

Gujarat High Court

Gujarat High Court

Gujarat vs Union on 26 August, 2011

Author: Mr.S.J.Mukhopadhaya, Mr.Justice J.B.Pardiwala,

Gujarat High Court Case Information System BODY { SCROLLBAR-FACE-COLOR: #d4d0c8; SCROLLBAR-HIGHLIGHT-COLOR: #808080; SCROLLBAR-SHADOW-COLOR: #d4d0c8; SCROLLBAR-ARROW-COLOR: #ffffff; scrollbar-dark-shadow-color: #ffffff} SPAN.searchword { background-color:yellow; } function loadSearchHighlight() {

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Print

SCA/749/2011 27 JUDGMENT

IN

THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL

CIVIL APPLICATION No. 749 of 2011

For

Approval and Signature:

HONOURABLE

THE CHIEF JUSTICE MR. S.J. MUKHOPADHAYA

and

HONOURABLE

MR.JUSTICE J.B.PARDIWALA

=====

1

Whether

Reporters of Local Papers may be allowed to see the judgment ? No

2

To be

referred to the Reporter or not ? No

3

Whether

their Lordships wish to see the fair copy of the judgment ? No

4

Whether

this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? No

5

Whether

it is to be circulated to the civil judge ? No

=====

GUJARAT

POSITRA PORT COMPANY LIMITED & 1 - Petitioner(s)

Versus

UNION

OF INDIA MINISTRY OF ENVIRONMENT AND & 3 - Respondent(s)

===== Appearance

:

MS

ANUJA S NANAVATI for

Petitioner(s) : 1 - 2.

MR HRIDAY BUCH for Respondent(s) : 1, MR

PK JANI GOVERNMENT PLEADER for Respondent(s) : 2 -

4.

CORAM

:

HONOURABLE

THE CHIEF JUSTICE MR. S.J. MUKHOPADHAYA

and

HONOURABLE

MR.JUSTICE J.B.PARDIWALA

Date

: 26/08/2011

CAV JUDGMENT

(Per

: HONOURABLE MR.JUSTICE J.B.PARDIWALA)

By

way of this petition under Article 226 of the Constitution, the petitioner, a Company, has prayed for the following reliefs :-

"A) This

Hon'ble Court in exercise of the extraordinary powers conferred under Article 226 and 227 of the Constitution of India may issue a writ mandamus or any other appropriate writ, order or direction quashing and setting aside the two orders/ decisions dated 12.4.2010 and 13.10.2010 of the Standing Committee of National Board for Wildlife (produced at Annexure-A to this petition) rejecting the proposal of the petitioners to conduct/carry out the Environmental Impact Assessment Study and further be pleased to direct the respondents to issue necessary permission/clearance to the petitioners to conduct/carry out the Environmental Impact Assessment Study for the development of a port at Positra, in accordance with the approved Terms of Reference by the MoEF on 01 Aug 2007.

B) Pending

the admission, hearing and final disposal of the present petition, this Hon'ble Court may be pleased to pass an appropriate order/direction directing the concerned respondents/authorities to allow petitioners to conduct/carry out the Environmental Impact Assessment Study for the development of a port at Positra, in accordance with the approved Terms of Reference by the MoEF on 01 Aug 2007.

C) An

Ex-parte ad-interim relief in terms of prayer - "B" above be granted.

D) Such

other and further relief as the Hon'ble Court may deem fit and proper."

2. The

facts, in brief, giving rise to this petition are as under :-

The

petitioner is a Company incorporated under the provisions of the Companies Act. One of the main objects and purposes for incorporation of the Company is to construct, develop, maintain, build, equip, hire, own, operate, transfer or otherwise deal with ports, shipyards, jetties, harbours, docks, etc. at any port in India or elsewhere and to carry on business of providing port services including handling any other services to carry on business of Inland and Sea Transport including goods, passengers etc..

3. The

petitioners, by filing the present petition, seek to challenge the decision of Standing Committee of National Board for Wild Life (NBWL) dated 13.10.2010 rejecting the proposal of the petitioners to carry out study for Environmental Impact Assessment (EIA) and risk assessment for the establishment of port at Positra, Dist. Jamnagar. The petitioners also seek to challenge the earlier decision taken by the authority dated 12.4.2010 whereby the same proposal to carry out study for Environmental Impact Assessment and risk assessment for the establishment of port at Positra was rejected.

