
(1991) 07 GUJ CK 0025
In the Gujarat High Court

Dwarka Cement Works Ltd. and Others	APPELLANT
Vs	
State of Gujarat and Another	RESPONDENT

Date of Decision : 22-07-1991

Acts Referred:

Air (Prevention and Control of Pollution) Act, 1981 — Section 2(2), 21(4), 21(4), 21(5), 21(5)
Criminal Procedure Code, 1973 (CrPC) — Section 482, 482

Citation : (1992) 1 GLR 422

Hon'ble Judges : K.J. Vaidya, J

Bench : Single Bench

Judgement

K.J. Vaidya, J.—The Dwarka Cement Works, a limited company and five others who are its Chairman, Directors and General Manager respectively, have by this Misc. Criminal Application, u/s 482 of the Code of Criminal Procedure, 1973, moved this Court for quashing and setting aside the impugned order issuing process against them in Criminal Case No. 162 of 1989, by the learned J.M.F.C., Dwarka, for their alleged offences under Sections 21(4), 21(5), 31 A, 39 and 40 of the Air (Prevention and Control of Pollution) Act, 1981 (for short "the Pollution Act").

2. In short, on 23-2-1989, the respondent No. 2, viz., Gujarat Pollution Board, Rajkot, through its duly authorised officer, one Mr. A.N. Shah, Dy. Environmental Engineer, filed a complaint before the learned J.M.F.C., Dwarka, alleging that the petitioner No. 1-Dwarka Cement Works Ltd. Company had committed offences under Sections 21(4), 21(5) and 31A of the Pollution Act and that at the relevant time, the petitioner No. 2-Jatin P. Modi was its Chairman, petitioner Nos. 3, 4 and 5, namely Mr. Suketu Jain, Mr. Piyush P. Modi and Mr. Rajnikant J. Modi were its Directors and Mr. S.B. Safi was its General Manager. According to the complainant since all of them were responsible for the management of the petitioner No. 1-Company, they were vicariously liable for the alleged offences committed by the petitioner No. 1-Company. On the basis of the aforesaid allegations, a complaint came to be filed against all the petitioners under

Sections 21(4), 21(5), 31A, 39 and 40 of the Pollution Act. After this came to be registered as a Criminal Case No. 162 of 1989, the learned Magistrate issued process against the petitioners herein, who feeling aggrieved by the same, have preferred the present application for quashing of the same.

3. Mr. K.J. Thakar, the learned Advocate appearing for the petitioners, challenging the legality of the impugned order issuing the process, has raised the following three contentions:

(1) That in absence of there being any specific averments in the complaint indicating as to in what manner the petitioners Nos. 2 to 6 were actually directly in-charge of and were responsible to the petitioner No. 1-Company for conduct of its business, they could not be assumed and arraigned as accused by way of their vicarious liabilities u/s 40 of the Pollution Act for the alleged offences committed by petitioner No. 1-Company.

(2) That the learned Magistrate has materially erred in taking the cognizance of the offence on the basis of the complaint filed by Mr. A.N. Shah, Deputy Environmental Engineer in clear disregard of Section 43 of the Pollution Act. According to the petitioners, in the instant case, on face of it, the complaint is neither filed by the Pollution Board itself nor the same is filed with previous sanction in writing of the Board as warranted in Section 43 of the Pollution Act. In fact, the said complaint, ex-fade, is filed by one Mr. A.N. Shah, Dy. Environmental Engineer, who is merely an employee of the Pollution Board, and in that view of the matter, the learned Magistrate could not have taken cognizance of the offence.

(3) That in absence of due compliance of Section 27 of the Pollution Act, which pertains to "the report of the result of the analysis on the sample taken u/s 26 of the Pollution Act, there being no legal justification for launching the criminal prosecution itself against the petitioners, no process could have been issued. According to the petitioners, even till the date of filing of this petition, they have not been given a copy of the said report as per the requirement of Section 27 of the Act.

Mr. Thakar emphasising the aforesaid infirmities, finally urged that since each one of them goes to the very root of initiation of the prosecution itself, the process issued against the petitioners deserves to be quashed and set aside.

