
(1995) 09 GUJ CK 0046
In the Gujarat High Court

Dahyabhai Kalubhai Solanki

APPELLANT

Vs

Devine Intermediates and Chemicals and Others

RESPONDENT

Date of Decision : 04-09-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378(4)

Evidence Act, 1872 — Section 114

Gujarat Water (Prevention and Control of Pollution) Rules, 1976 — Rule 27

Water (Prevention and Control of Pollution) Act, 1974 — Section 43, 43, 44, 44

Citation : (1996) 1 GLR 729

Hon'ble Judges : D.G. Karia, J

Bench : Single Bench

Judgement

D.G. Karia, J.—Gujarat Pollution Control Board at Gandhinagar has preferred the present appeal through its Law Officer u/s 378(4) of the Code of Criminal Procedure, 1973, against the judgment and order of acquittal rendered in Criminal Case No. 1193 of 1989 whereby the learned Chief Metropolitan Magistrate, Ahmedabad, under his order dated March 17, 1993, acquitted the respondents-accused of the offences punishable under Sections 43 and 44 of the Water (Prevention and Control of Pollution) Act, 1974, hereinafter referred to as "the said Act".

2. The respondent Nos. 2 to 4 are the partners of Divine Intermediates and Chemicals, situated at Vatva in Ahmedabad. The respondent-firm has been manufacturing black chemicals in process of which different types of chemicals and water are being used. It is alleged that the respondent-Industry discharged trade effluent without purifying it, in the open gutter of G.I.D.C, ultimately flowing in the River Khari at village Vinzol and thereby polluting the water of the said river. A complaint was, therefore, lodged against the respondents-accused for the offences under Sections 43 and 44 of the said Act. It is also the prosecution case that the accused No. 1-firm had applied for the consent under the provisions of the said Act, for discharge of the effluent from its unit, which came to be rejected by the complainant-Board under its letter dated February

16, 1987, a copy of which is produced at Exh. 7. On August 4, 1988, the authorised officers of the complainant-Board visited the factory-unit of the accused No. 1 and the accused No. 2, Ashok S. Maharaj, was present at that time. He was served with the notice of entry and inspection u/s 23 of the said Act, as per Exh. 14. A notice dated August 4, 1988 (Exh. 15) was also served on the accused No. 1 expressing the intention of collection and analysis of the samples u/s 21(3)(b) of the said Act. By Exh. 16 of even date, the accused No. 2 declared that they were not interested in getting samples analysed by Government Analyst.

3. The learned Metropolitan Magistrate, having recorded the evidence of the complainant, Dahyabhai Kalubhai Solanki, and P.W. 2, Pradip Kishorsinh Gohil, and on appreciation of the other documentary evidence on record, came to the conclusion, by his impugned judgment, that the complainant had failed to prove its case beyond reasonable doubt and the respondents-accused were ordered to be discharged, for the offences under Sections 43 and 44 of the said Act. It is against this acquittal order that the complainant has filed this appeal.

4. Mr. B.R. Gupta, learned Advocate appearing for the appellant-Board, vehemently contended that the learned Magistrate has committed error of law in reading and applying Section 21 of the said Act. The learned Magistrate has observed that the sample of the said effluent was required to be divided in two parts, as contemplated in Clause (b) of Sub-section (3) of Section 21 of the said Act. According to the learned Magistrate, the accused No. 2 expressed his intention for not getting the sample examined by the Government Analyst as per Exh. 16 would not mean that he opted for not dividing the sample in two parts, as is required u/s 21(3)(b) of the said Act. In this connection, Mr. Gupta submitted that Sub-section (5) of Section 21 of the said Act is to be taken notice of, wherein it is provided that when a sample of any sewage or trade effluent is taken for analysis under Sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under Clause (a) of Sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Clause (b) of Sub-section (3), then the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory.

