

STATE OF KERALA

v.

JOSEPH ANTONY

NOVEMBER 2, 1993

[P.B. SAWANT AND R.M. SAHAI, JJ.]

Kerala Marine Fishing Regulation Act, 1980—Sections 2, 4—Power of State Government to regulate, restrict or prohibit certain matters relating to fishing within specified areas—Notifications imposing restrictions—Validity of—Exercise of power—Whether arbitrary.

Constitution of India : Articles 19(1)(g), 19(6).—i) Notifications imposing ban on use of mechanised vessels, purse seine, pelagic and mid-water trawl gears for fishing in the territorial waters along the entire coast line of the State of Kerala—Whether violative of fundamental right to occupation trade or business guaranteed under Art. 19(1)(g) of the Constitution—Restriction—Whether reasonable within meaning of Art. 19(6) of the Constitution.

On 29-11-1980 the appellant State of Kerala in exercise of its powers under Sec. 4 of the Kerala Marine Fishing Regulation Act, 1980 (hereinafter referred to as the 'Act') issued two notifications. The said notifications defined the 'specified area' for the purpose of the Act, as the territorial waters and prohibited fishing by mechanised vessels using purse seine, pelagic and mid-water trawls along the coast line in the State of Kerala. These notifications, however permitted, by way of exemption the use of motorised country crafts in parts of the prohibited area.

The High Court of Kerala in *Babu Joseph v. State of Kerala*, ILR (1985)(1) Ker 402 while upholding the validity of the Act struck down the said notifications, as being an arbitrary exercise of power under the Act and as being violative of the fundamental right guaranteed under Art. 19(1)(g) of the Constitution. The High Court further directed that till a fresh decision is taken by the State Government, mechanised fishing vessels shall be allowed to operate only beyond 10 Kms from the shore.

The appellant State government, thereafter re-examined the situation and on 30-11-1984 issued two fresh notifications whereby (a) it specified the area along the entire coast line of the State but not beyond

A the territorial waters as the 'specified area' for the purpose of Clause (d) of Sub Sect.(1) of Sec. 4 of the Act; (b) in order to protect the interest of fishermen using traditional fishing crafts and to preserve the law and order in the territorial waters, prohibited the use of purse seine, pelagic and mid-water trawls for fishing in the territorial waters along the coast line of the State of Kerala.

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Writ petition was filed, before the High Court of Kerala challenging the fresh notifications. The High Court by its judgment and order, declared the said notifications to be unenforceable in so far as they imposed a ban on the use of purse seine nets beyond 10 Kms. The restriction imposed by the notifications were held to be an unreasonable restriction on the fundamental right guaranteed under Art. 19(1)(g) of the Constitution. The Court, however, held that the notifications could be enforced within the limits of the 10 Kms of the territorial waters of the State.

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Against the aforesaid order appeals were filed in this court, by the appellant and the original third respondent, namely the President of the Kerala Swanthanthra Matsya Thozhilali Federation, representing fishermen using traditional fishing crafts, contending therein that the High Court erred in holding that (a) the restriction placed in the use of purse seine boats and nets was unreasonable and violative of the fundamental rights guaranteed by Article 19(1)(g) be old material which was before the Court, while deciding the earlier writ petition viz. *Babu Joseph v. State of Kerala*, could not be taken into consideration by the State Government while issuing the fresh notifications; (c) that there was no new material before the appellant State, while issuing the new notifications and since the new notifications were based on the same material on which the earlier notifications were based, the earlier notifications having been struck down, the present notifications were also liable to be struck down on the very said ground.

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The respondent on the other hand contended that (a) mechanised gears which they are operating at present are not fit for off shore and deep sea fishing and hence should be permitted to fish within the territorial waters (b) Instances of violence reported, do not involve purse seiners, but are result of conflicts between those using motorised and non-motorised crafts.

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Allowing both the appeals the Supreme Court held that : 1. In matters which involve consideration of all relevant material having bearing on the socio economic life and scientific examination of the parameters involved, it is irrational to limit the objective material to be considered by yardsticks of time. The material when relevant and having bearing on taking decisions in such matters, cannot be ignored by applying the rule of staleness which is otherwise relevant for orders based on subjective satisfaction of the authorities. [546-H, 547-A-C]

2.1 The reports on record viz. Babu Paul Committee Reports Kalawar Committee Report and the two reports of the special officers appointed by the State Government show that mechanised nets like purse senie do an irreparable damage to the existing stock of fish by killing juvenile fish and fish eggs and by preventing fish breeding. [549-G]

2.2 The pelagic fish resources being limited in the Kerala coast there is a potential danger of over exploitation of the said fish resources leading to its rapid depletion and finally complete extinction, if mechanised nets are allowed to fish within the 22 kms of the belt of the territorial waters. Further the reports also indicate that with introduction of mechanised fishing in 1979 there has been within a few years sharp decline in the catch of the traditional craft resulting in 98.5% of the fisherman population being pushed below the poverty line. The mechanised nets are thus not only impoverishing the mass of the poor fishermen by reducing their catch progressively but also destroying the standing fish stock itself.

