

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2016 OF 2021

WITH

INTERIM APPLICATION (ST) NO. 4145 OF 2022

WITH

INTERIM APPLICATION NO. 757 OF 2022

Mariyayi Machhimaar Sahkari Sansthya Maryadit ... Petitioner

Versus

Department of Fisheries and others ... Respondents

.....

Mr. Zaman Ali for the Petitioner.

Mr. P.P. Kakade, Government Pleader alongwith Mr. A.I. Patel, Addl. G.P. for the State.

Ms. Jaya Bagwe instructed by Ms. Sharmila Deshmkh for Respondent No. 5.

Ms. Meenaz Kakalia for the Applicant in IA(ST)-4145-2022.

Dr. Milind Sathe, Senior Advocate alongwith Mr. Saket Mone, Mr. Subit Chakrabarti and Mr. Devansh Shah instructed by Vidhi Partners for Respondent No. 8 – MSRDC.

Mr. Sharan Jagtiani, Senior Advocate - Amicus Curiae alongwith Rohil Bandekar and Siddharth Joshi.

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CORAM : S.J. KATHAWALLA AND

MILIND N. JADHAV, JJ.

RESERVED ON : MARCH 17, 2022

PRONOUNCED ON : MARCH 23, 2022

JUDGMENT: (PER S.J. KATHAWALLA & MILIND JADHAV, JJ)

1. As per our previous order dated 25th February 2022, we had directed

MSRDC (Respondent No.8) to deposit a sum of Rs. 10 crores (i.e. Rs. 1 Lakh per affected family comprising the Petitioner Society) to be available for distribution as ad-hoc interim compensation. On that day, Shri Radhesyam Mopalwar, Managing Director, MSRDC who was present before us, undertook to deposit this sum of Rs. 10 crores with the Registrar, Judicial I, of this Court. MSRDC has accordingly deposited this sum with this Court. The matter was placed today to hear the parties on disbursement of this amount to the affected fisherfolk families comprising the Petitioner Society.

2. Shri. Zaman Ali, learned Advocate for the Petitioner, submitted that despite over 7 months having passed since our detailed order dated 12th August 2021 directing compensation to be paid to the Petitioner for the loss of their fishing livelihood, no compensation whatsoever has been paid. In light of this, the learned counsel for the Petitioner submits that the entire amount of Rs. 10 crores deposited in Court should be paid out to the Petitioner Society, as per the suggestion made by the Learned Amicus at the previous hearing. The Petitioner Society, he submits, will distribute this money to its individual members and keep detailed accounts of all such disbursements, which shall be placed before this Court.

3. Shri. Milind Sathe, learned Senior Advocate for MSRDC (Respondent No. 8) opposed any disbursement being made to the Petitioner or its members at this

stage on the ground that the impact of the TCB-III project on the livelihood of fisherfolk has not yet been ascertained. Shri Sathe submitted that there has not been any determination of whether TCB-III project will have any impact at all on the livelihood of fisherfolk. He said that this exercise will have to be carried out by a specialized agency and that until the impact of the TCB-III project on the Petitioner Society (and its members being the Koli fisherfolk community) is assessed, there can be no distribution of compensation be it ad hoc or final. Therefore, he submits that no disbursement should be made till the Central Marine Fisheries Research Institute (CMFRI), who has been engaged to study the detailed impact of TCB-III on the livelihood of fisherfolk, submits its report. MSRDC's apprehension is that that should the final compensation amount be less than interim compensation of Rs. 1 lakh per family, then MSRDC will be put to hardship in recovering any excess amounts from the Petitioner's 900-odd members.

4. According to Shri. Sharan Jagtiani, Learned Senior Advocate and *Amicus Curiae*, MSRDC's submission that that there has been no determination of whether TCB-III project will have any impact at all on the livelihood of the Petitioner fisherfolk is incorrect. Shri. Jagtiani relies on our Order and Judgment dated 12th August, 2021, more particularly paragraphs 1, 3, 46 to 49 and 51 to 58, to submit that there is in fact a finding, at least *prima facie*, of the TCB-III project's adverse impact

on the livelihood of fisherfolk who are defined in the above Order and Judgment as Project Affected Persons because of the ongoing construction of TCB-III. At the time when the matter was being argued this position was not contested by the Respondents on this aspect as such.

