The Plachimada Problem

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Groundwater is a precious natural resource for a community. The acute water shortage and pollution hazard created by the actions of the Coca Cola Company in Perumatty Grama Panchayat, Kerala has grave implications for Kerala’s farming community. Concomitantly, the decision of the Division Bench of the Kerala High Court will critically impact environmental jurisprudence in India. The Division Bench, while considering multifarious issues involved, adopted a narrow approach and failed to take into account material factors which could have substantially altered the result of the case. The Judiciary and the State failed to recognise the principle of public trust that mandate the use of groundwater resources in public interest. The judgement is incorrect, and deserves to be reversed.

KEYWORDS: Groundwater, Pollution control, Coca Cola, Water shortage, Panchayat, Public Trust Doctrine.

INTRODUCTION

§ 1.1 The Judgment

§ 1.2 Analysis of the Judgment

§ 1.2.1 Was the Panchayat competent to deny renewal of the licence?

§ 1.2.2 Does the High Court have the power to interfere with the decision?

§ 1.2.3 Did the High Court appropriately decide the issue, on merits?

§ 1.3 The Doctrine of Public Trust

CONCLUSION

INTRODUCTION

The most severe indictment of the parties involved in the Plachimada controversy is evident from the sobriquet that Plachimada had justifiably come to acquire- the ‘rice bowl of Kerala’.
It is within the jurisdiction of the Perumatty Grama Panchayat in Kerala. It first came into the limelight when the Coca Cola plant was set up there in 2000. On April 7, 2003 the Perumatty Grama Panchayat refused to renew the company’s license following complaints of acute shortage of groundwater as well as contamination of drinking water. A single judge bench of the Kerala High Court upheld the decision of the Panchayat. However, this was overturned by a Division Bench. The case now stands before the Supreme Court.

In an era of indiscriminate corporate expansion into every possible sphere, this case emphasises the constant struggle of the common man against corporate aggression to secure his basic rights. It denies the common man his fundamental right to life and livelihood and poses sobering questions to the legal framework designed to protect these rights. The Division Bench, while considering the various issues of the case, was very narrow in its scope in that it failed to take into account material factors which could have substantially altered the result of the case. I therefore argue that the judgement is incorrect, and deserves to be reversed.

Section I discusses in detail the decision of the Division Bench of the Kerala High Court. Section II analyses the claims in support of the proposition that the Division Bench unduly narrowed its field of vision, directly contributing to the inadequacy of the judgment. Section III puts forth the claim that groundwater is a resource governed by the doctrine of public trust, enjoining a duty upon the State to regulate its use. Section IV concludes the paper.

§ 1.1 The Judgment

All it took was a stone. When Goliath saw David walking out onto the battlefield to face him, he scoffed declaring that he would crush him like an insect. In all likelihood, he wasn’t the only one who thought so. After all, what chance did a small shepherd have against one of the most formidable warriors? However, David proved them all wrong. He showed that with perseverance and just a little bit of luck, the small can conquer the large. The revolution in Kerala is much the same. The players are similar: with the local people of Plachimada, a tiny hamlet in the Palakkad district of Kerala, facing off against the might of the Coca Cola Empire. However, unlike the story of David and Goliath, the people of Plachimada caught only a fleeting glimpse of victory before it was once again taken away from them.

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1 Perumatty Grama Panchayat v. State of Kerala, 2004 (1) KLT 731 [‘Kerala High Court’].
On April 7th 2003, the Panchayat passed a resolution refusing to renew the company’s license. This prompted a legal battle with the case coming before the Kerala High Court on two occasions. The case now lies before the Supreme Court.

The ruling of the single judge bench of the Kerala High Court ordering the company to find alternative sources of water was reversed on 1st June, 2005, when a Division Bench of the Kerala High Court, overturned the order of the single judge and ordered the Panchayat to renew the multi-national giant’s license. This ruling snatched away from the people the meagre hope the single judge had made possible.

On 16th December 2005, the Division Bench of the Kerala High Court overturned the decision of the single judge. It held that “we do not find justification for upholding the finding of the learned judge (single bench) that the extraction of groundwater is illegal…we cannot endorse the finding that the company has no legal right to extract this wealth.” 2 The Bench recognised groundwater as a private resource and held that the Panchayat, by refusing to renew the company’s license, was denying the company its proprietary rights over the groundwater. The Bench was of the view that the Panchayat had no ownership over groundwater and hence had no right to cancel the company’s licence on that ground. It felt that in the absence of a statute, landowners had express rights to extract groundwater from their land. 3

The Bench rejected the claim about the company’s pollution problem. It felt that the Panchayat did not have the capacity to make a true assessment of the situation. It rejected the report of the Joint Parliamentary Committee, set up to probe the purity of the cola on the ground, stating that the Committee had not taken any samples from the factory at Plachimada. However, it approved of the setting up of an expert committee by the Government to probe the situation.

