

(1996) 05 OHC CK 0020
In the Orissa High Court
Case No : O.J.C. No. 1581 of 1996

Samarendra Nath Mukherji and Others	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 13-05-1996

Acts Referred:

Water (Prevention and Control of Pollution) Act, 1974 — Section 17, 21, 22, 25, 27

Citation : (1996) 2 OLR 5

Hon'ble Judges : P. Ray, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : Ashoka Mukherji, for the Appellant; B.P. Das, for the Respondent

Final Decision : Allowed

Judgement

D.M. Patnaik, J.—Puri Hotel at Puri through its manager, petitioner No. 1 assails the order of the Orissa State Pollution Control Board (for short, the "Board") directing to close down the hotel for allegedly violating the provisions of the Water and Air (Prevention and Control of Pollution) Act, 1974 (Act No. 6 of 1974) (for short, the "Act").

2. Petitioners' case is, the hotel is a premier hotel of repute carrying on business in hotel industry since last more than 40 years it has been awarded various trophies for its performance in hotel industry. Being a premier hotel of the State, it has taken utmost care to keep the industry free from all types of pollution. Its trade effluent from bath-room and kitchen etc. is driven to the pits dug and from there through its own sewer to the municipal drain.

It is further case of the petitioner that notwithstanding the fact that the petitioner-hotel is not a polluting unit, the Board (opp. party No. 5) under Annexure-1 dated 23-6-1993 and Annexure-4 dated 23-5-1994 asked the petitioner-hotel to apply for consent as required under Sections 25 and 26 of the Act. Accordingly, petitioner No. 1 applied for such consent with requisite fee of Rs. 1000/- under Annexure-5 series dated 7-7-1994 and 20-7-1994 respectively.

On 29-9-1995 under Annexure-12 the Board informed the petitioner that the Public Health Department (Urban) expressed its inability for establishment of the Treatment Plant for Puri town at Banki Muhana and, therefore, the petitioner should install by 31-12-1995 its own treatment and disposal plant to treat its effluent within its premises failing which direction for closure of the hotel would be issued. Since the petitioner could not comply with this direction, the order for such closure was passed on 9-2-1996 under Annexure-15 which is challenged before this Court.

3. The Board filed a counter-affidavit justifying its action in collecting the sample effluent and giving such direction. With regard to the result of the sample collected, in para-15 of the counter the Board took the stand that the samples so collected were sent to the Board's laboratory and on analysis it showed parameter beyond the prescribed limit and, therefore, the unit was directed to treat the effluents before discharging the same to the municipal drain.

4. The main thrust of argument of Mr. Mukherji, learned counsel for the petitioners, is that the direction of the Board to close down the hotel seems to be pursuant to the direction of the Supreme Court in the case of *Rajan Deb v. Union of India and Ors.* : in writ petition (Civil) No. 16/1991 disposed of on 9-1-1995, In that judgment the Supreme Court directed the State Board to identify all the polluting units in the city of Puri. Before directing closure of the petitioners' unit it was incumbent on the part of the Board to find out if the hotel, in question was in fact a polluting unit so as to keep the Board's direction in consonance with the direction of the Supreme Court. In the absence of such a finding, it is the contention of Mr. Mukherji that the direction is not only against the provisions of the Act, but also unreasonable, arbitrary and unconstitutional. Besides, the learned counsel after drawing the attention of this Court to various provisions of the Act including Sections 22 and 25, strenuously urged that because of serious procedural defect in collecting the samples of the effluent and non-compliance of mandatory provisions of the Act, the action of the Board is unsustainable in the eye of law and is liable to be set aside.

Mr. B.P. Das, learned counsel for the Board, on the other hand, submitted that the sample of trade effluent was collected in presence of petitioner No. 1 who signed the notice for analysis of the effluent. It was given sufficient time to establish its own treating plant at the terminal point. It is further submitted that the action of the Board directing closure of the hotel is in compliance with the direction of the Supreme Court.

The rival contentions need examination.

5. The direction of the Board dated 9-2-1996 to close down the hotel is by virtue of the power u/s 33-A of the Act. On a bare reading of the provisions of that section it is clear that the Board's power to give various directions enumerated therein including the power to issue direction to close down any industry can be exercised subject to the other provisions of the Act. Therefore, it would be

appropriate that in order to judge the legality of Board's direction those provisions of the Act have to be gone into.

6. Section 25 of the Act provides that no person shall, without the previous consent of the State Board, establish or take any steps to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land. An application for such consent shall be made as provided under Sub-section (2) of that section. Thereafter comes the relevant provisions under Sub-section (3) of that section which prescribes that the State Board may make such inquiry as it may deem fit in respect of the application for consent and in making such inquiry shall follow such procedure as may be prescribed. Under Sub-section (4), the Board may grant its consent subject to such conditions as it may impose and those conditions may be as provided under that Sub-section (4) (b) empowers the Board to refuse such consent for reasons to be recorded in writing. Sub-section (7) of that section prescribes that the consent referred to above shall, unless given or refused earlier, be deemed to have been given unconditionally on the expiry of a period of four months of the making of an application in this behalf complete in all respects to the State Board.