4. It

is the case on behalf of the petitioners that Positra was one of the green field port site identified by the Government of Gujarat in the year 1995 to be developed as a joint sector port under the State's Port Policy. The SKIL Infrastructure Ltd., which was previously known as Sea King Engineers Ltd. incorporated under the provisions of the Companies Act, 1956 on 20.2.1990 is a pioneer company in development of the various infrastructure projects in the private sector in the country. The said company has developed the private sector port in the country at Pipavav in the State of Gujarat. The said company with its consortium has entered into an agreement with Gujarat Port Infrastructure & Development Company Ltd. a company promoted by Gujarat Maritime Board and Gujarat Industrial Investment Corporation Ltd. to develop port facilities at Positra, Gujarat.

5. It

appears that based on some evaluation carried out by experts, Positra-III was evaluated as the preferred site for the port and terminal facilities ranking first in each of main criteria groups, marine operation aspects, onshore developmental aspects and environmental impact considerations. It appears that GMB also consulted/appointed National Institute of Oceanography (NIO), Goa to further evaluate and prepare a comprehensive Environmental Impact Assessment study report for the development of port at Positra.

6. National

Institute of Oceanography in its report stated as under :-

"A. Corridors

II and III do not have much marine life. Some coral were found to the east of Corridor III. Taken together with our earlier observations at Bet Sankodar, it is unlikely that any human interference on the proposed corridors might affect adversely the local marine life within the corridors.

B. x

x x

We

suggest that any EIA study, if and when undertaken, should include a detailed study of the marine life at Boria and Paga reefs. This should also include a provision of likely impacts on the two reefs (and the intertidal vegetation) based on the projected amplitude of the developmental activities."

7. Based

on the above mentioned report, the petitioners preferred an application in July 2000 to the State Government (Environment and Forest Department) for all applicable clearances under the Wildlife (Protection) Act, 1972 and other applicable Acts and Rules. During the pendency of the environmental clearance application, the petitioners were informed vide letter dated 12.12.2000 from Chief Conservator of Forests, Jamnagar stating that pursuant to the order of the High Court in the case of M/s. Bharat Oman Refinery Ltd. formal approval under Sections 29 and 33 of the Wildlife (Protection) Act, 1972 cannot be granted. It appears that the petitioners on 12.4.2008 wrote a letter requesting the Secretary, MoEF to approve the Terms of Reference for Environment Impact and Risk Assessment Study for the development of the port at Positra. For the said purpose, the petitioners proposed to engage National Environmental Engineering Research Institute (NEERI) to conduct Environmental Impact and Risk Assessment Study.

8. Thereafter,

on 22.8.2008, the petitioners filed an application to the Chief Conservator of Forests, Jamnagar with a request to grant permission for conducting the Environmental Impact Assessment study. The petitioners have also submitted a request in the prescribed format to the same authority on 27.8.2008. Respondent No.4 forwarded the said proposal of the petitioners to Chief Wildlife Warden, Gandhinagar (respondent No.3 herein) on 28.8.2008 for his due consideration. The Wildlife Board met on 1.9.2008 under the Chairmanship of the Hon'ble Chief Minister of Gujarat State in which the proposal of the petitioner was considered and recommended to MoEF, New Delhi for its approval. The said proposal along with the Map and other relevant information in the prescribed format was later on forwarded to MoEF for obtaining permission of Standing Committee of National Board for Wild Life (NBWL).

9. In

the 13th meeting of Standing Committee of NBWL held on 12.12.2008, it was unanimously decided to carry out an inspection of the area before taking any final view of the matter. The Committee, therefore, decided to appoint two members to visit the site and carry out inspection and render a report.

