

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NOS. 33 AND 46 OF 2021

CRIMINAL WRIT PETITION NO. 33 OF 2021

Goa State Pollution Control Board, Rep. By its
Member Secretary Dr. Sharmila Monteiro, ... Petitioner
having office at near Pilern Industrial Estate,
Opp. Saligao Seminary, Saligao, Bardez, Goa.

Versus

1. M/s. South West Port Ltd., 1st Floor, Port
Users Complex, Margao, Goa. Represented by
Shri Adivappa C. Kamble, major in age, Unit
Head, Mormugao Harbor-Goa.
2. Shri Shri Adivappa C. Kamble, major in
age, Unit Head, M/s. South West Port Limited,
1st Floor, Port Users Complex, Margao, Goa.
3. Shri Vithal Jadhav, major in age, Safety
Manager, M/s. South West Port Limited, 1st
Floor, Port Users Complex, Margao, Goa. ... Respondents

AND

CRIMINAL WRIT PETITION NO. 46 OF 2021

Goa State Pollution Control Board,
Represented by its Member Secretary Dr.
Sharmila Monteiro, having office at near

Pilern Industrial Estate, Opp. Saligao ... Petitioner
Seminary, Saligao, Bardez, Goa.

Versus

1. Shri Adivappa C. Kamble, major in age,
Unit Head, M/s. South West Port Limited, 1st
Floor, Port Users Complex, Margao, Goa.

JSW Dharamtar Port Ltd, Alibag-Mumbai
Road, Post Dovli, Taluka Pen. District Raigad,
Maharashtra 402107.

2. M/s. South West Port Ltd., 1st Floor, Port
Users Complex, Margao, Goa. Represented by
Shri Adivappa C. Kamble, major in age, Unit
Head, Mormugao Harbor-Goa.

3. Shri Vithal Jadhav, major in age, Safety
Manager, M/s. South West Port Limited, 1st
Floor, Port Users Complex, Margao, Goa. JSW
Jaigad Port Ltd, Sakhar Mohalla, Post Jaigad,
Maharashtra 415614.

...Respondents

Mr. J. Godinho, Advocate, with *Mr. S. Jalmi, Advocate for the
Petitioner in WPCR Nos. 33 and 46.*

Mr. S. S. Kantak, Senior Advocate with *Mr. A. Gosavi, Mr. A. Naik
and Mr. K. Simoes, Advocates for the Respondent nos. 1 and 2 in
WPCR Nos. 33 and 46 of 2021.*

CORAM: SANDEEP K. SHINDE, J.
RESERVED ON: 13th JULY 2022
PRONOUNCED ON: 21st JULY 2022

JUDGMENT

1. Heard learned Counsel for the parties.
2. Rule. Rule made returnable forthwith with the consent of the parties. Learned Counsel appearing for the Respondents, waive notice.
3. In a complaint instituted by the member-secretary, of Goa State Pollution Control Board (GSPCB) under Section 200 of Code of Criminal Procedure (Cr.P.C.) read with Section 43 of Air (Prevention and Control of Pollution) Act, 1981, (*Act*, for short) (*complaint* for short), learned Judicial Magistrate First Class 'A' Court, Vasco da Gama, 'issued process', against the respondents-accused under Section 21(5)(v) and 31 (A)(i). punishable under Section 37(1) read with Section 39 of the said Act.
4. In revision, the learned Sessions Judge South Goa, quashed and set aside the order 'issue process'. Thus, aggrieved, GSPCB has questioned the correctness of that order in this Petition.

BACKGROUND FACTS :

5. In the case at hand, subject complaint was filed by the member-secretary, consistent with powers delegated, to him by the GSPCB in its' meeting held on 29th June 2016. Complaint states, that the accused no.1 Company, had handled material coal at berth no. 5a and 6a for the year 2012-13 2013-14, 2014-15 and 2015-16, in excess of quantity material, thereby violating the terms and conditions of consent to operate and committed offences under Section 21(5)(v) and 31(A)(i) punishable under Section 37(1) read with Section 39 of the Act of 1981 on verification of complaint. The learned Magistrate issued process on 5th April 2018 against the accused-respondents therein.

6. The respondents-accused, questioned the correctness of the order 'issue process', in revision, wherein they raised two preliminary issues; (i) that, order 'issue process', does not reflect or show application of mind by the learned Magistrate. Much less, it was cryptic and for want of reasons, the order was not sustainable; and (ii) that the powers delegated by the State Board to the member-secretary purported to be under Section 15 read with Section 43 of the said Act, were limited to presenting the complaint. Submission of

Respondents was that there is marked difference between, 'Power to Present complaint' and 'Power to file complaint'. Later, power includes power to prosecute or power to decide to prosecute. As against which power to present complaint, is a step to further the decision to prosecute. To put it in other words, according to the Respondents, power to prosecute or decision to prosecute for alleged contravention of the provisions of the Act, are exclusive powers of the board which were neither delegated to the member-secretary nor State Board could delegate such powers to the member-secretary. Therefore, in absence of the decision of the board to prosecute the Companies and its officers, Magistrate could not have issued the process.

