

(2013) 07 AHC CK 0223

In the Allahabad High Court

Case No : Criminal Miscellaneous No. 2633 of 2009

M/s. Kothari Fermentation and Biochem Ltd. and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Citation : (2013) 82 ALLCC 807 : (2013) 3 EFLT 810

Hon'ble Judges : Vishnu Chandra Gupta, J

Bench : Single Bench

Advocate : Asit Kumar Chaturvedi, Salil Kumar Srivastava and Sushil Kumar, for the Appellant; Ashok Kumar, Government Advocate, for the Respondent

Final Decision : Disposed Of

Judgement

Vishnu Chandra Gupta, J.—Challenge in this petition u/s 482 of Criminal Procedure Code (for short "Cr.P.C.") is the prosecution launched against the petitioners by way of criminal Complaint Case No. 1720 of 2009 (U.P. Pollution Control Board, Lucknow v. M/s. Kothari Fermentation and Biochem Ltd., Bulandshahr) pending in the Court of Special Judicial Magistrate, CBI (Pollution), Lucknow including the order dated 13.5.2009 (Annexure-13) and order dated 25.6.2009 (Annexure-15) to this petition, passed in the aforesaid criminal proceeding. The brief facts of the case are that a criminal complaint has been filed by U.P. Pollution Control Board, Lucknow (hereinafter referred to as the "State Board") through Sri J.B. Singh, Assistant Environmental Engineer against the petitioners, i.e., M/s. Kothari Fermentation and Biochem Ltd. and its Chairman and Managing Director, other Directors, General Manager and Factory Manager u/s 37 of the Air (Prevention and Control of Pollution) Act, 1981 (hereinafter referred to as the "APCP Act") with the allegations that the area in which the industrial plant of the petitioners is situated falls in air pollution control area. The petitioner No. 1, the company applied for grant of consent by its application dated 28th February, 2009 to operate its industrial plant. The State Board by its order dated 24.4.2009 declined to grant consent to operate

industrial plant of the company. The order was communicated to company by means of registered letter. The petitioner No. 1, who is a company within the meaning of section 40 of the APCP Act, despite communication of order of refusal of consent was found operating the industrial plant violating the parameters of air quality on inspection made by the officers of the State Board on 4.5.2009. They also collected the sample after giving due notice from stock attached to the boiler and sent for analysis to the laboratory authorized by the Board. The report of analysis made it clear that parameters prescribed by the Board for air pollution were violated. The report dated 5.5.2009 of the analysis was communicated to the petitioners-company. The act complained said to be in breach of section 21 punishable u/s 37 of the APCP Act. It was further alleged that petitioner Nos. 2 to 9 were Chairman and Managing Director, Directors, General Manager and Factory Managers of petitioner No. 1, are under obligation to comply the mandatory provision of the APCP Act so as to meet out the liabilities under the Act in accordance with provision of section 40 of the APCP Act. They were under legal obligation to operate their industrial plant after obtaining the consent of the State Board but they have been found operating their industrial plant without obtaining consent of the Board. It was further alleged that petitioner Nos. 2 to 9 are incharge of day-to-day business of petitioner No. 1 and have willfully disobeyed the statutory provision of APCP Act and as such they all shall be liable for punishment under the provision of APCP Act. The complaint was filed on behalf of the Board by Sri J.B. Singh, Assistant Environment Engineer who has been duly nominated by Member, Secretary of the Board in pursuance of the resolution passed by the State Board. The copy of Board resolution was also annexed with the complaint. The Court took cognizance against the petitioners vide order dated 13.5.2009 and issued process against them to appear before the Court. When the accused persons did not appear the complainant moved an application for issuing non-bailable warrant on 25.6.2009. After considering the request of the complainant bailable warrant were issued against the petitioners by order dated 26.11.2009. Both these orders sought to be quashed along with criminal prosecution launched by way of complaint on various ground by means of this petition.

2. The prosecution and orders impugned have been assailed on the following grounds:--

Point No. 1.