[551-A, 550-B, 551-E]

3. The operators of mechanised gears are few rich entrepreneurs comprising of a negligible percentage of the fishermen population. They have enough resources at their command and hence can easily diversify into such fishing methods which are not prohibited in the territorial waters. They are in fact not prohibited from fishing within the territorial waters but are prohibited for using certain types of nets. There is, therefore, no restriction on their fundamental right under Art. 19(1)(g) to carry on their occupation, trade or business. They cannot insist on carrying on their occupation which is demonstrably harmful to others and threatens them with deprivation of their source of livelihood. [552-DE, 553-A-C]

4. Protection of interests of weaker sections of the society is warranted as enjoined by Article 46 of the Constitution. So also on the ground that it is necessary to prevent the fragment clashes between owners of

A country crafts and those mechanised crafts and thus to maintain law and order within the territorial waters the notifications in question being in public interest are justified and thus constitute a reasonable restriction within the meaning of Art. 19(6) of the Constitution. [553-D]

B 5. In the present case, the evidence on record clearly indicates that the High Court was not right in taking the views that (a) the State Government had no new material before it while passing the impugned notifications (b) the State Government could not look into the material which was before it while passing the earlier notifications along with the new material it had, while passing the impugned notifications (c) the notifications constitute an unreasonable restriction within the meaning of Art. 19(6) and are thus violative of Art. 19(1)(g) of the Constitution. Hence the High Court was not justified in confining the operation of the said notifications only to 10 Kms the base coastal line. [547-C, 548-B, 546-C]

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D CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3531 of 1986.

From the Judgment and order dated 9.4.86 of the Kerala High Court in O.P. No. 253 of 1985.

With

E Civil Appeal No. 3532 of 1986.

G. Vishwanath Iyer, R. Sasi Prabhu, M.A. Firoz and E.M.S. Anam for the appearing parties.

F The Judgment of the court was delivered by

G **SAWANT, J.** The dispute in the present case is essentially between the fishermen in the State of Kerala who use traditional fishing crafts such as catamarans, country crafts and canoes which use manually operated traditional nets and those who use mechanised crafts which mechanically operate sophisticated nets like purse seine, ring seine, pelagic trawl and mid-water trawl gears for fishing in the territorial waters of the State. In order to understand the nature and parameters of the dispute, it is necessary to know certain facts relating to the social life in the State and the marine life in the territorial waters of the State as well as the scope and

H object of the regulations made by the State to regulate fishing in its

territorial waters.

2. The fishermen-population actively engaged in fishing by traditional fishing vessels in the territorial waters of the State which was earlier 5,37,017 increased by 20.8% to 6,32,967 in the year 1981. However, the average landing of the fish in the traditional sector of fishing declined by 50.3% from 3,34,992 tonnes in 1969-71 to 1,68,512 tonnes in 1980-82. During this period, the number of traditional crafts such as catamarams, country crafts and canoes increased by 14% from 29,560 to 33, 805. This shows that in terms of production, the average of 3.55 tonnes per annum per fisherman declined to 1.55 tonnes per annum during this period. The annual income of the traditional fisherman-household which constitutes 89% of the total fisherman- household decreased, and the households falling below the poverty line (Rs. 3,500 per annum) were as high as 98.5% in the year 1979. These figures speak for themselves and leave no doubt that the traditional fishermen constitute one of the weaker sections of the society needing protection at the hands of the State as ordained particularly by Article 46 of the Constitution.

3. These fishermen till the year 1979 were exploiting exclusively the pelagic (surface) fish resources of the sea within the territorial waters by using the country crafts and the traditional nets. However, in that year for the first time, few rich enterprises introduced the use of purse seine gears for exploiting the pelagic resources of the sea by operating costly mechanical fishing vessels. The purse seine is a sophisticated gear and covers a wide area. A purse seine net which is on an average 400 meters in circumference, covers an area of 12,826 square meters, i.e., more than 1 hectare and catches on an average 600 to 800 tonnes of fish per annum. As against this, the traditional fishing crafts in the period 1969-71 could catch only 11.3 tonnes per annum which was reduced to 5 tonnes per annum in 1980-82. These figures are not only sufficient to show the comparative advantage and disadvantage of fishing by purse seine gears as against by the traditional fishing crafts and nets but also the adverse effect which the use of the sophisticated gears had on the catch of fish by the traditional fishing crafts.

4. It is also necessary to note in this connection the facts about the standing stock of fish within and without the territorial waters of the State. The pelagic fish which is available in the territorial waters consists mainly of oil sardine and mackerel. The limit of the territorial waters of the State

- A as defined by Section 3 (2) of the Maritime Zones Act, 1976 (Act 80 of 1976) is the line every point of which is at a distance of 12 nautical miles from the nearest point of the appropriate base line. One nautical mile is equivalent to 1852 meters and when converted into kilometers 12 nautical miles come to 22.22 kms. The purse seine is used only for pelagic fishing.
- B Therefore, the only species of fish substantially available for catch by purse seine boats in the territorial waters of the State are mackerel and sardine. The mackerel and sardine are thinly distributed beyond 22 kms. which is almost the limit of the territorial waters. According to Babu Paul Committee Report of July 1982 (Page 54, Para 6.12), there were at that time 37 units of 43-1/2 feet length purse seiners regularly operating from Cochin.
- C These boats are designed for in-shore fishing and they can fish between 5 kms. and 25 to 30 kms. only. Since these boats do not have equipment such as echo-sound, radar, storage system, wireless, cold storage facility etc. They are not fit to operate offshore and in deep sea and have to keep the shore in sight while operating in the sea.

- D Paragraphs 6.13 to 6.16 of the said Report point out that in the opinion of the UNDP/FAD Pelagic Fishery Project, it is the traditional fishing method which is more harmful to the stock of sardine and mackerel because the young ones of these species move closer to the coast during the first year of their life and move out to offshore waters as and when they
- E grow in size. Since the traditional fishing is done nearer the shore it is described in the Report as a wasteful utilisation of the resources while the purse seining is lauded as a more rational method of harvesting the fish resources.

