

(1994) 12 KL CK 0028
In the High Court Of Kerala
Case No : Criminal M.C. No. 763 of 1992

Pandan Krishnan and Another

APPELLANT

Vs

Asst. Engineer, Kerala State Pollution Control Board Regional
Office and Another

RESPONDENT

Date of Decision : 22-12-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 29, 482
Employees State Insurance Act, 1948 — Section 85B(1), 94A
Water (Prevention and Control of Pollution) Act, 1974 — Section 17, 25, 26, 33, 4

Citation : (1995) CriLJ 2275 : (1995) 2 ILR (Ker) 516 : (1995) 1 RCR(Criminal) 642

Hon'ble Judges : B.M. Thulasidas, J

Bench : Single Bench

Advocate : K. Ramakumar and V. Sadasivan Pillai, for the Appellant; N.N. Sugunapalan, (for No. 1) and Chellath Franklin, Public Prosecutor (for No. 2.), for the Respondent

Final Decision : Dismissed

Judgement

B.M. Thulasidas, J.—In these petitions filed u/s 482, of the Code of Criminal Procedure the common petitioners have challenged and sought to quash the complaints and proceedings in C.C. Nos. 142/90 and 220/92 of the Judicial First class Magistrate Court, Kochi taken at the instance of the first respondent, C.C. No. 142/90 has been laid u/s 44, read with Sections 47 and 49, of the Water (Prevention and Control of Pollution) Act, 1974 (for short the Act) and the other case for the alleged violation of Section 41(2). Before initiation of the proceedings, the first respondent made an application, C.M.P. No. 1558/90 u/s 33, of the Act and by order dt. 25-5-1990 the Magistrate directed the Managing director who is the Ist petitioner in Crl. M. C. 763/92 and the second petitioner in the other to desist forthwith from discharging the spent wash and waste got from the fermentation of jaggery into backwaters of Kochi." Allegedly there was flagrant breach of the direction that led to the complaints in the two cases in the

course of which M. P. No. 460 and 461/92 were filed by the Managing Director for a preliminary adjudication of the maintainability of the complaints as according to him, they were not laid according to law, and the proceedings were also otherwise vitiated. By a common detailed order the petitions were dismissed whose correctness is also assailed here.

2. Heard.

3. Pandan Krishnan is the Managing Director of Indo Scottish Brand Private Limited which owns a distillery (They will be hereinafter referred to as the 1st petitioner and 2nd petitioner). About 1000 litres of spirit are produced each day in the factory from three tons of jaggery. The factory started production as early as in 1984 and it has been allegedly discharging untreated effluents directly into the backwaters of Kochi in violation of Section 25 and 26 of the Act punishable u/s 44, read with Sections 47 and 49. The factory was inspected on 28-1-1989 and it was alleged that necessary directions were" given to apply and obtain the consent of the Board. Since nothing had been done, the factory was once again inspected on 19-5-1989 and a sample of the effluent was collected, analysed when it was found that it was highly polluted. Thereupon notice was issued on 27-5-1989, in response to which the last petitioner submitted that he had taken necessary steps to obtain the permission of the Board. But then no follow up action was taken by him and again the factory was inspected on 11-8-1989 as also on 20-9-1989, on which date again a sample of the effluent was collected and got analysed and the results confirmed that it was highly contaminated. A copy of the analyst's report was sent to the petitioners, who did not submit a proper or satisfactory explanation. The company has been discharging contaminated effluents unauthorisedly and it is a continuing offence. Indeed, in the course of the proceedings here, the factory was again inspected as directed by this Court and a report was submitted by the Senior Environmental) Engineer, Kerala State Pollution Control Board, where he has stated, that the distillery is functioning and it is discharging untreated toxic effluents into the Cochin backwaters.

4. As stated already, even before the initiation of the present proceedings before the Court below the first respondent made an application u/s 33, of the Act, which was allowed by Annexure-B order dated 25-5-1990. The two complaints were only filed thereafter following non compliance of the directions in that order. It could hardly be believed that petitioners were unaware of the action taken by the Board, or what it could be expected to do to prevent the discharge of untreated effluents and make them alive by the provisions in the Act which seem to have been grossly violated. The factory had been inspected and samples of untreated effluents discharged into the backwaters had been collected, analysed more than once and they were found highly contaminated. They had been given notice and asked to show cause why action should not be taken under the provisions of the Act. They did not give any satisfactory answer and steps also were not taken for treatment of the effluents before discharge from the factory.

It was in the above context that Crl. M. P. No. 1558/90 was filed and the Court below passed an order, as it was expected to, on 25-5-1990 directing the 1st petitioner Managing Director of the company, -

"to desist from discharging the spent wash and waste got from the fermentation of Jaggery into the backwaters of Kochi."

