

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present :

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Syed Mansoor Ali Shah

C.P.1290 -L/2019

(Against the Order of Lahore High Court, Lahore
dated 31.01.2019)

(i) the Provincial Government and its line Department lacked jurisdiction to issue the Notification and only Local Government under the Punjab Local Government Act, 2013 (“Act”) could exercise jurisdiction over matters relating to zoning and classification of land, land use, environment control, water sources and ecological balances; (ii) the respondents without a detailed scientific study about underground water levels acted with undue haste in issuing the Notification; (iii) the petitioner was not given the opportunity of hearing under section 3 of the Ordinance read with Articles 4, 9, 10A, 18 and 25 of the Constitution of the Islamic Republic of Pakistan (“Constitution”); (iv) the petitioner’s right to freedom of trade, business and profession under Article 18 of the Constitution was infringed; and (v) the actions of the respondents unreasonably discriminated between the petitioner and other cement manufacturers similarly placed on the basis of materials and information that could not be termed as reasonable or intelligible differentia thereby violating Article 25 of the Constitution.

3. We consider in this case if the Government’s decision of issuing the Notification lacks statutory authority or if factual grounding of the Notification compromises its legal validity.

Legality of declaring an area as a “Negative Area” under the Ordinance

4. We first turn to the question whether the Provincial Government can declare an area to be a “Negative Area” under the Ordinance. “Negative Area” under the Notification is where no new cement plant can be set up and no enlargement or enhancement of an existing cement plant can be allowed. The preamble to the Ordinance provides for organized and planned growth of industries in the Province. Organized and planned industrial growth is unquestionably in the public interest and is effectively regulated through section 3 of the Ordinance. No person can establish an industrial undertaking or enlarge any existing industrial undertaking except with the prior permission of the Provincial Government. Generally, such permission can be granted or refused only after extending an opportunity to the applicant to show

cause against it. The discretion of the Government to permit the setting up or enlargement of an industrial undertaking under section 3 is structured according to the conditions spelled out in section 3(b) of the Ordinance. Section 3(a) deals with the permission for establishing or enlarging an industrial undertaking in an area as a greenfield project, which is being examined by the Government for the first time. However, section 3(b) refers to the area where the Government has already satisfied itself on the basis of the information available to it and after making such inquiry as to whether the industrial undertaking to be established or enlarged is prejudicial to national interest, or injurious to health of the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged, or is a source of nuisance for the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged and may declare such an area to be either positive or negative area or zone as the case maybe. "Planning" is a comprehensive, coordinated and continuing process that involves identification of future goals, development of plans to achieve those goals, and devising of mechanism to give effect to those plans with a view to promoting the common good of the society.² Zoning of the Province into positive and negative areas is a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals. Zoning divides land into distinct geographical areas and imposes restrictions with respect to use of land in each area. These regulatory controls allow or disallow use of land in a particular geographical zone. Therefore, any application requesting permission to establish or enlarge an industrial undertaking under section 3 of the Ordinance in an area that is already marked as a zone (negative or positive) is decided accordingly. The organization and planning under the Ordinance is, therefore, in effect, actualized

have since multiplied and become more complex as the population has swelled from approximately 48 million in 1963 to more than 217 million in 2019 .⁴ Organized and planned growth in the world today would undoubtedly mean “sustainable development ⁵” and the terms prejudicial to national interest , injurious to health and source of nuisance would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution ; water pollution ; noise pollution ; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety , natural resource conservation, environmental protection , social equity, social choice, etc. The authority to regulate land use, introduce zones or negative or positive areas, has been recognized as the police power of the state , asserted for public welfare. ⁶ The legislative policy of organized and planned growth , under the Ordinance, also synchronizes well with our constitutional values, set out in the preamble of the Constitution , as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity ,⁷ promotion of social and economic well - being of the people ⁸ and safeguarding

The value of zoning lies in the flexibility by which it is administered to react to new social and economic situations. ¹¹ We, therefore, hold that zoning of areas for the purposes of the Ordinance is not absolute but is subject to change provided such change is necessitated by new circumstances. Hence, the prohibition under the Notification not to establish or enlarge an industrial undertaking in a negative area is not absolute.

