

India -- Thiruvamkulam Nature Lovers Movement v. Plantation Corporation of Kerala (2002.08.12) (banning aerial spray of endosulfan)

08/12/2002

IN THE HIGH COURT OF KERALA

Thiruvamkulam Nature Lovers Movement

v.

Plantation Corporation of Kerala

O.P. Nos. 20716/2002, 17026/2002, 16300/2002 & 29371 of 2001

8.12.2002

ORDER

Srikrishna. C.J.

O.P. Nos. 20716 and 17026 of 2002 admitted.
Resopndents waive service through respective counsel.

1. In all these original Petitions the question raised is whether a pesticided known as ENDOSULFAN by its generic name having different trade names should be prohibited from being sprayed on agricultural crops.

2. ENDOSULFAN was registered under the provisions of the Insecticides Act sometime in the year 1968 and has been extensively used there after. As required under the provisions of the Insecticide Act, 1968 and the Insecticides Rules 1971, extensive tests were carried out before it was registered and permitted to be used. There have been persistent media reports about the toxicity of this particular pesticide. There have been repeated complaints made that ENDOSULFAN has known effects of reproductive toxicity, Genotoxicity, Carcinogenicity, and endocrinal disruption. Debate as to the toxicity and deleterious effects of ENDOSULFAN has been carried on in media nd scientific journals for quite sometime. Recently, there was a hue and cry made by media with regard to the deleterious effects caused by aerial spraying of ENDOSULFAN by the Plantation Corporation of Kerala in its cashew estates in the Kasaragod District. In response to the public outcry, the District Collector of the area banned the use of ENDOSULFAN by aerial spraying by exercising powers under Section 133 of the Cr. P.C.. The State Government appointed an expert committee consisting of Dr. A. Achuthan, a known environmentalist, L. Sundaresan, Senior Additional Director of Agriculture, Dr. K.P. Aravindan, Associate Professor of Pathology, Dr. Abdul Salam, Associate Professor and Head of Cashew Research Station, and Dr. Samuel Mathew, Associate Professor, Kerala Agricultural University. The Committee headed by Dr. A. Achuthan made extensive study and has also recorded statements for several representatives of the N.G.O.s, Government Officers, and had made spot study. It also

considered the report made by the Centre for Science and Environment and made a report on 22nd November, 2001. While the report reiterates the known toxicity of ENDOSULFAN, the focus appears to have been to identify if ENDOSULFAN is the culprit for the reported health problems experienced by the villagers in Padre Village and its surroundings. Even on this issue, the report of Dr. A. Achuthan Committee appears to be inconclusive in as much as it states: "there are reports of health problems from three Panchayath adjacent to the plantations. There is no direct evidence to attribute these directly to endosulfan pollution; but there is no evidence to completely deny it."

3. While this was the state of affairs, the National Human Rights Commission suo motu intervened in the matter in response to the report entitled "Spray of Misery published in India Today, in its issue dated 23rd July, 2001 and asked a number of agencies including the Indian Council Medical Research (ICMR), to submit a report within four weeks. At the request of the Director of ICMR, a team of experts from the National Institute of Occupational Health (NIOH) visited the affected areas, collected information and submitted its report to the National Human Rights Commission. There has been severe criticism of the methodology of the study carried out and the conclusions drawn by the CSE, National Institute of Occupational Health and the Frederic Institute of Plant Protection and Toxicology (FIPPAT). However, the Government of India being concerned in the matter, referred the matter to the Registration Committee constituted under the Insecticides Act for review of the continued registration of ENDOSULFAN. The Committee has Dr. O.P. Dubey to study the matter in depth and make its report, keeping all the aspects in mind. This Committee is currently examining the matter and had even proposed a visit to the concerned area in the State of Kerala sometime in July, but for some reasons the visit has been postponed.

4. In response to public demand, the State of Kerala, totally banned the use of ENDOSULFAN by an order of the Government, dated 25-8-2001. In the meanwhile, the Pesticide Manufacturers and Formulators Association of India moved O.P. No. 29371 of 2001 in this court and sought quashing of the said Government Order. In CMP. No. 62352/2001 in this O.P., one of us (Sivarajan, J.) directed that, if the Government has already received the report of the expert committee of Dr. Achuthan, they should take a decision without delay keeping in mind the provisions of Section 27 of the Insecticides Act. Pursuant to this order, the State Government reconsidered the matter and made an order dated 18th February, 2002(Ext.P12 in O.P. No.20716 of 2002), wherein, after considering the provisions of the Insecticides Act, the Government gave the following directives:-

" (a) Aerial spraying of the endosulfan will continue to be prohibited for all crops in Kerala considering the difficulties in a hearing to conditions for safe aerial application of the insecticide in Kerala terrain.

1. Perla division of PCK (covering Padre and Muliya Village, Kasaragod District) will observe a pesticide holiday for a period of five years.

2. PCK will undertake only ground based spraying of pesticides in their cashew

plantation after following due safeguards for prevention of contamination of water bodies in accordance with the package of practices recommended by Kerala Agricultural University.

3. All spraying operations of PCK in its cashew plantations will be carried out under the direct technical supervision of a joint Kerala Agricultural University-PCK Expert Group. This group will provide technical guidance regarding plant protection operations in PCK cashew estates, recommend the pesticides to be used in accordance with the recommended package of practices, prescribe the modalities of application and monitor the spraying operations conducted by the PCK. It will ensure that health safeguards for workers engaged in application and for nearby inhabitants are strictly complied with. PCK will provide necessary logistic support for the Expert Group to carry out these functions.

