

**BEFORE THE NATIONAL GREEN TRIBUNAL
SOUTHERN ZONE, CHENNAI**

Application No.331 of 2013 (SZ) (THC)

[W.P. (C) No. 24035 of 2009, High Court of Kerala at Ernakulam]

IN THE MATTER OF:

1. Kamburam Dharma Paripalana Araya Samajam
Regn. No: 207/2002,
Kamburam Beach, Kozhikode.
Represented by its Secretary, V.V.Sivaprakash
S/o. V.V.Vijayaraghavan, Padmalayam,
Thekke Pandikasalappady,
Kangode - Kozhikode

... Applicant/Petitioner in
W.P.No. 24035 of 2009

Versus

1. Kozhikode Corporation
Represented by its Secretary,
Kozhikode.
2. The Town Planning Officer
Kozhikode Corporation,
Kozhikode.
3. District Collector
Kozhikode.
4. The Coastal Zone Management Authority (Kerala)
Science, Technology and Environment Department,
Sasthra Bhavan, Pattom, Thiruvananthapuram.
5. The District Pollution Control Board
Kozhikode, Represented by the Environmental Engineer.
6. M/s. Pentagon Builders,
Represented by its Managing Partner,
6/160, Pentagon Builders,
Near Malabar Christian College,
Kannur Road, Kozhikode.
7. State of Kerala represented by its Chief Secretary
Government Secretariat
Thiruvananthapuram.
8. M/s. Koroth Gulf Links Pvt.Ltd.
Having its registered office at 5th floor,
Lalan Towers, Banerji Road,
Ernakulam.

9. M/s Apollo Build Tech India Pvt. Ltd.,
Kottooli, Kozhikode.

... Respondents in both the
application and W.P.No. 24035 of 2009

Counsel appearing for the Applicant ... M/s. R. Bindu Sasthamangalam
and M.P. Prasanth

Counsel appearing for the Respondents ... Sri. P.V. Surendranath for
Respondent No.1; Smt. Suvitha A.S for Respondent Nos. 2, 3, and 7; Sri. T.N.C.
Kaushik for Respondent No.4; Sri.M.Ajay and Smt.Rema Smrithi for Respondent
No.5; M/s King and Partridge for Respondent No.6; Sri. Babu KarukamPadath
and M.A.Vaheeda Babu for Respondent No.8; M/s. Hari Shankar and Srinath
Sridevan and Baskar for Respondent No.9.

ORDER

PRESENT:

1. **Hon'ble Shri Justice M. Chockalingam**
Judicial Member
2. **Hon'ble Shri P.S.Rao**
Expert Member

Dated, 22nd September, 2015.

1. Whether the judgement is allowed to be published on the internet. Yes / No
2. Whether the judgement is to be published in the All India NGT Reporter. Yes / No

1. This application is taken on file of this Tribunal by an order of transfer of the Writ Petition (C). No. 24035 of 2009 from the Hon'ble High Court of Kerala at Ernakulam by an order dated 12.09.2013.

The synopsis of the case is that the Petitioner *Samajam* is a registered society which represents the traditional fisher folks and their grievance is about the indiscriminate and illegal construction activities being carried out in the *Kamburam Beach* which falls within the Coastal Regulation Zone-II (CRZ-II) area by the builders/developers including the 6th respondent which would have an adverse impact on the coastal environment thereby affecting the day to day lives of

the members of the Society. The Petitioner put forth that the permission granted by the Respondent Nos.1 to 5 to the builders is in utter disregard to the building rules and in violation of the instructions given by the Coastal Regulation Zone Management Authority (CRZMA). The writ petition was filed as the concerned authorities did not act upon the grievance of the Petitioner and as the activities were violative of the fundamental rights guaranteed to the Petitioners under Art.14 and 21 of the Constitution of India.

Respondent Nos. 8 and 9 were added as additional respondents *vide* an order dated 13.06.2011 in I.A.No.3727 of 2010 in Writ Petition (C).No. 24035 of 2009, in the Hon'ble High Court of Kerala. The 4th respondent was directed to inspect the disputed areas and file a report by the Hon'ble High Court of Kerala by an order dated 15.02.2012 and they had submitted a report on 03.11.2012.