After refusal of the consent, there is a provision of preferring an appeal against the order u/s 31 of the APCP Act and unless the appeal is finally disposed of it cannot be said that order refusing consent was violated. Moreover after rejecting the application for consent, it was incumbent upon the State Board to issue direction not to operate the industrial plant to the petitioners. No such specific direction has been given by the State Board, hence offence u/s 37 of the APCP Act is not made out.

Point No. 2.

The report of analyst is not acceptable on the ground that no standard has been prescribed by the State Board for air pollution. Further sample of analyst has not been analyzed by a public analyst in view of section 29(2) as the same laboratory has not been approved by the State Government. Further that analyst has not been signed by Analyst and also for the reason that the provisions of taking sample has not been complied within terms of section 26 of APCP Act. The procedure in this regard has not been strictly complied with.

Point No. 3

The complaint has not been filed by any authorised person as provided u/s 43 of the APCP Act.

Point No. 4

All the Directors cannot be impleaded and prosecuted in this case due to non-compliance of section 40 of APCP Act.

Point No. 5

All the petitioners are resident of a place beyond the local limits of jurisdiction of the Court. Mandatory provisions of section 202 CrPC has not been complied with by the Magistrate. Hence cognizance taken is void.

3. I have heard Sri Salil Kumar Srivastava, learned Counsel for the petitioner, Sri Ashok Kumar Verma, Counsel for the State Board as well as learned AGA and also gone through the record of this case and written submissions made by the Counsel for the parties.

4. To appreciate the submission of the parties, it would be necessary to look into the statutory provisions of the APCP Act which are being reproduced herein below for ready reference;

Statutory Provisions

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.

17. Functions of State Boards.--(1) Subject to the provisions of this Act, and without prejudice to the performance of its functions, if any, under the Water (Prevention and Control of Pollution) Act, 1974 (Act 6 of 1974), the functions of a State Board shall be--

(a) to plan a comprehensive programme for the prevention, control or abatement of air pollution and to secure the execution thereof;

(b) to advise the State Government on any matter concerning the prevention,

control or abatement of air pollution;

(c) to collect and disseminate information relating to air pollution;

(d) to collaborate with the Central Board in organising the training of persons engaged or to be engaged in programmes relating to prevention, control or abatement of air pollution and to organise mass-education programme relating thereto;

(e) to inspect, at all reasonable times, any control equipment, industrial plant or manufacturing process and to give, by order, such directions to such persons as it may consider necessary to take steps for the prevention, control or abatement of air pollution;

(f) to inspect air pollution control areas at such intervals as it may think necessary, assess the quality of air therein and take steps for the prevention, control or abatement of air pollution in such areas;

(g) to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft:

Provided that different standards for emission may be laid down under this clause for different industrial plants having regard to the quantity and composition of emission of air pollutants into the atmosphere from such industrial plants;

(h) to advise the State Government with respect to the suitability of any premises or location for carrying on any industry which is likely to cause air pollution;

(i) to perform such other functions as may be prescribed or as may, from time to time, be entrusted to it by the Central Board or the State Government;

(j) to do such other things and to perform such other acts as it may think necessary for the proper discharge of its functions and generally for the purpose of carrying into effect the purposes of this Act.

(2) A State Board may establish or recognise a laboratory or laboratories to enable the State Board to perform its functions under this section efficiently.

21. Restrictions on use of certain industrial plants.--(1) Subject to the provisions of this section, no person shall, without the previous consent of the State Board, establish or operate any industrial plant in an air pollution control area:

Provided that a person operating any industrial plant in any air pollution control area, immediately before the commencement of section 9 of the Air (Prevention and Control of Pollution) Amendment Act, 1987, for which no consent was necessary prior to such commencement, may continue to do so for a period of

three months from such commencement or, if he has made an application for such consent within the said period of three months, till the disposal of such application.

(2) An application for consent of the State Board under sub-section (1) shall be accompanied by such fees as may be prescribed and shall be made in the prescribed form and shall contain the particulars of the industrial plant and such other particulars as may be prescribed:

Provided that where any person, immediately before the declaration of any area as an air pollution control area, operates in such area any industrial plant, such person shall make the application under this sub-section within such period (being not less than three months from the date of such declaration) as may be prescribed and where such person makes such application, he shall be deemed to be operating such industrial plant with the consent of the State Board until the consent applied for has been refused.

