

Supreme Court of India

Kerala Swathanthra Malaya ... vs Kerala Trawlnet Boat Operators ... on 23 June, 1994

Equivalent citations: JT 1994 (7) SC 33, 1994 (3) SCALE 29, (1994) 5 SCC 28, 1994 Supp 1 SCR 203

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Bench: S Agrawal, B J Reddy

JUDGMENT B.P. Jeevan Reddy, J.

1. These appeals manifest the on-going conflict of interest between traditional fishermen and mechanised fishing boat operators in the territorial waters of Kerala and the attempts of the government to balance their contending demands. Fishing in the territorial waters and beyond has always been the major source of livelihood for fishermen all along the coast of Kerala. Till the early seventies, fishing was confined to traditional types of vessels, viz., cetamarans, county craft and canoens. Thereafter, mechanised vessels using several types of fishing gear including bottom-trawling were introduced which soon gave rise to a conflict between the traditional fishermen and the new class of mechanised boat OperatOrs. "While these inputs (have) contributed to enhance the marine fish production, they (have) also brought-forth a number of resource-related and socio-economic problems necessitating serious management considerations. One such problem area is the fishing during monsoon being practised by the mechanised vessels in some of the States along with west coast particularly in Kerala. This activity which was started in the seventies with the advancements in the operational capabilities of mechanised vessels in the context of increasing demand for fish in the internal and external markets, soon belied its advantages. It is perceived as competing with the artisanal fisheries in the in-shore waters and fostering resource degradation as bottom-trawling during monsoon period is apprehended to adversely affect the spawning populations and subsequent recruitment (From the preface to the CMFRI Bulletin 45 - "Monsoon Fisheries of the West Coast of India - Prospects, Problems and Management" published by Central Marine Fisheries Research Institute, a wing of the Indian Council of Agricultural Research). The present dispute is confined to the permissibility of bottom-trawling during the monsoon months- a period of about six to eight weeks. The subject-matter of challenge in the writ petitions filed by the operators of bottom-trawling mechanised boats are two orders made by the Government of Kerala under Section 4 of the Kerala Marine Fishing Regulation Act, 1980. By virtue of these orders, not only the bottom-trawling was prohibited altogether within territorial waters ('specified area') for period of forty four days - monsoon period - in the year 1992, the boats of the writ petitioners were practically confined to the sea-shore during the said period; they were not to stir out to sea for the said period.

2. It is stated that most of the mechanised boats engaged in bottom-trawling are of Norwegian origin with a length of about 32 feet and fitted with an engine of 48 to 60 HP. Bottom-trawling may broadly be described as scraping the bottom of the sea for fish. It is obvious that deeper the sea, larger should be the fishing gear, which in turn calls for a bigger boat. According to the State of Kerala, the boats of the writ petitioners (respondents in these appeals) can engage in bottom trawling only upto a depth of 30-35 metres inasmuch as the length of wire rope required is five times the depth (with a little extra for meeting emergency situations). The writ petitioners (owners/operators of mechanised boats engaged in the bottom-trawling) who are the contesting respondents in these appeals dispute this assertion. They say that they are capable of bottom

trawling in far deeper waters. Yet another point of dispute is; according to the State of Kerala, the depth of sea beyond territorial limits (22 Kms.) is 45 to 50 metres or more, while according to the writ petitioners, the depth is less than 50 metres at many places beyond the territorial waters' limit. In short, the case of the State is that the boats of the Writ petitioners (of 32 feet length fitted with an engine of 48 to 60HP and the fishing gear they carry) are capable of bottom trawling only within the territorial waters whereas the writ petitioners say that they can bottom-trawl not only within but also beyond the territorial waters. Basing on its assertions aforesaid, the Government of Kerala has issued the impugned orders. Yet another ground given by the Government for supporting the said orders - which ground is strongly supported by traditional fishermen - is that bottom-trawling during monsoon months has extremely adverse effects on the growth and availability of fish, in particular, on the spawning of the fish. According to them, the gradual decrease in the fish haul is mainly the result of bottom-trawling during monsoon period. They say that bottom-trawling during the monsoon months is seriously affecting the livelihood of the traditional fishermen. They point out that for this very reason, this Court has upheld a complete ban on use of purse seines, ring seines etc. by mechanised boat-operators within territorial waters in the State of Kerala v. Joseph Antony [1994] 1 S.C.R. 301.

Relevant provisions of law and the Notifications:

3. Entry 57 of List-I of the Seventh Schedule to the Constitution specifies "Fishing and fisheries beyond territorial waters" as a Union subject, whereas Entry 21 of List-II speaks of "Fisheries" as a State subject. Though Entry 57 of List-I speaks both of 'fishing' and 'fisheries', they do not appear to carry different meanings in the context relevant herein. The word "fishery" is given the following meanings in the Compact Edition of the Oxford English Dictionary ; "(1) the business, occupation or industry of catching fish, or of taking other products of the sea or rivers from the water. (2) a place or district where the fish is caught; fishing ground. (3) a fishing establishment; coll. those who are engaged in fishing in a particular place. (4) the right of fishing in certain works. (5) fish of different kinds." Whichever meaning one adopts, it does not seem to convey any different connotation than the expression "fishing". Therefore, nothing turns on the difference in language employed in Entry 57 of List-I and Entry 21 of List-II. Reading both the entries together, it follows that control and regulation of fishing and fisheries within territorial waters is the exclusive province of the State, where beyond the territorial waters, it is the exclusive domain of the Union.