2. The respondents have filed their respective replies to the Writ Petition and to the application challenging the averments made by the applicant. The 1st respondent put forth that it has granted building permits to the 6th, 8th and 9th respondents at a relevant point of time wherein the constructions were permissible within CRZ –II area and they were under the *bona fide* belief that no separate prior clearance from the CZMA or such a reference for clearance was available in the CRZ Notification, 1991. The 5th respondent states that Consent to Establish was granted by them to the 6th, 8th and 9th respondents after necessary verification of their proposal of waste water management and location of the sewage treatment plant. The 6th respondent has obtained the renewal of Consent to Establish for the term up to 14.07.2014. The 8th respondent has obtained the renewal of Consent to Establish for the term up to 31.10.2015. While the 8th respondent has requested for Consent to Operate, an order dated 23.05.2013 was forwarded by the Chairman, Kerala Coastal Zone Management Authority (KCZMA) informing that they have

violated the Coastal Regulation Zone (CRZ) Notification wherein the 8th respondent secured an order of the Hon'ble Kerala High Court dated 01.07.2013 staying the order of the KCZMA. Though the 9th respondent has obtained Consent to Operate for the term up to 31.08.2013, the same was not renewed for the current term. According to the 9th respondent, the report submitted by the 4th respondent is incorrect and false as they have not violated the CRZ norms or any other relevant building rules.

On the above pleadings, the following questions were formulated for consideration by the Tribunal.

- i) Whether the Petitioner is entitled for a declaration that the 6th, 8th and 9th respondent builders/ developers have no right or authority to carry on construction activities in the *Kamburam* Beach adversely affecting the coastal environment.
- ii) Whether it is necessary to issue directions to the Respondent Nos. 1 to 5 not to permit any builder or developer to carry out any construction in the said beach.

3. In pursuance of an order of transfer made by the Hon'ble High Court of Kerala at Ernakulam in WP(C) 24035/2009, this application was taken on file. Pending the proceedings before this Tribunal on application, the 8th and 9th respondents were also added as respondents.

4. Advancing the arguments on behalf of the applicant it is submitted that the applicant society represents the traditional fisher folks of *Kamburam* beach area whose livelihood is dependent on the fish catch and marine ecology of the area. The very intention of the CRZ Notification, 1991 was to protect the livelihood of fisher folks and the cultural entity and ecology of the coastal areas. The applicant is

one of the direct beneficiaries of the notification. The commercial construction of flats by the 6th, 8th and 9th respondents was destroying the ecological balance of the area. Without obtaining any consent from the 4th respondent KCZMA or MoEF&CC those respondents were carrying on their construction activities in CRZ-II area. The Hon'ble High Court of Kerala made an interim order on 15.05.2012 directing the 4th respondent, KCZMA to inspect the disputed area and take analysis of each building by each respondent and whether regulations of the buildings are complied with or not. Following the inspection, the 4th respondent prepared a report and placed before KCZMA on 11.06.2012 and the construction of those respondents were found in violation of CRZ Notification, 1991. On 03.11.2012, the 4th respondent had filed a detailed counter explaining the illegality committed by those respondents. Despite the stop memo, the respondents were carrying on the constructions. A petition is filed by the applicant before the Hon'ble High Court of Kerala in Writ Petition (C) No.24035 of 2009 to stop the illegal construction. While the matter stood so, the application was transferred to the Tribunal and taken on file. The 4th respondent, KCZMA formed a special team to visit the site and file a factual report regarding the allegations made by the applicant. The site inspection report of the 4th respondent is produced as Exhibit P4 (1) which clearly shows that it is in CRZ-II as per Kerala Coastal Zone Management Plan. All the three constructions are towards the landward side of the existing beach road. The design and construction of the buildings should be consistent with the surrounding landscape and local architectural style. But the constructions of those respondents are not so. Even if the applications were filed by those respondents they would have been rejected since they did not satisfy the above mentioned criteria while the construction of the 9th respondent is admittedly in an extent of 68.75 cents of land with a plinth area of 8962.67 sq.m. within the CRZ -II area. The total investment of the 9th respondent is more than Rs. 10 crores