(3) The State Board may make such inquiry as it may deem fit in respect of the application for consent referred to in sub-section (1) and in making any such inquiry, shall follow such procedure as may be prescribed.

(4) Within a period of four months after the receipt of the application for consent referred to in sub-section (1), the State Board shall, by order in writing, [and for reasons to be recorded in the order, grant the consent applied for subject to such conditions and for such period as may be specified in the order, or refuse consent]:

Provided that it shall be open to the State Board to cancel such consent before the expiry of the period for which it is granted or refuse further consent after such expiry if the conditions subject to which such consent has been granted are not fulfilled:

Provided further that before cancelling a consent or refusing a further consent under the first provision, a reasonable opportunity of being heard shall be given to the person concerned.

(5) Every person to whom consent has been granted by the State Board under sub-section (4), shall comply with the following conditions, namely:--

(i) the control equipment of such specifications as the State Board may approve in this behalf shall be installed and operated in the premises where the industry is carried on or proposed to be carried on;

(ii) the existing control equipment, if any, shall be altered or replaced in accordance with the directions of the State Board;

(iii) the control equipment referred to in Clause (i) or Clause (ii) shall be kept at all times in good running condition;

(iv) chimney, wherever necessary, of such specifications as the State Board may

approve in this behalf shall be erected or re-erected in such premises; and

(v) such other conditions as the State Board, may specify in this behalf,

(vi) the conditions referred to in Clauses (i), (ii) and (iv) shall be complied with within such period as the State Board may specify in this behalf:

Provided that in the case of a person operating any industrial plant in an air pollution control area immediately before the date of declaration of such area as an air pollution control area, the period so specified shall not be less than six months:

Provided further that--

(a) after the installation of any control equipment in accordance with the specifications under Clause (i), or

(b) after the alteration or replacement of any control equipment in accordance with the directions of the State Board under Clause (ii), or

(c) after the erection or re-erection of any chimney under Clause (iv), no control equipment or chimney shall be altered or replaced or, as the case may be, erected or recreated except with the previous approval of the State Board.

(6) If due to any technological improvement or otherwise the State Board is of opinion that all or any of the conditions referred to in sub-section (5) require or requires variation (including the change of any control equipment, either in whole or in part), the State Board shall, after giving the person to whom consent has been granted an opportunity of being heard, vary all or any of such conditions and thereupon such person shall be bound to comply with the conditions as so varied.

(7) Where a person to whom consent has been granted by the State Board under sub-section (4) transfers his interest in the industry to any other person, such consent shall be deemed to have been granted to such other person and he shall be bound to comply with all the conditions subject to which it was granted as if the consent was granted to him originally.

26. Power to take samples of air or emission 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 air or emission from any chimney, flue or duct or any other outlet in such manner as may be prescribed.

(2) The result of any analysis of a sample of emission taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of sub-sections (3) and (4) are complied with.

(3) Subject to the provisions of sub-section (4), when a sample of emission is taken for analysis under sub-section (1), the person taking the sample shall--

(a) serve on the occupier or his agent, 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, collect a sample of emission for analysis;

(c) cause the sample to be placed in a container or containers which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent;

(d) send, without delay, the container to the laboratory established or recognised by the State Board u/s 17 or, if a request in that behalf is made by the occupier or his agent when the notice is served on him under Clause (a), to the laboratory established or specified under sub-section (1) of section 28.

(4) When a sample of emission 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), then,-

(a) in a case where the occupier or his agent willfully absents himself, the person taking the sample shall collect the sample of emission for analysis to be placed in a container or containers which shall be marked and sealed and shall also be signed by the person taking the sample, and

(b) in a case where the occupier or his agent is present at the time of taking the sample but refuses to sign the marked and sealed container or containers of the sample of emission as required under Clause (c) of sub-section (3), the marked and sealed container or containers shall be signed by the person taking the sample,

and the container or containers shall be sent without delay by the person taking the sample for analysis to the laboratory established or specified under sub-section (7) of section 28 and such person shall inform the Government analyst appointed under sub-section (1) of section 29, in writing, about the willful absence of the occupier or his agent, or, as the case may be, his refusal to sign the container or containers.