- F It appears that this Committee has not given any importance to the fact that the traditional fishermen use nets with wide meshes which enable the small fish to escape through them. Further, about 80 per cent of the traditional fishing boats have been motorised which enables them to cruise at least upto a distance of 20 to 22 kms. from the shore. The traditional fishing, therefore, is no longer confined to areas nearer the shore.

- G As against this, the Kalawar Committee report of 19th May, 1985 states as follows :

- H "..... The decline in both Goa and Maharashtra seems to stem mainly from overfishing that has set in after the advent of commercial purse seining in Karnataka (Fig. 74; Table 60) and Goa

particularly and Kerala to some extent. The sharp decline in Kerala owes mainly to a combination of factors including mainly : (1) competition for space from the mechanised trawlers until 1980 (Fig. 66 and 67); (2) competition for resource from purse seiners since 1979 (Table 48); and (3) overfishing by purse seiners in Karnataka (Table 60; Fig. 74), Goa and also Kerala (see section 2 above).

Since the traditional sector in Kerala is certainly capable of putting in optimal levels of effort (Table 70; Fig. 67), and particularly in the context of a newly emerging fleet of motorised fishing canoes (there are already over 2,000 units) with much greater fishing efficiency (Table 48), this Committee is of the opinion that there is little case for a purse seine fishery for the smaller pelagics of oil sardine, mackerel and whitebaits in Kerala, and therefore, the action of the Government of Kerala prohibiting purse seining within the territorial waters, is commendable. Since the management of the fisheries for the common pelagic stocks in the south-west coast involves interstate questions, there is need to optimise the number of purse seiners in the neighbouring Karnataka at about 230 (Fig. 74) as already pointed out. Annual catches of oil sardine and mackerel during 1925-83 (Fig. 79) clearly reveal that the productions of these fisheries has not increased any significantly at all after the advent of the purse seine fishery in 1977. Even in Karnataka, ironically enough, the average annual production for the 5 year period, 1969-73 before the introduction of purse seining was much higher (38,271 tons) than in 1974-78 (24,308 tons) or in 1979-83 (18,060 tones) (Table 55).

Moreover, the age at first capture in the traditional fisheries during 1934-73 has almost invariably been 6 months (the length at first capture being 175 mm) rarely less than that (3 months in 1956, 1960 and 1969; Tables 72,73 and 75) so that the half year group which includes 6 to 11 months old fish almost always constituted the fully recruited group (Table 75)....."

(Pages 284-285)

".....On the contrary, purse seines, particularly of mesh size used in the whitebait fishery, have been reported to be landing sig-

A significant quantities of young and juvenile mackerel both of at Mangalore and Cochin, thereby reducing considerably the size at first capture and accelerating the process of recruitment and growth overfishing. There are also enough number of lessons from all over the world, of major pelagic stocks of herrings, sardines, pilchards, mackerels and anchovies having been driven to commercial extinction by unregulated Purse seine fisheries. "

(Page 291)

C ".....The very steep slope of the ascending limb of the recruitment curve together with the short distance between the origin and the optimum (230.856 million) as against the gentle slope of the descending limb together with the significant distance between the optimum and the replacement level ($P = R = 954.7399$ million) suggests that extreme overfishing of the spawner stock can be catastrophic to the stock. The purse seine fishery certainly has the potential to bring about this catastrophe....."

(Page 293)

E "Before the advent of the purse seine fishery any fall in the catch used to be compensated by higher prices. In 1980, however, the extremely low catches of oil sardine did not bring about a price increase at the landing centres on account of the regular supply of purse seine catches, as seen from the average prices of 50 paise in 1979, 50 paise in 1980 and 60 paise 1981. This is turn, discouraged fishing by indigenous craft in usual numbers, resulting in low aggregate revenue from oil sardine catch by the traditional sector (rupees 54 million in 1979, 26 million in 1980, and 78 million in 1981) as well as revenue per traditional boat per day from oil sardine (rupees 57 in 1979, 35 in 1980 and 90 in 1981) in 1980. As a result, income per fishermen family reduced by about 50% in 1980 from the income in 1979. About 10% of the active traditional fishermen abandoned fishing in 1980 and took up alternative employment including road repairing, rubble work, metalling and head load work besides about 250 traditional fishermen employed in purse seiners at Cochin fisheries harbour. At certain centres like Kannamali and Manasseri, a number of fishermen shifted from marine fishing to backwater fishing at least temporarily while those

who remained in marine fishing were underemployed. With the revival of the oil sardine fishery in 1981, there was a substantial increase in the effect by the traditional fishery which was able to provide regular supplies and attract wholesale and retail traders in large numbers to the traditional landing centres. The introduction of motorised canoes in the second half of 1981 from Quilon to Munambam also helped increased the sardine catches (Jacob *et al*)".

(Page 308-9)

The first of the two reports given by the experts appointed by the State Government states, in this connection, as follows:

"1. The need to ban the purse-seine, ring seine, mid-water trawl and pelagic trawl up to 22 km from the shore is motivated by the following crucial factors viz., (1) conservation of marine resources of territorial waters, (ii) protecting the interest of the traditional fishermen and (iii) to keep law and order problem in the territorial sea. The bulk of catch of purse seiners consists of sardine and mackerel while the traditional fisheremen have the fishing technology to catch the above fishes. Landing of sardine and mackerel fishes contribute a major part of the income to the poor traditional fishermen who live below the poverty line.

2. According to the well established thinking in Fisheries biology, 40 to 60 per cent of standing fish stock can be only fished annually. As per estimate, the potential stock within the territorial waters and beyond territorial waters is 94,600 tonnes in oil sardine and 47,999 tonnes in mackerel (Ref. P.C. George & others- Publication). But as per the fish landing statistics the total fish landing exceeds the above limit-maximum sustainable yield. Thus, there is danger of over-exploitation of pelagic fishery resources, leading to rapid depletion if purse-seine is allowed in 22 KM territorial waters.