4. With a view to provide for the regulation of fishing by fishing vessels in the sea along the coast-line of the State, the Legislature of Kerala enacted, in the year 1980, the Kerala Marine Fishing Regulation Act (Act 10 of 1981) - hereinafter referred to as the 'Kerala Act'. The Preamble to the Act recites that "whereas it is necessary to provide for the regulation of fishing by fishing vessels in the sea along the coast line of the State", it was enacted. Section 2 defines certain expressions occurring in the Act. Clause (h) of Section 2 defines the expression "specified area". It means "such area in the sea along the entire coast line of the State, but not beyond territorial waters, as may be specified by the Government, by notification in the Gazette." Section 4 empowers the Government to regulate, restrict or prohibit fishing in the territorial waters, while Section 5 prohibits the use of fishing vessels in contravention of the orders made under Section 4. Having regard to their crucial relevance, it is appropriate to set out Sections 4 and 5 of the Act in their entirety:

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-

(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

(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.

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

(a) the need to protect the interests of different section of persons 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;

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

(d) any other matter that may be prescribed.

5. Prohibition of use of fishing vessel in contravention of any order made under Section 4:- No owner or master of a fishing vessel shall use, or cause or allow to be used, such fishing vessel for fishing in any manner which contravenes an order made under Section 4:

Provided that nothing in such order shall be construed as preventing the passage of any fishing vessel from, or to, the shore, through any specified area to, or from, any area other than a specified area the purpose of fishing in such other area or for any other purpose:

Provided further that the passing of fishing vessel through any specified area shall not in any manner cause any damage to any fishing nets or tackles belonging to any person who engages in fishing in the specified area by using any traditional fishing craft as catamaram, country craft or canoe.

5. Sub-section (1) of Section 4 specifies the ambit of the power while Sub-section (2) specifies the objectives to achieve which the power under Sub-section (1) is to be exercised. The objectives set out in the Sub-section (2) inter alia are : (a) the need to protect the interests of the different sections of persons engaged in fishing particularly those engaged in fishing using traditional fishing craft such as catamaran, country craft or canoe; (b) the need to conserve fish and to regulate fishing on a

scientific basis; and (c) the need to maintain law and order in the sea. The restrictions, regulations and prohibitions that can be imposed by the State under Sub-section (1) include specification of areas, specification of class and length of fishing vessels and the number of vessels which can be used for fishing in the specified area, specification of the species and of fishing periods in a specified area. Section 5 says that no owner or master of the fishing vessel shall use or allow the vessel to be used in any manner contrary to the orders made under Section 4. The first proviso to Section 5 clarifies that nothing in any order made under Section 4 shall be construed as preventing the mere passage of any fishing vessel from or to the shore through any specified area for fishing beyond territorial waters. This clarification is accompanied by a rider (second proviso) to the effect that such passage shall not in any manner cause any damage to any fishing nets or tackles being used by traditional fishermen within the territorial waters. The purport of the two provisos, in short, is to provide for what may be described as 'innocent passage' - if we can borrow the expression from a different context - through the territorial waters. These provisos have to be understood in view of the constitutional limitation upon the power of the State Legislature explained hereinbefore. So far as the Parliament is concerned, it is admitted that it has made no law regulating or prohibiting fishing beyond the territorial waters nor has the Union Government issued any such orders in exercise of its executive power.

6. With a view to collect the relevant data, information and particulars to enable them to make orders under Section 4 of the said Act, the Government of Kerala appointed, in the year 1981, an expert committee headed by Sri D. Babu Paul to enquire into the need for conservation of marine fishery resources and other allied matters. The committee submitted its report to the Government on July 21, 1982 but it appears that its recommendations were not unanimous. Later, another expert committee was appointed headed by Sri V.C. Kalawar. Based on the reports of these committees, the Government of Kerala had been issuing various orders from time to time under Section 4(1) prohibiting bottom trawling during the monsoon period. The judgment of the High Court (dated 31st July, 1992) sets out the various orders issued from the year 1988 onwards. (The judgment also sets out the particulars of various writ petitions filed by mechanised boat operators questioning those orders and the orders passed thereon.) We do not think it necessary to refer to those orders inasmuch as we are concerned herein with the orders relevant to the year 1992 alone. We need notice only two orders, viz., G.O. (P) No. 31/90/F&PD dated 25th June, 1990 (First Order) and G.O. (P) No. 26/92/F&PD dated 20th June, 1992 (Second Order) which were issued on the basis of yet another expert committee report and certain other technical advice. While the First Order is of a permanent nature, the Second Order is applicable only for the monsoon period (44 days) during the year, 1992. Each of these Orders is accompanied by an Explanatory Note with the clarification that the Explanatory Note does not form part of the statutory notification but is intended to indicate the general purport of the G.O.

The First Order along with its Explanatory Note reads as follows:

S.R.O. No. 874/90.--WHEREAS, there is need to preserve law and order in the sea;

AND WHEREAS there is need to avoid accident and ensure safety of life and property of fishermen;

NOW, THEREFORE, in exercise of powers conferred by Section 4 of the Kerala Marine Fishing Regulation Act, 1980 (10 of 1981) read with Rule 3 of the Kerala Marine Fishing Regulation Rules, 1980, the Government of Kerala hereby restrict the use of the specified area notified under G.O. (P) 136/84/PW, F&PD dated the 30th November, 1984 in Kerala Gazette Extraordinary No. 1055 dated the 3rd December, 1984, by imposing the following prerequisites for vessels going for bottom trawl fishing beyond territorial waters:

- (i) The engine fitted in the boat shall have a minimum power of 160HP and the hull shall have a length of not less than 40 feet.
- (ii) The boat shall have a minimum length of 500m, wire rope in the winch drum.
- (iii) The boat shall carry on board sufficient number of life saving appliances and fire appliances as stipulated under Section 435K of the Merchant Shipping Act, 1958 (Central Act XLIV of 1958).
- (iv) The Syrang and the Driver shall possess the competency certificate issued by the Mercantile Marine Department/Post Department.
- (v) The boat shall carry on board articles of first aid and navigational aids such as Mariners Compass.