27. Reports of the result of analysis on samples taken u/s 26.--(1) Where a sample of emission has been sent for analysis to the laboratory established or recognised by the State Board, the Board analyst appointed under sub-section (2) of section 29 shall analyse the sample and submit a report in the prescribed form of such analysis in triplicate to the State Board.

(2) On receipt of the report under sub-section (1), one copy of the report shall be sent by the State Board to the occupier or his agent referred to in section 26, another copy shall be preserved for production before the Court in case any legal proceedings are taken against him and the other copy shall be kept by the State Board.

(3) Where a sample has been sent for analysis under Clause (a) of sub-section

(3) or sub-section (4) of section 26 to any laboratory mentioned therein, the Government analyst referred to in the said sub-section (4) shall analyse the sample and submit a report in the prescribed form of the result of the analysis in triplicate to the State Board which shall comply with the provisions of sub-section (2).

(4) Any cost incurred in getting any sample analysed at the request of the occupier or his agent as provided in Clause (d) of sub-section (3) of section 26 or when he willfully absents himself or refuses to sing the marked and scaled container or containers of sample of emission under sub-section (4) of that section, shall be payable by such occupier or his agent and in case of default the same shall be recoverable from him as arrears of land revenue or of public demand.

28. State Air Laboratory.--(1) The State Government may, by notification in the official Gazette,-

(a) establish one or more State Air Laboratories; or

(b) specify one or more laboratories or institutes as State Air Laboratories to carry out the functions entrusted to the State Air Laboratory under this Act.

(2) The State Government may, after consultation with the State Board, make rules prescribing-

(a) the functions of the State Air Laboratory;

(b) the procedure for the submission to the said Laboratory of samples of air or emission for analysis or tests, the form of the Laboratory's report thereon and the fees payable in respect of such report;

(c) such other matters as may be necessary or expedient to enable that Laboratory to carry out its functions.

29. Analysts.--(1) The State Government may, by notification in the official Gazette, appoint such persons as it thinks fit and having the prescribed qualifications to be Government analysts for the purpose of analysis of samples of air or emission sent for analysis to any laboratory established or specified under sub-section (1) of section 28.

(2) Without prejudice to the provisions of section 14, the State Board may, by notification in the official Gazette, and with the approval of the State Government, appoint such persons as it thinks fit and having the prescribed qualifications to be Board analysts for the purpose of analysis of samples of air or emission sent for analysis to any laboratory established or recognised u/s 17.

31. Appeals.--(1) Any person aggrieved by an order made by the State Board under this Act may, within thirty days from the date on which the order is communicated to him, prefer an appeal to such authority (hereinafter referred to as the Appellate Authority) as the State Government may think fit to constitute:

Provided that the Appellate Authority may entertain the appeal after the expiry of the said period of thirty days if such authority is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2). The Appellate Authority shall consist of a single person or three persons as the State Government may think fit to be appointed by the State Government.

(3) The form and the manner in which an appeal may be preferred under sub-section (1), the fees payable for such appeal and the procedure to be followed by the Appellate Authority shall be such as may be prescribed.

(4) On receipt of an appeal preferred under sub-section (1), the Appellate Authority shall, after giving the appellant and the State Board an opportunity of being heard, dispose of the appeal as expeditiously as possible.

[31-A. Power to give directions.--Notwithstanding anything contained in any other law, in subject to the provisions of this Act, and to any directions that the Central Government may give in this behalf, a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.

Explanation.--For the avoidance of doubts, it is hereby declared that the power to issue directions under this section, includes the power to direct--

(a) the closure, prohibition or regulation of any industry, operation or

(b) the stoppage or regulation of supply of electricity, water or any other service.]