5. Further, Shri Jagtiani submitted that MSRDC's concern about recovery of excess compensation is based on a highly unlikely scenario that the final compensation will be less than the interim compensation. He points to the Draft Compensation Policy dated 29 November 2021 which adopts the approach of the National Green Tribunal in its order dated 27 February 2015 (in the matter of Ramdas Janardan Kohli) in respect of quantifying compensation. The NGT found that there was a loss of the customary right to fishing and awarded ad-hoc compensation in the following manner. The NGT presumed: (i) loss of livelihood would be for a period of three years; (ii) a family consists of 4 members who would be earning Rs. 200 per person per day (i.e Rs. 800 per family per day) which annually amounts to Rs. 2,92,000/- per family; (iii) due to mere subsistence 1/3 of this amount was reduced and the final figure of compensation was Rs. 1,94,666/- per family per year. The total compensation per family for a period of 3 years awarded was Rs. 5,83,998/-. Given that this Court has already found that TCB-III is likely to affect the customary rights of fisherfolk vide order dated 12th August 2021 and that

the state's draft compensation policy has recommended the NGT approach for quantifying compensation, the final compensation amount will almost certainly exceed Rs. 1 lakh per family. If the final policy is based on other formula's such as that of the Mumbai Trans Harbour Link then the compensation would be even more. Therefore, Shri Jagtiani submits that MSRDC's concern of recovering any excess compensation amount paid to the Petitioner's members is not a realistic concern.

6. Having heard the parties, we are unable to accept the contention of Shri. Sathe, learned Senior Advocate appearing for MSRDC, that there has not been any determination of whether TCB-III project will have any impact at all on the livelihood of fisherfolk. As rightly pointed out by Shri. Jagtiani, *Amicus Curiae*, we have in our order dated 12th August 2021 held that the TCB-III project is likely to have an adverse impact on the customary right of the Petitioner's members to fish for a living. In fact, the entire subject matter of Issue No. (ii) in our order dated 12th August 2021 was a consideration of this question: whether TCB III is likely to detrimentally impact customary right of the Petitioner's members to fish for a living. We have also determined, in answering Issue No. (i) that the Petitioner has established that they have a customary right to carry on the activity of fishing in the Thane Creek. The issues that fell for determination before us in our Order of 12th August 2021 were as follows:

“ISSUES FOR DETERMINATION :

(i) Whether the Petitioner can prove that the Project Affected Fishermen (as defined in paragraph 1) have a customary right to fish for a living in Thane Creek?

(ii) Whether TCB III is likely to detrimentally impact the practice of such customary rights?

(iii) Whether a state-wide policy for all categories of persons whose customary rights are affected by infrastructure projects is required? If yes, what is the framework for such a policy that can be recommended to the appropriate authorities?

(iv) If the answer to Issue (i), Issue (ii) and Issue (iii) is yes, what should be the contours of a policy compensating those affected by TCB III? ”

(emphasis supplied)

7. In paragraph no. 1, we defined Project Affected Fishermen as the members of the Petitioner Society:

“1. The Petitioner is a society registered under the Maharashtra Cooperative Societies Act, 1960. The Petitioner states that it comprises of members from the traditional fishermen community known as Koli community, from Koliwadas such as Vashigaon, Juhugaon, Koparkhairane, Ghansoli, and Diva (“Project Affected Fishermen”). The Petitioner states that it was formed in 2001, and is actively engaged in raising welfare concerns on behalf of fishermen from Koliwadas located in and around Thane Creek.”

(emphasis supplied)

8. In paragraph 3, we described the TCB-III project as:

“TCB III is a proposed six-lane bridge on the Sion-Panvel Highway. It is being constructed as an addition to the existing Thane Creek Bridge, near Vashi, Maharashtra. The Thane Creek Bridge is built across Thane Creek,

connecting the city of Mumbai to the main land at Navi Mumbai. It is one of the four entry points into Mumbai, the other three being the Airoli Bridge, Mulund Check Naka and Dahisar Check Naka. According to Respondent No.8, Thane Creek Bridge I (“TCB I”) was constructed in 1973 and Thane Creek Bridge II (“TCB II”) was built and opened to traffic in 1997...”

9. After analyzing the various documents placed on record by the Petitioner, in respect to issue (i), we concluded in paragraph 49 that:

49. The documents, therefore, establish with sufficient clarity that the Project Affected Fishermen have a customary right to fish for a living in Thane creek. Most importantly, the Affidavits in Reply of Respondent No. 1 also appears to accept this position.