4. As against the above, Mr. H.J. Trivedi, the learned Advocate appearing for the Pollution Board, has tendered reply-affidavit duly sworn by Mr. B.E. Salunia, the Member-Secretary of the Pollution Board controverting the contentions raised by the petitioners. On the basis of the said affidavit, Mr. Trivedi vehemently submitted that none of the aforesaid contentions raised before this Court have any substance worth the name, and in that view of the matter, the petition deserves to be dismissed summarily. Apart from this, Mr. Trivedi further pointed out that though the complaint against the petitioners came to be filed before the learned Magistrate as far back as on 23-2-1989, surprisingly till this date, the

said proceedings for whatever reasons are lying in cold-storage and that the process is now sought to be challenged at a belated stage on 24-4-1991. Under such circumstances also this Court should refuse to exercise its discretion u/s 482 of the Code in favour of the petitioners. Mr. P.S. Chapaneri, the learned A.P.P. has supported the above contentions of Mr. Trivedi.

5. On carefully examining the rival contentions at the Bar, it may be stated at the outset that the contentions raised by Mr. Thakar, the learned Advocate for the petitioners having no substance whatsoever deserve to be rejected at this very stage of admission.

6. To start with, in order to appreciate the first contention raised by Mr. Thakar, it is necessary first of all to examine Section 40 of the Pollution Act, which reads as under;

Section 40. Offences by Companies:

(1) Where an offence under this Act has been committed by a Company, every person who at the time the offence was committed, was directly in charge of, and was responsible to, the Company for the conduct of the business of the Company, as well as the Company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this Sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in Sub-section (1), where an offence under this Act has been committed by a Company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the Company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section.

(a) "Company" means any body corporate and includes a firm or other association of individuals, and

(b) "director" in relation to a firm, means a partner in the firm.

Now reading the above Section in the light of the averments made in para-4 of the complaint, there is no difficulty whatsoever in holding that the facts averred therein do constitute a *prima facie* offence against the petitioners. It has been alleged in para 4 of the said complaint that "accused No. 1-Dwarka Cement Works Ltd. is a company, while accused Nos. 2 to 5 respectively are its Directors and accused No. 6 is its General Manager. Accused Nos. 2 to 6 are responsible (emphasis supplied) for the management of the company". Mr. Thakar submitted

that Section 40 of the Pollution Act could be attracted only if there were specific averments in the complaint to the effect that the petitioner or any of the petitioners at the relevant time of the commission of the offences by the petitioner No. 1-Company were directly in charge of and were responsible to the company for the conduct of its business. Mr. Thakar further submitted that the said averments are patently absent in the complaint. According to Mr. Thakar, merely by saying that the petitioners Nos. 2 to 6 were responsible to the management of the company, that by itself cannot bring the case of the complainant within the sweep of Section 40 of the Pollution Act. Now it is true that in what manner each of the petitioners Nos. 2 to 6 were directly in charge and responsible to the conduct of the company, is not deftly and exhaustively stated in the complaint, but then at the same time, such minute details of evidence are not necessary while filing the complaint for putting the criminal law in motion. The matter and material of details are always subject matter of the evidence to be led at the time of the trial while recording the evidence. At the initial stage of issuing the process, the Court has to mainly find out whether the facts disclosed in the complain contain a "germ" of the alleged offence-the "ingredient", to put the criminal law in motion or not. If that "germ" or the "ingredient" is found to be present in the complaint, there is no scope for any grievance that because the detailed description about the manner was absent in the complaint, (he learned Magistrate was not justified in issuing the process. The material available in the complaint cannot be insisted upon as that much material on the basis of which an order of conviction can be recorded. The test for initiation of the criminal proceeding and by virtue of the same, the issuance of the process is the existence of the prima facie material while the test for termination of the process in order of conviction and sentence is fullfledged material establishing the guilt beyond the doubt. Under such circumstances, the question as to "whether the petitioners Nos. 2 to 6 were directly in charge and responsible for the conduct and business of the company or not" in view of the word used in the complaint, viz, responsible is an open question both to the prosecution as well as to the petitioner-accused. The said question at this stage is so delicately poised that firstly the prosecution while leading the evidence pertaining to the particulars in detail can prove its case beyond the doubt, and secondly the petitioners in their turn, can legitimately attack and destroy the same by proving to the contrary. The averment "accused Nos. 2 to 6 are responsible for the management of the accused No. 1-Company" is sufficient enough for any Court to take cognizance of the offence and order issuance of process on the basis of the same. Thus, taking into consideration the contents of the complaint, at this stage, it cannot be said that the averments made therein lacks any vital ingredient showing no ground made out that the process could not been issued. In fact, to accept the first contention raised by the petitioners at this stage, would be simply prejudging the issue without affording a reasonable; opportunity to the prosecution to substantiate its allegations as held by the Supreme Court in the case of State of Bihar Vs. Raj Narain Singh, . Such an unwarranted interference at a preliminary stage, according to this Court, would

be nothing less than miscarriage of justice. In this view of the matter, the first contention raised by Mr. Thakar having no substance, is rejected.