and the permit was issued by the 1st respondent on 04.11.2006. Since, the investment has exceeded Rs. 5 crores the construction requires prior CRZ clearance from MoEF&CC as per CRZ Notification, 1991. The constructions were completed in 2011 without obtaining CRZ clearance from the authority. The construction was regularized by the 1st respondent without obtaining CRZ clearance from the Central Government. It is well admitted by the 9th respondent. No evidence was adduced by the 9th respondent to support their contention that cost of construction did not exceed Rs. 5 crores. Equally, the 8th respondent has also constructed in the same zone whose cost was much more than Rs.5 crores. Copy of the Consent to Establish issued by the District Pollution Control Board would also reveal the fact that investment by the 9th respondent was above Rs.5 crores. As per the 4th respondent report the construction of the 8th respondent was in 40.43 cents of land with plinth area of 5492.99 sq.m. falling in the CRZ-II area. The permit was issued by the 1st respondent in 19.11.2008 and the construction was completed before 2011 without CRZ clearance from the MoEF&CC. The construction site of the 6th respondent is an extent of 64.5 cents with plinth area of 9780.04 sq.m. in CRZ-II area. The permit was issued on 10.09.2008 by the 1st respondent. The total investment is more than Rs.5 crores as evident by the Exhibit 'E'. The construction in the CRZ-II area is without the prior CRZ clearance from MoEF&CC. All the constructions made by the 6th, 8th and the 9th respondents were completed prior to 2011 that too in CRZ-II area and without obtaining prior permission from the Central Government. Projects with less than 20,000 sq.m. also require prior clearance from the Central Government. After completing the construction in 2011, the 6th and 8th respondents approached the 4th respondent for CRZ clearance which would indicate CRZ clearance as a prior requisite. Application was rejected by the 4th respondent and one of the main reasons was that the project is in violation of the CRZ Notification. Since all the constructions

are prior to CRZ Notification, 2011 the CRZ Notification, 1991 would prevail. Under CRZ Notification, 1991, KCZMA had no authority to issue any clearance for construction in the CRZ-II area. CRZ Notification, 1991 clearly envisages that the MoEF&CC is the authority under the said notification to grant or refuse the CRZ clearance. But the respondents have neither approached the said authority nor obtained the clearance till date. There's no provision in the Environment Protection Act, 1986 or CRZ Notification, 1991 which authorizes any authority to issue *ex post facto* clearance for construction already built without obtaining statutory requirements such as Environmental Clearance (EC) / CRZ clearance. In case of the constructions of the 6th, 8th and 9th respondents, CRZ clearance is a prerequisite. Since those constructions were carried out without CRZ clearance from MoEF&CC they cannot be regularized by any authority. The 6th respondent filed Appeal No.26 of 2014(SZ) against rejection of their application by the 4th respondent, KCZMA for getting the CRZ clearance. The said appeal was allowed by the Tribunal in which the legal points were not taken into consideration and the judgment in the appeal has no effect in this application. Pointing to the judgment of the Principal Bench of this Tribunal in Application No.37 of 2015 and O.A 213 of 2014 wherein the Office memorandum issued by the MoEF&CC for providing *ex post facto* clearance was quashed, the counsel would submit that the principle laid down in that application has to be applied in the present case. Apart from that he relied on the judgment of the Hon'ble Apex Court in *Piedade Filomena Gonsalves v. State of Goa and others* (2004) 3 SCC 445. In order to substantiate his arguments, the petitioner laid down the following cases:

- i) *Vamika Island (Green Lagoon Resort) v. Union of India and others* 2013 (8) SCC 760;

ii) *Antony A.V. v. Corporation of Cochin and others* 2014 KCH 828, 2014 (4) KLJ 851.

The learned counsel would submit that in view of the above arguments, the application has to be allowed granting the reliefs asked for.

5. The counsel for all the respondents placed their respective submissions on the contentions put forth by the applicant's side.

6. The Tribunal paid its anxious considerations on the submissions made and made a scrutiny of all the materials made available.

Discussion and Conclusion

7. As seen above, this Application No. 331 of 2013 was taken on file pursuant to an order of transfer of the Hon'ble High Court of Kerala in a writ proceedings above referred to against the 6th respondent alleging that the construction was illegal since it is in violation of CRZ Notification, 1991. Subsequently, 8th and 9th respondents were also added as party respondents against whose construction also challenge was made on the same grounds.

