the above petition in as much as I have no right, title or interest in the property known as 'Span Resorts'

owned by 'Span Motels Private Limited'.

I further say that the allegations made in the press reports based on which this Hon'ble Court was pleased to issue notice are highly exaggerated, erroneous, mala fide, mischievous and have been published only to harm and malign the reputation of this respondent.

3. On behalf of Span Motel Private Limited (the Motel), Mr. Banwari Lal Mathur, its Executive Director filed counter affidavit. Paras 2 and 3 of the Counter are as under:

I say that Mr. Kamal Nath who has been arrayed as respondent No. 1 in the above writ petition has no right, title or interest in the property known as SPAN RESORTS owned by Span Motels Pvt. Ltd. or in the lands leased out to the said company by the State of Himachal Pradesh.

I say that the shareholding of SPAN MOTELS PVT. LTD. is as under:

	<i>No. of Shares held</i>	<i>% Share holding</i>
Mrs. Leela Nath	32,560	42
EMC Projects Pvt. Ltd.	14,700	19
SHAKA Properties Pvt. Ltd.	15,000	19
SHAKA Estate & Finance	15,000	19
Pvt. Ltd. Capt. Alok Chandola	250	01
	<u>77,510</u>	<u>100</u>

4. It was not disputed before us by Mr. Harish Salve, learned Counsel appearing for Mr. Kamal Nath that almost all the shares in the Motel are owned by the family of Mr. Kamal Nath. We do not wish to comment on the averment made on oath by Mr. Kamal Nath that he has "no right, title or interest in the property known as Span Resorts owned by Span Motels Private Limited.

5. Mr. B. L. Mathur filed an additional counter affidavit dated July 30, 1996 on behalf of the Motel. The counter affidavit mentioned above states that Government land measuring 40 bighas 3 biswas situated along side Kullu Manali Road on the bank of river Beas was granted on lease to the Motel for a period of 99 years with effect from October 1, 1972 to October 1, 2071. The lessee was granted permission to enter and occupy the said area for purpose of putting up a motel and for installing ancillaries in due course as may be subsequently approved by the lessor. We may refer to paras 6 and 7 of the lease deed dated September 29, 1972 which are as under:

The Lessee shall not dig deep pits or trenches in the said land, which may lead to the danger or erosion and shall make good the Lessor's defects caused by their acts or defaults within one month of notice by the Lessor.

In the event of said land being required by Lessor for any other purpose, whatsoever the Lessor will be entitled to terminate this lease at any time by giving six months notice in writing to the lessee and the lessee shall not be entitled to any compensation whatsoever on account of such termination.

6. The current management (Shri Kamal Nath's family) took over the Motel in the year 1961. Fresh lease was signed on September 29, 1981. The new lease was for the same period from 1972 to 2071. Paras 4 and 5 of the additional affidavit are as under:

I say that the Motel commenced operations in 1975. There are over 800 trees in this area of 40 bighas. the motel has two clusters with 8 dwelling units of 3 rooms each. The rooms are nowhere near the river - the distance between the cluster of rooms and the beginning of the river basin is about 10 meters actually the river is another 30 meters therefrom. Thus, the effective distance between the edge of the river and the cluster of rooms is 40 meters.

I say that in the peak of the flood, the river did not come closer than 10 meters to the rooms and did not, therefore, pose any danger to the rooms, particularly there is no problems qua rooms as the rooms are on a higher level - at least 5 - 7 meters at their closest point.

Along with the additional affidavit the correspondence between the Motel and Government has been annexed. In a letter dated October 19, 1988 addressed to the Chief Minister Himachal Pradesh. The Motel gave details of the flood damage during the year 1988 and finally requested the Government for the following steps:

Further it is imperative that the Government take immediate steps to stop erosion of the land under lease to us. It would appear that strong concrete blackened retaining walls will be necessary to be placed at appropriate points to protect the land mass around us.

7. The Motel addressed letter dated August 30, 1989 to the Divisional Forest Officer, Kullu. The relevant part of the letter is as under:

When we acquired our land on lease, there were no clear demarcations of the surrounding areas and boundaries. There has existed a stretch of waste and 'banjar' (Class III) forest land in a longitudinal strip along the River bank admeasuring about 22.2 bighas, contiguous and adjacent to our leased land. Over the years, and especially after the severe flood erosion last year, we have built extensive stone, cemented and wire mesh crated embankments all along the

river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste a 'banjar' area, beautified and landscaped it, planted ornamental, fruiting and varied forest trees extensively such that it blends with our estate and with the surrounding flora and environment in a harmonious manner. A Revenue map along with all revenue department records covering this entire area, is forwarded enclosed herewith for your reference and perusal.

We are aware that in accordance with the forest Conservation Act of 1980, the use of Forest land by Private Agency even for natural development and afforestation scheme, requires alternative matching compensatory afforestation land areas to be surrendered by the concerned party, after due approval of the Government. In view of this statutory pre condition, we wish to submit that we can immediately surrender to the Government nearly 28 bighas & 13 biswas of private agricultural cultivated land located at Village MAJHACH, (Burua), MANALI, in exchange for the above mentioned 22.2 bighas of Class III banjar forest land adjoining our land in Village Baragran Bihal, which we request for transfer to our company in lieu of the land we are willing to surrender. The specific Revenue maps and records concerning this area of land at Village Majhach, are also enclosed herewith for your kind perusal.

It is obvious from the contents of the letter quoted above that the motel had encroached upon an additional area of 22.2 bighas adjoining to the lease hold area. Apart from that the Motel had built extensive stone, cemented and wire mesh created embankments all along the river banks. The Motel was keen to have the encroached land by way of exchange/lease. A request to that effect was repeated in the letter dated September 12, 1989 addressed to the Divisional Forest Officer, Kullu. The Motel again repeated its request for lease of the additional land by the letter dated July 9, 1991. The said letter further stated as under:

We would also like to mention that the Banjar land adjoining our hotel, referred to in para 1 above, lies along the bank of river Beas which erodes it every year. About ten years ago almost 4 bighas of this land were lashed away and the on flowing water had posed a serious threat to our motel buildings and adjoining area. To protect our property we were compelled to erect deep protection embankments along the banjar land in question at huge cost the details of which will be sent to you shortly. If our proposal is accepted for the exchange of land it will become possible for us to take further steps to protect this land.

8. The Divisional Forest Officer, Kullu sent reply dated January 12, 1993 which stated as under:

In this connection it is intimated that at present we are not having funds to put crates and spurs along the river side near your hotel to check the soil erosion, as indicated in your letter referred to above. In order to protect your property from the damage, you can carry out such works at your level, subject to the condition that the ownership of the land would vest with Forest Department and the Department would not be liable to pay any amount incurred for the purpose by you at a later stage and you would not claim any right on government property.

The above quoted letter can be of no consequence because much before the said letter the Motel had built extensive stone, cemented and wire mesh crated embankments all along the river banks. This is obvious from the contents of the letter dated August 30, 1989 (quoted above).

9. The Motel addressed a letter dated June 21, 1993 to the Chief Secretary, Himachal Pradesh wherein it is clearly stated that the adjoining land measuring 22 bighas and 3 bishwas had been reclaimed by the Motel. The relevant part of the letter is as under:

Adjoining our Resort and Contiguous to our leased land is a stretch of class III - Banjar forest land in a longitudinal strip along the river bank admeasuring 22 Bighas and 3 Biswas. This was a stony piece of land and used to get flooded every year during monsoons and often got washed away and reduced in size by river erosion year by year. This land was reclaimed by us and protected by an embankment and filling from the river side.