The Committee reported that the reason for the declining groundwater levels was the lack of rainfall and stated that the company could be allowed to extract groundwater if the rainfall

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2 *Hindustan Coca-Cola Beverages (P) Ltd v. Perumatty Grama Panchayat*, 2005 (2) KLT 554 ['Kerala High Court'].
3 *Id.*
was average and that the volume extracted could be proportionally reduced with the decrease in rainfall.\textsuperscript{4}

The judgment has been very narrow in its scope in that it has not taken into account a variety of factors that have tremendous bearing on the situation. The Bench has not considered the various pollution control laws nor has it taken into account the principle behind the decentralisation policy. The following sections attempt to substantiate the thesis statement that the judgment of the Division Bench is incorrect and deserves to be reversed.

\textbf{§ 1.2 ANALYSIS OF THE JUDGMENT}

\textbf{§ 1.2.1 WAS THE PANCHAYAT COMPETENT TO DENY RENEWAL OF THE LICENCE?}

The first question that arises in this context, as with most disputes regarding state action, pertains to whether the Panchayat was \textit{competent} to deny renewal. The merits or soundness of the decision are entirely irrelevant unless the Panchayat was a body capable of making such a decision.

The Kerala Panchayat Raj Act 1994 [hereinafter ‘the Act’], confers on the Panchayat, by virtue of s. 218, the power “\textit{to manage and regulate the minor irrigation, water management and water development}.”\textsuperscript{5} The Act provides that authority over all water resources, except ones flowing through more than one Panchayat, “\textit{absolutely vests in the Panchayat}”.\textsuperscript{6} S. 12(c) of the Ground Water Act gives the Ground Water Authority the power to cancel a permit if “\textit{a situation has arisen which warrants limiting of the use or extraction of ground water in the area around well}.” There is no express ban on the Panchayat denying the licence on grounds that the Ground Water Authority has already considered the issue. If that were the case, there would be little point in requiring the consent of another authority i.e. the Panchayat. The Act also requires all companies to obtain the permission of the Panchayat prior to setting up

\textsuperscript{5} Kerala Panchayat Raj Act, 1994.
\textsuperscript{6} S. 218, Kerala Panchayat Raj Act, 1994.
factories and industries. S. 233A confers on the Panchayat the power to abate pollution by factories and industries in the area by empowering it to investigate and take appropriate action in consultation with appropriate bodies. The Panchayat was authorised under s. 166 to issue notice to the company. It is axiomatic that a body entrusted with managing and regulating water management and water development is also entrusted with the power to issue licences. The power flows as a necessary implication, and has been expressly recognised by many analogous legislations in other States. S. 66 of the Karnataka Panchayat Raj Act is a case in point, stating that no person can establish a manufacturing plant driven by water power without the permission of the Panchayat.\(^7\)

This power of the Panchayat has to be exercised for the purpose of preserving water resources. Not renewing the license of the company is one way of achieving the desired purpose. S. 70 of the Karnataka Act authorises the Panchayat to suspend a licence for default of any conditions under which it was granted. It hence follows that the Panchayat was competent and had the powers to take requisite measures to ensure the preservation of the water.

§ 1.2.2 *Does the High Court have the power to interfere with the decision?*

Section 276 of the Act states that an appeal from a decision taken by the Panchayat lies with a Tribunal constituted by the government under s. 271S. The Government, having failed to institute such a tribunal, becomes the appellate authority. Even without the tribunal, the Government has the power under s. 191 to cancel any illegal resolution passed by the Panchayat.\(^8\)

Article 226 confers upon the High Court the powers to pass orders when the Government or public authority has failed to exercise or wrongly exercised the discretion conferred upon it by a statute.\(^9\) In the case in question, the appeal against the Panchayat’s decision was made to the

\(^7\) Karnataka Panchayat Raj Act, 1993.  
\(^8\) *Supra* note 1.  
\(^9\) *General v. KS Jagannathan*, AIR 1987 SC 537 [‘Supreme Court of India’].
Government. The High Court therefore had the jurisdiction to look into the case if it felt that the authorities had wrongly exercised their discretion.\(^{10}\)