7. Insofar as the cognizance of offences committed under the said Act is concerned, Section 43 mandates that no Court shall take cognizance of any offence under this Act except on a complaint made by –

(a) a Board or any officer authorized in this behalf by it; or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a

complaint to the Board or officer authorised as aforesaid.

8. Mr. S. S. Kantak, learned Senior Counsel appearing for the Respondents, submitted that the State Board alone, is empowered to take decision, whether to prosecute the company or not, for contravention of provisions of the said Act, and who, at the time of offence, was directly in charge of and was responsible to the company for the conduct of business, as to proceed against him. Mr. Kantak, learned Senior Counsel submitted, that this power of the Board could be read in to clause (f) read with (j) of sub-section (1) of Section 17 of the Act which, empowers the Board to do such things and to perform such other acts as it may think necessary for discharge of its function and generally for the purposes of carrying into effect the purposes of the Act. Mr. Kantak, learned Senior Counsel, submitted that the resolution of the State Board dated 29th June 2016, simply empowered the member-secretary to, present the complaint to the Court, and nothing more. To express differently, according to Mr. Kantak, decision to prosecute the company and/or its officer, is prerogative of the State Board. That being the scheme of the Act, unless Board's decision/resolution to prosecute the company or its' officer for alleged contravention of the provisions of the Act, forms a

part of the complaint and/or such a decision is referred to therein or produced along with the complaint, plainly empowering the member-secretary, to make present complaint, would not constitute 'complaint'. In the support of this submission, Mr. Kantak, learned Senior Counsel, relied on paragraph 5 of the judgment of the Supreme Court in the case of ***P. Pramila & Ors. vs. State of Karnataka & anr.***¹, which reads as under :

“5. Our attention has been pointedly invited to sub-section (1) of Section 43 of the Air Act. Having perused the same, there cannot be any doubt, that when the authorities decided to initiate proceedings under the provisions of the Air Act, the complaint could have been made either by the Board or by an Officer authorised by the Board. The question which has to be adjudicated upon (as has been raised by the appellants), was whether, the complaint in furtherance of which Ccs Nos. 546-49 of 2006 had been filed by the Board or an officer authorised by the Board. To be valid, in terms of the mandate of Section 43(1) of the Air Act, it ought to be filed either by the Board or by an officer authorised by the Board.” (emphasis supplied)

¹ (2015) 17 SCC 651

9. Mr. Kantak, learned Senior Counsel, further relied on the judgment of the Karnataka High Court in the case of *M/s. Puravankara Projects Ltd. vs. Karnataka State Pollution*². In this case, complaint was filed by the State Pollution Control Board, before the Magistrate, that the company engaged in the construction of the residential complex without obtaining necessary consent from the Board, as required by Sections 25 and 26 of the Water, (Prevention and Control of Pollution) Act, 1974, and as required by Environmental Impact Assessment Notification dated 27.01.1994. The said company, inspite of notice/letters, failed to apply for clearance. Whereupon the complaint was filed by the State Board. The Magistrate took cognizance of offences alleged in the complaint. On coming to know of the same, company presented the Writ Petition before the High Court, seeking to quash the complaint, *inter alia*, on the ground that, even if allegations made in the complaint and the documents furnished along with the complaint are taken on their face value, they do not constitute commission of offence alleged. It appears upon perusal of the original records, secured from the jurisdictional Magistrate indicated that along with complaint, no material was produced to show that the Board had passed any resolution to lodge a complaint. (emphasis supplied). The complaint

² Criminal Petition No. 5205/2008

in the said case was signed by the Environmental Officer of the State Pollution Control Board as per the authorization to file a complaint. However, the authorization did not relate to offences either under Water Act or under the Air Act. Thus, held that there was no proper authorization to file a complaint on the allegation under Water Act and the Air Act.

10. The next Judgment relied upon by Mr. Kantak, was the case of *S.M. Dubash, Indian Lead Pvt. Ltd. & Ors. vs. V. M. Bhosale, Air Pollution Cont. Officer & Ors.*³ 1996(2) Mh.LJ 312. In this case, it was held that,

“..... It is the Board alone which has to take a decision as to who amongst the Directors of the Company and who amongst the Officers of the Company are responsible for the alleged violation of the Act.”

In the said case, it was found that the Board had not passed any resolution and had not taken any decision to prosecute any of the Directors or the Officers of the Company. In that view of the matter, it was held therein that question as to who are responsible and who

³ 1996 (2) Mh.LJ. 312

are liable on behalf of the Company has to be decided by the Board and the Board alone, and it cannot be decided by any Officer of the Board as to who should be prosecuted.

Mr. Kantak, therefore, submitted that the decision/resolution of the State Board to prosecute the Respondent-company and/or its Officer, was indispensable document, in absence of which, Magistrate could not have issued the process. In this way, Mr. Kantak, supported the impugned Judgment.