7. Insofar as the objection of the petitioner that the mandate of zoning of land belongs to the local government is concerned, suffice it to say that the matter involved a trans -district issue which could be dealt with by the Provincial Government exercising

offend Article 18 of the Constitution. ¹³ Moving on, the decision to impose a ban on the establishment and expansion of cement plants was not taken to benefit or punish anyone but to ensure the organized and planned growth of industry in the Province in view of the findings of a multidisciplinary study (discussed later) which provided reasonable basis for zoning of project area without violating Article 25 of the Constitution. ¹⁴

Factual foundation of the “Negative Area ”

9. The next question is whether the Notification was issued in public interest in line with the objectives of the Ordinance or not. In 2016, the Secretary, Mines and Minerals Department informed the Provincial Government that existing cement plants in the Salt Range were causing ecological harm to the area. In this backdrop, the Government decided to inquire into the matter and solicit expert advice. A study was commissioned for determining the suitability of the project area for cement plants comprising Districts of Chakwal, Jhelum, Khushab and Mianwali of Punjab. M/s. NESPAK and M/s. Sogreah (“Consultants”) were engaged for the purpose. The project team included foreign experts such as Cement Plant Expert, Environmental Chemist and Geologist having experience of working in a range of countries in different regions of the world. ¹⁵ The methodology of the study reflects that following determinants were identified to be the criteria for suggesting proposals concerning delineation of the negative and positive zones for the establishment of new and expansion of existing cement plants:

- i. sufficiency of cement raw materials;
- ii. sustainable water resources;
- iii.

sq km . It was also proposed that demarcation of negative zones be reviewed after every ten years on the basis of technical assessment.

11. The Provincial Cabinet in view of the said recommendations of the Consultants took a number of decisions including declaration of "Negative Area" comprising 979 sq km of land in the Salt Range out of a total area of 8,872 sq km where establishment of new and expansion of existing cement plants was completely banned. It is underlined that the Positive Area adjoins the Negative Area and can be accessed by the petitioner for future development subject to the regulatory approvals under the law. It was also decided that the existing cement plants falling within the Negative Area would be allowed to operate only if they were fully compliant with all legal, technical and environmental standards prescribed by the Government and after a final approval was given by the Government to this effect. The Notification was thus issued and establishment of new and expansion of existing cement plants was banned in the Negative Area. The Government concluded that permitting the establishment of new and expansion of existing cement plants would be prejudicial to public interest.

12. It is hardly a secret that water situation in the project area is far from satisfactory. In November 2017, this Court had taken notice of the reports of drying up of the fabled Katas Raj Temple Pond. Cement companies situated in the vicinity of the pond were found pumping huge quantities of water free of charge and without having any regard for the environmental impact of such unbridled extraction on the aquifer as well as surrounding areas.¹⁶ This Court in

and, therefore, t he Director General (“DG”)

C.P

consultant s engaged by the petitioner d id not say that cement plants could be run without using water . On the contrary, according to the position taken by the petitioner and confirmed by the DG, EPA, Punjab, the petitioner is currently using six rainwater harvesting ponds and two water tanks to save water for use in the cement plant . This act of building storage tanks and ponds show s that water is essential for the running of the cement plant, not to mention that development of the ponds and storage tanks further restrict

sustainable development in the area can take place. Negative area in other words means an environmentally fragile area, which is a vulnerable natural habitat and needs care and protection, till it recovers, if at all. Enlargement of an existing cement plant in a negative area attracts the well-established principle of international environmental law called the Precautionary Principle, reflected in Principle 10 of the Rio Declaration, 1992. The principle provides; “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Another emerging environmental principle declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) is *in dubio pro natura* i.e. “in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom.” In the facts of the case, the Provincial Government was obliged to take a precautionary approach and act in-line with the principle of *in dubio pro natura*, till, inter alia, a detailed hydrogeological study assessing the potential of groundwater resources for industrial purposes of the project area is carried out. This approach is also constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life, sustainability and dignity of the community surrounding the project remains paramount till such time that the Government is of the view that the project has no adverse environmental effects. Also, the environment needs to be protected in its own right. There is more to protecting nature than a human centered rights regime. We see elements of personhood have now been ascribed to nature by legislatures and courts around the world.