[37. Failure to comply with the provisions of section 21 or section 22 or with the directions issued u/s 31A.--(1) Whoever fails to comply with the provisions of section 21 or section 22 or directions issued u/s 31-A, shall, in respect of each such failure, be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.

(2) If the failure referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine.]

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 purpose 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.

Point No. 1

5. The main thrust of the petitioner in regard to commission of offence is that the complaint has been filed without observing the provision contained in section 37 of the APCP Act. In this case no direction has been issued by the State Board after refusal of the consent for not operating the industrial plant to the petitioners. Section 21 of the APCP Act no doubts empowers the Board for refusal of the consent but the order passed u/s 21 of the APCP Act is subject to decision of an appeal preferred u/s 31 of the APCP Act.

6. This Act has been introduced in the statute book to prevent pollution of our environment, necessary for health of a common man and for better life of human being. If any body pollutes the air beyond the prescribed limit he would be subjected to prosecution in terms of the APCP Act. Section 21 of the APCP Act mandates that no person (including a juristic person) without the previous consent of the State Board establishes or operate any industrial plant in a air pollution control area. Procedure has been prescribed for grant of consent in sections 21 of APCP Act. Section 31 of the APCP Act provides the right to appeal by an aggrieved person against the order passed by the State Board under the Act.

7. The scheme of APCP Act made it clear that once the consent has been refused to establish or operate an industrial plant that plant cannot be allowed to run under the garb of right to appeal i.e. till the period for preferring the appeals expires or in case appeal is filed till its final disposal. The act of not granting consent by State Board itself of the indication that industrial unit cannot be established or operated in air pollution control area. The right to appeal simply gives right to redress the grievance against an order of refusal or grant with conditions to operate the industrial unit. In case an appeal is filed unless

appellate authority permits to establish or operate the industrial plant or allow operation of any industrial plant by specific order staying the operation of the order of the State Board no industrial plant could be established or operate after refusal of consent of the Board.

8. Once the consent is refused, it is not obligatory on the part of the State Board to give specific direction not to establish or to operate the industrial unit. Once the person move for consent to establish or operate industrial plant he was under statutory obligation only to establish or operate the industrial plant after getting the consent of the concerned Board and in such situation the person to whom consent has been refused cannot establish or operate the industrial plant so no direction as alleged by the petitioners is required to be passed by the State Board to the industrial unit company the consent of which has been refused u/s 21 of APCP Act. Section 31-A of the APCP Act is not at all applicable in this case. It is well settled that once an act is committed by violation of standard prescribed it constitute a criminal offence and offender may be punished for such offence.

9. The provision of APCP Act made it clear that if any consent has been declined to establish or operate the industrial plant it also affect civil rights of a person which could be subject to remedy of appeal thus, provided u/s 31 of APCP Act. So, these two streams one u/s 21 read with section 37 and other u/s 21 read with section 31 of the APCP Act provide two distinct forum. Section 37 of the APCP Act connected with punishment of particular offence. On the other hand, section 31 is a civil remedy available to a person aggrieved against the order of the Board. These two sections are operated entirely in different filed. Section 21 read with section 37 is an independent course which board can adopt to prosecute the wrongdoer and section 31 is not an impediment to take action u/s 37 of APCP Act.

10. The Counsel for petitioners placed reliance of a judgment of Rajasthan High Court in Bahubali Stone v. Rajasthan Pollution Control Board (the text of which has been filed along with the written submission) but the same is not on fact applicable to the present case. Section 31-A empowers State Board to implements its own orders by issuing direction for execution to other authorities as held by Hon''ble High Court of Rajasthan but not create any obligation to issue positive direction not to establish or operate the industrial plant to the person who himself sought consent and whose request has been declined.

11. Hence on this score, it cannot be said that prosecution launched u/s 37 of APCP Act is suffering from any legal defect.

Point No. 2.