The said letter further states as under:

Similarly on the river side part of our leased land there used to be floods and erosion every year. If we would have let this continue, the leased land would have also got reduced every year. In order to protect our leased land and to save damage to our hotel property, we at our own considerable expense and cost built stone and wire mesh crated embankment all along the river bank. This not only protected our hotel land but also the forest land....

In 1988 there were severe floods when every a portion of leased land got washed away. It became imperative for us at considerable expense to build an embankment on the river front along the leased property. In order to build an embankment on the river front along the leased property the washed away area and part of the river bank had to be filled at huge cost. Once the river bed and the washed away area was filled, the choice before us was either to put soil on it and

grow grass and trees to secure it or let it remain unsecured and aesthetically displeasing. We chose the former. As a result of land filling and embankment our leased area when measured will obviously show an increase. This increase is not an encroachment but reclamation with the objective of protecting the leased property.

10. In the letter dated August 7, 1993 addressed to the Divisional Forest Officer, the Motel again asked to lease of adjoining area. The relevant part of the letter is as under:

We had explained in our previous letters dated 21.6.93 and 23.7.93 (copies of which have been sent to you with our letter dated 5.8.93) the circumstances under which we had to spend enormous sum of money in protecting and reclaiming the forest land adjoining our Resort. It had become necessary for us to undertake this reclamation and protection work by filling the land from the river bed, constructing embankments, retaining walls and crating etc. in order to protect the land leased by the Government to our Span Resort and property thereon but we were unable to complete the entire work as we were restrained from carrying on with the work under undue allegations of encroachment on the forest land....

In order to expedite the process of commencing protection work on an urgent basis on the forest land, we propose that the forest land be given to us on long lease coterminus with the lease of the land granted by the government for our Span Resorts. This could be done by a supplementary lease as it is imperative to save the land under the original lease.

All we have done is to reclaim and protect the land from erosion by constructing crates, retaining walls and embankments along the river Beas by investing huge amounts which unfortunately have all been washed away due to floods and now requires reconstruction to save the forest land and our adjoining property from total destruction.

11. The Government of India, Ministry of Environment and Forests by the letter dated November 24, 1993, addressed to the Secretary, Forest, Government of Himachal Pradesh, Shimla conveyed its prior approval in terms of S.2 of the Forest (Conservation) Act, 1980 for leasing to the Motel 27 bighas and 12 biswas of forest land adjoining to the land already on lease with the Motel. A lease deed dated April 11, 1994 regarding the said land was executed between the Himachal Government and the Motel. The additional affidavit filed by the Motel refers to the

prior approval granted by the Government of India as under:

In the Ministry of Environment and Forests, the proposal was cleared by the Secretary and Forwarded to the Forest Advisory Committee by passing the Minister concerned. The Forest Advisory Committee cleared the proposal subject to severe restrictions - and also certain restrictions which are not normally imposed in such cases. The proposal was then cleared at the level of the Prime Minister and a letter of 24th November, 1993, approval was communicated to the State Government and SMPL.

12. It may be mentioned that Mr. Kamal Nath was the Minister in charge, Department of Environment and forests at the relevant time. What is sought to be conveyed by the above quoted paragraph is that Mr. Kamal Nath did not deal with the file. The correspondence between the Motel and the Himachal Government referred to and quoted by us shows that from 1988 the Motel had been writing to the Government for the exchange/lease of the additional Forest land. It is only in November 1993 when Mr. Kamal Nath was the Minister, incharge of the Department that the clearance was given by the Government of India and the lease was granted . Surely it cannot be coincidence.

13. This Court took notice of the news item - quoted above - because the facts disclosed therein, if true, would be a serious act of environment degradation on the part of the motel. It is not disputed that in September 1995 the swollen Beas engulfed some part of the land in possession of the motel. The news item stated that the motel used earth movers and bulldozers to turn the course of the river. The effort on the part of the motel was to create a new channel by diverting the river flow. According to the news item three private companies were engaged to reclaim huge tracts of land around the motel. The main allegations in the news item was that the course of the river was being diverted to save the motel from future floods. In the counter affidavit filed by the motel, the allegations in the news item have been dealt with in the following manner:

(1) If the works were not conducted by the Company, it would in future eventually cause damage to both banks of the river, under natural flow conditions.

(m) By dredging the river, depth has been provided to the river channel thus enhancing its capacity to cope with large volume of water.

(n) The wire crates have been put on both banks of the river. This has been done to strengthen and protect the banks from erosion and NOT as any form of river diversion. It is not necessary to divert the river because simply providing greater

depth and removing debris deposits enhances the capacity of the river to accommodate greater water flow.

(o) I further state that the nearly 200 metres of wire crates which have been put on the left bank of the river (the river bank on the opposite side of SPAN) is in the interest of the community and nearby residents/villages. This left Bank crating protects the hillside where RANGRI, CHAKKI and NAGGAR are located.

(s) After the floods, it was observed, that the boulders and rubble deposits were obstructing and hindering the flow of the river and thus, it was the common concern of the Company as well as of the Panchayat of the Village BARAGRAN BIHAL to carry out dredging measures to provide free flow of the river water.

(t) Accordingly alleviation measures conducted by the company and the villagers of BARAGRAN BIHAL were as under:

(i) Dredging of Debris deposit: Debris deposits in river basin which had collected due to the floods were removed by dredging. This deepens the channel and thus allows larger flow of water.

(ii) Strengthening of both banks with wire crates: Wire crates are the common method of protection of bank erosion. Accordingly wire crates were put along the opposite side (left bank) to protect the landslide of the hillside wire on which village RANGRI is perched. Wire crating was also put on the Resort side of the River (Right Bank) to strengthen & protect the bank against erosion. All the wire crating runs along the river flow and not as an obstruction or for, any diversion,

(w) It is further submitted that whereas the report mischievously refers to villagers of Rangri, Chakki and Naggar nowhere does it take in to account the very real problems of villagers of Baragran Bihal which is located immediately on the Right Bank near the SPAN Resort who were seriously affected by the floods. Chakki, Rangri and Naggar Villages have not at all been affected by the floods and there is no remote possibility of these villages being affected due to the flood protection works conducted by the Company.

In the additional affidavit filed by the motel the facts pleaded are as under:

(ii) It had become necessary for them to undertake this reclamation and protection work by filling the land from river bed, constructing embankment, retaining walls and crates, etc. in order to protect the land leased by the Government to the Resort and the property thereon.

(vii) The forest land which is susceptible to heavy river erosion by floods involves high cost for its protection from getting washed away every year would be protected by construction of embankments and filling from the river side by the

Company local community or Kullu Manali and surrounding villages will benefit.

14. Mr. G. D. Khachi, Under Secretary (Revenue) Government of Himachal Pradesh in the counter affidavit filed in this Court stated as under:

(iii) That subsequently, a piece of land measuring 21 - 09 bighas was encroached by M/s. Span Motels. On coming to the notice of the Government of such encroachment, the Govt., of Himachal Pradesh in Revenue Department took action and reportedly got the encroached land vacated, and the possession of which has been taken over by the Forest Department,

that on 21 - 22 July, 1992, the then Chief Secretary to the Government of Himachal Pradesh visited the site who drew the inference that M/s. Span Motel Ltd. were still using the encroached land. The copy of note on inspection of the then Chief Secretary is annexed as R1,

that immediately on receipt of the recommendations of the then Chief Secretary (Annexure R I), the Department of Forest started working at the site but in the mean time, it was decided to lease out a piece of land measuring 27 - 12 bighas which includes the said encroached land measuring 21 - 09 bighas. the lease granted by the Government of Himachal Pradesh in Revenue Department vide letter No. Rev. D(G)6-53/93, dated 6.4.1994 is annexed as Annexure R II after obtaining the approval of Government of India, Ministry of Environment & Forest, New Delhi vide letter No. 9-115/93-ROC, dated 24.11.93 (copy annexed as Annexure R III) for the purpose of protecting earlier leased land,

that the developmental activities which was being undertaken by M/s. Span Motels Ltd. came to the knowledge of the Government from the News Item which appeared in the Press and field officers of all the concerned departments took an exercise to carry out the inspection and reported the matter to the Government.