By order of the Governor, M.S. JOSEPH Secretary to Government.

Explanatory Note (This note does not form part of this Notification but is intended to indicate its general purport).

Section 4(1) of the Kerala Marine Fishing Regulations Act, 1980 empowers Government to regulate, restrict and prohibit the use of any specified area for purpose of fishing. There have been a number of complaints from among the traditional fishermen that the vessel prohibited from conducting fishing in the territorial waters are actually fishing within the prohibited area. The mechanised boats of less than 43 feet length are not capable of conducting trawling beyond the territorial waters. Claims by the contrary can only be false inasmuch as it has been established that such boats cannot operate safely during the monsoon season beyond the territorial waters without endangering human life. Therefore, the Government have decided to prescribe certain pre-requisites to trawl boats going to fishing beyond territorial waters to ensure that bottom trawl fishing is not conducted in the prohibited area.

This notification is intended to achieve the above purpose.

7. The Second Order (G.O. dated 20th June, 1992) along with its Explanatory Note reads thus:

S.R.O. No. 743/92: WHEREAS the Government are convinced of the need to protect the interest of different sections of persons engaged in fishing, particularly those engaged in fishing using traditional fishing crafts such as catamarams, country crafts and canoes:

AND WHEREAS it is imperative to maintain law and order in the sea;

AND WHEREAS the Government consider that there is need to conserve fish wealth ;

NOW, THEREFORE, in exercise of the powers conferred by Clause (d) of Sub-section (1) of Section 4 of the Kerala Marine Fishing Regulation Act, 1980 (Act 10 of 1981) read with Rule 4 of the Kerala Marine Fishing Regulation Rules, 1980, the Government of Kerala hereby prohibit bottom trawl in the sea along the entire coast line of the State, not beyond the territorial waters specified under notification G.O. (P) 136/84/PW&F&PD dated the 30th November, 1984 published as S.R.O. No. 1496/84 in the Kerala Gazette Extraordinary No. 1055, dated the 3rd December, 1984 for the period from 21st June, 1992 to the 3rd August, 1992.

By order of the Governor, G. CHANDRAN Special Secretary to Government Explanatory Note (This does not form part of the notification but is intended to indicate its general purport).

Clause (4) of Sub-section (1) of Section 4 of the Kerala Marine Fishing Regulation Act, 1980 empowers Government to regulate, restrict or prohibit the use of any fishing gear in any specified area as may be prescribed. Sub-section (2) of Section 4 of the Act prescribes the grounds for invoking the powers under Section 4.

There have been persistent demands from the traditional fishermen for ban on trawling during June, July, August on the ground that trawling has been adversely affecting the conservation of fish wealth and their share of earnings from fishing. Consequently, there have also been clashes between the fishermen belonging to traditional sector and mechanised sector leading to serious law and order problems.

Therefore, the Government after considering the recommendations of expert committees in the matter decided to ban bottom trawl specified in the Rule 4 of the Kerala Marine Fishing Regulation Rules, 1980 in the entire coastal line of the State, not beyond the territorial waters of the State during the monsoon period from the 21st June, 1992 to the 3rd August, 1992 in the interest of conservation of fish wealth and to avoid the possible law and order problems in the Coastal area and in the area.

The notification is intended to achieve the above purpose.

8. It would be appropriate at this stage to notice the purport and effect of the above two Orders. The First Order recites that it was issued in view of the "need to preserve law and order" and the "need to avoid accidents and ensure safety of life and property of Fishermen". The Explanatory Note which throws light upon the objectives sought to be achieved by the G.O. refers to a large number of complaints from the traditional fishermen that the vessels prohibited from conducting fishing in territorial waters<sup>1</sup> were actually fishing in the prohibited area. It then recites the Government's opinion that the mechanised boats of less than 43 feet length are not capable of conducting bottom-trawling beyond the territorial waters, rejecting the contention to the contrary. The Explanatory Note further recites that the Government has decided to prescribe certain prerequisites

for trawling boats for fishing beyond territorial waters to ensure that bottom trawl fishing is not conducted in the prohibited area. The Notification accordingly imposes certain restrictions upon the length of the boat, horsepower of the engine and the particulars of the fishing gear to be carried in boats going for bottom-trawling beyond territorial waters. The requirements prescribed inter alia are:

(1) the Engine fitted in the boat shall have a minimum power of 160HP and the hull shall have a length of not less than 43 feet.

(2) the boat shall have a minimum length of 500 metres wire-rope in the winch drum.

9. Now, coming to the Second Order - which is valid and applicable only for a period of forty four days commencing from June 21, 1982 to August 3, 1992 - it prohibits bottom-trawling altogether by any and all boats during the said period in the territorial waters. The Explanatory Note says that the said ban was imposed "in the interest of conservation of fish wealth and to avoid the possible law and order problems in the coastal area and the sea". It refers not only to the complaints of traditional fishermen that bottom-trawling during monsoon months is adversely affecting the conservation of fish wealth and is affecting their livelihood but also the recommendations in the report of the expert committees. The said recommendations are stated to be the basis of the Order.