5. In order to appreciate and deal with the aforesaid contention of Mr. Gupta, it would be necessary to scan the provisions of Section 21 of the said Act, which read as under:

21. Power to take samples of effluents and procedure to be followed in connection therewith:

(1) A State Board or any officer empowered by it in this behalf shall have power to take for the purpose of analysis samples of water from any stream or well or

samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into such stream or well.

(2) The result of any analysis of a sample of any sewage or trade effluent taken under Sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of Sub-sections (3), (4) and (5) are complied with.

(3) Subject to the provisions of Sub-sections (4) and (5), when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis under Sub-section (1), the person taking the sample shall

(a) serve on the person in charge of, or having control over, the plant or vessel, or in occupation of the place (which person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed of his intention to have it so analysed.

(b) in the presence of the occupier or his agent, divide the sample into two parts;

xxx xxx xxx xxx

(5) When a sample of any sewage or trade effluent is taken for analysis under Sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under Clause (a) of Sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Clause (b) of Sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in Sub-clause (i) or Sub-clause (ii), as the case may be, of Clause (d) of Sub-section (3).

The aforesaid provision of Section 21 of the said Act is with regard to "Power to take samples of effluents and procedure to be followed in connection therewith". Sub-section (1) of the Section 21 of the said Act incorporates the powers of the State Board or any officer empowered by it to collect samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from or over any place into any such stream or well. Sub-section (2) of Section 21 contemplates that the result of any analysis of a sample of any sewage or trade effluent taken under Sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of Sub-section (3), (4) and (5) are complied with. The sample of any sewage or trade effluent is to be collected as per Sub-section (3) of Section 21. However, the said Sub-section would be subject to the provisions of Sub-section (4) and (5) of Section 21 of the said Act. It is true that the concerned officer is required to divide the sample into two parts in the presence of the occupier or his agent, as laid down in Clause (b) of Sub-section (3) of Section 21. However, that would be subject to the provisions of Sub-sections (4) and (5). As laid down in Sub-section

(5), the occupier or the agent who would be present at the time of taking sample has to make a request for dividing the sample into two parts and on failure to do so, the concerned officer collecting the sample, shall place the sample in a container. In the instant case, the accused No. 2 specifically expressed his opinion that he did not desire to get the sample examined by the Laboratory of his choice. It is true that it is not specifically mentioned in his letter at Exh. 16 that the sample may not be divided in two parts. However, the sample is to be divided in two parts, only when the occupier is to examine the sample in the Laboratory of his choice. Therefore, on a conjoint reading of Section 21(3)(b) and Section 21(5), the net effect would be that the sample is to be divided in two parts when it is so expressed by the occupier or agent who is present at the time of taking such sample. Admittedly the accused No. 2, who was present at the time of collecting the sample, did not make any such request for dividing the sample into two parts. In the facts of the case, the learned Metropolitan Magistrate is, therefore, not right in holding that the sample was required to be divided in two parts as required u/s 21(3)(b) of the said Act. Mr. Gupta is, therefore, right in contending that the learned Metropolitan Magistrate did not consider Sub-section (5) of Section 21 of the said Act in its proper perspective and particularly read with the aforesaid Clause (b). The contention of Mr. Joshipura, learned Advocate appearing for the respondents-accused, that it was not brought to the notice of the accused No. 2 that he was required to express if the sample was to be divided into two parts cannot be accepted, in as much as the procedure for taking sample is to be followed as per the provisions of Sub-sections (3), (4) and (5) of Section 21 of the said Act.

6. Mr. Gupta, in support of his submission, has relied on the decision of Dahyabhai Kalubhai Solanki Vs. Kashiram Textiles Mills Pvt. Ltd. and Others, , wherein it is laid down that for the purpose of compliance of Section 21(2) of the Act there must be substantial compliance of the provisions of Sub-sections (3), (4) and (5) of the Act. It is important to look at Sub-section (5) of Section 21, which inter alia provides that when a sample of any sewage or trade effluent is taken for analysis under Sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under Clause (a) of Sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Clause (b) of Sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample.