12. This point relates to acceptability of the analyst report. It has been attacked three ways.

13. Firstly that no standard has been prescribed for measuring the pollution of

air in terms of section 17 of the APCP Act. The Counsel for the petitioner has drawn the attention of this Court of the provisions contained in clause (g) of sub-section (1) of section 17 which provides that the State Board to lay down, in consultation with the Central Board and having regard to the standards for the quality of air laid down by the Central Board, standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for discharge of any pollutant into atmosphere from any other sources whatsoever not being a ship or aircraft. It has been further submitted that no notification has been brought on record to show that State Board has prescribed any standard for emission of air pollutant into atmosphere from industrial plants.

14. Contrary to it, learned Counsel for the complainant submitted that on 22.3.1983 Central Board for Pollution and Control of Water prescribed the standards after exercising the jurisdiction u/s 16(2)(h) of APCP Act. These standard has been adopt by the State Board on its meeting dated 26.3.1984. The copy of representation dated 26.3.1984 has been annexed with the written submission. It is also important to note that the standard prescribed by the Central Board cannot be overlooked by the State Boards unless they have been approved by Central Board. The notification of adoption of standards of the Central Board is sufficient to act by the State Board in pursuance of the power conferred under the APCP Act. Therefore, at this stage it cannot be said that the State Board has not prescribed any standard for emission of pollutant in the environment.

15. Secondly the analysis report was assailed on the ground that Laboratory which has examined the sample has not been conducted by a laboratory approved by the State Government in view of section 29 of the APCP Act. The report is available on record and annexed to the complaint as Annexure-1, is of Regional Laboratory of U.P. Pollution Control Board situated in Sector 16, Vasundhara, Ghaziabad. Sub-section (2) of section 17 clearly provides that a State Board may establish or recognizes a laboratory or laboratories to enable the State Board to perform its function under this sections efficiently. This statutory provision does not require any prior consultation with the State Government for recognising any laboratory or laboratories to enable the State Board to perform its function under the Act.

16. So far as section 29 is concerned, it gives power to the State Government to appoint a person as Government analyst for the purpose of analysing the sample of air sent for analysis for any laboratory established or specified under sub-section (1) of section 28. Sub-section (2) of section 29 made it clear that the powers conferred u/s 29 may be exercised by the State Government. In case of appointment of analyst for the laboratory or laboratories establish or recognise u/s 17 are concerned the same may be done by the Board with the approval of State Government. This made it clear that power u/s 17 of the State Board are independent and the power of the State Government conferred u/s 29 of the APCP Act is not an impediment to exercise the powers by the board u/s 17 of the

APCP Act. However, it is provided in section 28 of the APCP Act that State Air Laboratory would be constituted by the State Government through notification or by specify one or more laboratories or institutes as State Air Laboratory to carry out the functions entrusted to the State Air Laboratory under the Act. The functions of the State Air Laboratory has been defined under sub-section (2) of section 28. In that case consent of the State Board for making rules would be compulsory. In case the State Board acted in furtherance of sub-section (2) of section 17, the powers of State Board cannot be curtailed under the garb of section 28 or 29 of the APCP Act. Therefore, it cannot be said that the laboratory which has been recognised by the State Board is not competent to analyse the sample collected by the Officers of the Board during course of inspection.

17. Third attack on public analyst report is that there is no signature of public analyst on the report. I have gone through the report which has been made available on record. This report contains the signature of the person who analyse the sample, namely A.K. Gupta and K.K. Choudhary. It also have signature of Scientific Officer, Deepa Arora and the same has also signed by regional officer of the State Board namely Sri Rohit Singh, so it cannot be said that report has not been signed by the analyst.

18. In view of above, there is no merit in the submission of the Counsel for the petitioners and the prosecution cannot be quashed on these ground.

19. The Analyst report has also been assailed for non-compliance of section 26 of the APCP Act. The allegation made in the complaint made it clear that sample has been collected in accordance with the statutory provision.