(emphasis supplied)

10. Having found that the Petitioner’s members (Project Affected Fishermen) have established their customary right to fish for a living in the Thane creek, we proceeded to consider the question of whether TCB III is likely to detrimentally impact the practice of such customary rights in issue (ii).

11. It is pertinent to note that regarding this issue no (ii), none of the Respondents even contended before us that the TCB-III would not have *any* impact at all on the ecology and the customary rights of fisherfolk. The Respondents submissions were:

“SUBMISSIONS ON ISSUE (ii) – Whether TCB III is likely to detrimentally affect the practice of customary rights?”

Respondent No. 8:

19. **Respondent No. 8 has in its Affidavit not denied the possible impact that TCB III will have during the construction phase and thereafter, on the mangroves, biodiversity, fish catch etc.**

20. However, Respondent No. 8 submitted that the navigational channels for fishing activities will not be impacted, as TCB III is only in the nature of expansion of TCB II. It is planned parallel to the existing TCB I and TCB II and is sandwiched between TCB II and the railway bridge next to it. For this reason, Respondent No.8 submits that the addition of TCB III will have no material effect on the navigational channels.

Respondent Nos. 1 and 2:

21. **Shri Patel for Respondent Nos. 1 and 2 submitted that TCB III is likely to impact the fisheries and livelihood of the Project Affected Fishermen, because, during the construction period, movement in the inter-tidal fishing areas will be curtailed and mangroves, mudflats, and creeklets in Thane Creek will to some extent be destroyed.”**

(emphasis supplied)

12. Our findings were as follows:

“FINDING ON ISSUE (ii) :

51. We have analyzed the submissions of the various parties. **On an appreciation of the material before us, we are of the view that TCB III is likely to impact the Project Affected Fishermen’s customary right to fish for a living, and therefore answer Issue (ii) in the affirmative.**

52. **The Court only needs to satisfy itself that there will be some or a likely impact. If it is so satisfied, which it is, then that is enough for us to hold that the customary rights to fish for a livelihood are being impacted. The extent of the impact may be considered in greater depth by the committee to be constituted, as discussed later in this judgment.**

53. **The livelihood of fishermen is dependent on a healthy environment and balanced ecology.** The Department of Environment, Forests and Wildlife of the Government of India has recognized this in the Preamble of the CRZ Notification, 2011 by stating that coastal stretches

need to be protected “... with a view to ensure livelihood security to the fisher communities...” It requires that any development activity needs to be done in a “... sustainable manner based on scientific principles taking into account the dangers of natural hazards in the coastal areas...”

54. **The MCZMA itself, in its 114th Minutes of Meeting dated 2 and 3 November 2016 has stated that TCB III should be constructed in a manner which does not affect the navigational routes of local fishermen. This shows that the MCZMA believes, and is aware, that navigational routes of the Project Affected Fishermen are likely to be impacted.**

55. **Further, Respondent Nos. 1 and 2 in a communication to various authorities of the State Government recognizes that projects implemented in the maritime area or along the sea coast would impact the livelihood of local fishermen in the proximity of the project.**

56. **Both of these documents show that even the State Government authorities are of the view that maritime projects like the TCB III are likely to impact the livelihood of fishermen communities in the vicinity of the project.**

57. **Further, we agree with the Amicus Curiae’s submission that destruction of mangroves for TCB III will disturb the ecological balance in Thane Creek. The vital role that mangroves play in maintaining ecological balance and sustaining biodiversity is well documented. The Thane Creek Flamengo Sanctuary Management Plan and The Preliminary Report on Biodiversity of Thane Creek, which are discussed above also bear out that the destruction of mangroves often results, inter alia, in loss of biodiversity, and reduced fish catch, which in turn would impact livelihood of the Project Affected Fishermen. The judgment in Bombay Environmental Action Group v. State of Maharashtra (supra) of this Court, elucidates the importance of mangroves on the ecology. The judgment states, at paragraph 32:**

“In the instant case it has been established that mangrove forests are of great ecological importance and are also ecologically sensitive.”

58. **Being satisfied that there is likely to be some impact, we prefer to leave the exercise of determining the extent of the impact**

with more precision to a body that has the wherewithal to make such a determination.

59. **Since we hold that the Project Affected Persons' customary rights are being impacted, we also hold that they are entitled to be compensated for their loss, subject to what is stated below.**

60. As of today, no state-wide compensation policy exists which provides guidance on how to constitute a committee to look into fine print of a compensation policy. Which brings us to the next issue.”