7. The aforesaid ratio, followed in the judgment rendered in Criminal Revision Application Nos. 227 to 280 of 1994 and 282 to 286 of 1994, decided on April 6, 1994, by Justice K.J. Vaidya of this Court, will squarely be applicable to the instant case, as on perusal of the materials on record, it appears that the attention of the learned Metropolitan Magistrate was not invited to the provisions of Section 21(5) of the said Act. In other words, the procedure of collecting samples u/s 21(3) has to be followed, subject to the provisions of Sub-sections

(4) and (5) of Section 21 of the said Act.

8. There is, however, a clear breach of the rules of the Gujarat Water (Prevention and Control of Pollution) Rules, 1976 in respect of following the procedure for submitting the samples to State Water Laboratory. Rule 27 of the said Rules reads as under:

27. Procedure for submitting samples to State Water Laboratory. - While submitting samples for analysis to the State Water Laboratory, the following procedure shall be followed:

(1) The sample shall be collected preferably in polythene container and shall be labelled giving the following details, namely:

- (i) the source, and nature of sample,
- (ii) the date and time of collection,
- (iii) the method of preservation used.

(b) At least 2.5 litres of the materials required to be analysed shall be sent in a container, the capacity of which shall not be less than 3 litres and not be more than 5 litres.

(c) The sample shall accompany with the letter from the concerned authority and shall give the number of parameters to be analysed.

(d) The sample shall be preferably transported to the Laboratory by a messenger.

(e) The messenger shall take receipt of sample from the Laboratory.

(f) Fees for analysis shall be paid either in advance or at the time of submission of sample.

(g) The sample shall be preserved as per the instruction given in IS-2488-1966 and 1968 (Part I, II and III) and IS 4733-1968.

In order to ascertain whether the aforesaid procedure in respect of collection of the sample is followed or not, it would be necessary to scan and appreciate the evidence of P.W. 2, Pradip Kishorsinh Gohil. He was on duty as Senior Scientific Assistant on August 4, 1988. He was authorised by the complainant-Board to collect the sample of trade effluent (Exh. 13). On August 4, 1988, he collected the sample of the trade effluent from the factory-unit of the accused No. 1. He has deposed that sample was collected in a clean bucket and was then filled in a Kerba. The sample was 5 litres and was measured in P.H. and Temperature. Thereafter, he had prepared a slip wherein the name of the factory, its address, date of taking the sample, temperature, time, etc. were written in the slip Exh. 17. That slip was then tied to the Kerba wherein the sample-effluent was collected. In all four seals were applied. Now, the aforesaid Rule provides that the sample is to be collected preferably in a polythene container. It is not clear from the evidence of P.W. 2 that the bucket or Kerba wherein the sample was

collected was of polythene. The label Exh. 17 does not mention the source and the nature of the sample. It is true that the date and time of the collection is stated therein. It is also not stated in the slip Exh. 17 about the method of preservative used. On the contrary, in his cross-examination, P.W. 2, Pradip Kishorsinh Gohil, has clearly admitted that no preservative was added in the sample. According to Clause (b) of Sub-Rule (1) of Rule 27 of the said Rules, at least 2.5 litres of the material is required to be collected for the purpose of analysis and it is to be kept in a container, the capacity of which shall not be less than 3 litres and not be more than 5 litres. On perusal of the evidence of P.W. 2, it is not clear as to what was the capacity of the container in which the sample-effluent was collected. He has admitted that the sample of 5 litres was taken. This is in clear breach of provisions of Rule 27 of the said Rules.