15. C. P. Sujaya, Financial Commissioner cum Secretary (Irrigation and Public Health) Government of Himachal Pradesh in her counter affidavit filed in this Court, inter alia, stated as under:

Admitted to the extent that the Span Resorts management had deployed heavy earth moving machinery to reclaim their land and to divert / channelise the course of river to its course which it was following prior to 1995 floods: by dredging and raising of earthen and wire crated embankments.

The flow of river has been changed / diverted by dredging / raised of wire crated embankments and creating channel from a point u/s of Span Resorts to D/s of

Span Resorts. The approximate length of channel is about 1000 mtrs.

Admitted to the Extent that village Ranghri and Chakki are located on left bank of river Beas. However, channelization of river has been done slightly away from the toe or foot hills except for the last about 500 metres where it is running along the foot hills.

The hill on which village Rangri and Chakki are situated consists of small boulders embedded in Sandy Strata and is quite fragile / unstable in nature. Therefore, this reach of river is prone to land slides in the normal course also. However, it is feared that flow of river along the foot hills may hasten/aggravate the process of land slides. The Span management has provided wire crated embankment in a reach of about 30 metres on left bank and about 270 metres on right bank to channelise the flow and also to reclaim part of land on right bank of river Beas.

Admitted to the extent that the diversion / channelization of river has been done to restore it to its course of pre 1995 floods and in doing so, by raising the earthen and wire crated embankments, some land of villagers situated on right bank of river Beas has also been reclaimed along with land of Span Resort.

16. This Court by the order dated May 6, 1996 directed the Central Pollution Control Board (the Board) through its Member Secretary to inspect the environments around the area in possession of the motel and file a report. This Court further ordered as under:

Meanwhile we direct that no construction of any type or no interference in any manner with the flow of the river or with the embankment of the river shall be made by the Span Management.

17. Pursuant to this Court's order dated May 6, 1996 the Board filed its report along with the affidavit of Dr. S. P. Chakrabarti, Member Secretary of the Board. It is stated in the affidavit that a team compromise Dr. Bharat Singh, Former Vice Chancellor and Professor Emeritus, University of Roorkee, Dr. S. K. Ghosh, Senior Scientist and former Head, Division of Plant Pathology (NF), Kerala Forest Research Institute, Peechi, Trichur and Dr. S. P. Chakrabarti, Member Secretary, Board was constituted. The team inspected the area and prepared the report. Para 4.2 of the report gives details of the construction done by the motel prior to 1995 floods. The relevant part of the paragraph is as under:

To protect the newly acquired land, SMPL took a number of measures which include construction of the following as shown in Fig. 2:

- (a) 8 nos. studs of concrete blocks 8m long and 20m apart on the eastern face of the club island on the upstream side,
- (b) 150m long stepped wall also on the eastern face of club island on the downstream side,
- (c) A 2m high bar of concrete blocks at the entry at the spill channel, and
- (d) Additional 8 nos. studs also 8m long and 20m apart on the right bank of the river Beas in front of the restaurant of the SMPL.

While (a) & (b) were aimed at protecting the club island from the main current, (c) was to discourage larger inflow into the spill channel. Item (d) was meant to protect the main resort land or SMPL if heavy flow comes into the spill channel.

The works executed in 1993 were bank protection, works, and were not of a nature so as to change the regime or the course of river.

A medium flood again occurred in 1994. Partly due to the protection works, no appreciable damage occurred during this flood. The main current still continues on the left bank.

18. The happening of events in the vicinity of motel during the 1995 flood and the steps taken by the motel have been stated in the report as under:

A big slip occurred on the hill side on the left bank, at a distance about 200m upstream from the point where division into main and spill channels was occurring on the afternoon of September 4, 1995. This partially blocked the main left side channel which was relatively narrow at this location. This presumably triggered the major change of course in the river diverting the major portion of the flow into spill channel towards the right and almost over the entire land area of the club island. The entire club building and the plantation as well as the protection works build in 1993 were washed away. Heavy debris was deposited on this land. Damage occurred on the right bank also but the buildings of the main SMPL resort remained more or less unaffected. A large hotel and many buildings on the right bank, almost adjacent to SMPL in the downstream were also washed away. The bar of blocks at the upstream end of the spill channel as well as most of the studs on this channel were also washed away. Some remnants of five downstream studs could be seen at the time of the visit. After the passage of 1995 flood, SMPL have taken further steps to protect their property as shown in Fig. 3. These are as follows:

1. The left side channel (the main channel), which had become less active, has been dredged to increase its capacity. Wire crate revetments (A, B & C) on both banks of this channel have been made to direct the flow through this channel.

These revetments and restoration earth work done would curtail the entry of water into the right side relief/spill channel which had developed into the main channel during the flood. A relatively small channel (the relief/spill channel) still exists and carries very little flow. Bulk of the flow is now going into the left bank channel.

On the left bank, there are steep unstable slopes at higher elevations left after the slides during the flood. These are likely to slip in any case, and if so happens, may block the left channel again.

This land belongs to some villagers from Rangri. The left bank channel is again sub dividing into two streams (D) and the small stream is flowing close to the toe of the hills for a distance of about 500 to 600 m before it turns towards midstream. Some of the dredged material is piled on the right bank and some on the divide between the main channel and the subsidiary channel on the left. Strips can be seen in this reach of 500 - 600 m even now, and erosion at toe may aggravate sliding tendency. SMPL has also put 190m wire crates (C) as protection against erosion of this bank, which may be helpful upto moderate flood conditions.

The dredging and channelisation of the left bank channel, though aimed at protecting SMPL land, should normally keep high intensity of flow away from both banks in moderate floods. This should thus not be a cause of concern. In high floods, the water would spill or spread beyond this channel. Due to restriction of entry in the right relief/spill channel, though the works may not withstand a high flood, there may be a tendency for more flow towards the left bank. However, the river is presently in a highly unstable regime after the 1995 extra ordinary floods, and it is difficult to predict its behaviour if another high flood occurs in the near future.

The conclusions given by the inspecting team in the report are as under:

6.4. M/s. Span Motels Private Limited had taken some flood control measures at the immediate upstream by construction of wire crates (Fig. 3) on both sides (A, B & C) and also dredged the main channel of the river by blasting the big boulders and removing the debris, the flood control measures, taken by them on the right bank of the main channel and at the mouth of relief channel after the 1993 flood, were also washed off. There is no sign of any boundary of the premises of the newly acquired land.

6.5. The mouth of the natural relief/spill channel has been blocked by construction of wire crate and dumping of boulders (A & B). The area has almost

been levelled. Although a little discharge was observed due to seepage through boulders and flowing through the remnants of the relief channel to the downstream, the channel is blocked by a stonewall across the channel (F) at the downstream of M/s. SMPL by a private property owner who has even constructed two wells (E) on the bed of the channel. This indicates the intention of the occupiers of the right bank properties in the concerned stretch in favour of filling up of the natural spill/relief channel.

6.6. M/s. Span Motels has not consulted any Flood Control Expert as it appeared from the way of construction of the wire crate. In proper revetment was done white crating. As such, these cratings may not last long.