3. Due to the introduction of purse seine boats which has sophisticated net shooting, and hauling arrangements, huge quantity of sardine and mackerel are caught with their larger net within a few minutes. The efficiency of purse-seine lies in its speed of boat and quicker operation of nets with the help of mechanical force. Thus motorised country crafts, even though reach the deeper sea, they

A cannot compete with the purse-seiners to catch sardines and mackerels with their age old fishing methods. The traditional fishermen have only smaller nets and only manual operation of net.

B 4. According to Prof. P.C. George and others, sardine and mackerel are concentrated in the 0 to 50 metre depth range. Most part of 50 metre depth ranges of sea of Kerala coast also extends beyond 22 KM territorial waters, except in few place. The purse-seiners can easily conduct fishing from the sea beyond 22 KM. Besides the owners of purse-seiners can easily diversify the fishing methods, such as trawling, trolling line, gilling netting, pot fishing etc. which are not prohibited in the entire 22 KM territorial waters.

C 5. There are only about 100 purse-seine boats now operating in the Kerala Coast. Each purse-seine catches 600 to 900 tonnes of fish per annum. This directly decreased the income of traditional fishermen by lesser fish catch in their nets. This is the main cause of conflict between the traditional fishermen and purse-seiners. This economic factor has been the cause leading to law and order problem.

D 6. By introduction of purse-seineres the process of monopolisation of pelagic fishery wealth by an elite few to the detriment of the large mass of poor fishermen would take place. This is not only against the policy of Government and against the aim of Indian planning.

E 7. The banning of purse-seiners is also justified because purse seiners have been responsible for large scale destruction of eggs and small fishes on account of indiscriminate fishing and the use of closed mesh size of the net. A depletion in pelagic fishery has been noted in the Karnataka State by the introduction of purse-seiners.

F 8. The prohibition of purse seiners is also necessary for the socio-economic uplift of traditional fishermen."

G The second report states as follows :

H "4. Appendix 18 shows the total production figures. It may be seen that we have already approached the maximum sustainable yield

in respect of mackerel and that we have in several years exceeded the maximum sustainable yield of oil sardine. The average annual production of oil sardine and mackerel during 1979 to 1983 worked out to 126, 445 and 15,350 respectively. This clearly suggests that our oil sardine and mackerel resources are limited and that we cannot allow uncontrolled exploitation of these resources. There is the potential danger of over-exploitation of pelagic fishery resources leading to rapid depletion if purse-seine fishing is allowed within the 22 Km belt. In their paper entitled "Fishery Resources of the Indian Economic Zone." P.C. George, B.T. Antony Raja, and K.C. George (4) have observed that mackerel and sardine resources are "Fairly intensively exploited" of Kerala.

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7. The purse seine is a highly sophisticated gear, covering a wide area, adversely affecting fishing operations of the traditional fishermen, who use passive gear. A purse seine net of 400 metres circumference will cover an area of 12, 826 sq. metres i.e., more than one hectare. The original petitioner in O.P. 2243/83 claims to use a purse seine net of 450 metres length, which, when used, will cover an area of 16,278 sq. meters in a single fishing operation. In the process, each purse seiner catches 600-800 tonnes of fish per annum, compared to about 5 tonnes (1980-82) per traditional craft (as against 11.3] tonnes per traditional craft in 1969-71) for data on traditional craft See Appendix V. Thus a process of monopolisation of pelagic fishery wealth by an elite few to the detriment of the large mass of poor fishermen would take place as a consequence of purse seining.....

8. The banning of purse seine is also justified on various other grounds. Purse seiners have been responsible for large scale destruction of eggs and juveniles on account of indiscriminate fishing and use of close mesh seines. The Marine Fisheries Information Service Bulletin in No. 44 (November, 1982) of the Central Marine Fisheries Research Institute has highlighted the massive destruction of eggs of cat fish by purse seiners. A copy of the concerned article is given as Appendix IIA & IIB.

9. The CMFRI (1980) has observed in the Marine Fisheries Infor-

A mation Service Bulletin No.24 as follows, "one of the disquieting
 aspects of purse seining noted along the Karnataka coast in 1979
 was the usually large catch of oil sardine in ripe running condition
 during the first week of June." (5) The CMFRI gave a timely
 B warning about the heavy incidence of spawners in the operation
 of purse seiners in view of the fact that the spawning of oil sardine
 and mackerel mainly occurs from may to August.

C 10. In this context, the CMFRI have further highlighted the inten-
 sive and indiscriminate purse seine fishing of the pelagic fish stock
 in other parts of the world which has resulted in the patrol or
 complete depletion of some of the major pelagic fish resources
 "Good examples are Californian sardine fishery the herring fishery
 of Norwegian sea and the mackerel fishery of the North sea and
 D British waters. It is suspected that intensive fishing pressure com-
 bined with an environmental aberration in the form of R1. Nino
 current has been responsible for the catastrophic destruction of
 the peruvian Ahchovetta stocks in the early seventies. At present,
 strict voluntary closed seasons and restrictions in purse seine
 fishing for tuna such as the young ones of yellow fin albacore and
 skipjack tuna in the pacific have helped the rational exploitation
 of stocks. Regulation of purse seine fishing for the Barrent sea
 E capelin has been prohibited during the summer months and during
 the subsequent months a 'minimum legal size' has been imposed
 on the purse seining by the Norwegian Government . Another
 example of the depletion of the stocks by the intensive purse
 seining is that of Japanese sardine fishery, the catch the of which
 F failed because of the recruitment failure under pressure of fishing"
 (6).