Subsequently a petition was filed on 24-8-1990 to proceed against the petitioners u/s 41(2) of the Act for failure to comply with the directions in the above order. The said petition was seen to have been taken on file as C.C. No. 220 of 1992, the proceedings in which are challenged in Crl. M.C. No. 790 of 1992. A complaint was also filed u/s 47 of the Act and that had been taken on file as C.C. No. 142 of 1990. the proceedings in which are challenged in Crl. M.C. No. 763 of 1992. In my view, the order passed u/s 33, of the Act is unexceptionable, particularly in the context in which it had been made. Petitioners cannot contend that they had a right to be heard and "he order passed without hearing them is illegal. Indeed, Section 33, does not say that an order under that section could be passed only after hearing the affected party. It is a special provision which could be invoked by the Board, if there is an apprehension, that -

"the water in any stream or well is likely to be polluted by reason of the disposal or likely disposal of any matter in such stream or well or in any sewer or on any land, or otherwise." No doubt, the Court has to satisfy itself about the genuineness or acceptability of the apprehension and must apply its mind to the relevant aspects, before it passes an order under sub-section (2), and gives directions under sub section (3). Indeed what had been alleged was serious and well-founded. The Court had applied its mind and satisfied itself of the urgent nature of the order that it passed, which, in my view, cannot be faulted either as arbitrary or illegal. Indeed, the conduct of the petitioners was uncompromising, that also justified its tenability.

5. It appears the proceedings against the petitioners have been initiated under the provisions of Act 6 of 1974 as amended by Act 44 of 1978. There was a subsequent amendment in 1988, with which we are not concerned. No doubt, it was submitted on their behalf that there was nothing to show that the State of Kerala has adopted the provisions of Act 44 of 1978 and therefore reliance on its provisions would not be justified. This was disputed by counsel for the respondents, who submitted that the Act had in fact been adopted and is in force in the State of Kerala. In the complaint also reference is made about the amended Act, 1978. There is indeed no reason why the submission made by counsel for the respondents could not be accepted. u/s 49, of the Act, -

(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 or officer 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 complaint has been made under Clause (b) of Sub-section (1), 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.

(3) Notwithstanding anything contained in Section 29, of the Code of Criminal Procedure, 1973 (2 of 1974), it, shall be lawful for any Judicial Magistrate of the First Class or for any Metropolitan Magistrate to pass a sentence of imprisonment for a term exceeding two years, or of fine exceeding two thousand rupees on any person convicted of an offence punishable under this Act."

It was stated in the complaints filed by the first respondent that sanction had been accorded to file complaints by the Kerala State Pollution Control Board by its order dated 8-11-1989. The said order is Annexure-B among the documents filed in CrI. M.P. No. 3086/94 filed in CrI. M.C. No. 763/92. The order was passed by the Chairman of the Board in exercise of the powers delegated to him at the 67th meeting of the Board. Indeed, Annexure-C filed along with Annexure-B is in regard to agenda item No. 6 which is "delegation of the power to the Chairman to accord sanction for legal action"; and states the Board discussed the necessity of taking timely legal action under the Water Act and the Air Act to achieve the purposes of the Acts and adopted the following resolution unanimously."

The Kerala State Pollution Control Board, in consideration of the necessity of timely legal action under the Water (Prevention and Control of Pollution) Act and the Air (Prevention and Control of Pollution) Act. unanimously resolves that its powers u/s 49 of the former Act and Section 43, of the latter Act to sanction legal action be and is hereby delegated to the Chairman of the Board in accordance with the delegatory provisions of Section 11-A of the former Act and Section 15 of the latter Act.

According to counsel for the petitioners.

Annexure - B is not valid, that it does not satisfy the mandatory requirements of Section 49, of the Act and therefore the Court below was not justified to take cognisance of the offences alleged in the complaints. I am unable to agree with the submission. The section no doubt prohibits taking cognisance of any offence except on a complaint made or with the previous sanction in writing of the State Board. The question for consideration is whether the State Board was entitled to delegate its power to grant sanction for prosecution to the Chairman and the sanction so accorded by him is valid and legal.

6. Section 17, deals with the functions of the State Board. Section 4, deals with the composition of the State Board and by sub-clause (2) (a), it has to consist of a Chairman nominated by the State Government, who is -

"a person having special knowledge or practical experience in respect of matter relating to environmental protection or a person having knowledge and experience in administering institutions dealing with the matters aforesaid."