10. Pursuant

to the unanimous decision taken by the Standing Committee in its meeting held on 12.12.2008 to carry out inspection of the area before taking the final decision, two members were appointed to conduct the Site Inspection, viz. (1) Dr. M.K. Ranjitsinh and (2) Dr. Asad R. Rahamani. Dr Ranjitsinh visited the area on 7.4.2009 whereas Dr. Asad R. Rahamani visited the area on 9.6.2009. Both the Committee members thereafter submitted their joint written report to the Standing Committee wherein the following recommendations have

been made :-

"We

are of the considered opinion that the country cannot have both the Positra Port and the Gulf of Kutch Marine national Park for the purpose it was established. The choice would, therefore, have to be made between the Park and the Port. Since the nodal Ministry in this regard is the MoEF, the stand that should be taken is that the interest of the marine national Park should prevail that over the Positra Port and that this proposal of establishing a port at Positra should be rejected."

11. Subsequently,

on 17.7.2009, in the 15th meeting of Standing Committee of National Board for Wild Life wherein Chairman of the Standing Committee advised that the petitioners as well as the Members of the Committee who had inspected and visited the site should exchange the documents to know the view of each other in a more holistic manner. Extracts of the Minutes of the meeting are as under :-

"Member

Secretary informed that this proposal was considered by the Standing Committee in its meeting held on 12th December 2009 and it was decided to carry out a site inspection before taking a final view. Site Inspection Report prepared by Dr. M.K. Ranjithinsh and Dr. Asad Rahamani who carried out the inspection has been circulated. Member Secretary requested Dr. Rahmani to deliberate his views in the matter. Dr. Rahmani informed that Marine National Park at Jamnagar is one of the most important National Park considering the marine biodiversity. It has rare species of Corals, Sponges, Sea Anemones, etc.. There are about 477 species of Molluscans, out of which about 170 are the new records. Report of endangered mammals like Dugongs have also been reported. Considering the importance of marine bio-diversity in the area, the Inspecting Team was of the considered opinion that Positra Port and Marine National Park both in the Gulf of Kutch cannot exist together. It was either to be a Marine National Park or the Port. Principal Secretary (Forests), Government of Gujarat submitted that the proposal was only for seeking permission to carry out environmental impact assessment which should be considered by the Standing Committee. Unless an EIA is conducted, it was not possible to predict the loss of biodiversity etc.. Hon'ble Chairman observed that Ministry has already decided to carry out a study to know the cumulative impact of all the forthcoming Port projects on the Indian coastline. Till the report is received, it would perhaps be not appropriate to consider this proposal. He also advised the project proponents to come up with some alternative sites as well. Dr. Rahmani informed that in past, NIO has also carried out certain studies concluding not to recommend any port in this area. Chairman advised that both project proponents and members of the Committee who inspected the site should exchange the documents to know each other's views in a more holistic manner. Chief Wildlife Warden, Gujarat would coordinate this activity. Hon'ble Minister also requested Secretary (E&F) to expedite submission of report on the cumulative impact assessment of forthcoming ports."

A

copy of the Expert committee Report was forwarded by the Principal Chief Conservator of Forests, Wild Life, Gujarat State to the petitioners vide his letter dated 4.9.2009. The petitioners were surprised to see that the study report extensively quoted data that were outdated and the bibliography attached with the report was also outdated. It appeared that no physical samples were collected nor any analysis were made. The petitioners submitted their detailed comments on the "Expert Committee Report" vide its letter dated 29.10.2009 to the Chairman of the Standing Committee (NBWL) and requested to consider their comments prior to arriving at any decision.

12. Thereafter

in the 17th meeting of the Standing Committee of NBWL held on 22.12.2009, after due deliberations, it was decided to finalize the comments on the observations of the Port Authorities with inputs of the Chief Wildlife Warden, Gujarat and take a final decision in the next meeting.

13. Thereafter

on 12.4.2010 in the 18th meeting of the Standing Committee of National Board for Wild Life, held under the Chairmanship of the Hon'ble Minister of State for Environment and Forests, final decision was taken by the Ministry of Environment and Forests (Wild Life Division) without giving any reply to the comments of the petitioner and opportunity to be heard had rejected the petitioner's proposal to carry out study for Environment Impact Assessment for establishment of port at Positra. The relevant abstract of the minutes of 18th meeting of the Standing committee of National Board for Wild Life held on 12.4.2010 is reproduced hereunder:-

"1. Permission

to carry out study for Environmental Impact Assessment and risk assessment for establishment of Port at Positra Dist. Jamnagar.