9. Mr. Gupta submitted that there is no maximum limit prescribing as to how many litres of the material should be collected and as such the P.W. 2 was justified in collecting 5 litres. Rule 27(1)(b) of the Rules requires that at least 2.5 litres of the material required to be analysed shall be sent in a container, the capacity of which shall not be less than 3 litres and not be more than 5 litres. In my view, the capacity of the container is prescribed, minimum to be of 3 litres and maximum of 5 litres, for the purpose that if there is fragmentation or any other transformation in the collected sample, it may be preserved or maintained properly or may not overflow. However, in the present case there is no material to show as to what was the capacity of the container. In the facts of the case, P.W. 2 has failed to comply with the procedure laid down in Rule 27 of the said Rules. As per Section 21(5) of the said Act, the sample is to be sent forthwith to the Laboratory referred to in Sub-clause (1) or Sub-clause (2), as the case may be, of Clause (d) of Sub-section (3) of Section 21. In the present case, after taking the sample, the Kerba was handed over to Miss P.S. Shah in the office. In the cross-examination, P.W. 2 has deposed that he did not know as to what happened to the Kerba, after handing it over to Miss P.S. Shah in the office. Thus, it appears that the sample was not sent forthwith to the Laboratory for the purpose of analysis.

10. Mr. B.R. Gupta, learned Advocate appearing for the appellant, fairly concedes that there is breach of Rule 27 as the slip Exh. 17 does not contain the source and the nature of the sample and the method of preservation used. There are also breaches in the procedure for collecting and submitting the sample to the State Laboratory as mentioned hereinabove. In submission of Mr. Gupta, however, the Rules are directory in character and no prejudice can be said to be caused to the respondent-accused in non-compliance of the Rules. He also submitted that the non-compliance with the Rule is mere irregularity which requires to be condoned. I am unable to accept this submission of Mr. Gupta. The Gujarat Water (Prevention and Control of Pollution) Rules, 1976 have been enacted in exercise of the powers conferred by Section 64 of the said Act, after consultation with the Gujarat State Water (Prevention and Control of Pollution) Board. The said Rules are, therefore, statutory. Having regard to the scheme of

the Act and the Rules, the said Rules of 1976 are mandatory in nature and non-compliance thereof would vitiate the trial. It is, therefore, imperative that the sample taken by following the procedure as prescribed in Rule 27 should be strictly complied with. The said Rule provides elaborate procedure and manner of collecting and submitting the sample to the concerned Laboratory.

11. The aforesaid Rule 27 necessarily means that the Rule is mandatory in character. It cannot be lightly assumed that the Legislature wanted the citizens to be sentenced to stiff penalty in a light-hearted manner. Rule provides that before invoking the penal provision, certain requirements should be complied with to send the citizens to jail, but it cannot have been intended by the Legislature that the same result would follow, even if the requirements were not complied with by the authorities concerned.

In facts of the case, therefore, non-compliance of such statutory Rules would be fatal and it cannot be concluded that the complainant brought the charge home nor it can be said that the guilt of the accused persons was established beyond all reasonable, doubt.

12. In this connection, Mr. Gupta placed reliance on the case of Rameshkumar Babulal Patel v. State of Gujarat and Anr., reported in (1981) XXII GLR 404. The Division Bench of this Court (Coram: A.M. Ahmadi and R.C. Mankad, JJ., as they were then) held that the presumption u/s 114 of the Evidence Act could be raised that requirements of Rule 16(d) of the Rules under the Prevention of Food Adulteration Act which are required to be strictly complied with, were complied with. Application of Section 114 does not depend upon the mandatory character or otherwise of the provisions of law which are required to be considered while deciding whether particular official act has or has not been performed or done. It is immaterial whether the official acts are to be done under directory provisions or mandatory provisions. In either case, once the acts are proved, presumption can be drawn that they are regularly or properly done. It is optional to raise presumption u/s 114 or in other words the Court was not bound to raise it. Therefore, the proposition that presumption u/s 114 Illustration (c) in favour of compliance with the requirement of the Rules is permissible is not open to doubt or debate. Having gone through the judgment, the above decision of the Division Bench of this Court could not be made applicable to the facts and circumstances of this case, in as much as there is no question of raising any presumption. P.W. 2, Pradip Kishorsinh Gohil, has clearly admitted that he did not add any preservative. When there is clear breach in compliance of the mandatory Rule, the question as to presumption u/s 114 of the Evidence Act does not arise in the present case.

In the above view of the matter, the appeal fails and is dismissed.