10. A reading of the two Notifications yields the following position:

(1) Bottom trawling is prohibited altogether for the aforesaid period of 44 days in the year 1992 by one and all. During the remaining period of the year, bottom trawling is permitted by one and all within the territorial waters.

(2) Only the boats having a minimum power of 160HP and a hull length of not less than 43 feet (carrying a minimum length of 500 metres wire rope in the winch drum) shall alone be deemed to be capable of conducting bottom trawling beyond territorial waters, which means that boats with lesser horse power/or lesser length shall be deemed to be meant/for bottom trawling only within the territorial waters. In short, the orders have created a conclusive presumption of law that boats having lesser length, horse power and fishing gear than prescribed shall be deemed to be meant for bottom trawling within the territorial waters alone and are incapable of bottom trawling beyond the territorial waters. The necessary consequence of this conclusive presumption of law provided by the Order is that boats not answering the requirements prescribed in the First Order shall not be permitted to leave the coast during the aforesaid period of 44 days. They are confined to and tied down to the sea-shore.

## CONTENTIONS OF THE PARTIES BEFORE THE HIGH COURT AND THE DECISION OF THE HIGH COURT

11. Aggrieved by the above restrictions, the owners and operators or the mechanised boats engaged in bottom trawling (whose boats did not answer the specifications prescribed in the First Order) approached the Kerala High Court challenging the validity of the said Orders. Their contention was

that even though their boats are of lesser length than 43 feet and are having an engine with less than 160HP, they are yet capable of engaging in bottom-trawling beyond territorial waters and that, therefore, they should be allowed to go beyond the territorial waters for the said purpose. Reliance was placed in this behalf on the report of the advocate-commissioner in C.M.P. No. 10964 of 1990 in O.P. No. 6092 of 1990 in the Kerala High Court. The said report, according to the writ petitioners, established that their boats are capable of bottom-trawling even beyond the territorial waters. They disputed the underlying assumption that the depth of sea beyond territorial waters is more than 50 meters. In several places, they said, the depth of sea beyond the territorial waters (22 Kms. from the sea coast) is between 35 to 50 metres, wherein their boats are fully and perfectly capable of bottom-trawling. They submitted that the requirements specified in the First Order are arbitrary, unsupported by any relevant data and have been prescribed under the pressure of and with a view to mollify the traditional fishermen whose number is very large compared to the number of the owners/operators of the mechanised boats. They submitted that their right to go beyond the territorial waters (right of 'innocent passage') cannot be taken away always altogether even for the limited period of 44 days in the year. According to them, they were interested mainly in 'karikkadi' (prawns) and this particular type of prawns is available only during the monsoon period beyond territorial waters. If they are not allowed to fish during the monsoon period, these prawns float away and will not be available thereafter. Their main reliance was upon the two provisos to Section 5 of the Kerala Act. They pointed out that neither the Parliament nor the Central Government - who alone are competent to regulate the fishing beyond territorial waters - have imposed any sort of restriction on bottom trawling. They submitted that their right to fish (bottom-trawl) beyond the territorial waters cannot be defeated by the State Legislature and/or its delegate under the guise of prescribing the aforesaid particulars. Article 19(1)(d), they submitted, guaranteed to them the right to move freely through the territory of India (which includes the territorial waters). The writ petition was opposed by the Government of Kerala as also by the Association of traditional fishermen. They submitted that the restrictions prescribed are conceived in the interest of maintenance of law and order within the territorial waters as also to protect and preserve the fish in the larger interest of all the fishermen and the consuming public. The requirements prescribed in the First Order, they submitted, are designed to prevent bottom-trawling by mechanised boats within territorial waters under the guise of going out to sea beyond territorial waters. It is only a measure to prevent abuse of the restriction placed by the Second Order (during 1992 monsoon period) - and similar orders that may be passed for the future years - they submitted.

12. The Kerala High Court upheld the contention of the writ petitioners (mechanised boat-owners) and held that the Government of Kerala was not competent to prohibit the boats of the writ petitioners from proceeding to sea beyond the territorial waters. The High Court declared that the "Notification dated June 25, 1990 is void in so far as it specifies conditions in regard to 'any fishing vessel' which is going beyond the territorial waters for the purposes of fishing in such areas". The correctness of the said order is questioned in these appeals both by the Government of Kerala as well as by the Association of traditional fishermen, "Kerala Swathanthra Malaya Thozhilali Federation".

QUESTION ARISING FOR CONSIDERATION:



13. Having regard to the contentions urged before the High Court and before us, the following questions arise for consideration in these appeals:

(1) Whether the Government of Kerala was competent, acting under Section 4 of the Kerala Act, to create a conclusive presumption of law to the effect that a boat not satisfying the requirements prescribed in the order dated June 25, 1990 (First Order) is not capable of bottom-trawling beyond the territorial waters of Kerala?

(2) Whether the First Order is arbitrary and discriminatory? In other words, whether there is no relevant material to support the requirements prescribed in the First Order and whether the said Order brings about an impermissible discrimination between the bottom-trawler's and other fishing vessels?

(3) In case, Question No. 1 is answered in favour of the State whether such a conclusive presumption can be made the basis for confining the bottom-trawlers to the sea-shore for a period of forty four day's specified in the Second Order (Order dated 20th June, 1992) - or by similar orders that may be issued for the ensuing years? Whether such confinement constitutes an unreasonable restriction upon the right guaranteed to the owners/operators of the bottom-trawlers by Article 19(1)(d) of the Constitution of India?