"While

discussing, the proposal on Positra Port, it was observed that the Marine National Park was highly rich in Marine Bio diversity and his highly ecologically fragile area. The Standing Committee also took a note of the recommendation of Swaminathan committee on Development of new Ports. It has recommended no development of any port within 10 kms. from Ecological fragile area/Protected areas. Committee also considered the report of the inspecting team of the Standing Committee consisting of Dr. M.K. Ranjitsingh and Dr. Asad Rahmani recommending rejection of the proposal for conservation of marine biodiversity in Marine National Park. Under this background the committee unanimously rejected the proposal to carry out study for EIA for establishment of Port at Positra.""

14. The

aforesaid decision was later on communicated by the Principal Chief Conservator of Forests, Gandhinagar to the petitioner Company vide its letter dated 15.5.2010 which was received by the petitioners on or about 15.5.2010. The proposal was rejected basically on two points :-

A) On

the basis of the report submitted by the Inspection Team of the Standing Committee consisting Dr. M.K. Ranjit Sinh & Dr. Asad Rahamani.

B) On

the basis of the recommendation of Swaminathan Committee report.

15. Being

aggrieved and feeling dissatisfied with the aforesaid decision, the petitioners preferred an appeal before the National Environment Appellate Authority on 11.6.2010. The said appeal was rejected by National Environment Appellate Authority vide its order dated 6.7.2010 on the ground that the said authority does not have jurisdiction to decide the controversy under the provisions of National Environment Appellate Authority Act, 1997. It was further observed by the said Authority that as per the Notification dated 29.11.1999 [S.O. 1189(E)] issued by the Ministry of Environment and Forests, the said Authority (i.e. MoEF) retains appellate

power against the rejection of any proposal, with themselves.

16. In

view of the facts stated above, the petitioners preferred an appeal before the Secretary, MoEF challenging the order passed by NBWL dated 12.4.2010 on the grounds stated in the memo of appeal. However, the Secretary, MoEF did not take the decision himself and once again referred the matter to the Standing Committee of NBWL for its due consideration. In the 20th meeting of the Standing Committee of NBWL held on 13.10.2010 at New Delhi under the Chairmanship of the Hon'ble Minister of State (independent charge) for Environment and Forests, Government of India wherein the Member Secretary has briefed the Committee regarding the proposal of the petitioners. The Member Secretary informed that the same proposal was rejected by the Standing Committee in its earlier meeting dated 12.4.2010. Thereafter, the petitioner had made an appeal before the Secretary, MoEF to reconsider their proposal. The relevant observations of the Committee are reproduced hereunder:-

"The

Committee was of the opinion that the Marine National Park was highly rich in Marine Bio Diversity and is highly ecologically fragile area which was also suggested by the site inspection team of Dr. M.K. Ranjitsinh and Dr. Asad Rahmani, who had in turn rejected the proposal in view of the biodiversity richness. Further the Swaminathan Committee in their report on Development of New Ports, had also recommended no development of any port within 10 kms. from Ecological fragile/ Protected Areas.

In

view of the above facts, the Standing Committee of NBWL unanimously rejected the proposal to carry out study for EIA for establishment of Port at Poshitra."

17. We

have heard learned Senior Counsel Mr S.I. Nanavati appearing with learned advocate Ms Anuja S Nanavati for the petitioners, learned advocate Mr Hriday Buch appearing for respondent No.1-Union of India and learned Government Pleader Mr PK Jani for respondent Nos.2 to 4.

18. The

learned counsel for the petitioners would submit that the impugned orders of Standing Committee dated 12th April 2010 and 13th October 2010 appears to have been passed without considering the detailed comments submitted by the petitioners against the report of the Expert Committee. On plain reading of the minutes of meeting and the decision of the Standing Committee which was conveyed to the petitioners, it clearly appears that the detailed comments submitted by the petitioners were neither discussed nor considered by the Standing Committee. Even prior to the taking of the impugned decision by the Standing Committee in its meeting held on 12th April 2010 and 13th October 2010, the Standing Committee did not give any opportunity to the appellants of being heard or to make their submissions to the Standing Committee. Thus, the orders/decisions of the Standing Committee taken in the meeting held on 12th April 2010 and the subsequent meeting held on 13th October 2010 are violative of the principles of natural justice and hence the same deserves to be quashed and set aside.