(emphasis supplied)

13. Our Order and Judgment of 12th August 2021, therefore, holds that the TCB-III is likely to affect the Petitioner's members (defined as the Project Affected Persons) and that they are entitled to be compensated for such loss. What was left open for the compensation committee to determine was the precise extent of such loss and quantum of compensation.

14. We will now consider the question of disbursement of ad hoc compensation especially keeping in mind that the Order and Judgment dated 12th August 2021 was more than seven months ago and one of the objects of the said Order was to ensure that persons who are affected receive the benefit of compensation.

14.1 As stated above, in our order of 12 August 2021 we held that TCB-III is likely to adversely affect the customary rights of Petitioner's members and therefore they are entitled to be compensated. These issues were never contested before us

until this belated stage, more than seven months since our order.

14.2 When the matter came up on 1st December 2021, we were informed that CMFRI has been engaged to study the detailed impact of TCB-III on the livelihood of the curtailed fisherfolk. We accordingly directed CMFRI to be represented before us to apprise us of the steps taken by them in this regard.

14.3 On 16th February 2022 we were informed that CMFRI's entire exercise would take at least one year to be completed. Despite six months having passed since our order of 12 August 2021, we were informed that it will take at least a year to finally decide the issue of compensation. As the fisherfolk and their families cannot be expected to starve till the authorities decide the quantum of compensation, we directed CMFRI to submit an interim report on the quantum of interim compensation required to be paid to these fisherfolk. On that day, the advocates for MSRDC on instructions made a statement that upon CMFRI recommending the quantum of interim compensation, MSRDC would disburse the same to eligible fishermen, which statement was accepted. The responsible officer from CMFRI was directed to appear before this Court on the next occasion.

14.4 In the Affidavit dated 22nd February 2022 filed before us, CMFRI *inter alia* stated that it is not competent to render assistance for determining compensation. CMFRI can only assist any agency or institute such as the Tata

Institute of Social, which may be entrusted with the responsibility for determining compensation with technical data.

15. Thus, seven months later there is still no clarity as to how the final compensation will be quantified or by whom. We cannot expect these fisherfolk to wait one more year without any livelihood or compensation. We find merit in the submissions of Shri Zaman Ali and Shri Jagtiani that in all likelihood the final compensation will exceed the present interim compensation of Rs. 1 lakh per family. If, for example, the compensation rate or formula as per the NGT Order is taken into consideration, the NGT took, on an ad-hoc basis, the loss to be for a period of three years at Rs. 1,94,666/- per family per year. The total compensation per family awarded was nearly 6 lakhs. Given that the Compensation Committee in its Draft Policy (which itself will have to be considered by the State Government cabinet in terms of our Order dated 16th February 2022) has recommended the NGT approach and that the project itself will take more than 3 years to complete, it is very likely that the final compensation amount will exceed Rs. 1 lakh per family. We are also of the view that if the ad hoc compensation is paid to the Petitioner Society and not to individual fisherfolk there is more accountability. In the event of the final compensation being less than this ad hoc amount or if in the final report for payment of compensation concludes that compensation is not payable to some members of the

Petitioner, then it would be the Petitioner Society's responsibility through its officer bearers to ensure that the excess amounts of ad hoc compensation are returned to MSRDC.

16. In light of this we find it reasonable to order that interim compensation of Rs. 1 lakh per family should be paid to the Petitioner's members.

17. We accordingly direct the Registrar, Judicial I, of this Court to pay the sum of Rs. 10 crores deposited by MSRDC to the Petitioner within two weeks from today, who shall distribute it to its members in the sum of Rs. 1 Lakh per family. The Petitioner shall place on record all details of such monies distributed. We also note the undertaking of the Petitioner Society through its office bearers to ensure that the amount of ad hoc compensation that may be determined to be in excess of what is to be paid by MSRDC will be brought back in to Court if so determined by Court in this Writ Petition.

18. Since this is only a distribution towards ad hoc compensation, we are also of the view that MSRDC must either with the assistance of CMFRI or any other agency proceed to determine the final compensation payable to the Project Affected Persons within three months from today. The ad hoc compensation is not a substitute for the final compensation.

19. All concerned to act on a digitally authenticated copy of this order.

(MILIND N. JADHAV, J.)

(S.J. KATHAWALLA, J.)