6.7. In the process of channelising the main course, the main stream has been divided into two, one of which goes very near to the left bank (G) because of which fresh land slip in future is not ruled out.

6.8. The relief channel is supposed to be the government land. Construction of any sort to block the natural flow of water is illegal and no permission has been taken from the concerned department.

6.9. The lease agreement of 1994 had the clause for protection of the land but it should have been done not by blocking the flood spill/relief channel.

6.10. Relief channel is the shortest path between the two bends. Any future slip on left bank due to training of discharge at its foot may cause flood on the right bank where the leasehold land (1994) exists.

6.11. No new construction should be allowed in this flood prone area except flood protection measures. No economic activity should be undertaken in the aforementioned stretch.

6.12. Since newly acquired land of M/s. SMPL is located on the flood plain, sandwiched between the main channel and the relief/spill channel, the land may be deleased and the Forest Department take care of plantation in the area after adequate flood control measures are taken by the Irrigation Department. This is necessitated in view of the fact that the left bank opposite SMPL is very steep (almost vertical) and is subjected to potential threat of land slip to block the channel and cause change of course of the river flow again.

6.13. Even if land slips occur, the impact will be local limited only to the stretch of the Beas river near SMPL.

6.14. The river is presently in a highly unstable regime after 1995 extra ordinary floods, and it is difficult to predict its behaviour if another high flood occur in the near future. A long term planning for flood control in the Kullu Valley needs to be

taken up immediately with the advice of an organisation having expertise in the field, and permanent measures shall be taken to protect the area so that recurrence of such a heavy flood is mitigated permanently.

19. On a careful examination of the counter affidavits filed by the parties, the report placed on record by the Board and other material placed on record, the following facts are established:

1. The lease hold area in possession of the motel is a part of the protected forest land owned by the State Government.
2. The forest land measuring 27 bighas and 12 biswas leased to the motel by the lease deed dated April 11, 1994 is situated on the right back of the river and is separated from the motel by a natural relief/spill channel of the river.
3. A wooden bridge on the spill channel connects the main motel land and the land acquired under the 1994 lease deed.
4. 22.2 bighas out of the land leased to the motel on 1994 was encroached upon by the motel in the year 1988/89.
5. Prior to the 1995 floods the motel constructed 8 studs of concrete blocks 8m long and 20m apart on the upstream bank of the river, 150m long stepped wall on the downstream side of the river and 2m high bar of concrete blocks at the entry at the spill channel and additional 8 studs 8m long and 20m apart on the right bank of the river Beas in front of the restaurant of the Motel.
6. After the 1995 floods the motel has dragged the left side channel (the main channel) of the river to increase its capacity. Wire crate revetments on both banks of the main channel of river have been made to direct the flow through the said channel. This has been done with a view to curtail the entry of water into the right side relief/spill channel.
7. The motel has constructed 190m wire crates on the bank of the river (upstream). The dredged material is piled up on the banks of the river. The dredging and channelising of the left bank has been done on a large scale with a view to keep high intensity of flow away from the motel.
8. The dredging of the main channel of river was done by blasting the big boulders and removing the debris.
9. The mouth of the natural relief/spill channel has been blocked by wire crates and dumping of boulders.
10. The construction work was not done under expert advice.
11. The construction work undertaken by the motel for channelising the main course has divided the main stream into two, one of which goes very near to the

left bank because of which, according to the report, fresh land slip in future cannot be ruled out.

20. The report further indicates that the relief channel being part of the natural flow of the river no construction of any sort could be made to block the said flow. According to the report no permission whatsoever was sought for the construction done by the motel. The Board in Us report has further opined that the clause in the lease agreement for protection of land did not permit the motel to block the flood spill/relief channel of the river. The report categorically states that no new construction should be allowed in this flood prone area and no economic activities should be permitted in the said stretch. It has been finally recommended by the inspection team that the land acquired by the motel under the 1994 lease deed is located on the flood plain, sandwiched between the main channel and the relief/spill channel and as such it should be released so that the Forest Department may take care of the plantation in the area and also preserve the ecologically fragile area of river Beas.

21. Mr. Harish Salve vehemently contended that whatever construction - activity was done by the motel on the land under its possession and on the area around, if any, was done with a view to protect the lease hold land from floods. According to him the Divisional Forest Officer by the letter dated January 12, 1993 - quoted above - permitted the motel to carry out the necessary works subject to the conditions that the department would not be liable to pay any amount incurred for the said purpose by the motel. We do not agree. It is obvious from the correspondence between the Motel and the Government, referred to by us, that much before the letter of the Divisional Forest Officer dated January 12, 1993, the Motel had made various constructions on the surrounding area and on the banks of the river. In the letter dated August 30, 1989 addressed to the Divisional Forest Officer Kullu - quoted above - the Motel management admitted that "over the years, and especially after the sever flood erosion last year, we have built extensive stones cemented and wire mesh crated embankments all along with the river banks at considerable expense and cost. We have also gradually and painstakingly developed this entire waste and banjar area". The "banjar area" referred to in the letter was the adjoining area admeasuring 22.2 bighas which was not on lease with the Motel at that time. The admissions by the Motel management in various letters written to the Government the counter affidavits filed by the various Government officers and the report placed on record by the

board clearly show that the Motel management has by their illegal constructions and callous interference with the natural flow of river Beas has degraded the environment. We have no hesitation in holding that the motel interfered with the natural flow of the river by laying to block the natural relief/spill channel of the river.

22. The forest lands which have been given on lease to the Motel by the State Governments are situated at the bank of the river Beas. Beas is a young and dynamic river. It runs through Kullu valley between the mountain ranges of the Dhauladhar in the right bank and the Chandrakheni in the left. The river is fast - flowing, carrying large boulders, at the time of flood. When water velocity is not sufficient to carry the boulders, those are deposited in the channel often blocking the flow of water. Under such circumstances the river stream changes its course, remaining within the valley but swinging from one bank to the other. The right bank of the river Beas where motel is located mostly comes under forest, the left bank consists of plateaus, having steep - bank facing the river, where fruit orchards and cereal cultivation are predominant. The area being ecologically fragile and full of scenic beauty should not have been permitted to be ' converted into private ownership and for commercial gains.

23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled an ecological perspective on property: A call for judicial protection of the public's interest in environmentally critical resources published in Harvard Environmental Law Review Vol. 12, 1988 page 311 in the following words:

Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970's as well as the pesticide scare of the 1960's. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained. "[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our

freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. "There is a limit to the capacity of the environment to service ... growth, both in providing raw materials and in assimilating by product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable.

Professor Barbara Ward has, written of this ecological imperative in particularly vivid language:

We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death.

There is a commonly recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources - for example, wetlands and riparian forests can no longer be destroyed without enormous long term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions.

24. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties

such as rivers, sea shore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman Law these resources were either owned by no one (Res Nullious) or by every one in common (Res Communious). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation of fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public, Joseph L. Sax, Professor of Law, University of Michigan proponent of the Modern Public Trust Doctrine in an erudite article "Public Trust Doctrine in natural resource law; effective judicial intervention". Michigan Law Review Vol. 68 Part I page 473 has given the historical background of the Public Trust Doctrine as under:

The source of modern public trust law is found in a concept that received much attention in Roman and English law - the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public, accordingly, property used for the those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties - such as the seashore, highways, and running water - "perpetual use was dedicated to the public," it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit then use for private ownership or commercial

purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority.

Three types of restrictions on governmental authority are often thought to be imposed by the public trust: first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.