8. The applicant has sought for the following reliefs:

i) A declaration by the builders/ developers including the 6th respondent has no right or authority to carry on construction activities in the *Kamburam* beach adversely affecting the coastal environment.

ii) Direct respondent nos. 1 to 5 not to permit any builder or developer to carry out any construction in the said beach.

iii) Direction to the 5th respondent to carry out extensive study on the adverse impacts of construction activity now being damned by builders and developers.

9. The main contentions of the learned counsel for the applicant on which the construction of the 6th, 8th and 9th respondents are termed as illegal and challenged are that the construction of the 6th respondent is an extent of 64.5 cents with a plinth area of 9780.04 sq.mts, that the construction made by the 8th respondent is of 40.43 cents with a plinth area of 5492.99 sq.m. while the construction of the 9th respondent is an extent of 68.75 cents with a plinth area of 8962.67 sq.mts that all constructions are within the CRZ-II area and total investment in each case has exceeded Rs. 5 crores. All the above constructions by the 6th, 8th and the 9th respondents require prior CRZ clearance from the MoEF&CC as per CRZ Notification, 1991 Clause 3-5. The constructions of those respondents were completed before 2011 without obtaining CRZ clearance from MoEF&CC. For all those cases, CRZ Notification, 1991 would prevail according to which MoEF&CC is the only authority to grant or refuse CRZ clearance. Since, the 6th, 8th and the 9th respondents admittedly have not obtained any clearance from the competent authority, all constructions must be restrained and they have to be removed since they were made in violation of law. On the contrary, it is specifically pleaded by those 6th, 8th and the 9th respondents that their constructions have been done by obtaining necessary permissions and licenses from authorities competent to issue and the CRZ clearances from MoEF&CC is not necessary and thus application has no merits.

10. As could be seen above, the applicant has sought for the reliefs that the 6th, 8th and the 9th respondents have made the construction activities in the CRZ-II area without obtaining prior CRZ clearance from the Central Government or from any other authority as the total investment of each of the project is more than Rs.5 crores and thus all the constructional activities of the 6th, 8th and the 9th respondents are violative of law since CRZ Notification, 1991 would prevail in their cases. According to the 6th respondent, the land on which the construction is being made

was covered by Town Planning Scheme notified by the Government of Kerala under Madras Town Planning Act, 1920 which was much before CRZ Notification, 1991 and hence the CRZ Notification, 1991 had no application to the case of the 6th respondent. Equally, it is a case of the 8th respondent that the building permit from the Calicut Corporation was obtained by the 8th respondent even in the year 2006 which was renewed in the year 2012. Though, the property is situated in CRZ-II area, the CRZ Notification, 1991 and CRZ Notification, 2011 permit construction activity in the landward side of the existing road and the constructions are actually on the landward side as permitted by the CRZ notification and thus the contention of the applicant is not sustainable. Equally, discontented, the 8th respondent submits that the land owned by the 8th respondent is covered by the Town Planning Scheme notified by the Government of Kerala under the Madras Town Planning Act, 1920 as early as 25.03.1988 which was much before CRZ Notification, 1991 and thus the construction of the 8th respondent are made as per the approved plans satisfying all statutory requirements. The 9th respondent has defended the application by stating that the building permit was issued by the 4th respondent dated 03.11.2006 while Consent to Establish was granted by the 5th respondent on 14.07.2008. On the date of application for the building permit the proposed investment for the project was less than Rs.5 crores and total built up area was below 10000 sq.m. and hence CRZ clearance for the construction of the 9th respondent would not arise and thus the application has got to be dismissed.

11. A perusal of the Exhibit 'G' relied on by the 6th respondent would clearly indicate that a building permit was granted to the 6th respondent by the 1st respondent, Kozhikode Corporation on 10.09.2008 while Exhibit 8 'B' & 'C' relied by the 8th respondent would show that the first document was the building permit from the Kozhikode Corporation while the latter was a renewal in the year 2012, in favour of the 8th respondent in respect of the construction in question.