11. Mr. Joaquim Godinho, appearing for the Petitioner, submitted that the Board in its meeting held on 29th June 2016, in exercise of its powers under Section 15 of the Act, delegated powers to member-secretary for making complaint to the Court under Section 43 of Act of 1981. According to Mr. Joaquim Godinho, learned Advocate for the Petitioner, resolution dated 29th June, 2016, sufficiently empowers the member-secretary to file the complaint and, therefore, the cognizance taken by the learned Magistrate cannot be faulted with. Learned Counsel submitted that, at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and is only to

prima facie satisfy whether there are sufficient grounds for proceedings against the accused.

In support of this submission, reliance was placed on the judgment of the Supreme Court in the case of ***U. P. Pollution Control Board vs. Dr. Bhupendra Kumar Modi & anr.***⁴. In the said case, State Pollution Board, granted conditional consent to accused-Company to discharge their trade effluent in River Sai. Since conditions of the consent were not being complied with, the Board through its Officer, filed a complaint against the Company as well as Chairman, Vice Chairman, Managing Director, Joint Managing Director, Directors, General Manager, Commercial Manager and Company Secretary of the said Company before the Chief Judicial Magistrate Raebareli. It was specifically mentioned in the complaint that aforesaid persons were responsible for the conduct of the business of the Company and for their monetary benefits continued to discharge noxious and polluting trade effluent of the Company without complying with conditions of consent and mandatory provisions of law. The accused-Company, instituted a Petition under Section 482 of Cr.P.C., wherein it was alleged that first respondent Dr. Bhupendra Kumar Modi, Joint Managing Director, was not concerned with day to day business of

⁴ (2009) 2 SCC 147

the Company and cannot be prosecuted for offence committed by the Company and hence it was prayed that complaint filed by the aforesaid Board be quashed. In counter affidavit, the Board stated that the complaint could not be quashed at an initial stage or whether a person is responsible for conduct of day to day business of the Company or not, is a question which has to be decided by evidence. In context of these facts, in the said case it was held, that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint and he is only to *prima facie* satisfy whether there are sufficient grounds for proceedings against the accused. In my view, the facts in the cited case and the ratio laid down therein has no application to the facts of the case at hand.

12. The next Judgment relied on by Mr. Joaquim Godinho, learned Counsel for the Respondent, was in the case of *P. Pramila & Ors. vs. State of Karnataka & anr.*⁵ In the said case, it was held that State Board could delegate powers to Chairman of Board because Section 43(1) of the Air Pollution Act, authorizes Board to do so. However, the Chairman of the Board could not have further delegated the authority vested in him to file complaint for taking cognizance of offences under the Act. In the context of these facts, the Apex Court

⁵ 2015 ALL MR (Cri) 2015 (S.C.)

directed to re-initiate the proceedings under Section 43(1) of the Air Act. Taking cue from the directions to re-initiate proceedings, Mr. Joaquim Godinho, argued simply because decision of the Board had not been produced, on such a technical ground, the learned Sessions Judge could not have dismissed the complaint. Mr Joaquim Godinho submitted that it would be travesty of justice if complainant is non suited for technical reason which does not go to the root of the matter.

13. I have carefully considered the submissions of the learned Counsel appearing for the parties and relevant provisions of the said Act.

14. The State Goa Pollution Control Board, is body corporate within the meaning of Section 5(3) of the Air Act 1981, having perpetual succession and a common seal with power, subject to provisions of the Act, to acquire and dispose of property by the said name, sue or be sued. Section 5(2) contemplates, constitution of the Board; whereas under Section 17, functions of the Board are enumerated. The clause (f) read with clause (j) of sub-section (1) of Section 17, empowers the State Board, to do such other things and to perform such other acts, as it may think necessary for proper discharge of its functions and

generally for the purpose of carrying into effect the purposes of this Act. Reading these powers conjointly, it leads to infer and hold that 'decision', to prosecute the company or its officers, for contravening the provisions of the Act, is power of the State Board alone, to be taken by its' members having a special knowledge or practical experience in respect of matters relating to Environmental Protection. Thus, in the backdrop of the scheme of the Act, before initiating or prosecuting a Company or its Officers, the Board is obliged through its Chairman/Members having special knowledge, and experience in respect to matters relating to environmental protection, to take the decision, either by passing a resolution or otherwise. Once such decision is taken, power to present or make a complaint, could be delegated to the member-secretary in accordance of Section 15 of the Act, and not otherwise.

15. In the case at hand, admittedly, neither the complaint makes reference to the decision of the State Board, having had been taken to prosecute the Company and/or its Officers, nor such resolution or decision was produced before the learned Magistrate or before this Court. What was relied on by the Petitioners in support their case is, the resolution of the State Board passed in meeting held on 29th June 2016, whereby, vide Agenda item no.12, powers were delegated to

member–secretary for making the complaint under Section 43 of the Air Act and nothing more.

16. Thus, having regard to facts of the case, in absence of a resolution and/or decision by the Board to prosecute the respondents, the learned Magistrate could not have issued any process against them. As such, in my view, the non production of the resolution and/or decision of the Board to prosecute the Company and/or its officers, is a material defect which goes to the root of the matter and therefore it was not curable. Complaint presented by member–secretary, therefor fails.

17. For all the above stated reasons, the impugned judgment calls for no interference.

18. As a result, the Petitions are dismissed with no order as to costs.

SANDEEP K. SHINDE, J

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