7. Further apart from the above finding, there is yet one more important angle, perspective from which the point is required to be looked at, viz, that of the social welfare jurisprudence. This perspective and angle none of us can ever afford to get lose of sight. In fact, an identical point was raised by Mr. Thakar in Misc. Criminal Application No. 1398 of 1991 (decided on 18-7-1991) (Dwarka Cement Works Ltd. v. State of Gujarat). There the question raised was u/s 32 of the Industrial Disputes Act. 1947, pertaining to the vicarious liability of the Chairman, Directors, etc. for the alleged commission of the offence by the company under the Industrial Disputes Act. It is true that the wordings of Section 32 of the Industrial Disputes Act and that of Section 40 of the Pollution Act (which also pertains to the offences committed by the company) are slightly differently worded. But at the same time, the point to be decided remains identical. Thus the present case also requires to be dealt with and decided on the same footing as that of the decision rendered in Misc. Criminal Application No. 1398 of 1991. In this view of the matter, the defence taken up by the petitioners Nos. 2 to 6 in the present case also needs to be examined in the light of the said social welfare jurisprudence. Accordingly, examining the point raised from that angle of the social welfare jurisprudence, it is obviously clear-(i) That the offences alleged against the petitioners Nos. 2 to 6 are under an important social legislation, viz; the Pollution Act, (ii) That such proceedings under the Pollution Act, be it Civil or Criminal, the same needs to be attended to and disposed off as expeditiously as possible to make the provisions of the Act effective and meaningful enough to bring about the social justice; (iii) That the petitioner No. 1-Company unlike an ordinary accused is limited company (emphasis supplied); (iv) That the petitioners Nos. 4 to 6 arc sought to be prosecuted and tried for the alleged vicarious liability of the petitioner No. 1-Company; (v) That the prosecution of the petitioners Nos. 2 to 6 by way of their vicarious liability under the Pollution Act stand distinctly apart and on different footings than that of the prosecution of the other accused under the ordinary criminal laws; (vi) That unlike the accused in ordinary criminal cases, the petitioner No. 1-Company and its Directors who are to be prosecuted and tried, maintain the record of their day-to-day business and names of persons concerned with the management in their ordinary course of the business. In this view of the matter, as to who in fact were the real persons at the relevant time of the alleged offences committed by the company concerned with the management of the company to be prosecuted for their vicarious liabilities is a fact within the special knowledge of the Company and so far as its Directors are concerned, they have at least access to that special knowledge (emphasis supplied). Under such circumstances, the vague assertions of the petitioners Nos. 2 to 4 by merely saying that there is nothing in the complaint to indicate as to how they were concerned with the management to the company and that they were prosecuted on mere assumptions, cannot be straightway accepted. In such type of criminal cases, both the offending

company and its Directors owe a foremost duty to the Court and to the cause of justice to place on record full and true disclosure of the facts and particulars (on the basis of the relevant notings, entries etc. pertaining to the duty assignments and/or some other material) pointing out therefrom as to whether the particular Director or such other persons were or were not concerned with the management of the Company at the relevant time when the alleged offence came to take place. This has got to be done and that neither the petitioner No. 1-Company nor its Directors Nos. 2 to 6 can ever be permitted to take shelter behind some technical pleas like the one taken in the instant case by either suppressing some material facts or stating half truth or by lying (for what ought we know the record of the company may expose themselves as total liars). There indeed can never be any scope for any legal battles to be fought by way of some strategies, tracteries or gaming to be played by the accused at the imminent cost and risk of society under the guise of some technicalities ultimately playing foul with the noble object of the Act and overall beneficial interest of the society, (at the cost of repetition) more particularly when things are matter of record within the special knowledge of the petitioner No. 1-Company and its Directors. Thus, in the opinion of this Court, the bald assertion of the petitioners Nos. 2 to 6 that at the relevant time, they were not looking after day-to-day works and affairs of the company without placing on the record of the Court any material from the record of the company is not sufficient. Instead of coming to this Court praying for quashing the process, the petitioners Nos. 2 to 6 ought to have gone first before the concerned learned Magistrate who had issued the process and requested him for reasonable adjournment and exemption to appear before the Court in order to point out as to if they were not concerned with the affairs of the management of the Company, who else as per the record were the persons concerned with the same, so that they can be brought on the record for prosecuting them for their vicarious liabilities. The oft quoted dictum that the accused need not open his mouth in defence can be a good principle of Criminal Jurisprudence in the matter of ordinary prosecution and trials, but as stated earlier, in such types of cases under special statutes in the direction of social welfare, the petitioner No. 1-Company which is a Public Limited Company and its Directors have got to open their mouth and point out who are the real persons concerned with the management and affairs of the Company who can be held vicariously liable. At this stage, it was argued by Mr. Thakar that there were no such law by virtue of which a burden can ever be laid upon the petitioners who are sought to be prosecuted by way of their vicarious liability for the offences committed by the company calling upon them to show from the record of the company as to who were those persons directly in charge of and were responsible to the company for the conduct of the business of the company. Quite true. Indeed the Pollution Act does not whisper even a word about it. But then no Court can be precluded from taking a common sense and reasonable view of the matter, if that was possible to be taken from the facts and circumstances of the case, more particularly in such extraordinary social legislation like the present one. In fact, it should not be forgotten that it is only when an individual or a society gradually and consistently