(4) Whether the First Order is inconsistent with the first proviso to Section 5 of the Kerala Act? Whether the said order trenches upon the field reserved to the Union by Entry 57 of List-I?

14. Before we deal with the questions aforesaid, it is necessary to refer briefly to the facts and reasoning in Joseph Antony, a decision rendered by a Bench of this Court comprising P.B. Sawant and R.M. Sahai, JJ. in a dispute of a like nature. That was also a dispute between traditional fishermen and mechanised boat-operators with this difference that the mechanised boats concerned therein were not engaged in bottom-trawling but were using sophisticated nets like purse seines, ring seines, pelagic trawl and mid-water trawl gears. An average purse seine is said to be 400 meters in circumference, covering an area of more than one hectare. It is used mainly for gathering the pelagic (surface) fish. It could and did haul in 600 to 800 tonnes of fish per annum, compared to five tonnes by a country draft. On account of the activities of the said mechanised boats, the fish (sic) by traditional fishermen came down drastically, seriously affecting their livelihood. The judgment at of this Court sets out the particulars of the fall in the annual catch by traditional fishermen and the consequent misery caused to (sic) and their families. Naturally, therefore, it gave rise to (sic) discontent among them. Basing on the expert committee reports the Government of Kerala issued two Notification on 30th November, 1984 under the provisions of the Kerala Act. Under one Notification, the Government 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 Kerala Act. Under 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 catamarans, country crafts and canoes in the territorial waters of the State and further because there was need to preserve law and order in the 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. The Validity of the said Notification was questioned by mechanised boat operators in the Kerala High Court which upheld then-complaint partly. The High Court declared that the Notification in so far as it prohibited the use of purse seine nets beyond 10 Kms. of the territorial waters is not valid and effective - against which judgment, the Kerala Government and the Association of traditional fishermen appealed to this Court. This Court allowed the appeals on the following reasoning:

(i) The expert committee reports, viz., Babu Paul Committee Report, Kalawar Committee Report and had two reports of the Special Officers appointed by the State Government read along with the Central Marine Fisheries Research Institute (CMFRI) Bulletin Nos. 12 and 14 (referred to in the Babu Paul Committee Report) establish that "mechanised nets like the purse seine do an irreparable damage to the existing stock of fish by killing the juvenile fish and fish eggs and by preventing fish breeding". This is apart from the fact that according to the lending figures of 1980-82, while each purse seiner caught 600-800 tonnes fish per annum, the traditional crafts could catch only five tones.

(ii) Over the years while the population of the traditional fishermen has increased by more than 20.8% the average production of each fishermen declined by more than half, which resulted in 98.5% of the fishermen population descending below the poverty line. While the traditional fishermen who constitute 89% of the total fishermen-household caught a negligible proportion of the fish, the mechanised fish gear operators who are very small in number have been taking away the bulk of the catch, viz., more than 92%. This is having a fatal effect upon the lives and economy of the traditional fishermen giving rise to several incidents of breach of law and order.

(iii) The use of mechanised gear in fishing does not lead to any increase in production. On the other hand, they present a real threat of depletion of the stocks. Even in advanced countries like, U.S.A., Norway, Great Britain and Japan, where the number of fishermen engaged in fishing is very small, steps have been taken to restrict fishing by sophisticated gears like the purse seine to avoid destruction and depletion of the pelagic (surface) fish wealth. It is, therefore, necessary to prohibit such mechanised fishing gears 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 the eventual total destruction.

(iv) In all the above circumstances, the Notifications issued by the Government of Kerala prohibiting the use of the said mechanised fishing gears within the territorial waters is perfectly valid and justified and it represents a reasonable restriction within the meaning of Article 19(6) read with and in the light of Article 46 of the Constitution of India.

15. We may now turn to the question arising in these appeals.

16. That the Legislature can create a conclusive presumption of law in appropriate situations does not admit of doubt. So long as the Legislature acts within the sphere allotted to it and does not infringe the provisions in Part-III of the Constitution or the constitutional limitations, if any, the law made by it including the conclusive presumption created by it cannot be questioned. But the

conclusive presumption concerned herein is created not by the Legislature but by the government purporting to act under, Section 4 of the Kerala Act. The question is whether Section 4 empowers the Government to do so. Now, what does the conclusive presumption provided by the First Order say? It says that unless the mechanised boat is of specified length and fitted with engine of specified power and specified Fishing gear, it shall be presumed that it is not capable of bottom-trawling beyond territorial waters. In other words, it shall be presumed conclusively that such a boat is meant for and can operate only within territorial waters. The government also says that if such boats are allowed to go for bottom-trawling beyond territorial waters, it would endanger the lives of the fishermen manning such boats. With a view to ensure safety of life and property of fishermen and to avoid accidents, the government says, it has imposed the said restriction. Moreover - and this is important to note - this is not an independent restriction. It has to be read along with and as supplemental to the other Orders which were issued every year restricting/prohibiting bottom-trawling within territorial waters (specified area) during the monsoon period. Putting it differently, so far as the year 1992 is concerned, the First Order and the Second Order have to be read together and not independently. So read, it is clear that they are perfectly warranted by Section 4 of the Kerala Act. At the same time, we agree that since the said conclusive presumption of law and the restriction created by the First and Second Orders respectively is created by the Government in exercise of the statutory power conferred upon it, it has to answer the test of reasonableness, for the added reason that it affects the fundamental right of the writ petitioners guaranteed by Article 19(1)(g) of the Constitution.