20. The petitioners are challenging the procedure of taking sample. Prima facie, it appears that sample has been collected after due notice and sent for analysis without any delay for analysing it by laboratory recognized by the State Board. The sample thereafter found deficient. The copy of analysis report has been sent to the petitioner-company. The question whether the necessary requirements of collecting sample were complied with or not is a question of fact and could be assailed during the course of trial and the same is not subject to scrutiny by this Court while exercising the power conferred u/s 482 Cr.P.C. Point No. 3

21. It has been challenged by the learned Counsel for the petitioners that Sri J.B. Singh is not competent to present the complaint and the complaint has not been filed by the Board through a competent officer.

22. The learned Counsel for the complainant submitted that section 15 of the APCP Act provides that 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. It has been shown by the learned Counsel for the complainant that the Board through its resolution dated 23.12.1981 in its 16th meeting has delegated the power to various officers including the Member-Secretary. The Member-Secretary was

authorised to nominate a person to file complaint. A copy of resolution of the Board along with the authority issued by the Member-Secretary in favour of J.B. Singh is available on record of this case as well as in complaint filed with the Trial Court. So, prima facie it could not be said that the complaint filed by Sri J.B. Singh is not competent within the meaning of section 43 of the APCP Act.

Point No. 4

23. This question relates to prosecution of the Chairman and Managing Director, Directors, Factory Manager of the company. It has been submitted by the learned Counsel for the petitioners that while filing the complaint the reason for impleading the Chairman, other Directors, Managing Directors and Factory Manager has not been stated and no averment were made as to why they have been made party. Section 40 of the APCP Act mandates when an offence is committed by a company every person who at the time of the commission of offence 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. Sub-section (2) of section 40 of APCP Act provides that notwithstanding any contained in sub-section (1), where an offence has been committed by a company and it is proved that offence has been committed with the consent or connivance or is attributable to any neglect on the part of, any Director, Managing Director, Secretary, Managers or other Officers of the company such Director, Managing Director, Secretary, Managers or other Officers shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. However, the proviso to sub-section (1) of section 40 provides that any person liable to punishment provided in the APCP Act if he proves that the offence was committed without his knowledge or that he exercise all due diligence to prevent the commission of such offence shall not held guilty for the offence committed.

24. Learned Counsel for the petitioners relied upon following authorities in support of his contention;

- (i) N.A. Palkhivala and Another Vs. Madhya Pradesh Pradushan Niwaran Mandal,
- (ii) Pepsi Food Co. Ltd. v. Special Judicial Magistrate and others, 1998 (36) ACC 20 (SC).

Citations relied upon by the learned Counsel for the petitioners speaks about that unless there are specific averments involving the directors of the company responsible for the alleged omission or commission of the Act constituting an offence in the complaint, cognizance should not be taken for the offence committed by the company against the Directors.

25. So far as the present case is concerned there are averments in paras 10 and 11 of the complaint regarding involvement of petitioner Nos. 2 to 9 for the alleged commission of the act on behalf of petitioner No. 1.

26. In this case the company which is a juristic person and is body corporate, seems to perform its act in accordance with the Companies Act through a Board of Directors. In this case the company asked for consent to operate the industrial plant from the State Board. This should be with the approval of the Board of Directors of the company. The request of the company has been turn down and communicated to the company. In spite of that when officers to the State Board visited the plant to look into the compliance of the order passed by the Board they found that industrial plant of company was in operation. Not only this the company was not observing the standard of emission of pollutant to atmosphere. Therefore, the company was said to have been committed two folds offence one by violating the order passed by the State Board refusing consent to operate the industrial plant and other by operating a plant not observing the standards of emission of pollutant to atmosphere. It is important that when the order was communicated to the company the Board of Director must have passed resolution not to operate the industry. In this case the action to operate the industrial plant by the company shall deemed to have been in the knowledge of Chairman, all the Directors, Managers and factory manager, so they were responsible for operating the industrial plant of company. Operation of industrial plant in such situation is an act which cannot be performed unless the Board of Directors have taken a decision to operate the plant. So it cannot be presumed that operation of industrial plant in violation of refusal of consent order was not within the knowledge of the Board of Directors specially in view of provision of sub-section (2) of section 40 of the APCP Act.