He

would further submit that in the 17th meeting of National Board of Wild Life held on 22.12.2009, it was decided that the Ministry of Environment & Forests would finalise the comments on the observations of the

Port Authority on the Expert Committee Report along with input from the Chief Wild Life Warden, Gujarat and thereafter will take the final decision in the next meeting. However, the petitioners did not receive any comments from them and the ex-parte decision was taken in the 18th meeting of National Board of Wild Life held on 12.4.2010 and thereafter, on 13.10.2010. Hence, the impugned decisions/orders deserve to be quashed and set aside.

He

further contended that the study by the two members of the Expert Committee extensively quotes out dated data and the bibliography attached with the site inspection report was outdated. It appears that no physical samples were collected nor any analysis made. The petitioners submitted its detailed comments on the Expert Committee Report that there is very little description in the Report that is based on the observations made at the site during the site inspection made by the Expert Committee. He also contended that the Expert Committee Report does not make any comment on various key factors which were brought to the notice of each Expert member during their respective visits and also in the comments submitted by petitioners against the report of the Expert Committee in which the following aspects were elaborately elucidated -

i) Positra

Port is one of the Greenfield site identified by the Government of Gujarat to be developed as Joint Sector under the State's Port Policy. The identification of the site was done after extensive studies by Frederic Harris (now Maunsell Harris) and the NIO.

ii) The

Ministry of Environment & Forests (MoEF), Government of India, approved the Terms of Reference (ToR) for the Environmental Impact Assessment Study in August 2007.

iii) In

compliance with the approved Terms of Reference, the petitioners engaged the National Environmental Engineering & Research Institute (NEERI) - a Govt. of India organization, to conduct the Environmental Impact and Risk Assessment study and also Seabed Engineering study at Positra by Indomer, Chennai.

iv) The

proposed methodology of conducting the survey was explained to the Expert Committee Members who came for site inspection indicating that the study would be non-destructive and non-invasive and would not cause any adverse effect on the Flora and Fauna of the region.

v) The

area which was proposed to be surveyed is substantially in deep water and does not directly form part of the Notified/Prohibited area. When the Gujarat Gulf of Kutch Marine National Park Notification 1982 was promulgated on 20th July 1982, there was no authorised map attached with the Notification of the marine National park (MNP) and Marine Sanctuary (MS). Even as on date, no authorized MNP/MS map is available. The process of delineation and demarcation of the eco-sensitive areas is still underway. It will be too premature to say that the proposed studies to be conducted by the petitioners falls under the MNP/MS area.

He

lastly contended that the Expert Committee's report is not borne out by facts. What the National Institute of Oceanography Report states is that a detailed Environmental Impact Assessment Study of the area when undertaken should include a detailed survey of the Marine life at Boria and Paga reefs and likely impact on these two reefs based on the projected amplitude of the developmental activities.

19. Per

contra, learned advocate Mr Hriday Buch appearing for respondent No.1 submitted that the present petition deserves to be rejected only on the ground that the petitioners have no legal right to carry out Environmental Impact Assessment Study and the respondent-Union of India has no legal duty to grant such a permission. He further submitted that the site inspection report by Dr. M.K. Ranjitsinh and Dr Asad Rahmani was considered by the Standing Committee of National Board for Wildlife in its meeting held on 17th July 2009 wherein the Committee had decided that both project proponents and members of the Committee who inspected the site should exchange the documents to know each others views in a more holistic manner. The Project proponents had also made a presentation before the Standing committee of National Board for Wild life and the Committee had heard the Members of the Committee, Officials of the Ministry of Environment and Forests, the State Government of Gujarat and the Proponents to arrive at a very judicious decision. Further, during the meeting of the Standing Committee of National Board for Wildlife held on 22nd December 2009 it was decided to finalize the comments on the observations of the Port Authorities with inputs of the Chief Wildlife Warden, Gujarat and take a final decision in the next meeting.

He

also submitted that during the meeting of the Standing Committee of National Board for Wildlife held on 12th April 2010, the Committee had decided to reject the proposal based on all the discussions, the site inspection report and the Swaminathan Committee report. The Standing Committee of National Board for Wildlife had noted that the area was rich in biodiversity and also that the Swaminathan Committee report had recommended that no port be developed within 10 kms. from the ecologically fragile/Protected areas.