26. The American law on the subject is primarily based on the decision of the United States Supreme Court in *Illinois Central R.R. Company v. Illinois* 146 US 537 (1892). In the year 1869 the Illinois legislature made a substantial grant of submerged lands - a mile strip along the shores of Lake Michigan extending one mile out from the shoreline - to the Illinois Central Railroad. In 1873, the legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to suit title. The court while accepting the stand of the State of Illinois' held that the title of the State in the land in dispute was a title different in character, from that which the State held in lands intended for sale. It was different from the title which the United States held in public lands which were open to preemption and sale. It was a title held in trust - for the people of the State that they may enjoy the navigation of the water, carry on commerce over them, and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to the Professor Sax the court in *Illinois' Central* "articulated a principle that has become the central substantive thought in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self interest of private parties".

27. In *Could v. Greylock Reservation Commission* 350 Mass 410 (1966), the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. In 1888 a group of citizens interested in preserving Mount Greylock as a unspoiled natural forest, promoted the creation of a association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and

the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorised the commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust. The court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of the authority. The crucial passage in the judgment of the Court is as under:

The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.

Professor Sax's comments on the above quoted paragraph from Gould decision are as under:

It hardly seems surprising, then that the court questioned why a state should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the state's authority to change the use of a certain tract of land ... Gould, like Illinois Central, was concerned with the most overt sort of imposition on the public interest: commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem - that concerning projects which clearly have some public justification. Such cases arise when, for example, a highway department seeks to take a piece of parkland or to fill a wetland.

28. In *Sacco v. Development of Public Works* 532 MASS 670, The Massachusetts Court restrained the Department of Public Works from filling a great pond as part of its plan to reallocate part of State Highway. The Department purported to act under the legislative authority. The court found the statutory power inadequate and held as under:

the improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that the improvement of public lands which the legislature provided for is to preserve such lands so that they may be enjoyed by the people for recreational purposes.

29. In *Robbins v. Department of Public Works* 255 N.E. 2d 577, the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wet lands of considerable natural beauty ... often used for nature study and recreation" for highway use.

30. Professor Sax in the article (Michigan Law Review) refers to *Priewe v. Wisconsin State Land and Improvement Company* 93 Wis 534 (1896), *Crawford Country Lever and Drainage district No. 1*, 182, Wis 404, *city of Milwaukee v. State* 193 Wis 423 and *State v. Public Service Commission* 275 Wis 112 and opines that the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other state.

31. Professor Sax state the scope of the public trust doctrine in the following words:

If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture or procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides-, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.

32. We may at this stage refer to the judgment of the Supreme Court of California in *National Audubon Society v. Superior Court of Alpine County* 33 CAL. 3d 419, the case is popularly known as "the Mono lake case, Mono lake is the second largest lake in California, the lake is saline. It contains no fish but Support a large population of brine shrimp which feed vast numbers of nesting

and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the city of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of the Mono Lake were imperiled. The plaintiff environmentalist - using the public trust doctrine - filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification on the States public trust doctrine. The Court explained the concept of public trust doctrine in the following words:

By the law of nature these things are common to mankind - the air, running water, the sea and consequently the shores of the sea." (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign own "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.

The Court explained the purpose of the public trust as under:

The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks v. Whitney*, supra, 6 Cal. 3d 251, "(public trust easements [were] traditionally defined in terms of navigations commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses navigation, commerce and fishing did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that "[T]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands a use encompassed within the tidelands trust is the preservation of those lands in

their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."

Mono Lake is a navigable waterway. It supports a small local industry which harvest brine shrimp for sale as fish food, which endeavor probably qualifies the lake as a "fishery" under the traditional public trust cases. The principal values plaintiffs seek to protect, however, are recreational and ecological - the scenic views of the lake and its shore, the purity of the air and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney*, supra, 6 Cal. 3d 251, it is clear that protection of these values is among the purposes of the public trust.

The court summed up the powers of the state as trustee in the following words:

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust...

The Supreme Court of California, inter alia, reached the following conclusion:

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriate water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests, (See *Johnson*, 14 U. C. Davis L. Rev. 233. 258 - 257; *Robie*, some Reflections on Environmental Considerations in Water Rights Administration, 2 Ecology L. Q. 695, 710 - 711 (19/2); *Comment*, 33 Hastings L. J. 653, 654.) As a matter of practical necessity the state may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen v. N.D. State Water Cons. Comm'n* 247 N. W 2d 457,462 - 463 (N.D. 1976), and to preserve, so far as consistent with the public interest, the uses protected by the trust.

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

33. It is no doubt correct that the public trust doctrine under the English Common

Law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in Mono Lake case clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in Mono Lake case to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In Phillips Petroleum co. v. Mississippi ###1988 108 SCC 791, the United States Supreme Court upheld Mississippi's extension of public trust doctrine to lands underlying non navigable tidal areas. The majority judgment adopted ecological concepts to determine which land can be considered tide lands. Phillips Petroleum case assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all eco systems operating in our natural resources.

34. Our legal system based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is beneficiary of the sea shore, running waters, air, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasing complex society, find it necessary to encroach to some extent open lands heretofore considered in violate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislature the courts can serve as an instrument of

determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership or for commercial use. The esthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary in good faith, for the public good and in public interest to encroach upon the said resources.

36. Coming to the facts of the present case, large area of the bank of river Beas which is part of protected forest has been given on a lease purely for commercial purposes to the Motels. We have no hesitation in holding that the Himachal Pradesh Government committed patent breach of public trust by leasing the ecologically fragile land to the Motel management. Both the lease - transactions are in patent breach of the trust held by the State Government. The second lease granted in the year 1994 was virtually of the land which is a part of riverbed. Even the board in its report has recommended deleasing of the said area.

37. This Court in Vellore Citizens Welfare Forum v. Union of India and Others, 1996 (5) SCC 647, explained the "Precautionary Principle" and "Polluters Pays principle" as under:

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 cooperate, 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) Environment measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.
- (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 action is environmentally benign.

The Polluter Pays" principle has been held to be a sound principle by this Court in

Indian Council for Enviro Legal Action v. Union of India JT (1996) 2 196. The Court observed, "We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country". The Court ruled that "Once the activity carried on is hazardous or inherently dangerous, the persons carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on". 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 areas". The "Polluter Pays" principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only the 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 polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology.

The precautionary principle and the polluter pays principle have been accepted as part of the law of the land.

38. It is thus settled by this Court that one who pollutes the environment must pay to reverse the damage caused by his acts.

39. We, therefore, order and direct as under:

1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land.
2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated November 24, 1993 and the lease deed dated April 11, 1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original natural conditions.
3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constitutions made by the Motel in the river bed and the banks on the river Beas has to be removed and reversed. We direct NEERI through its Director to inspect

the area if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.

4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.

5. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated September 29, 1981. The Motel shall not encroach / cover / utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.

6. The Motel shall not discharge untreated effluent into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices / treatment plants set up by the Motel. If the effluent / waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the motel.

7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into river Beas. The Board shall inspect all the hotels / institutions / factories in Kullu Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

8. The Motel shall show cause on December 18, 1996 why Pollution fine and damages be not imposed as directed by us. NEERI shall send its report by December 17, 1996. To be listed on December 18, 1996.