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G 12. From the socio-economic point of view, protecting the interests
 of traditional fishermen has become a vital necessity. The average
 annual landings of the traditional sector declined heavily from
 3,34,992 tonnes in 1969/71 to 1,68,512 tonnes in 1980-82, the fall
 being 50.3 per cent over the years. (See Appendix III). At the same
 time, production in the mechanised sector went up from 42,600
 H tonnes to 1,26,622 tonnes recording an increase of 196.8 per cent.

(See Appendix IV). The number of traditional craft operating during the period increased from 29560 (average of 1969-71) to 33,805, and increase of 14 per cent. (See Appendix V). The Traditional fishermen population increased from 460, 905 in 1971 to 544,462 in 1981 an increase of 20.80 per cent (Appendix VI). In terms of production per active traditional fishermen, the average was 3.55 tonnes per annum 1969-71, which declined to 1.55 ton per annum during 1980-82. (Appendix VII). The distribution of annual income of fishermen households is given in Appendix X. It may be seen that as many as 105, 811 fishermen households (constituting 89 per cent of the total number of fishermen households) in 1979 have an income of Rs. 2000 or less per annum. The per cent of fishermen households falling below the poverty line (Rs. 3500 per annum) is as high as 98.5 per cent. Government would thus be failing in its duty if they did not do all that they could to ensure that a fair share of the total catch goes to the traditional fishermen.

13. Considering the present level of exploitation of resources, and the abysmal poverty in which our traditional fishermen live, the introduction of a highly destructive fishing device such as purse seining would result in massive transfer of income from the hands of more than five lakhs of traditional fishermen to a very few rich man operating costly boats on the seas.

14. Allowing the operation of purse seine boats in areas within the 22 km belt would not result in increased production, given the standing stock and the present level of exploitation. There is, on the other hand, a very real threat of depletion of stocks, as we have indicated before."

5. It is against the background of the above facts of social and marine life that we have to appreciate the issues involved in this case. The Kerala Government enacted the Kerala Marine Fishing Regulation Act, 1980 (hereinafter referred to as the "Act") to regulate fishing by fishing vessels in the sea along the coast line of the State. Section 2 (d) of the Act defines "fishing vessel" to mean "a ship or boat" whether or not fitted with mechanical means of propulsion, which is engaged in sea-fishing for profit and includes - (i) catamaram (ii) country craft and (iii) canoe engaged in sea-fishing. Section 4 of the Act gives power to the State Government to regulate, restrict or prohibit certain matters within the specified area. The

A section reads as follows :

"4. Power to regulate, restrict or prohibit certain matters within specified area. - (1) The Government may, having regard to the matters referred to in sub-section (2), by order notified in the Gazette. regulate, restrict or prohibit -

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(a) The fishing in any specified area by such class or classes of fishing vessels as may be prescribed; or

(b) the number of fishing vessels which may be used for fishing in any specified area; or

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(c) the catching in any specified area of such species of fish and for such period as may be specified in the notification; or

(d) the use of such fishing gear in any specified area as may be prescribed.

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(2) In making an order under sub-section (1), the Government shall have regard to the following matters, namely :-

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(a) the need to protect the interests of different section of persons engaged in fishing, particularly those engaged in fishing using traditional fishing craft such as catamaram, country craft or canoe;

(b) the need to conserve fish and to regulate fishing on a scientific basis;

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(c) the need to maintain law and order in the sea;

(d) any other matter that may be prescribed."

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6. In the present case, we are mainly concerned with the provisions of sub-section (2) (a), (b) and (c) of the said section. In exercise of the powers conferred by Section 4, the Government issued two notifications on 29.11.1980. By one of the notifications, the specified area was defined as the territorial waters of the State while by the other notification (i) fishing by mechanised vessels was prohibited in the territorial waters except for small specified zones (ii) use of gears like purse seine, ring seine, pelagic trawl and mid-water trawls was prohibited along the coast line and (iii)

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motorised country crafts were permitted fishing, by way of exemption, in

parts of the prohibited area. These notifications were challenged by the operators of the mechanised vessels using purse seine by writ petitions, in the High Court and they were struck down by the High Court in *Babu Joseph v. State of Kerala*, ILR (1985) 1 Kerala 402 on the ground that they represented an arbitrary exercise of power under the Act and imposed restrictions on the fundamental rights of the writ petitioners. The Court, however, upheld the validity of the Act which was also challenged in the petition. While striking down the notifications, the Court stated as follows:

"..... This will not, we hasten to clarify, prevent the Government from re-examining the whole question and exercising their powers in accordance with law. And in view of the circumstances that some demarcation of an exclusive zone for the traditional crafts was in force for quite some time, either under executive orders or under interim orders of this Court we further direct that till a fresh decision is taken by Government, mechanised fishing vessels shall be allowed to operate only beyond 10 kms. from the shore."

This decision was not challenged. On the other hand, the State Government after re-examining the whole question as suggested by High Court, issued on 30.11.1984 two fresh notifications. By one notification the State Government again specified the area along the entire coast line of the State but not beyond the territorial waters as the specified area for the purpose of clause (d) of sub-section (1) of Section 4 of the Act. By the other notification, the State Government declared that since they were convinced of the need to protect the interests of the persons engaged in fishing using "traditional fishing crafts" such as catamarams, country crafts and canoes in the territorial waters of the State and since further there was need to preserve law and order in territorial waters, the use of purse seine, ring seine, pelagic and mid-water trawl gear for fishing in the territorial waters along the entire coast line of the State shall stand prohibited.