starts forgetting and neglecting their ordinary and obvious course of code of natural human conduct, duties etc. that in order to remind, regulate and enforce the said rule of behaviour, the legislature by way of unavoidable necessity has to step in and legislate the particular provision. Thus, merely because there is no special provision to the said effect in the Pollution Act, it cannot be said that the petitioners Nos. 2 to 6 are absolved from common sense discharge of the paramount duty of disclosing the facts lying within their knowledge to the Court. If the Courts of law are not to take such absolutely natural, implicit and reasonable view of the matter, and instead become idle technical and mechanical and wait only for the legislatures to step in and tell them to do something, the legislature will, of course, step in and will do the needful, but that certainly does not mean that till the time legislature makes some such provisions (casting duty on accused like the petitioners in the present case) the Court should feel itself powerless to take common sense view of the matter. Thus, in this view of the matter, merely because there is no provision in the Pollution Act to the effect that in a given case, the petitioners are also expected to disclose the names of the persons who were directly in charge of and were responsible to the company for the conduct of the business of the company, it cannot absolve them from common sense discharge of the duty to the Court in disclosing the names of the persons who are vicariously liable for the offences committed by the petitioner No. 1-Company. Thus, unless the Court in its awareness attunes and adopts itself to the above principles of the social welfare jurisprudence, the promise of the Act to the society in such cases will go on ever eluding it denying justice like a mirage which despite, being chased and chased to be reached at to quench the thirst is never to be reached at and the searcher ultimately finds itself wandering away, tired out without getting even a drop of water to wet his throat. However, it may be clarified that though prima facie as stated earlier, the averments made in the complaint do disclose the offence against the petitioners Nos. 2 to 6, yet the petitioner No. 1-Company and its Directors would be at liberty to place the relevant material available on record of the company before the trial Court showing as to who in fact were the real persons who can be ultimately prosecuted and tried for their vicarious liability for the alleged offences committed by the company, and the trial Court in its turn after duly verifying the genuineness of the same, shall issue the notices to so newly named persons liable to be prosecuted and tried and decide the question after hearing all concerned.

8. Now as regards the second contention raised by Mr. Thakar, it has been pointed out by Mr. H.J. Trivedi, the learned Advocate for the Pollution Board that the same is devoid of any merits as Section 43 which has been reproduced in para-14 of the petition, has been subsequently duly amended and substituted by the Air (Prevention and Control of Pollution) Amendment Act (47 of 1987) (1-4-1988). The said Section 43 which has been relied upon and reproduced in para-14 of the petition reads as under:

No Court shall take cognizance of any offence under this Act, except on a

complaint made by, or with the previous sanction in writing of the State Board, and no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under this Act.

As against the above, the substituted Section 43 of the Pollution Act, as stated above, reads as under:

Section 43. Cognizance of offences:

(1) No Court shall take cognizance of any offence under this Act except on a complaint made by.

(a) a Board or any officer authorised 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 of office authorised as aforesaid and no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(2) Where a complaint has been made under clause (b) of Sub-section (I), the Board shall on demand by such person, make available the relevant reports in its possession to that person:

Provided that the Board may refuse to make any such report available to such person if the same is, in its opinion, against the public interest.