40. The writ petition is disposed of except for limited purpose indicated above.

1998 KHC 430
Kerala High Court
P. K. Balasubramanyan, J.

Chandrasekharan Pillai v. State of Kerala

Parallel citation(s) : 1998 KHC 430 : 1998 (2) KLT 648 : 1998 (2) KLJ 195

CaseNo : O. P. No. 14764 of 1997

Date : 22/07/1998

Constitution of India -- Art.226, 48A -- Sand extraction -- Environmental degradation -- Constitutional obligation -- The Constitution mandates that the State should endeavour to protect and improve the environment -- Further direction also issued to the State

Important Para(s):8, 9, 10, 11

Advocates:

V. Giri; For Petitioners

V. N. Achutha Kurup; T. M. Mohammed Youseff; H. B. Shenoy; For Respondents

JUDGMENT

1. This Original Petition is filed by three residents of Pattazhi Vadakkekara Panchayat in Quilon District. They have properties on the northern bank of Kallada river. They have filed this Original Petition praying for the issue of a writ of mandamus directing the State of Kerala, the District Collector, Quilon and the Tahsildar, Pathanapuram to take appropriate action to see that the removal of sand from Kallada river carried on at the Konnaman Kadavu is stopped forthwith, for the issue of a direction to the said respondents to see to it that there is no further removal of sand from the river bed at Konnaman Kadavu at least until such a time an expert body constituting of the representatives of the Pollution Control Board and Central Water Authority certify that sand could be removed and for such other appropriate directions. The petitioners essentially complain that there is over exploitation of the river by auctioning of the right to collect and remove sand by contractors who have no commitment to the environment or to the preservation of Ecology and who are only concerned with self

aggrandisement. The Original Petition is resisted by the contractor for the current year impleaded as respondent No. 4. But it must be noticed that his year has run out and the State has also stopped from 1.4.1998 auctioning of the right to collect sand from certain specified rivers including Kallada river. As directed by this Court, respondents 1 to 3 have also filed a counter affidavit to the Original Petition in which it is printed out that the State has now drawn up certain norms in that behalf.

2. In this Original Petition, in C.M.P. 26512 of 1997, a petition for the issue of an interim direction this court issued a direction to the State Pollution Control Board as follows: -

"Senior Environmental Engineer of Pollution Control Board or any other Engineer next in the rank of the said Environmental Engineer shall conduct an inspection in Konnaman Kadavu of Kallada river in Pattazhi Vadakkekara with notice to the Secretary to the Grama Panchayat, the first petitioner and the fourth respondent and furnish a report on the following aspects:

1. Whether the extraction of sand from the said kadavu is in accordance with the conditions contained in Ext. P4;
- 2 Whether the extraction of sand causes environmental de - gradation; 3. Any suggestion to avert environmental degradation if found.

He can take assistance from Tahsildar as well.

The report shall be filed on or before 23.9.1997....."

Ultimately the report dated 6.10.1997 was submitted by the Environmental Engineer to this court on 9.10.1997. The aspects directed to be reported on were reported on. On behalf of the first respondent State an objection to the report of the Environmental Engineer dated 27.5.1998 was filed. Thereafter learned counsel for the petitioners, learned Additional Advocate General on behalf of respondents 1 to 3 and learned counsel for respondent No. 4 contractor were heard in detail.

3. Three persons who claim to be members of the union engaged in collection of sand from the Konnaman Kadavu filed C.M.P. 27583 of 1997 seeking to get themselves impleaded as additional respondents in the Original Petition. Their counsel was also heard at the time of arguments.

4. Under the Government order Ext. P1 dated 29.6.1993 the Government of Kerala excluded from vesting in the Panchayat through which the rivers flowed

nine of the major rivers in the State including the Kallada river. The rivers thus excluded from vesting in the Panchayat are: (1) Bharathapuzha, (2) Periyar, (3) Chaliyar, (4) Pamba, (5) Kallada, (6) Vamanapuram, (7) Chandragiri, (8) Karamana and (9) Meenachil. The reason for such exclusion was explained in that Notification as follows: -

"The removal of sand from the rivers in the State and the licensing thereof are handled by the Panchayats through which the rivers concerned flow. It has come to the notice of the Government that the indiscriminate and uncontrolled removal of the sand from the major rivers causes large scale land sliding and loss of property. Such large scale dredging of sand also disturbs the biophysical environment system of the river beds in different degrees. The Honourable High Court has directed the Government to take appropriate preventive measures in this regard. Government consider that there should be a new approach altogether to the whole question of managing and exploiting this natural resources in a sustainable way with a view to protecting that river system. As a first step towards this, Government have decided that nine major rivers in the State may be excluded from the control of the Panchayats. So that those rivers and the river beds will become the property of the Government to which the provisions of the Land conservancy Act will apply....".

The circular Ext. P2 dated 30.10.1993 was also issued to the various departments and certain instructions were issued. These instructions were based on the discussion regarding the relevant aspects with the concerned officials of various departments. As per the decisions taken the right to grant permit for removal of sand was rested with the Tahsildar of the concerned Taluk and the permission had to be obtained in writing. The sand can be removed only at places which are 300 meters away from the sides of bridges, dams and other works. The sand could be removed only from the middle of the river situate at a distance of 10 meters of the boundary of the river on either side. In one season sand could be removed only to a height of 60 cms from the sand bed in the river. Sand can be removed only between 6 A.M. and 6 P.M. No mechanical device can be used for removal of sand. In areas where there was a possibility of salt water flowing into the river sand should not be removed. There should be no removal of sand from areas where on the surface the deposit of sand was less. Sand could not be removed from publically important places in then river like Maramon, Cherukolpuzha, Alwaye and Thirunavaya. The boundaries of the areas within the Panchayat and Municipality from where the sand is permitted to be

removed must be determined and clearly specified. The contracts for the current year can be revised by incorporating the conditions as above. Finally the permission to remove the sand should be without any detriment to the environment. This circular further directed the Collectors of the Districts to constitute river management and planning committees to ensure the implementation and to prevent violation of the conditions.

5. In the counter affidavit dated 17.2.1998 filed on behalf of the State it is stated that the Government had considered the relevant aspects in detail and had issued specific restrictions for the collection of sand from Bharathapuzha on the basis of directions issued by this Court in O.P. 15971 of 1997. The restrictions imposed are set out in the counter affidavit as follows : -

Passes are to be issued for the transporting of sand to other States and sales tax is to be imposed for the inter state transaction of sand.

2 District Collectors are to appoint Expert Committees as to fix the quantity of the sand which can be collected from each shutter. The District Collector has to take decision on the recommendations of the Committee and sanction should be accorded to the Panchayats and Municipalities thereafter.

The Expert Committee has to estimate the quantity of the sand twice in a year and submit report for the long time action plan.

4. Check posts are to be maintained on each shutter at the cost of the Panchayat concerned and watchman should be appointed there.

5. Identity cards are to be issued to the existing workers engaged in the collection of sand by the Tahsildar with the cooperation of the local bodies concerned.

6. The system of auction of sand has to be fully stopped and the Panchayats themselves should collect the sand and sell the same directly.

7. The District Collectors have to fix the price of the sand prior to the commencement of season each year. 50% of the net profit has to be given to the local body concerned and the remaining 50% has to be deposited with the River Management Fund controlled by the District Collector. This amount is to be utilised for the protection of the river concerned. Detailed orders in this regard will be issued separately.

8. The Tahsildars are to organise Action Committees with the cooperation of the Voluntary Organisation so as to ensure that the sand is being collected in strict compliance with the restrictions laid down by the authorities concerned. The District Collectors are to make it sure that such action committees are being

formed prior to the commencement of the season. The 'Grama Sabhas' are to be actively participated in such proceedings.

9. The collection of sand is to be prohibited from 1st July to 30th September every year.

10. As far as Bharathapuzha is concerned CESS and CWRDMN are directed to conduct a detailed study and submit its report within a period of 4 months as to the salination of water especially in the area between Chamravattam and Thirunavaya.