He may either be a full-time or part-time employee as the State Government may think fit. u/s 11-A, the Chairman shall exercise such powers and perform such duties as may be prescribed or as may, from time to time, be delegated to him by the Board. It does not say in terms which powers can or cannot be delegated to the Chairman of the Board. It appears the Board can legitimately delegate its authority to sanction prosecution u/s 49, of the Act, inasmuch as in terms it has not been interdicted from giving such delegation. Indeed it is not that such power to grant sanction is exclusively that of the Board, which it has itself to exercise and not by anyone else under its delegated authority. Having regard to the composition of the Board, the manner in which its business is transacted at meetings that are held at intervals and the necessity to take urgent action in certain cases or in the exigencies of the situations that are likely to arise and to prevent avoidable delay to carry out the objects of the Act, the need to invest the Chairman with the authority to sanction prosecution cannot indeed be gainsaid. That seems to be precisely why u/s 11-A, the Chairman has been empowered to exercise such powers and perform such duties as may be delegated to him by the Board. If it was felt necessary to exclude the power of the Board u/s 49, from the scope of delegation it should have been so stated in Section 11-A, which is widely worded and comprehensive. In my view, the power of the Board to grant sanction for prosecution u/s 49, can be the subject of delegation by it and the exercise of the power by the Chairman in that behalf will be valid and legal. A complaint filed under the sanction granted by Chairman will not be bad and a competent Court will be justified to take cognisance of the offence alleged under such circumstances. The complaints had been laid by an officer duly empowered to do so. In my view, the decision reported in *State of Bihar Vs. Murad Ali Khan and Others*, relied on by counsel for the petitioners does not apply to the facts of this case.

7. In *Sahni Silk Mills (P) Ltd. and Another Vs. Employees' State Insurance Corporation*, it was held, construing Section 94-A, of the Employees State Insurance Corporation Act, that -

"it does not appear that Parliament vested power in the Corporation to delegate its power on any officer or authority subordinate to the Corporation, and also vested power in the Corporation to empower such officer or authority, to authorise any other officer to exercise the said power u/s 85-B(1). If Section 94A, had a provision enabling the Corporation not only to delegate its power to any other officer or authority subordinate to the Corporation but also to empower such officer or authority in its own turn to authorise any other officer to exercise

that power, the resolution could have been sustained. As such it has to be held that the part of the resolution dated 28-2-1976, which authorises the Director General to permit any other officer to exercise the power u/s 85-B(1), of the Act is ultra vires Section 94-A.

Once that part of the resolution dated 28-2-1976 is held as invalid, the office order dated 3-5-1976 issued by the Director General (under the said resolution) authorising the Regional Directors to exercise the power u/s 85-B(1), also becomes invalid. The Regional Directors therefore could not have passed the impugned orders on the basis of the invalid office order dated 3-5-1976."

It was also observed - AIR 1994 SCW 3832

"The Courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else. At the same time, in the present administrative set-up extreme judicial aversion to delegation cannot be carried to an extreme. A public authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorised either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by statutory authorities, the maxim delegatus non potest delegare is not being applied specially when there is question of exercise of administrative discretionary power.

By now it is almost settled that the legislature can permit any statutory authority to delegate its power to any other authority, of course, after the policy has been indicated in the statute itself within the framework of which such delegatee is to exercise the power. The real problem or the controversy arises when there is a sub-delegation. It is said that when the Parliament has specifically appointed authority to discharge a function, it cannot be readily presumed that it had intended that its delegate should be free to empower another person or body to act in its place. In *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, this Court said in respect of sub-delegation:

"Bearing in mind that the maxim delegatus non potest delegare sets out what is merely a rule of construction, sub-delegation can be sustained if permitted by express provisions or by necessary implication."

The facts are entirely different here, where there had been no sub-delegation by the Chairman, who" had himself granted sanction under the authority granted to him by the Board.

8. In *Gujarat Pollution Control Board v. Indian Chemicals Manufacturer* (1992 Cri J 1024 Gujarat) where almost on identical facts it was held : (at P. 1028 of Cri LJ)

".....it can be safely inferred that the legislature intended to authorise the State Board to delegate its powers and duties to be performed under the Act to its Chairman. Therefore, power u/s 49(1), to prosecute or to give previous sanction to prosecute any person for offences under the Act can be delegated by

the Slate Board to the Chairman u/s 11-A, of the Act."

I am in respectful agreement with the above observations.

9-10. As stated, the complaints in these cases are laid by the first respondent as per sanction granted by the Chairman. No doubt reference had been made in the complaints to an order dt. 8-11-1989 of the Board, which is actually the order of the Chairman and not of the Board as such. But then that made no difference at all since it is a valid sanction for prosecution. The contentions of the petitioners to the contrary are unacceptable. The Court below rightly took cognisance of the offences on the complaints laid against them. In my view having regard to the background of the prosecution and the nature of the allegations raised in the complaints where a prima facie case had been made out these at any rate are not fit cases where this Court will be justified to interfere with the proceedings u/s 482, of the Code of Criminal Procedure.

The Crl. M.Cs. are hence dismissed. The cases shall be disposed of within two months of receipt of a copy of this order.