He

further contended that as per the present policy and law, the construction of a port within a Protected Area or within 10 kms from the boundary of a Protected Area would require mandatory Environmental as well as Wildlife clearances. While the Environmental Clearance requires a set of procedures to be followed like screening, scoping, impact assessment, documentation/reporting and evaluation, the Wildlife clearances requires that the proposal be considered by the Standing committee of National Board for Wildlife and if recommended, then by Hon'ble Supreme Court. In order to streamline the process, the Ministry of Environment and Forests has issued an Office Memorandum No.J-11013/41/2006-I.A.II (I) dated 2nd December 2011 wherein it has been categorically mentioned that grant of environmental clearance does not necessarily imply that forestry and wildlife clearance will be considered by the respective authorities on their merits and decision taken. Further that the Ministry of Environment and Forests shall not be responsible for the investments made by the project proponent in anticipation of the clearance from forestry and wildlife angle. In view of the above position, the contention of the petitioner that the same Ministry that approved the TOR has rejected the proposal for carrying out Environmental Impact Assessment does not carry any merit.

He

lastly contended that the Standing Committee of National Board for Wildlife was well within its powers to decide the prospects for wildlife conservation and since the construction of the Port in such a fragile ecological site would have a negative impact on the wildlife of the area had decided that no ports should be constructed in the area. Since there was no question of recommending construction of a Port in the proposed site, there was no purpose in going ahead with an Environmental Impact Assessment study. The petitioners

have themselves admitted that the Integrated Coastal and Marine Area Management (ICMAM) Report suggest/ recommends to avoid location of ports around 10 kms on either of ecologically sensitive areas, estuaries and lagoons of biodiversity importance. Further, all the parties have been heard before the Standing Committee of National Board for Wildlife and has arrived at a decision to reject the proposal.

20. An

affidavit-in-reply is also filed on behalf of respondent No.1 wherein it has been stated as under:-

The

Marine National Park and Sanctuary was established by the Government of Gujarat for conservation and protection of the coral reefs, mangrove forests, islands and inter-tidal areas. It is one of the best marine protected areas in the country. The Marine National Park and Sanctuary is not only the home for the endangered coral reefs but is also the home for the critically endangered animals like Dugongs (Sea Cows), Whale Sharks, Olive Ridley Turtles and large variety of endangered bird species. The Mangrove species such as Rhizophora, Ceriops and Aegiceros, which are reported to have once existed in the region, are now rare. Further Corals being extremely sensitive to even small changes in the environment, the entire Marine national Park area is highly fragile. Any activity man-made or natural, would lead to seriously damaging the entire ecosystem.

The

Wild Life (Protection) Act, 1972 provides for declaration of Protected Areas for the conservation and protection to wildlife and their habitats. Further, rare and endangered species are listed under the Schedules of the Wild Life (Protection) Act, 1972 for according them protection. Corals, Whale Sharks, Dugongs, Olive Ridley Turtles all of which are found in the Marine National Park and Sanctuary have been listed under Schedule-I of the Act so as to accord highest degree of protection.

Section

29 of the Wild Life (Protection) Act, 1972 provides no person shall destroy, exploit or remove any wild life including forest produce from a sanctuary or destroy or damage or divert the habitat of any wild animal, except with the prior approval of the State Board for Wildlife. Further, Section 35(6) of the Wild Life (Protection) Act, 1972 provides no person shall destroy, exploit or remove any wild life including forest produce from a National Park or destroy or damage or diver the habitat of any wild animal except with the prior approval of the National Board for Wild life.

The

Hon'ble Supreme Court vide their order dated 9th May 2002 in Writ Petition (Civil) No.337 of 1995 had directed that all cases pertaining to Section 29 of the Wild Life (Protection) Act, 1972 shall be referred to the Standing Committee of National Board for Wildlife.