7. These notifications again came to be challenged before the High Court by the users of purse seine boats and nets, and the High Court by the decision under appeal held the material on record did not justify the impugned notifications, in so far as they totally prohibited the use of purse seine nets beyond 10 kms. from the base line from which the breadth of the territorial sea is measured. The High Court, therefore, declared unenforceable the said notifications so far as they imposed a ban on the use of

A purse seine net beyond the said 10 kms. as being unreasonable restriction on the fundamental right guaranteed under Article 19(1) (g) of the Constitution. The High Court also held that they could be enforced only within the limit of the said 10 kms. Accordingly, the High Court allowed the writ petition to the extent that the notifications operated beyond 10 kms. in the territorial waters of the State.

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8. It is against this order that the present two appeals are filed - one, i.e., C.A. No. 3531 of 1986, by State of Kerala and the other, i.e., C.A. No. 3532 of 1986 by the original 3rd respondent who is the President of the Kerala Swathanthra Matsya Thozhilali Federation representing the fishermen using the traditional fishing crafts. The grievances of the appellants in both the appeals are the same. It is contended that the High Court erred in law in holding that the restriction placed on the users of purse seine boats and nets by the said notifications was unreasonable and, therefore, violative of their fundamental right guaranteed by Article 19(1)(g). It is contended that the High Court has also erred in holding that the old material which was before the High Court when it decided the earlier writ petition, viz., *Babu Joseph v. State of Kerala*, (supra) could not be taken into consideration by the State Government while issuing the present notifications. The High Court, it is contended, has further erred in its view that no new material was before the State Government while it issued the said notifications and since the new notifications are based on the same material on which the earlier notifications were based which were struck down by it in *Babu Joseph's* case (supra), the present notifications were also liable to be struck down on the very said ground.

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9. In view of what has been stated above, the only question that falls for our consideration in these appeals is whether the use of purse seine nets beyond 10 kms. of the territorial waters can be validly prohibited by the State Government in exercise of the powers vested in it under Section 4 of the Act. The question as to what material the Government could take into consideration while issuing the said notifications, according to us, is not of much significance so long as the State Government had taken into consideration all relevant material and had not omitted to consider any relevant material, before it issued the impugned notifications. In matters of this nature, which involved consideration of all the relevant material having bearing on socio-economic life and scientific examination of the

parameters involved, it is irrational to limit the objective material to be considered by yardsticks of time. In fact that was clearly recognised by the Division Bench of the High Court which decided the earlier case, i.e., *Babu Joseph*' case (supra). In terms the Division Bench had suggested that the Government should "re-examine the whole question" and exercise their powers in accordance with law. That is as it ought to be, for in examining the question of this nature, the material though relevant and having bearing on taking decisions in the matter cannot be ignored by apply the rule of staleness which is relevant for the orders based on subjective satisfaction of the authorities. We are, therefore, of the view that the High Court was not right in taking the view that the Government could not look into the material which was before it when it passed the earlier notifications which were the subject matter of the decisions in *Babu Joseph's* case (supra) along with the new material which it had before it while passing the impugned notifications which are the subject matter of the present writ petition.

10. We are also afraid that the High Court was not right in the second reason given for striking down the impugned notifications partially, when it observed that there was no new material before the State Government when it issued the present notifications. The State Government has pointed out that in fact when it issued the present two notifications, an Expert Committee appointed on 31.3.1984 and headed by Shri A.G. Kalawar, Fishery Advisor to the Government of Maharashtra was also examining the subject. They had collected all the relevant material and had also arrived at certain conclusions. However, the publication of their Report was delayed till 19.5.1985 and in the meanwhile, the law and order situation was under threat of a large scale agitation from the traditional fishermen as evidenced by the report made by the Inspector General of Police (Intelligence) to the Government on 24.10.1984 which was Annexure R-1(a) to the reply of the State Government filed before the High Court. Further the Report of the Babu Paul Committee which was not before the State Government when it had issued the earlier two notifications on 29.11.1980 was certainly one of the pieces of the new material before the State Government when it issued the present two notifications on 30.11.1984. Two reports of the Special Officer appointed by the State Government specifically to study the problem were also before it. So were the events

A which had occurred between the dates of the issuance of the earlier notifications and the present notifications which were detailed in the report of the Inspector General of Police and which did furnish new material to the State Government. It is, therefore, not possible for us to accept the view of the High Court that there was no new material before the State Government while it issued the notifications in question.

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C 11. Hence, as pointed out earlier, the only question which falls for consideration before us lies in narrow compass, viz., whether the purse seine, ring seine, pelagic trawl and mid-water trawl users can be prohibited from fishing beyond 10 kms. of the territorial waters since the High Court itself has restricted the operation of the said prohibition upto 10 kms. of the territorial waters.

D 12. The High Court has observed that no relevant material had been placed before it to come to the conclusion that the traditional fishermen will be denied what they otherwise would be in a position to catch if total prohibition operated against the purse seiners and that the scientific information brought to its notice indicated that pelagic fishing in respect of mackerel and sardine cannot be profitably conducted beyond the limit of territorial sea. Hence it is necessary first to scrutinize the material on record in that connection.