27. Moreover the proviso add to sub-section (1) of section 40 provides that if a person proves that he was not having knowledge of commission of the offence or he tried to prevent the commission of the offence he cannot be punished. So, it cannot be said that after prosecution the Chairman, the Directors or Managers who have been arrayed as party, are remedy less. However, prima facie, running an industrial plant after refusal of consent is such an act which in the ordinary Court shall deem to be in knowledge of the Directors and Managers of Company. It is also prima facie appears to be correct that unless there is connivance of the authorities of company including the Managing Director, Secretary etc. the plant cannot operate after refusal of consent by the Board. The averments to this effect are available in paras 10 and 11 of the complaint. Hence, at this stage it cannot be said that the learned Magistrate has not taken care while summoning the accused persons to face the trial.

28. The impugned order taking cognizance has been passed by the learned Magistrate after taking into consideration the material made available u/s 202 Cr.P.C. and he thereafter taken a decision to summon the accused person. Thus, there appears no illegality in passing the impugned order of summoning.

Point No. 5

29. The cognizance has also been assailed on the ground that no inquiry as contemplated u/s 202 Cr.P.C. has been initiated before issuing process which was

a mandatory provision if the accused are resident beyond the jurisdiction of the Court at the time of taking cognizance. He relied upon in this regard a judgment of the Apex Court delivered in *National Bank of Oman v. Barakara Abdul Aziz and others*, in Special Leave to Appeal (Criminal) No. 9098 of 2012. So far as the mandatory provision of section 202 Cr.P.C. are concerned they have not been violated in this case. The Magistrate has taken a conscious decision after taking the material available on record u/s 202 Cr.P.C. and after making necessary inquiry. Moreover, this case is being tried by the Special Court constituted for conducting the offence committed by the accused persons in different part of the State. Court is constituted at Lucknow and have jurisdiction to take cognizance in respect of matters relating to those districts which falls within the jurisdiction of special Court and in such situation the mandatory provision contained in section 202 Cr.P.C. could not said to be violated. This mandatory provision has been introduced with intent to prevent harassment of those persons who reside outside the jurisdiction of the Court at the time of taking cognizance of the offence. Here in this case the Court taking cognizance was having jurisdiction over the area where the offence has been committed. Therefore, the benefit of authority cited by the petitioners cannot extend any help. Moreover the order impugned reveals that the Magistrate has considered and embarked an enquiry to satisfy himself before taking cognizance in the matter on the basis of material available on record. In this case the Magistrate has not exercised discretion to order investigation and inquired himself so it cannot be said that the order taking cognizance and issue processes are bad in law or have been passed without application of mind by the learned Magistrate.

30. At the end, the learned Counsel for the petitioners submits that in this case the petitioner-company filed an appeal against the order refusing the consent but during the pendency of appeal on the basis of fresh application and after complying all the necessary requirement consent has been accorded to the company to operate hence the present proceeding is an abuse of process of law. In the light of the subsequent permission accorded by the State Board the petitioner-company has not pressed its appeal and therefore no useful purpose will be served by continuing the prosecution of the petitioner.

31. Hence I would like to point out that the copy of order passed by the Appellate Court has not been brought on record.

32. Criminal offence always related to a particular act and in this case that act has been performed within the meaning of section 21 read with section 37 of APCP Act. The offence thus, completed. However, if Trial Court comes to the conclusion that offence has been committed and petitioners are guilty it might to be a mitigating circumstances while awarding the punishment but is not a ground to quash the prosecution.

33. Having considered all the facts and circumstances of the case, this Court is of the view that petition lacks merit and is liable to be dismissed.

34. However, it is provided that in case the petitioners appears before the Court and got them bail out they can apply for exemption of their personal attendance during the course of trial in accordance with law and Trial Court may exempt the personal attendance of opposite party Nos. 2 to 9 on making application to this effect, if the personal presence is not needed in this case so unnecessary harassment should not take place of opposite party Nos. 2 to 9 who are responsible person of a company.

35. The Trial Court will expedite the hearing of the trial of this case as the same is petty in nature keeping in view the provision contained in Criminal Procedure Code. With this observation, the petition is finally disposed.