17. It is from the above stand point that we shall proceed to examine the First Order as well as the Second Order. There is no doubt that both the Orders impose restrictions upon the fundamental rights guaranteed to the owners/operators of bottom-trawlers by Article 19(1)(g) of the Constitution. Indeed, according to them, it also violates their right under Article 19(1)(d) as well. We shall proceed on the assumption that they are right in so complaining. It means that the restrictions imposed have to answer the test of reasonableness in Clause (6) as well as Clause (5) of Article 19. Both the said clauses permit reasonable restrictions to be placed upon the respective guaranteed rights "in the interests of general public". That the restrictions contemplated by these clauses can take in a prohibition in appropriate cases was recognised by this Court as far back as 1960. See *Narendra Kumar v. Union of India*. It was held by the Constitution Bench:

It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Article 19(1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction the more the need for strict scrutiny by the Court.

In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the

evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public.

18. While judging the reasonableness of a provision, we may remind ourselves, the court should bear in mind the classical statement in *V.G. Rew v. State of Madras* . It reads:

It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the impositions, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of value of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitutions is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorising the imposition of the restrictions, considered them to be reasonable.

19. It is vehemently contended by Sri G. Ramaswamy, learned Counsel for the respondent-writ petitioners that was no material upon which the Government of Kerala could have created the presumption that the boats with less than the prescribed particulars are not capable of bottom-trawling beyond the territorial waters. He also challenged the underlying presumption that the depth of the sea beyond territorial waters is uniformly beyond 45-50 feet and that therefore the writ petitioners' boats are not capable of bottom- trawling. We do not think that the said contentions are well-founded.

20. In the counter-affidavit filed in the High Court (in O.P. No. 8461 of 1992), the following facts have been stated by the government : the proliferation and indiscriminate operation of the mechanised trawl-net boats along the coastal waters has resulted in large scale decrease of catch for the traditional fishermen who were already below the poverty line; it has also affected adversely the availability of many species of fish which were being traditionally caught by country craft. After referring to the particulars relating to number of mechanised craft, motorised country craft, nonmotorised country crafts and the clashes between them from the year 1976 onwards which necessitated the enactment of Kerala Act in 1980, the counter- affidavit proceeded to state that the Government felt the need to regulated the fishing activities of mechanised boats and for that purpose it appointed various expert committees to suggest ways and measures to be taken in order to conserve marine resources and also for safeguarding the interests of the traditional fishermen; the Babu Paul Committee appointed in 1981 made certain recommendations but the members of the committee were not unanimous in their recommendations; the continual unrest in the traditional sector and the law and order problems compelled the Government to appoint another committee

headed by Sri A.C. Kalawar, an eminent Scientist and Fisheries Adviser, State of Maharashtra in 1984; this committee recommended that the number of trawl-net boats used in Kerala should be reduced from 3500 to 1145; this recommendation was, however, found not feasible and practicable in the circumstances; therefore, the Government appointed yet another committee headed by Prof. N. Balakrishnan Nair; one of the terms of reference of this committee was "to review the steps taken by the Government so far based on the recommendation of the Babu Paul Committee and Kalawar Committee and to assess the adequacy or inadequacy of these steps with a view to recommend further future course of action, if any, with special reference to --

(a) identify the species and areas which are over exploited and to recommend whether there is any need:

(i) to impose total or seasonal ban in respect of exploitation of such species in the areas;

(ii) to impose selective ban on operation of certain types of crafts and gears in respect of such species areas;

(iii) to restrict the number the size of certain types of craft and gear in respect of such species and areas.

(b) Identify species in respect of which and areas where there is scope for more exploitation and recommend suitable types of craft and gear for such purpose.

21. In the "statement by the counsel filed on behalf of the State of Kerala" pursuant to our Order dated April 5, 1994, it is stated further that the Balakrishnan Nair Committee consisted of ten members and that it submitted its report on June 26, 1989. Recommendation No. 5 of the committee was in the following terms:

In the interest of conservation of resources, it is suggested that a total ban be enforced on trawling by all types of vessels in the territorial waters of Kerala during the months of June, July and August. The impact of these measure on the conservation and optimum utilisation of the resources should be examined in detail and be subjected to close scrutiny and review in the next three years....

22. It is stated that Table No. 8 in Chapter-II of the Report set out the characteristics and capacities of the most popular mechanised boats. (The table has been extracted in the Statement.) According to the said table, a boat with 32 feet length and having an engine of 40-45HP is capable of bottom trawling at a depth of about 37 metres (20 fathoms). After the receipt of the said report, it is stated, the State Government consulted the Director, Integrated Fishing Project, Government of India on the requirements and capacity of fishing vessels for operations beyond territorial waters and that the Director submitted to the Government a "Note on the Mechanised Boats of Kerala and their capacity for fishing". A copy of the said Note is appended to the Statement. It would be appropriate to extract the relevant paragraphs from this Note. They read:

(1) Most of the mechanised boats operating along the Kerala coast are 32' or 30'. They are fitted with engine ranging from 48HP to 60HP. These boats are capable of trawling in shallow water only upto 30m. depth. The winch capacity also is limited to that depth. Normally the length of the wire-rope should be about 5 times depth of the water + 10 to 20% wire-rope in excess for meeting the emergency situation.

(2) To operate beyond the territorial water at a depth of 50m. and above, these boats are not suitable, because they must have 50m. of wire-rope and excess of wire-rope in the drum diameter and the wire-rope has to be 10 to 12m. diameter and winch also should have more capacity. The present boats do not have this capacity.