Equally, the building permit was issued by the 1st respondent, Kozhikode Corporation on 03.11.2006 in favour of the 8th respondent. Though the 6th, 8th and the 9th respondents admit that the respective constructions fall within the CRZ-II Zone they do not require CRZ clearance since CRZ Notification, 1991 is not applicable to them. It is evident that all those respondents 6th, 8th and 9th have applied for permit to construct the buildings which were sanctioned by the 1st respondent, Kozhikode Corporation in the year 2008, 2006 and 2006 respectively from the above documents relied on by them. Under a Gazette Notification by the Government of Kerala dated 27.09.2011 Annexure A6, DTP scheme underwent an amendment in Class 4 and 5 therein that all constructions within that area covered by the Town Planning Scheme should comply with the Kerala Municipality Building Rules, 1999 (KMB Rules, 1999) only. A reading of the Gazette Notification of the year 1988 and Gazette Notification dated 2011 would indicate that the lands on which the constructions are made by the 6th, 8th and the 9th respondents are covered by the Town Planning Scheme notified in the Gazette even from the year 1988. It is not disputed that Kerala Municipality Building Rules, 1984 were superseded by KMB Rules, 1999 by the above notification. The Government has ordered that the KMB Rules, 1999 must apply to the particular area. Hence, the constructions of 6th, 8th and the 9th respondents are concerned, the KMB Rules, 1999 are necessarily to be applied. Under the KMB Rules, 1999 the Floor Area Ratio (FAR) is applicable to the respondent projects. The Counsel for the applicant pointed out that each project was above Rs.5 crore investment and hence it must be considered by the MoEF&CC directly and not at the State level. It is contended by the counsel for the 6th, 8th and the 9th respondents that the sole authority responsible for certifying whether a construction activity is permissible or not is Centre for Earth Science Studies (CESS) and the sites in question were inspected by the said authority who has made a recommendation to the effect that

the project falls in CRZ-II towards the landward side of the existing road and does not have any ecologically sensitive areas such as mangroves which come under CRZ -I (A) and has also further recommended that the construction activities were permissible subject to Floor Space Index / Floor Area Ratio restriction.

12. By exercising powers under Sec.3 (1) and 3(3) of the Environment Protection Act, 1986 the Central Government constituted two authorities namely: a) National Coastal Zone Management Authority and b) Kerala Coastal Zone Management Authority. The CRZ Notification, 1991 had laid down its framework for i) Prohibited activities; ii) Permitted activities; iii) Regulation for permissible activities; and iv) Procedure for monitoring and enforcement. But the CRZ Notification, 2011 has laid down for i) Prohibited activities; ii) Regulation of permitted activities; and iii) Procedure for clearance of permissible acts. The CRZ Notification, 1991 underwent a number of amendments in view of the defects and deficiencies which were serious in nature. Under such circumstances, the CRZ Notification, 2011 was notified by curing those defects. While CRZ Notification, 1991 stipulated that all projects above Rs. 5 crores investments must be considered by the MoEF&CC directly and not at the State level then the same was found to be unrealistic and without any scientific basis and hence the same was removed and modified substituting extent of built up area and not on cost basis. Hence a limit of 20000 sq.m. built up area was fixed and introduced with the EIA Notification, 2006. It is because of which the regulation of 4(d) of CRZ Notification, 2011 specifies that all activities less than 20000 sq.m. should be dealt with at the State level only. The CRZ Notification, 1991 was superseded by CRZ Notification, 2011. It is not in controversy that the built up area of all the 6th, 8th and 9th respondents were below 20000 sq.m. Hence, in view of the legal and factual position, the 4th respondent, KCZMA is the competent authority to consider the application and make orders thereon since it is vested with the jurisdiction to do so.

13. Hence the contention of the applicant that the 6th, 8th and 9th respondents should have applied to the MoEF&CC when no such procedure existed cannot be countenanced. The applicant cannot have any grievance while the 4th respondent, the competent authority constituted under law, has considered the applications and passed orders thereon on the strength of the powers vested in it. The very inherent purpose of the EP Act, 1986 is to ensure that the activities are controlled according to the law and the Central Government has chosen to dedicate and invest the 4th respondent with powers to do so. While the 6th, 8th and 9th respondents have applied and the 4th respondent authority has granted clearance in accordance with law, no reason is noticed to interfere with these orders. Apart from that, as stated above, on inspection the CESS had also reported that the building constructions made by the respondents are very much permissible in law though they are in CRZ-II zone.

14. In view of all the above, the Tribunal has to necessarily hold that the application is devoid of merits both on facts and in law. Hence, the application is dismissed. No costs.

(Justice M. Chockalingam)
Judicial Member

(Shri P.S.Rao)
Expert Member

Chennai.
Dated, 22nd September, 2015.