11. The collection of sand within 500 metres from the bridges and irrigation projects are to be prohibited. The Panchayats and Revenue authorities are to ensure that the collection of sand is being done in compliance with the restrictions imposed by the Government from time to time.

12. The filling of land should not be permitted with river sand. The Panchayats and 'Grama Sabhas' are to enlighten the people in this regard.

13. The waste and impurities, especially those from the septic tanks should not be permitted to be opened to the river. The local bodies are to initiate remedial measures in this regard.

14. The encroachments of all sorts are to be prohibited and the existing encroachments are to be evicted summarily.

15. The District Collectors are to enlarge Special Survey Staff so as to measure and demarcate the boundaries of the river within a specified time.

16. The existing River Management Committees are to function efficiently and District Collectors are to take special attention in this regard.

17. The Forest department is to give special attention to the conservation of forests at the origination point of the rivers since unavailability of water is essential for the existence of rivers.

18. Check dams are to be built in cooperation with the Irrigation Department so as to save the water".

It is submitted in the counter affidavit that the Government had decided to implement the restrictions set out above in respect of the other eight rivers also with effect from 1.4.1998. Thus all the nine rivers referred to in Ext. P1 Notification are governed by the above directions.

6. In the report submitted by the Senior Environmental Engineer as per the interim directions of this court extracted earlier, after furnishing answers to question No. 1, on the question 'whether the extraction of sand causes environmental degradation' it was stated as follows: -

"The extensive sand extraction will cause environmental degradation such as

- a. This will spoil the normal gradient (slope) of the river bed and thereby affect the self clearing velocity of the river.
- b. This will give chances to the accumulation of silt and dirt and affects water quality.
- c. Reduces ground water table during summer, and causes drinking water shortage.
- d. Land slide on river banks.

Affects the water management structures, bridges, retaining walls etc'

It was stated that in that particular stretch of the river no environmental degradation was actually noticed. Regarding the third aspect referred to in the order of this court it is stated that extensive sand extraction will cause serious environmental degradation and to avert such problems suggestions that follow were being given: -

(a) continuous sand extraction at a particular stretch may be stopped. The auction may be done in alternate years.

(b) In condition No. 1 of the Ext. P4, it is stated that sand extraction shall be done only 10m. away from river bank.

But the "river bank" is not clearly defined. Due to land slides, the width of the river may increase and hence the sand mining area will also get increased. To avoid this, the river bank may be fixed with some permanent structure i.e., from the survey stones placed along the river course. So that land slide occurred if any also can be assessed.

(c) The prohibited area i.e., on either sides of bridges, dams, etc are not earmarked by the concerned agency. This prohibited area may be earmarked by a permanent stone painted in Red colour on either bank of river.

(d) The maximum depth of sand excavation is limited to 60 cm from normal sand bed. But normal sand bed level is not defined and specified.

Normal sand bed level at a river stretch may be defined and shall be marked with some permanent Bench Mark on the river banks. If the present sand bed level is below the required level, then auction may not be conducted till it attains the required level.

(e) Regarding condition No. 6, the area where sand deposit is less may be located and may be declared as prohibited area, before finalising the auction.

(f) A regular monitoring cell may be formed by including local representatives to check the violations if any.

(g) Retaining wall may be restricted along the river banks, wherever the chances of land slides exists.

(h) The limiting conditions shall be intimated to the sand extraction workers and in case of violations, the responsibility shall be shared by them along with the contractor."

7. The system of auctioning the right to collect sand has now been given up by the State as disclosed from Clause.6 of the conditions imposed and now the local authorities are themselves to collect the sand and sell the same directly. It was submitted by the Additional Advocate General on behalf of the State that the system of auctioning of the right to collect sand from the nine rivers referred to in Ext. P1 Notification has been discontinued with effect from 1.4.1998 and hereafter there will be no such auction. It is therefore, not necessary to further consider the question whether the right to collect sand should be auctioned or not. It is only necessary to record the stand adopted by the Additional Advocate General that there will be no further auction of the right to collect sand from the nine rivers referred to in Ext. P1 as per the decision now taken by the Government.

8. One of the important suggestions made by the Environmental Engineer, Pollution Control Board to preserve the environment and prevent environmental degradation is that the extraction of sand may be done only in alternative years and continuous sand extraction at a particular stretch may be stopped. This is the first suggestion made by the Pollution Control Board. Learned Additional Advocate General appearing on behalf of the State submitted that this suggestion by the Environmental Engineer was not acceptable to the State and the State wanted to file an objection to the suggestions made by the Environmental Engineer. After a number of adjournments and extensions of time for filing objections, an objection dated 27.5.1998 was filed before this Court. It is stated therein that the conditions stipulated by the Government in its Circular dated 5.1.1998 is considered by the Government to be sufficient for protection of the rivers and the environment. It is stated that the Government was of the view that total banning of removal of sand was not proper. If the removal of sand is banned for one year there was every possibility of the sand mining workers becoming jobless for the entire one year boosting the price of sand and affecting the construction activities etc. The Government was of the opinion that the precautions taken as per the circular are sufficient enough to safeguard the

environment and the river. If the expected result is not obtained on implementing the circular or any difficulty is experienced in the way of giving effect to the guidelines in the circular then the Government will reconsider the entire issue and appropriate remedial measures will be taken in the matter. Therefore, the Government was of the view that there was no necessity for ordering a total ban for one year in mining sand at present. No serious objections are seen taken to the other suggestions made by the Environmental Engineer in his report. The stand adopted by the Government is that the directions in the circular issued by it would be sufficient for protecting the environment and to prevent environmental degradation. But it can be seen from the report of the Environmental Engineer that without clearly defining the river bank, the condition that sand extraction shall be only 10 meters away from the river bank on either side could not effectively implemented. There was no earmarking of the prohibited area from which no sand could be removed except beyond 300 meters on either side so that the said prohibition also could not be effectively implemented. Though it is provided that the maximum depth of sand excavation should be limited to 60 centimeters from normal sand bed, normal sand bed limit is not defined and specified. These omissions in my view would make the implementation of the circular issued by the Government ineffective, if not impossible and the directions would not be sufficient to protect the environment and to avert environmental degradation. The position is now clear that unregulated sand extraction will lead to environmental degradation. It is in this context that one has to consider the recommendation made by the Environmental Engineer of the State Pollution Control Board that there may be a "sand removal holiday" for every river in one out of two years. The main objection on behalf of the Government appears to be that because of the banning of removal of sand for one year out of every two years, there was a possibility of sand mining workers becoming jobless and the price of sand going up. This is not an objection to the merit of the suggestion from the point of view of environmental protection, the need for which is recognised. But this possibility could be averted to a considerable extent by alternating the year of the ban among the "kadavus" and the rivers. It is not as if there should be a ban on removal of sand from all the nine rivers in the State and in all the "kadavus" in them during the same year. The banning could be by rotation or by alternating it and in a particular year banning could be confined to some of the kadavus of the rivers or to four or five rivers as the case may be. There is no other serious objection raised in the objection filed on behalf of the first respondent. There is no

controverting of the statement of the Environmental Engineer of the State Pollution Control Board that the constant and continuous removal of sand from the river would lead to or the statement that extensive sand extraction will cause serious environmental degradation.

9. Art.48 A of the Constitution of India provides that the State should endeavour to protect and improve the environment. This is thus a constitutional obligation of the Government. The State Pollution Control Board is an expert body that has been created with a view to avert pollution and ensure the due implementation of the Environment Protection laws and it consists of experts in that field. In the nature of the objection raised by the State, I find no justification in not accepting the recommendations of the Environmental Engineer in full for the purpose of protection of the nine rivers referred to in Ext. P1 including the Kallada river involved in the present Original Petition. Even to implement the decisions already taken by the Government, it appears to me to be necessary to carry out the suggestions made by the Environmental Engineer in his report dated 6.10.1997. I am therefore, satisfied that in addition to accepting the conditions imposed by respondent No. 1 as disclosed from the counter affidavit which the learned Additional Advocate General assures this Court, will be implemented strictly, it is necessary to issue the following directions to the first respondent.