(5) Therefore to operate beyond the territorial waters with the larger otter-boards and the larger net, thicker wire-rope, the engine power should be more than 150BHP.

(6) The power take-off clutch should have more capacity and the winch drum should have more capacity. All these things means that the length of the boat itself should be 43' and above with proper fish hold, higher fuel tank capacity and also higher fresh water capacity.

23. It is on the basis of the above material - it is stated in the Statement by the Government - that it has issued the Notification dated June 25, 1990 (First Order) prescribing specifications of vessel going for bottom-trawling beyond territorial waters. The Statement also refer to the Government's counter-affidavit filed in the High Court in another writ petition (O.P. No. 6245 of 1989) wherein in addition to the above facts it was stated that the depth of the sea beyond territorial waters is more than 45-50 metres. This was said to be clear from the chart of depth zones indicated in the Central Marine Fisheries Research Institute's Publication regarding the Marine Fisheries of Kerala.

24. In addition to the above material, our attention has been invited to certain passages in Chapters 4.12 and 6 of the CMFRI Bulletin 45 referred to hereinbefore. We do not, however, wish to refer to the said material at any length except para 4 of the "suggestions and recommendations" contained in Chapter 6 entitled "Impact of fishing along the west coast of India during southwest monsoon period on the fin fish and shell fish resources and the associated management considerations", contributed by Sri T.S.B.R. James, CMFRI, Cochin. The suggestion/recommendation No. 4 reads thus:

In consideration of the urgent necessity of conservation of the resources and since there is no effective regulatory measure under operation to safeguard the resources in the sea and in the context of improvement of the habitat, it is recommended that bottom trawling during monsoon is allowed strictly only beyond territorial waters all along the west coast. As comprehensive and stringent regulations of monsoon fishery is not possible due to a number of socio-economic and political reasons, total ban of all fishing during monsoon may not be advocated.

25. Even in Chapter 4.12 entitled "Present status of exploitation of fish and shell fish resources - Prawns". The following statement occurs in the Abstract:

As 'karikkadi' is mainly concentrating in the off-shore waters and the trawl proportion of breeding population, shrimp fishing in the deeper waters beyond the 30m. depth line would be advantageous to the fishery during this season.

26. The Abstract also states that "In Kerala, monsoon trawling is mainly targeted for 'Karikkadi' which occupies relatively deeper waters during July-August."

27. The above factual narrative makes it abundantly clear that the specifications prescribed in the First Order are neither arbitrary nor can it be said that they are based on no material. There was enough technical data in support of the said specifications in the shape of reports of the expert committees and the opinions of technically qualified experts in the field. May be, there is some other material which tends to support the case of bottom-trawlers but that makes no difference to the situation. It is for the expert committees and the technical personnel to evaluate all the factors and arrive at a particular conclusion. The Government is entitled to go by their conclusions/recommendations. It would be justified in doing so. It cannot be expected to go on enquiring endlessly even after the receipt of the expert committees' recommendations. In this case, there are three expert committee reports, including the Balakrishnan Nair Committee Report. The Government, evidently to re-assure itself, sought the opinion of Director, Integrated Fishing Project, Government of India, even after the receipt of the Balakrishnan Nair Committee Report. Since the opinion of the Director, I.F.P., concurred with the recommendations of the Balakrishnan Nair Committee Report, the Government accepted the same and issued the First Order. We do not think that the Government can reasonably be called upon to make still further enquiries and investigations before issuing orders of the nature contained in the First Order. The Government was, therefore, justified in prescribing, on the basis of the recommendations aforesaid, that only a boat of 43' length and having an engine of about 160HP alone shall be deemed to be capable of bottom-trawling beyond territorial waters. In other words, the boats of the writ petitioners (with 32 feet length and with an engine of 40 to 60HP) are not capable of bottom-trawling beyond territorial waters. It must also be said the opinion of the Government that the depth of the sea beyond territorial waters is more than 40-50 metres and that the trawl boats of writ petitioners are not capable of bottom-trawling at that depth is equally based upon relevant material and data. So far as the report of the advocate-commissioners relied upon by the writ petitioners is concerned, it only establishes that the petitioner's boats can catch fish beyond territorial waters but does not establish that they can bottom trawl there. This aspect was commented upon by the learned Judge of the Kerala High Court who appointed the said commissioner and also in the judgment under appeal.

28. Both the parties have produced before us certain maps indicating the depth of the sea within territorial waters along the Kerala coast. It is found that the depth of the sea all along the Kerala coast is not uniform. Indeed, it cannot be. At some places, the depth of the sea within territorial waters is only 30-35 metres and in some other places, it is 50 metres or more. In some places, even the depth beyond territorial waters does not exceed 35-40 metres but on an overall basis it can safely be said that the depth of the sea beyond territorial waters is between 40-50 metres. Now, it may be remembered that the writ petitioners' boats are trawl-net boats. They are meant only for bottom trawling. Even according to the written submissions filed by them in this Court, the said boats are not fit for any other purpose and that adapting them to other types of fishing involves huge