§ 1.2.3 *DID THE HIGH COURT APPROPRIATELY DECIDE THE ISSUE, ON MERITS?*

In the case in question, the actions of the company were becoming increasingly dangerous to the welfare of the people. The toxic sludge distributed by the company as fertiliser had caused severe health problems. The water in the area had been unfit for drinking with dangerously high concentrations of cadmium and lead. In addition to this, the excessive extraction of groundwater was causing acute water scarcity. The Perumatty area once part of the rice bowl of Kerala was facing water shortage leading to decline in agricultural production.\(^{11}\) In light of all this, the Panchayat had a duty to protect and safeguard the rights and welfare of the people. The Division Bench in its judgement stated that the Panchayat did not have the authority to refuse the renewal of the company’s license on the grounds of protection of overexploitation of groundwater.\(^{12}\) However, on closer scrutiny of the Kerala Panchayat Raj Act, as seen above, it is clear that the Panchayat does indeed possess the powers to take whatever action is required to reduce pollution and to protect public welfare. This power is fettered by the Act itself in that it cannot prevent companies from indefinitely drawing water nor can it usurp the functions of some other organ of the government.

The Kerala Government introduced the Kerala Ground Water (Control and Regulation) Act in 2002. It was enacted one year later in 2003. Since the Coca Cola plant was set up in Plachimada in 2000, the Act does not apply to this case. Legislations are presumed to be prospective and this legislation therefore had no clause of retrospective application. The Act considers it “*necessary in the public interest to regulate and control any form of development of ground water.*”\(^{13}\)

The main bodies concerned with pollution control when the Plachimada problem reared its head were the Kerala Pollution Control Board and the State Ground Water Authority. Upon receiving complaints from the people of Plachimada about the decline in quality and amount

\(^{10}\) *Supra* note 1.


\(^{12}\) *Supra* note 2.

\(^{13}\) Kerala Ground Water (Control and Regulation) Act, 2002.
of groundwater, the Central Ground Water Board (CGWB) and the Kerala Ground Water Department (KGWD) conducted a study at the end of which they declared that the quality of the water did not require urgent government intervention and that despite the fact that there were a “few” problems, there was nothing to link the company to the pollution. At the same time, the water was tested by the Primary Health care centre and declared to be unfit for consumption. The KGWD declared lack rainfall to be the reason for the water deficit.14

At this juncture, it is important to recall the significance of s. 12(c) of the Ground Water Act. If a situation arises which warrants the limiting of groundwater extraction, the Ground Water Authority is empowered to cancel the permit after giving the holder of the same an opportunity of being heard. The Plachimada situation clearly fell under the ambit of s. 12(c). The company’s indiscriminate use of groundwater was causing acute distress and decline in agricultural production. Further, since there is no indication to the contrary, it must be presumed, in accordance with s. 114 of the Indian Evidence Act, 1872, that the Panchayat followed proper procedure in denying a renewal to the company.15 Therefore, it is evident that the Panchayat exercised this power to deny renewal of the license for one of the permissible purposes and in a proper manner.

The Expert Committee set up by the Government stated in its interim report that the reason for the acute shortage of water for drinking and agricultural purposes was the over extraction by the company. The company was also cited as responsible for health and environmental hazards in the interim report. However, the final report did not mention anything about the pollution problems.16

It is therefore surprising that the Court, despite having relied on the Expert Committee’s report refused to accept the findings regarding the contamination of groundwater stating that

14 Supra note 11.
15 See in particular, illustration (e) to s. 114, Indian Evidence Act, 1872 which states that s. 114. Court may presume existence of certain facts – The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.
   The Court may presume – (e) That judicial and official acts have been regularly performed.
16 Supra note 11.
the Panchayat was “not competent to go into the quality of the beverages produced and it is for other appropriate authorities to look into such allegations.”

The company sold toxic sludge to the farmers as fertiliser. When this was brought to light in a BBC report, the Kerala State Pollution Control Board (KPCB) conducted a study wherein it stated that, “in the common Panchayat well could a small quantity of cadmium be detected.” This was in spite of the fact that the level of cadmium was found to be double permissible limit. Had the Ground Water Act been implemented in time, the situation in Plachimada could have been prevented. Therefore, the Government should ensure that the act is implemented effectively to prevent another Plachimada.