10. I therefore, direct the first respondent

i to clearly define the river bank referred to in the conditions imposed by it and to fix permanent marks so as to enable the clear determinations of the river bank on either side.

to earmark the prohibited area on either sides of bridges, dams and other structures so as to implement the 300 metre ban.

iii to specify the normal sand bed level for the respective rivers and after such demarcation, to mark the level with some permanent bench mark on the river banks.

iv to prevent and / or ban the removal or extraction of sand from such rivers where the present sand bed level is below the required level as fixed by the State.

to locate the areas where the sand deposit is less and declare such areas as prohibited areas before taking up the work of extraction for the relevant year.

vi to construct retaining walls along the river banks where there exist chances of land slide, wherever possible.

I may notice that the issuance of the above directions are not seriously objected to by the first respondent or by the learned Additional Advocate General who appeared on behalf of respondents 1 to 3. As I noticed already, the main objection was to the 'sand removal holiday' in one out of two years suggested by the Pollution Control Board. But considering the need for environmental protection and to prevent environmental degradation and taking note of the nature of the objections raised on behalf of the first respondent I am of the view that the suggestions of "the Environmental Engineer in that behalf are to be accepted. This is especially so since I find from the various Original Petitions in that have come up before this Court, that the local authorities and bodies have not shown sufficient commitment to the protection of the environment. I therefore, issue the following direction also to the respondents 1 to 3. vii Not to permit removal of sand from specified kadavus in the 9 rivers covered by Ext. P1 notification or from the specified rivers themselves (thought proper) in one out of every two years and permit that removal once in two years only subject to the other conditions prescribed.

11. Since, for the current year, commencing from 1.4.1998, arrangements have already been made for removal of sand, the above directions will be implemented by the State from the year commencing from 1.4.1999. Before commencement of the next year on 1.4.1999, respondents 1 to 3 are directed to implement direction (i) to (vi) and also to prepare the list of kadavus or rivers themselves which are to have a 'sand removal holiday' during the year 1.4.1999 to 31.3.2000. This will be done at least by the end of February 1999 and their implementation carried out by the 1st respondent and all its officers. The exercise of identifying the kadavus or rivers that are to have the holidays for the succeeding years and the carrying out of the directions (i) to (vi) and such of them as are needed to be carried out every year, will be done before the end of the month of February of the succeeding year.

12. The experience of this court has shown that the local authorities and local bodies are not yet sufficiently conscious of the need to prevent environmental degradation and to protect the environment. The first respondent would do well to organise seminars and workshops on environmental protection so as to make the local bodies and those in charge of them conscious of the need for such protection. As of now, it is seen that wood based industries are freely given licence to establish factories even touching forests and certainly within 5

kilometers, and action prevented by the Supreme Court. River banks are permitted to be misused. Similarly, quite a few of the local authorities are seen to be keen only on deriving the maximum income from the sand extraction from the rivers. This has to change and they must be helped to develop an environmental friendly attitude while performing their statutory functions. The voluntary organisations referred to in the counter affidavit filed on behalf of the State can certainly play a leading and fruitful role in this kindling of environmental consciousness in the local bodies and their citizens.

13. It is true that the subject matter of this Original Petition was initially only the Kallada river, one out of the nine rivers specified in Ext. P1. But the suggestions made by the Environmental Engineer of the State Pollution Control Board, were common suggestions. The arguments were also about the steps to be taken to prevent environmental degradation in respect of all the rivers. The learned Additional Advocate General also argued this case only on that higher plane and on the basis that all the rivers included in Ext. P1 notification was within the purview of this Original Petition. Hence the directions issued above will have application to all the nine rivers included in Ext. P1 notification and they will be in addition to and not in derogation of the directions already issued by the Government, as detailed in its counter affidavit and extracted by me in this judgment.

This Original Petition is thus allowed and the directions as above are issued directing the first respondent State and all the District Collectors of all the Districts in the State to implement them strictly.

2009 (2) KHC 319
Kerala High Court
S. R. Bannurmath, C. J. ; *Kurian Joseph, J.

Paristhithi Samrakshana Sangham v. State of Kerala and Others

Parallel citation(s): 2009 (2) KHC 319 : ILR 2009 (2) Ker. 415 : 2009 (2) KLT 272
: 2009 (2) KLJ 161

Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001 -- S.9, S.29, S.30 -- Sand mining -- Sand audit -- Necessity of -- Only after obtaining and studying the expert audit report submitted by the CESS or CWRDM, the expert committee shall fix the quantity of sand that could be removed from the kadavus or river banks -- Protection of River Banks and Regulation of Removal of Sand Rules, 2002 (Kerala) -- Environment Protection

Facts of the case

The Public Interest Litigation was filed by an environmental group praying for a direction to the authorities to conduct a sand audit by an expert body like the CESS or the CWRDM and also for a further direction not to allot any kadavus within 500 mtrs. from any irrigation works as contemplated under the Kerala Irrigation and Water Conservation Act, 2003.

The Division Bench issued numerous trend setting guidelines for sand mining and held:

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 to 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. 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 S.9 of the Act shall fix the quantity of sand that can be removed from the kadavus or river bank. As far as the ongoing

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 unauthorised methods

Important Para(s):7

Constitution of India -- Art.226 -- Judicial review -- Environmental issues -- Sustainable development -- When there is conflict between irreparable injury to environment and severe damage to economic interests, protection of environment would have precedence over economic interests -- When State fails to safeguard environmental concerns, Courts can step in and issue appropriate directions -- Protection of River Banks and Regulation of Removal of Sand Act, 2001 (Kerala), S.9, S.29, S.30

Held:

This is a 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 failure, lapse or refusal as in the instant case, the Court steps in issuing appropriate directions.

Important Para(s):6

Referred: M. C. Mehta v. Union of India and Others, 2004 KHC 1674 : AIR 2004 SC 4016 : 2004 (12) SCC 118; Referred to

Advocates:

P. B. Sahasranaman; K. Jagadeesh; T. S. Harikumar; For Petitioner

Anwin Gopakumar; A. Jayasankar; Manu Govind; For Respondents

JUDGMENT

The Judgment of the Court was delivered by Kurian Joseph, J.

1. This is a public interest litigation filed by the Paristhithi Samrakshana 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 S.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 S.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 at least 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 Panchayat that it is not mandatory that there should be a sand audit for every three years, cannot be appreciated. S.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.'

R.30 of the Kerala Protection of River Banks and Regulation of Removal of Sand 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. S.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, Keezhmad Grama Panchayat, submits that S.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 S.9 and 29 of the Act and R.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 S.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 S.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. R.30 of the Rules having prescribed the mode of sand audit, it is mandatory that the audit contemplated under S.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 v. Union of India and Others, reported in 2004 KHC 1674 : AIR 2004 SC 4016 : 2004 (12) SCC 118, had occasion to go into the issue of sustainable development and its impact,

on environmental problems. In paragraph 48 of the judgment the Supreme Court has held as follows:

'48. The development and the protection of environments are not enemies. If without degrading the environment or minimising 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 strait 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 a 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 failure, lapse or refusal as in the instant 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 to 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. 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 S.9 of the Act shall fix the quantity of sand that can be removed from the kadavus or river bank. As far as the ongoing 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 unauthorised methods.