E 13. The reports on record, viz., Babu Paul Committee Report, Kalawar Committee Report and the two Reports of the Special Officer appointed by the State Government show that sardine and mackerel constitute the main variety of pelagic fish available on the Kerala coast and they are available mostly within the territorial waters. They breed in waters beyond 10-12 fathoms deep and move closer to the shore after the southwest monsoon. However, a part of the stock remains on the off-shore shelf throughout the year and this is known to consist mainly of adult fish (Babu Paul Committee Report - Page 34 which reproduces extracts from CMFRI bulletins published in 1979, 1980 and 1981). The young ones travel closer to the coast for food and for dissolved oxygen. While sardine is a pytoplankton (plant-eater), mackerel feeds both on pyto and zoo plankton. The productivity of pytoplankton is closer to the shore because of various oceanographic factors and hence both these species have a tendency to migrate towards the shore in search of better pastures. The paper publish-

ed by P.C. George, B.T. Antony Raja and K.C. George, experts state that the annual potential of pelagic fish in the south-west continental shelf is 8,77,000 tonnes of which 4,70,000 tonnes is available in the in-shore region and the balance 4,07,000 tonnes is available in the off-shore region. Of this total annual stock of pelagic fish in the south-west continental shelf, Kerala shelf accounts for 56.07 per cent i.e., 2,63,529 tonnes. For the period 1956-83 as a whole, the average annual in-shore pelagic catch for the entire south-west coast was 3,34,149 tonnes. Kerala's contribution to the total landing of pelagic fish was 2,36,012 tonnes (72.81 per cent) which comes to 89.56 per cent of the total in-shore potential of the State which is 2,63,529 tonnes. This shows that there is little scope for further increase in the production from the in-shore area. the traditional fishing crafts whether motorised or non-motorised use the traditional passive nets like Thangu Vala operated manually whereas the mechanised crafts use purse seine and ring seine nets, and pelagic and mid-water trawls which are operated mechanically. Both have mackerel and sardine as their main target being the major variety of the pelagic fish. It is an admitted fact that purse seine, ring seine, pelagic and mid-water trawls (hereinafter referred to as 'mechanised nets') at a time fish many times more than the traditional nets. The landing figures of 1980-82 show that each purse seiner caught between 600-800 tonnes fish per annum compared to about 5 tonnes by traditional crafts. There is, further, no dispute that whereas the traditional nets have wider meshes and catch only larger variety of fish, smaller fish having enough space to escape through the meshes, the mechanised nets like purse seine have close meshes which catch even the smallest fish and their eggs.

The Central Marine Fisheries Research Institute (CMFRI) bulletin 12 and 24 (as extracted at page 33 of Babu Paul Committee Report) further state that the purse seine nets encircle incoming shoals and prevent them from moving towards the shore. If purse seine nets are allowed to catch fish in the in-shore area, there will be little or on movement of the shoals towards the coast. Thus mechanised nets like the purse seine, do an an irreparable damage to the existing stock of fish by killing the juvenile fish and fish eggs and by preventing fish breeding.

14. Admittedly the mechanised fishing with purse seine nets was for the first time introduced on the Kerala coast in 1979. The result was that the catch of the traditional crafts which was 11.3 tonnes per annum in

- A 1969-71 declined to 5 tonnes in 1980-82. These figures are sufficiently telling to show the adverse effect of the mechanised nets like the purse seine on the traditional fishing crafts using traditional nets. If we also take into consideration the fact that, as has been stated earlier, the fisherman-population of the State has increased by about 20.8 per cent in the year
- B 1981 and that the average production of 3.55 tonnes per annum per fisherman has declined to 1.55 tonnes per annum between 1969-71 and 1980-82 which has resulted in 98.5 per cent of the fisherman-population being pushed below the poverty line, the situation for the traditional fisherman is grim enough. As against the fishermen using traditional crafts and nets who constitute 89 per cent of the total fisherman household, those
- C using mechanised crafts and nets constitute a negligible percentage of the fisherman-population. It is undisputed that they are, strictly speaking, not part of the fisherman-population but rich private entrepreneurs who have invested in fishing as a business. Fishing is not their source of livelihood unlike that of the traditional fisherman-population. In 1984 there were not
- D more than 100 purse seine boats and they were monopolising the pelagic fish wealth to the detriment of the large mass of poor fishermen who, as stated earlier, constituted 89 per cent of the fisherman-population which stood at 6,32,967 in the year 1981. Comparing the fisherman-population and the places occupied by the in-shore area in the national average came
- E to 37 hectares per fisherman. The majority of the fishermen are from Kerala and the fishermen in Kerala get only 10 hectares in the in-shore area. If the in-shore is further limited to 10 kms., the area available to each fishermen will be reduced to 4 hectares.
- F Secondly, the total potential yield of oil sardine in the south-west coast is estimated as 1,90,000 tonnes and the total potential yield of mackerel is indicated as 80,000 tonnes per annum. The whole of the catches made by purse seine nets of these two varieties of fish constitutes 92.5 per cent of the total purse seine catches. The maximum sustainable yield of oil
- G sardine in Kerala according to one estimate is 1,04,100 tonnes and of mackerel is 16,400 tonnes while according to another estimate, it is 94,600 tonnes and 47,300 tonnes respectively. During 1979 to 1983 the average annual production of oil sardine and mackerel worked out to 1,26,445 and 15,350 tonnes respectively. This shows that the oil sardine and mackerel
- H resources available in the Kerala coast are limited and uncontrolled ex-

exploitation of the said resources can no longer be permitted. In fact, there is a potential danger of over-exploitation of pelagic fish resources leading to rapid depletion if mechanised nets like purse seine are allowed to fish within the 22 kms. belt of the territorial waters (Ref: Fishery Resources of the Indian Economic Zone by P.C. George, B.T. Antony Raja and K.C. George). Mackerel and oil sardine stocks are concentrated in the 0 to 50 mtr. depth range. The distance to be travelled to reach the 50 mtr. depth contour falls generally beyond 22 km. limit laid down under the Act and the Rules.