The Supreme Court has held in many cases that natural resources attract the doctrine of public trust, and that overexploitation of these resources by the action or inaction of the State constitutes a violation of the fundamental right to life under Article 21 of the Constitution. Pollution control laws are meant to protect and preserve the environment. The authorities are empowered to take action to ensure the prevention and control of pollution. The reasons for the gross inaction and ineffectiveness of the authorities in this case should have made the court look into it as a ‘relevant circumstance’. It seems to have disregarded the “legal framework of the pollution control laws” and given more consideration for the property rights of the company than for the human rights of the people.

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18 Coca Cola – A Soft Drink with Other Uses available at http://www.bbc.co.uk/dna/h2g2/A12590327 (accessed on 5th November, 2009).
20 Id.
21 The Court originally construed Art. 21 narrowly, in A.K.Gopalan v. State of Madras, AIR 1950 SC 27 [‘Supreme Court of India’]. However, with Maneka Gandhi’s case, the Court indicated a shift in Art. 21 jurisprudence. See: Maneka Gandhi v. Union of India, AIR 1978 SC 597 [‘Supreme Court of India’]. Today, Art. 21 is considered to include everything necessary to lead a life with ‘dignity’, which the Court established in Frances Coralie v. Administrator, Union Territory of Delhi, AIR 1981 SC 746 [‘Supreme Court of India’]. This conception of the right to life includes natural resources such as rivers, forests, seashores, air etc. for the purpose of protecting the ecosystem.
22 MC Mehta v. Kamal Nath, (1997) 1 SCC 388 [‘Supreme Court of India’].
23 Supra note 10.
24 Supra note 10.
§ 1.3 The Doctrine of Public Trust

The discourse on environmental protection has gained tremendous prominence in the twenty first century. Central to this debate is the argument of access to resources. Natural resources are vital in facilitating economic growth. The lack of (adequate) access to these resources engenders intense feelings of discontent and seriously detrimental to sustainable growth and production.

Water is one of the most vital natural resources, destined to impact the in the world. According to the United Nations Economic Commission for Europe (UNECE), “in Europe and Asia, as in much of the world, the demand for clean water will continue to increase while the supply dwindles.” To address this issue, the member-countries of the UNECE have adopted the Water Convention to ensure equitable use of water. Generally, most International conventions concerning water govern surface water. This is problematic given the increasing vulnerability of groundwater to both pollution and depletion. Groundwater is one Earth’s “hidden treasures.” Constituting the primary reservoir of the world’s fresh water, it is the bedrock of agricultural irrigation systems day-to-day activities such as cooking, drinking etc. The dependence of towns and cities on groundwater is escalating to an extent that it has been suggested that 1500 million urban dwellers worldwide depend on “well, bore-hole and spring sources.” Faced with depleting surface waters, communities are not turning to groundwater to meet their needs. Consequently, the need to ensure greater regulation and protection of groundwater use is vital.

In India, groundwater was first sought to be regulated by the Indian Easement Act, 1882. S. 17 of the Act encapsulates the notion of absolute appropriation whereby the landowner has unhindered rights to exploit the groundwater below his land. This is drawn from the common law concept of unhindered rights of the landowner over his property including the

28 “A land owner has the right to appropriate water which is below his or her land and no action will be taken against him even if it intercepts, abstracts or diverts water which remains under the land of another.”
groundwater. However, while the United Kingdom itself has recognised the problems with this notion; making efforts in 1963 to reduce the ill-effects of this doctrine,29 India still lacks a central legal framework to regulate the use of groundwater.

In this background, Plachimada holds significant importance. The central issue there concerned the overuse and pollution of the groundwater by the Coca Cola Company. The interpretation of the Judiciary, as it stands with the decision of the Division Bench, is that the Coca Cola Company has complete rights over its land, including the groundwater below it. Hence, it can use the groundwater in an unhindered manner. Such a view is extremely problematic and it is argued that groundwater is a public resource, which the State, as a trustee, has the duty to regulate and protect for the community’s benefit.

The doctrine of public trust is a common law doctrine that imposes a legal duty upon the State to protect natural resources.30 Natural Resources are essential to the public and no private person can acquire a “vested right to appropriate”31 these resources in such a manner that it is “harmful to the interests protected by the public trust.”32 They are meant to be used by the general public and should be freely available to all. Thus the State, as a trustee of these resources, cannot convert them for private benefit.