C.

resources, and protect them, in conjunction with their associated ecological functions, for the benefit of current and future generations, and the Earth community of life .³¹ Because of the close interlinka ges between land and water and the ecological functions of water resources, any person with a right or interest to use water resources or land has a duty to maintain the ecological functions and integrity of water resources and related ecosystems. ³² The pre cautionary principle should be applied in the resolution of water -related disputes. Notwithstanding scientific uncertainty or complexity regarding the existence or extent of risks of serious or irreversible harm to water, human health or the environment, j udges should uphold or order the taking of the necessary protective measures having regard to the best available scientific evidence .³³ Consistent with the principle in dubio pro natura , in case of uncertainty, water and environmental controversies before t he courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems .³⁴ In adjudicating water and water -related cases, judges should be mindful of the essential and inseparabl e connection that water has with the environment and land uses, and should avoid adjudicating those cases in isolation or as merely a sectoral matter concerning only water. ³⁵ Water justice requires appreciation that there are no easy, simple or singular sol utions to the water crisis, and that water problems cannot be resolved through technical solutions alone but require broader recognition that they are inherently ecological, political and social issues simultaneously .³⁶

Climate Change & Climate Justice

18. The fragility of the Negative Area also needs to be examined in the larger context of climate change. The environmental issues initially brought to our courts were local geographical issues, be it air pollution, urban planning, water

legacy we leave for them?⁴¹ This Court and the Courts around the globe have a role to play in reducing the effects of climate change for our generation and for the generations to come. Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times. Democracy, anywhere in the world is pillared on the rule of law, which substantially means rights based rule of law rather than rule based; which guarantees fundamental values of morality, justice, and human rights, with a proper balance between these and other needs of the society.⁴² Post climate change, democracies have to be redesigned and restructured to become more climate resilient and the fundamental principle of rule of law has to recognize the urgent need to combat climate change. Robust democracies need to be climate democracies in order to save the world and our further generations from being colonized at the hands of climate change. The preambular constitutional value of democracy under our Constitution is in effect climate democracy, if we wish to actualize our Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations. Janine Benyus⁴³ suggests we learn from nature's 3.8 billion years of evolution. How is it that other species have learned to survive and thrive for 10,000 generations or more? Well, it's by taking care of the place that would take care of their offspring, by living within the ecosystem in which they are embedded, by knowing not to foul the nest. We must restore and repair and care for the planetary home that will take care of our offspring. For our children, and our children's children, and all those yet to come, we must love our rivers and mountains and reconnect with the long and life-giving cycles of nature.⁴⁴ To us there is no conflict between environmental protection and development because our answer would be sustainable development. Sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs⁴⁵ and it is in step with our constitutional values of social and economic justice.

⁴¹ Roman Krznaric, *The Good Ancestor* (2020 Penguin/Random House).

⁴² Aharon Barak, *The Judge in a Democracy*.

⁴³ Biomimicry Designer.

⁴⁴ 'How to be a good ancestor'

https://www.ted.com/talks/roman_krznaric_how_to_be_a_good_ancestor/transcript?language=en.

⁴⁵ The Pakistan Environmental Protection Act 1997, s 2 (xlii).

20. As a result, all contentions raised by the petitioner are rejected. We hold that the Notification dated 08.03.2018 is in accordance with the provisions of the Ordinance and negative area can be planned and designed banning industrial activity within its bounds. The Petitioner company is not allowed to enlarge or enhance the capacity of its existing cement plant till such time that the Negative Area subsists. In these circumstances, we uphold the Notification. The High Court has rightly refrained from interfering into the matter. Consequently, the leave is refused and the petition is dismissed.

Judge

Announced
Islamabad ,
15th April , 2021 .

Judge

Judge

Approved for reporting
Iqbal