Purse seine is a sophisticated technology borrowed from the West where there is labour shortage and where capital intensive techniques are needed. That technology is ill-suited to Kerala where there is huge fisherman-population in the artisanal sector as shown above and where the productivity and income per capita is low with 98.5 per cent of the fishermen living below the poverty line.

What is more, as stated above, the operation of fishing by mechanised nets like the purse seine is responsible for destroying the fish stock by killing juvenile fish and fish eggs and thus preventing their breeding. The mechanised nets are thus not only impoverishing the mass of poor fishermen by reducing their catch progressively but also by destroying the standing fish stock itself. There is also a danger of over-exploitation leading to complete extinction of the pelagic fish within the territorial waters.

It is not also correct to say that the large scale fishing by the mechanised nets has led to an increase in total production thus benefiting the consumer either by abundant supply of fish or by reduction in their price. As the reports show, given the standing stock and the present level of exploitation, the mechanised net fishing would not lead to any increase in production. On the other hand, as stated earlier, there is a real threat of depletion of the stocks. What is further, the reports also point out that in other countries such as USA, Norway, Great Britain and Japan steps have been taken to restrict fishing by sophisticated gears like the purse seine to avoid destruction and depletion of the pelagic fish wealth.

The aforesaid data on record clearly show that the ban on fishing by mechanised nets like purse seines, ring seines, pelagic and mid-water trawls

A is necessary firstly for protecting the source of livelihood of the already impoverished mass of fishermen in the State and also to save the pelagic fish wealth within the territorial waters from depletion and eventual total destruction.

B In addition to the above two factors, we have on record the report of the IGP which shows that several violence incidents had occurred on account of clashes between the users of mechanised crafts and those of the traditional crafts within the State territorial waters. The State Government was, therefore, fully justified in acting on the said report and banning the fishing by the mechanised nets within the territorial waters on that ground
C as well.

15. The contention on behalf of the respondent-operators of mechanised gears firstly that the purse seines which they are operating at present are not fit for off-shore and deep sea fishing and hence they should
D be permitted to fish within the territorial waters, in the circumstances, has to be rejected. The operators of purse seines are few and rich with enough resources at their command. They do not ordinarily form part of the fisherman-population proper. Fishing is not their traditional source of livelihood. They have entered the fishing "industry" only as late as in 1979
E and as entrepreneurs to make profits. They obviously look upon fishing as a business and not as a means of livelihood. Assuming, therefore, that the boats which they are at present operating are not fit for off-shore and deep-sea fishing, they can always replace or convert them for such use. Even with the present boats they can easily diversify their fishing methods to bottom trawling, trolling line, gill netting, pot fishing etc. which are not
F prohibited in the territorial waters. They can also engaged in hook and line fishing and dory fishing for fish resources like shark, cat fish, perches and anchoviella. With their financial resources they can also change over to sophisticated fishing crafts for off-shore fishing for exploiting fish resources beyond the territorial waters.
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16. By monopolising the pelagic fish stock within and by indiscriminate fishing in the territorial waters they are to-day denying the vast masses of the poor fishermen their right to live in two different ways. The catch that should come to their share is cordoned off by the giant closely
H meshed gears leaving negligible quantity for them. Secondly, the closely

meshed nets kill indiscriminately the juvenile with the adult fish and their eggs as well. That is preventing breeding of the fish which is bound in course of time to lead to depletion and extinction of the fish stock. There is thus an imminent threat to the source of livelihood of the vast section of the society. The State is enjoined under Article 46 of the Constitution in particular to protect the poor fisherman-population. As against this, the respondent-operators are not prohibited from fishing within the territorial waters. They are only prohibited from using certain types of nets, viz., purse seines, ring seines, pelagic and mid-water trawls. There is, therefore, no restriction on their fundamental right under Article 19 (1) (g) to carry on their occupation, trade or business. They cannot insist on carrying on their occupation in a manner which is demonstrably harmful to others and in this case, threatens others with deprivation of their source of livelihood. Since, in the circumstances, the protection of the interests of the weaker sections of the society is warranted as enjoined upon by Article 46 of the Constitution and the protection is also in the interest of the general public, the restriction imposed by the impugned notifications on the use of the gears in question is a reasonable restriction within the meaning of Article 19(6) of the Constitution.

17. As regards the contention that the instances of violence referred to in the report of the Inspector General of Police show that there is not even one instance involving purse seiners and that all but one instance, are of the conflict between those using motorised and non-motorised crafts, we are afraid that the contention is contrary to the report in question. The incidents of 21.5.1984, 23.5.1984, 24.5.1984, 25.5.1984, 15.12.1984 and 18.12.1984 clearly indicate that the boats which were attacked were the mechanised boats and the attackers the owners of country crafts. Further, the incident at serial No. 6 of the report, whose date is not specified, also relates to an attack on a purse seine boat. The report concludes by stating that clashes involving total of eight mechanised boats and two country crafts took place on 18.12.1984 and the total loss was to the tune of Rs. 2,11,000. The High Court has unfortunately not dealt with this aspect of the matter at all. It will thus be seen that even on the ground that it is necessary to prevent the fragment clashes between the owners of country crafts and those of the mechanised crafts and thus to maintain law and order within the territorial waters, the notifications in question being in

A public interest are justified. Thus the notifications constitute a reasonable restriction within the meaning of Article 19 (6) of the Constitution.

B 18. We are thus more than satisfied that the High Court was not justified in confining the operation of the said notifications only to 10 kms. from the base coastal line. In the circumstances, we set aside the impugned decision of the High Court and hold that the two impugned notifications dated 30th November, 1984 are valid and operative throughout the territorial waters of the State. The appeals are allowed accordingly with cost.

T.W.

Appeal allowed.