expenditure. Once that is so and once we accept that the specifications in the First Order and the conclusive presumption created thereby is well-founded, it follows that the writ petitioners' boats are not capable of bottom-trawling at a depth of more than 38-40 metres - which means that they are meant for bottom-trawling only within territorial waters and not beyond. The Government of Kerala is of the opinion that in the interest of preservation and availability of the fish and to safeguard the economic interests of the weaker sections of the society, viz., traditional fishermen, it is necessary to ban bottom-trawling within territorial waters during the period of about 44 days in a year. Can it be said that it is acting unreasonably? Can it be said that the said temporary ban is not in the interest of general public? We think not. As pointed out by this Court in *Joseph Antony*, Article 46 of the ' Constitution places an obligations upon the State to promote the economic interest of the weaker sections of the society with special care. The traditional fishermen belong undoubtedly to weaker sections of the society. Already they have been driven below the poverty line, mainly on account of the introduction of the mechanised fishing boats. It is equally relevant to notice that this Court has, in *Joseph Antony*, upheld a total ban on use of purse seines, ring seines etc. within territorial waters, whereas in this case, we are concerned with a limited ban, i.e., for a period of forty four days in a year. There can be no doubt about its validity. In the specific conditions obtaining in the Kerala State and having regard to the particulars relating to the number of fishermen and the availability of the fish noticed in *Joseph Antony* the restrictions imposed by impugned orders appears to be perfectly justified. The said restrictions serve twin purposes, viz., assuring the livelihood of the traditional fishermen whose number runs into several lakhs and also to ensure that indiscriminate fishing is not indulged in by these trawl-boats within territorial waters.

29. Sri G. Ramaswamy sought to rely upon certain material suggesting that bottom trawling during monsoon does not have any adverse effect upon the availability of the fish. Firstly, this material is inconsistent with the recommendations of the expert committees and the opinion of the Director, Integrated Fisheries Project, Government of India. Secondly, availability of the fish is only half the story. It does not take into account the State's interest - nay its obligation - in ensuring livelihood to lakhs and lakhs of fishermen engaged in fishing by traditional methods.

30. Sri G. Ramaswamy submitted that the present dispute is between the mechanised boats on one hand and the country-craft on the other and that the right is not really between trawl-boats and the fishermen using canoes and catamarans. We do not know. As at present advised, we are sceptical of the said assertion. But even if that is so, it in no way affects the validity of the impugned orders inasmuch as the material placed before us, including the material considered by this Court in *Joseph Anothony*, clearly shows that there is no comparison between the capacity of mechanised boats of the writ petitioners and the capacity of country craft. The country craft belongs to the traditional sector and it is so recognised by the Kerala Act and the impugned Orders issued thereunder.

31. We are also of the opinion that the Government of Kerala is perfectly justified in adopting the attitude that the public interest cannot be determined only by looking at the quantum of fish caught in a year. In other words, production alone cannot be the basis for determining public interest. The Government is perfectly justified in saying that it is under an obligation to protect the economic interest of the traditional fishermen and to ensure they are not deprived of their slender means of livelihood. Whether one calls it distributive justice or development with a human face, the ultimate



truth is that object of all development is the human being. There can be no development for the sake of development. Priorities ought not to be inverted nor the true perspective lost in the quest for more production. It should also be noticed that bottom-trawling is not being prohibited altogether. It is being prohibited only during the monsoon period, i.e., about a period of forty four days in a year. If there are boats which are capable of bottom-trawling beyond territorial waters, they are free to go beyond territorial waters and fish there, but the writ petitioners' boats which are not capable of bottom trawling beyond territorial waters cannot be allowed to indulge in bottom trawling within territorial waters, under the excuse, or guise, of going beyond territorial waters or in the name of 'innocent passage', relying upon the provisos to Section 5 of the Kerala Act. The State Government acting under Section 4 of the Kerala Act is not only competent to impose the aforesaid limited restriction/ban but also to prescribe measures to ensure due implementation of the said restriction and to ensure against its violation. The requirements prescribed in the First Order are designed precisely to ensure the said object and cannot be faulted on any ground. It would be wrong to look at it as prohibiting 'innocent passage' assured by the first proviso to Section 5 or as interfering with the freedom of movement. The question is innocent passage to where? Movement for what purpose? Once it is held that the writ petitioners' boats are not capable of bottom-trawling beyond territorial waters, why do they want to go there? They are not pleasure boats. Their only purpose is to bottom-trawl, and if they are not capable of bottom trawling at a depth of more than 40 metres, why are they going beyond territorial waters where the depth of the sea is more than 40 metres. One can easily see through the game. The plea of innocent passage appears to be merely a ruse. They evidently want to bottom-trawl within territorial waters. It is for this reason that they are asked to remain shore-bound during the said ban period. The first proviso to Section 5 does not avail such boats but those bigger boats which are capable of bottom-trawling beyond territorial waters as prescribed in the First Order. The argument that if they indulge in any violations, they can always be checked, caught and prosecuted is no answer, having regard to the vast area involved. It is not practicable. The cost of an effective supervision would be prohibitive. It would not be in the interest of general public. Since the reasonableness of the restriction has to be judged on the touch-stone of general public interest, whether under Clause (5) or Clause (6) of Article 19 of the Constitution, the above considerations (cost and practicability) are not irrelevant. In the circumstances, the temporary ban cannot be said to be either excessive, disproportionate or over-board. We are also unable to see in what manner can the impugned orders be said to travel beyond the purview or purposes of the Act. Except urging the said submission, no attempt was made to substantiate it.

32. We are, therefore, satisfied that in the facts and circumstances of the case, the two impugned Orders issued under Section 4 of the Kerala Act cannot be said to be illegal or invalid for any of the reasons suggested. The appeals are accordingly allowed. The orders of the Kerala High Court under appeal are set aside.

33. No order as to costs.

1. The reference obviously is to orders issued in the preceding years prohibiting bottom-trawling during monsoon months within territorial waters.