The

Wild Life (Protection) Act, 1972 also provides for constitution of the National Board for Wildlife and its Standing Committee. Amongst the members, five members are representatives of the Non Governmental Organizations and ten members are from amongst the eminent conservationists, ecologists and environmentalists. The constitution of the National Board for Wildlife is approved by the Prime Minister and the experts nominated to the National Board for Wildlife are par excellence in their fields. The National Board for Wildlife is duty bound to promote the conservation and development of wildlife and forests by such

measures as it thinks fit . The National Board is also mandated with the function of advising the Central Government on ways and means of promoting wildlife conservation and carrying out impact assessment of various projects and activities on wildlife or its habitat.

The

National Board for Wildlife has delegated its powers to Standing Committee of National Board for Wildlife for discharging the above mentioned duties and functions. The membership of the Standing Committee of National Board for Wildlife, including the experts, have also been approved by the Prime Minister. The members of the Standing Committee of National Board for Wildlife who had conducted the site inspection were also selected by the Prime Minister. The Standing Committee of National Board for Wildlife thus has the full powers and is well within its jurisdiction to carry out the site inspections and recommend or reject any proposed activity for which a proposal has been placed before it for consideration.

The

observations made at the site itself, by the inspecting team of experienced professionals had revealed that the area is very fragile and any activity that is taken up in the area would have a deleterious impact on the ecology of the area, especially given the fact that corals very specialized and highly sensitive organisms. The literature quoted in the Site Inspection Report also include papers/articles, as late as 2008. The Site Inspection report had indicated that the proposed site could either have the port or have the protected area, as both of them cannot exist together. The technical competence of such experts who have been appointed by none other than the country's Prime Minister and who have been working in the field of wildlife conservation for more than three decades is proven beyond doubt. Moreover, the experts have carried out their duties as members of the Standing Committee of National Board for Wildlife as has been prescribed in the Act. The nature and facts that would be brought out in the Impact Assessment Report financed by the project proponents themselves could be easily envisaged.

21. Having

heard the learned counsel for the respective parties and having perused the record of the case, we are of the view that no relief as prayed for by the petitioners can be granted, more particularly taking into consideration the site inspection report prepared by the members of the Standing committee after inspection of the area in question. It is apparent as per the record that the whole site at Positra was reviewed and three alternates were evaluated as Positra-I, Positra-II and Positra-III.

Positra-I

at the eastern side of Bet Shankhodhar, the Island just east of Okha

Positra-II,

at the northern side of Positra headland, adjacent to Positra Bay

Postira-III,

at the eastern side of Positra headland facing Positra Bay.

22. National

Institute of Oceanography (NIO) further evaluated all three alternates from Environmental sensitivity view point in 1998. Based on NIO's earlier work in the field and assessed in its 1998 report, NIO were of the views

that Corridor-II and III do not have much of a marine life hence this can support development. At that time GMB was not exactly aware about the percentage of developmental activities envisaged but since the Corridor-II and III are situated in Positra Bay where in other side there are reef area, therefore, NIO suggested for detailed EIA which included a detailed survey of the marine life at Boria and Paga Reefs and likely impacts on two reefs based on the projected amplitude of the developmental activities.

23. The

site inspection report as regards Coral Reefs of Positra Cluster, reads as under :-

"The

coral reefs of Positra Bay including 16 islands (Annexure 1) are classified into 3 categories on the basis of topography 1) Rock pools facies 2) Eulittoral and 3) Submerged. Of which submerged reefs are further classified in 4 zones 1) Shoreward reef 2) Back reef 3) Surface reef 4) Seaward reef. Out of these 4 subclasses, the most profuse and diverse forms of massive corals are found on back reef platforms. The percentage of live coral cover was calculated 90%. There were numerous patches where live coral cover was virtually 100% (Patel, 1978). Out of 37 species of Scleractinian coral, 22 species are found in the Positra cluster, which is as high as 60% of the total scleractinian corals of Gulf of Kachchh (Pillai and Patel 1988). Exposed pools at Positra host one of the most remarkable reefs which are considered as one of the most resilient reefs in context of climate change and sea temperature rise."