4. A small Cashew Research Unit will be set up by the Kerala Agricultural University in the PCK plantation at Perla utilizing the infrastructure available with PCK. The mandate of the Unit would be to evolve appropriate plant protection strategies, assess the impact of application or non-application of pesticides and identify appropriate cashew varieties and technologies in the region. Government will provide assistance of Rs. 3 lakhs for the operation of this Unit from the existing cashew development scheme of the State Government.

5. In the light of the above decisions the prohibition on the use of ENDOSULFAN for all crops and plantations in Kerala, issued vide order read as 2nd paper above will be withdrawn."

Petitioners in O.P. No. 16300/2001, 17026/2002 and 20716/2002 are dissatisfied with the order made by the State Government and seek a permanent total ban on the use of ENDOSULFAN anywhere in the State of Kerala.

5. We have extensively heard the counsel for the petitioners in O.P. Nos.16300/2001,17026/2002 and 20716/2002 and also the petitioner in O.P. No. 29371/2001. Learned Counsel Mr. Mohammed Youseff for the petitioner in O.P. No. 29371/01 strongly opposes any interim order on the ground that it will amount to a stigma on ENDOSULFAN which is being used all over the world by reason of its adverse publicity. He also contends that balance of convenience lies in favour of not granting even an interim order.

6. Both sides have placed on record copious technical literature and attempted to persuade us to their respective points of view. After perusing all the scientific and technical literature, we are of the view that, in a situation like this, it is not the function of this Court to decide an issue which is essentially a matter for Technical experts to decide. We notice that there is a difference of opinion within the scientific community itself as to the toxicity of ENDOSULFAN. In any event, the Central Government has already appointed a body of experts to advise it on the review of registration of ENDOSULFAN, which today is a permitted insecticide under the Insecticides Act. The said expert

committee is yet to make a studied report which will be considered by the Central Government before appropriate action is taken under the Insecticide Act. In these circumstances, it appears to us that making an order to prohibit permanently the usage of ENDOSULFAN would be improper.

7. It is contended for the petitioners in O.P. Nos. 16300/2001, 17026/2002 and 20716/2002 that the Government Order dated 18-2-2002 issued by the Government of Kerala is virtually an admission of the toxic effects of aerial spraying ENDOSULFAN. Not only does the Government Order prohibit totally the aerial spraying of ENDOSULFAN all over the State of Kerala, it also directs the Plantation Corporation of Kerala to declare a five year pesticide holiday in the Perla Division. Counsel for these petitioners contend that, if the Government was satisfied about the harmful effect of usage of ENDOSULFAN in Kasaragod District, there is no reason why it should not be considered harmful in other areas also. Hence, they press for a permanent total ban on its usage all over the State. For the petitioner in O.P. No. 29371 of 2001 (Pesticides Manufacturers and Formulators Association of India), it is contended that, without clinching evidence as to the toxicity of ENDOSULFAN banning its use in writ jurisdiction would cause incalculable harm. A powerful pesticide which has gained wide currency and acceptability, and has proved its usefulness, would be put out of use, exposing vital agricultural crops to the danger of pests and insects.

8. Mr. Rajendran Nair, for the petitioner in O.P. No. 17026/2002 brought to our attention, the judgement given by State Council, Court of Justice of the Administrative Contentious First Section, Bogota D.C. 23rd March, 2001 the result of which is to prohibit the use of ENDOSULFAN totally. He also drew our attention to the fact that though the World Health Organization has categorized ENDOSULFAN as "moderate to highly toxic", the United States Environmental Protection Agency has classified it as "highly toxic". Even under Rule 19 of the Insecticides Rule 1971, this substance has been declared to be highly toxic.

9. At this point, we are not in a position to impose a permanent total ban on the sale and distribution of ENDOSULFAN when the expert committee appointed by the central Government is still seized of the problem. We are therefore, left with the question as to what should be done during the interregnum till the experts committee decides the issue. There are two options open:- (1) to impose a temporary ban on the sale and distribution of ENDOSULFAN within the State of Kerala pending decision of the Central Government; (ii) to permit the use of ENDOSULFAN without restriction during the aforesaid period.

10. After anxious soul-searching, we have reached the conclusion that between the two alternatives, we must err on the safer side and choose the alternative which has less dangerous implications. If, ultimately, it is proved that ENDOSULFAN is an innocuous substance, not toxic and dangerous to human life and health, prohibiting its sale and distribution for a few months may perhaps result in nothing more than economic loss to the manufacturers. It is not as if the agricultural production in this country would come to a stand still if ENDOSULFAN is not used. There are several other insecticides which are

registered under the Insecticides Act which could be used with equal efficiency. On the other hand, if it turns out that it is a toxic substance and its continued use has adverse effects on human health and life and environment, we would have endangered life and health of the citizens. We have, therefore, decided to choose the lesser evil and, purely as a precautionary measure, to impose a temporary ban on the use of ENDOSULFAN within the State pending the decision of the Central Government on consideration of the report of the expert committee appointed by it. We hope that the Central Government will expedite its decision.

11. In the result, we make the following order:-

1. Pending further decision by the Central Government in the light of the advice tendered to it by the expert committee appointed to consider the hazards of ENDOSULFAN, the use of ENDOSULFAN, or any of its formulations under any of the trade names, shall not be permitted within the State until further orders with liberty to the parties to move for modification of this order in the light of the report of the expert committee and the decision taken by the Central Government in the matter.

2. We make it clear that we have not passed the above interim order by holding that ENDOSULFAN is inherently dangerous, but purely as a precautionary and defensive measure, as, in our view, balance of convenience lie in granting interim prohibitory order during the period when the matter is pending consideration before the Central Government.

3. Mr. Mohammed Yousuff, requests us that this order may be stayed to enable his client to move the Supreme Court. Request declined.

Handover, to both sides.

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