Mr. Trivedi further submitted that thus in cases wherein the Board itself does not file complaint, it can as well by virtue of Section 43(1)(a) of the Pollution Act authorise its officers to file complaint against the offending persons under the Act. Mr. Trivedi further submitted that in the instant case, such authorisation to file complaint against the petitioners has been duly given u/s 15 of the Pollution Act, which pertains to delegation of powers. The said Section 15 of the Pollution Act reads as under:

15. Delegation of powers". A State Board may by general or special order, delegate to the Chairman or the member-secretary or any other officer of the Board subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act as it may deem necessary.

Now the aforesaid submissions made by Mr. Trivedi has a considerable force and have got to be accepted. On perusal of the complaint, and in particular para-3 of it, it appears that the Gujarat Pollution Board by virtue of Section 15 of the Pollution Act, in its 63rd Board Meeting held on 12-7-1988 had authorised the complainant Mr. A.N. Shah, Dy. Environmental Engineer to file complaint against the petitioners for the aforesaid alleged offences under the Pollution Act. In this view of the matter, this contention also having no substance deserves to be rejected.

9. Coming to the third and the last contention of Mr. Thakar regarding non-compliances of the provisions of Section 27 of the Pollution Act, it may be stated that the said contention is also factually not correct in view of the averments made in the reply affidavit filed by the Pollution Board. In the reply affidavit, it is the case of the Pollution Board that Analysis Report No. I dated 15-10-1988 was already sent to the Company under the provisions of Sub-section (2) of Section 2 of the Pollution Act. Thus, taking into consideration the reply submitted by the Pollution Board disputing the factual averments, the third contention also fails. Unless the question raised is based on undisputed facts and pure question of law casting at to the very roots of the prosecution case no person is entitled to invoke inherent powers of this Court u/s 482 of the Code for quashing the process and/or proceedings.

10. The question that still remains to be considered as raised by Mr. Trivedi is whether this Court, would be justified in invoking and exercising the inherent powers u/s 482 of the Code at such a belated stage after two years of the issuance of the process by the learned Magistrate. Mr. Trivedi in this regard was at pains to point out-(1) That the date of the alleged offence appears to be 24-5-1988; (2) That the complaint regarding the same before the learned Magistrate came to be filed on 23-2-1989; (3) That the process pursuant to the said complaint was issued on 24-2-1989; (4) That for whatever reasons the process to the petitioners-accused has been kept at safe distance by the petitioners all these years; (5) That the present petition came to be filed before this Court on 24-4-1991, i.e., exactly after two years and two months. On the basis of the aforesaid circumstances, Mr. Trivedi submitted that the petitioners were not legally entitled to invoke the powers of the High Court u/s 482 of the Code. Mr. Trivedi relying upon a ratio of a decision of the Supreme Court in the case of *M.C. Mehta v. Union of India*, reported in AIR 1988 SC 1155 submitted that whenever prosecutions under the Pollution Act are filed before the learned Magistrate, the same are under one pretext or the other, unduly protracted frustrating the very object of the Act and further delaying the same by filing petitions before this Court u/s 482 of the Code. Mr. Trivedi submitted that looking to the gravity of the offence and problem of hazards to the health of the society involved, such sort of prosecutions must be given top-most priority and should be terminated as expeditiously as possible by this Court as well as by the trial Courts. This submission of Mr. Trivedi has a considerable force. To lightly invoke the inherent powers of this Court u/s 482 of the Code, is itself abusing the discretion of the Court and doing injustice to the society, which is allegedly the victim of the air pollution. The power u/s 482 of the Code is a discretionary power which has to be sparingly exercised "to prevent the abuse of the process of law" or otherwise "to secure the ends of justice". The light exercise of such powers, in the opinion of this Court, under such types of prosecutions, would frustrate the ends of justice. It is also true that such types of cases should be disposed of as expeditiously as possible. Now in this regard it is also the duty of the Pollution Board to be vigilant and insist upon the Court to dispose of the

matter as expeditiously as possible, if the Court under the pressure of work, loses sight of that particular case.

11. In the result, this Misc. Criminal Application having no substance fails and is dismissed summarily.

12. The learned Advocates for the respective parties are hereby directed to appear before the learned Magistrate on 25-10-1991 and take appropriate date for further proceeding. It is further directed that taking into consideration the gravity of the offence and hazards of the air pollution to the society, the learned Magistrate is directed to dispose of the case as expeditiously as possible.