24. The

relevant discussion in the report is as under :-

"Apart

from the above, there are certain other factors that need to be kept in view of the 42 islands in the Marine National Park, 19 are in the port area and 4 in the project area. Islands with the corals offshore are the most important areas for marine biology and biodiversity they also provide refuge to bird life. These island will bear the brunt of the adversely impact. The southern coast of the Gulf of Kutch stretching from Bet Dwarka to Navlakhi is a richer region from the biodiversity point of view than the northern coast, especially in respect of coral formation. On this southern coast, the southwestern corner around Positra by far the richest. This is because it is more favourably situated from the view points of ocean currents and wind direction and it also happens to be at the mouth of the Gulf. The coral reefs of this part of the park are the very best on the precincts of the Park. There is a very significant extent of endemism in the Gulf, especially in Positra Bay.

The

dimensions of the proposed port are also noteworthy. It is initially to have four berths; each would handle about 2000 containers per day. It is proposed to handle in Positra Port five million TEUs (Twenty Equivalent Units) or container of 20 feet X 10 feet per year. The four berths proposed would handle 1.6 million TEUs in the next 10 years, implying that more berths would have to be added. The project authorities said that they did not know as to what extent of depth that would have to be dredged to allow the movement of ships and the parking of vessels awaiting offloading.

The

dredging activity that would be involved in establishing shipping lanes to the port and in the construction of the berths would not only destroy the coral and the other marine biota, but the turbidity that would result would cover the corals and kill them. The damage would continue in the operation of the port where huge

ships would move along the lanes causing currents that give further rise to turbidity, as well as the discharges that would emanate from ships despite all the rules and regulations.

In

other words, both of us reporters are convinced that the establishment of the Poshitra Port would result in the ecological death of the South Western portion of the park which is, as mentioned above, is the richest. It would also seriously impact the neighbouring marine areas of the park. In the case of an accident or disaster, of course, the entire park would be jeopardized, but even without such an eventuality the ecological significance of the marine park as an entity, would be sacrificed.

Recommendations

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We

are of the considered opinion that the country cannot have both the Poshitra Port and the Gulf of Kutch Marine National Park for the purpose it was established. The choice would, therefore, have to be made between the park and the port. Since the nodal ministry in this regard is the MoEF, the stand that should be taken is that the interest of the Marine National Park should prevail over that of the Poshitra Port and that this proposal of establishing a port at Poshitra should be rejected."

25. We

are of the view that there is no reason for us to take a different view than what the team of experts have opined saying that the area is very fragile and any activity that is taken up in the area would have a deleterious impact on the ecology of the area, especially given the fact that corals are very specialized and highly sensitive organisms. The report makes it clear that the proposed site could either have the port or have the protected area, as both of them cannot exist together.

26. Vide

notification dated 20.7.1982 issued under the Wildlife (Protection) Act, 1972 by the government of Gujarat, areas at Okha and Jamnagar bases in the Gulf of Kutch in Jamnagar district, the limits of which are defined in the schedule are by reason of their ecological, faunal and floral geomorphological natural of zoological importance has been declared as a 'Marine National Park' for the purpose of propagating and developing wild life therein. The limits of the areas intended to be declared as "Marine National Park" includes Paga reef with its coral area and Boria reef.

27. Apart

from this, it must be remembered that the petition is for a writ of mandamus. The Supreme Court, in the case of Dr. Rai Shivendra Bahadur vs. Governing Body of Nalanda College, reported in AIR 1962 SC 1210, has pointed out that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and that aggrieved party has a legal right under the statute to enforce its performance.

28. In

Mani Subrat Jain vs. State of Haryana, reported in 1977 (1) SCC 486, the Supreme Court has observed as under :-

"It

is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as a legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something."

29. In

the present case, we do not find any such legal right under the statute or any other rules or regulations on the strength of which the petitioners can assert while seeking mandamus from this Court to direct the respondents to issue necessary permission/clearance to the petitioners to conduct/carry out the Environmental Impact Assessment study for the development of a port at Positra, in accordance with the approved terms of Reference by the MoEF dated 01 August 2007.

30. In

this view of the matter, we do not find any reason or deem fit to take a contrary view than the one which has been expressed by team of experts and, therefore, no relief as prayed for by the petitioners can be granted in exercise of powers under Article 226 of the Constitution.

31. In

the above view of the matter as we find no merit in this petition, the same is hereby rejected with no order as to costs.

(S.J.

MUKHOPADHAYA, C.J.)

(J.B.

PARDIWALA, J.)

zgs/-

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