In the United States of America, the Judiciary has expanded the scope of the doctrine of public trust. It has been interpreted to extend not just to navigation, commerce and fishing as

30 J. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68(3) MICH. L. REV. 471 (1963). Professor Sax states that the doctrine of public trust imposes certain restrictions on Governmental authority, “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.”
32 Id.
under Common Law, but also to all areas of ecological importance.\textsuperscript{33} The Judiciary has recognised that the purpose of the doctrine of public trust is to protect \textquote{\textit{ecological values}}.\textsuperscript{34}

The declaration by the Supreme Court in \textit{MC Mehta v. Kamal Nath},\textsuperscript{35} is the \textit{locus classicus} on the issue of public trust in India. The common law doctrine has been incorporated into Indian jurisprudence which believes that the doctrine must be expanded to include all natural resources in the ecosystem.

Water is a natural resource whose importance has been recognised across the world. States are under a legal obligation to ensure the preservation of water resources. The ambiguity arises in the context of groundwater. Those adopting the appropriation principle believe that groundwater is the absolute property of the landowner and no legal regulation can govern its use. However, property rights with respect to water cannot be deemed absolute. Public resources such as water (whether in the form of surface water or groundwater) can be allocated only so long as they are used for the general benefit of the community. If public interest is affected, then the State must intervene and ensure that \textquote{trust resources} are not harmed.\textsuperscript{36} This notion has been expressly formulated by the United States Supreme Court in \textit{Marks v. Whitney},\textsuperscript{37} which extended the doctrine of public trust to include groundwater rights. In essence, the State has a fiduciary duty to ensure that groundwater is not used in a manner detrimental to the public.

Indian laws exist covering the use and misuse of surface water. Even the Kerala Ground Water Act, 2002 was enacted subsequent to the Plachimada dispute. In the absence of any such regulation concerning groundwater, the executive authority cannot renounce its responsibility and convert groundwater resources over for private use. The Plachimada dispute is illustrative of such an abdication. Despite the decision of the Single Judge affirming

\textsuperscript{33} National Audubon Society v. Superior Court of Alpine County [the \textquote{Mono Lake} case], 658 P.2d 709 (Cal. 1983). The Court held that it includes freshwater, wetlands, riparian rain forests etc. The court in Gould v. Greylock Reservation Commission, 350 Mass 410 (1966), invalidated an executive action as commercial demands of private individuals cannot be held superior to public purpose. In Sacco v. Development of Public Works, 532 MASS 670, the Department of Public Works was prevented from filling a pond as part of its relocation plan for a State Highway. In Phillips Petroleum co. v. Mississippi, 108 S.C.C. 791 [1988], the public trust doctrine was extended to lands underlying non-navigable tidal areas. In Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971), the Court held that the purpose of the public trust doctrine is to \textquote{maintain the integrity of navigable waterways for various public interests, such as boating, fishing, and scientific study}.

\textsuperscript{34} Supra note 22, ¶ 26.

\textsuperscript{35} Supra note 22.

\textsuperscript{36} Supra note 31, at 371.

\textsuperscript{37} Marks v. Whitney, 491 P.2d 374 (Cal. 1971).
the principles of public trust, both the Division Bench and the State have permitted the continued exploitation of groundwater by the Coca Cola Company. This exploitation, at Plachimada, has caused acute water scarcity and pollution hazard. The detriment to the public is twofold. First, the drinking water supply has become scarce and polluted. Second, the agricultural and irrigation systems have been affected. The State cannot allow the interests of a private entity to override those of the general public. In the absence of any specific legislation governing groundwater use, the State must ensure that public resources such as groundwater are not exploited. Not doing so would violate the Right to Life enshrined in Art. 21 of the Constitution of India.\textsuperscript{38}

**CONCLUSION**

The over exploitation of groundwater and the pollution of water sources were the main issues plaguing the people of Plachimada. In dealing with this problem, the Division Bench of the Kerala High Court should have considered the legal implications of its decision. It gave greater regard to the property rights of the company rather than the basic rights of the people to life and livelihood (Article 21) The court did not recognise the power of the Panchayat and in doing so seems to have undermined the principle behind the system of decentralisation of powers as introduced by the 73\textsuperscript{rd} amendment. It has also not accepted the contention that groundwater is public property and that the authorities have the power to regulate its use. All of this not only expose gaps in the legal framework but also display a lack of desire on part of the authorities to effectively implement the necessary pollution control laws as well as a hesitation on part of the judiciary to “appreciate the legal transformation of decentralisation of powers.”\textsuperscript{39} All this suggests the researcher’s thesis statement that the judgment was incorrectly decided and deserved to be reversed.

\textsuperscript{38} Art. 21, Constitution of India, 1950, supra note 21.

\textsuperscript{39} Supra note 10.