Section 27 of the Act empowers the State Board not to grant its consent unless the industry so established has complied with any conditions imposed by the Board so as to enable the Board to exercise its right to take samples of the effluent. A bare reading of the provision of Section 26 of the Act would make it clear that the provisions of the Act are also applicable to the petitioner-hotel and this position is not disputed by Mr. Mukherji except, of course his argument that, the provisions will not be applicable unless the industry is a polluting one which is a matter for examination.

7. It is admitted fact that the petitioner No. 1 deposited Rs. 50/- and purchased the requisite form under Annexure-2/1 dated 30-3-1994 and deposited the consent fee on 20-7-1994. Therefore, as per the mandatory provisions of Section 25, Sub-section (7), the Board should have either given the consent or refused the same before expiry of four months from 29-7-1994 and, therefore, having not done so, as rightly pressed by Mr. Mukherji, it must be held that the petitioner-unit should be deemed to have been given an unconditional consent to run the unit. We find no explanation either in the counter or in the submission of Mr. Das, learned counsel for the Board, in complying with this statutory requirement.

8. Next we may examine whether the Board complied with the various provisions of the Act in taking samples of the effluent and the result of any analysis thereafter.

In this regard the provisions of Sections 17 and 21 are relevant. Section 17 prescribes the functions of the State Board, Clause (f) thereof envisages that the State Board may inspect sewage and trade effluents and to review plants and so

on and so forth enumerated under that clause. It further prescribes the functions of the Board to inspect the system of disposal of sewage or trade effluents which may arise in connection with grant of consent as required under this Act. Under Clause (m), it is one of the functions of the Board to lay down effluent standards to be complied with by persons while causing discharge to sewage or sullage or both and to lay down, modify or annul effluent standards for the sewage and trade effluents. Under Sub-section (2) of Section 17, the Board may establish or recognise a laboratory or laboratories to enable the Board to perform its functions under this section efficiently, including the analysis of samples of water from any stream or well or of samples of any sewage or trade effluents.

9. Section 21 of the Act authorises any officer of the Board to take for purposes of analysis, samples of water from any stream or well or samples of any sewage or trade effluent which is passing from any plant or vessel or from any place into any such stream or well. It mandates, as provided under Clause (3) (a) thereof that, person taking the sample, shall serve on the person in charge of, or having control over, the plant or vessel or in occupation of the place, as the case may be, a notice then and there under the prescribed form giving out his intention to have the sample analysed. Clause (b) thereof prescribes to divide the sample into two parts in presence of the occupier or his agent. Clause (c) prescribes to cause each part to be placed in a container which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent. Clause (d) authorises that the officer taking the sample, shall send one such container to the State laboratory or any other laboratory recognised by the Board as provided u/s 17 of the Act. Sub-section (5) of Section 21 provides that if the occupier or his agent, who is present at the time of taking sample after service of the notice as mentioned above does not make a request for dividing the sample in two parts as provided under Clause (b) of Sub-section (3), then the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the officer taking the sample and then the same shall be sent forthwith for analysis to the laboratory of the Board as referred to under Clause (i) of Sub-section (2) and Clause (d) of Sub-section (3).

10. While it was contended by Mr. Mukherji that this mandatory provision has not been complied with by the Board at the time of taking sample, it was contended by Mr. Das. learned counsel for the Board, that they were so complied. The factual dispute centres round the fact whether petitioner No. 1 who was present at the time of taking samples requested the officer taking the sample to divide the sample into two parts as required under Sub-section (5) of Section 21. This contention of Mr. Das is controverted by Mr. Mukherji that petitioner No. 1 in fact made a request to divide the sample. We are not supposed to dwell up on this disputed fact so pleaded by the parties. However, fact remains that sample was collected on 25-9-1995 as is clear from Annexure-11. This was so collected in presence of petitioner No. 1 and this fact is not disputed by Mr. Mukherji. But we have to see whether the other statutory requirements were adhered to in dealing with the sample so collected.

11. Section 22 of the Act prescribes that where a sample of any sewage or trade effluent has been sent for analysis to the laboratory by the Board, the Analyst shall analyse the sample and submit a report of the result of such analysis in triplicate to the State Board. Sub-section (2) of Section 22 mandates that on receipt of the report of the analysis, one copy of the report shall be sent to the occupier or his agent referred to u/s 21 and another copy shall be preserved for production before the Court in case any legal proceedings are taken against him and the third copy shall be kept by the State Board.

12. Petitioner No. 1 in para-13 of his writ petition averred that he was not aware whether the collected sample was at all sent to the Laboratory. He also denied to have received any report of any such analysis. The Board did not deny this assertion in para-14 of its counter. Mr. Das has also not placed any material before this Court to indicate that a copy of the report of analysis was sent to petitioner No. 1 as is prescribed under Sub-section (2) of Section 22. This provision is a mandatory one to keep the occupier or his agent informed of the result of the analysis. It goes without saying that the provisions of the Act are stringent and in case the report of any analysis brings out the trade effluent to be beyond the standard and/or parameter prescribed, then the person is liable to legal consequences prescribed under the Act. Therefore, the legislature to safeguard against any arbitrary action has prescribed the provision to keep the owner or occupier informed about the result of the analysis. Not only that, even the result of the analysis has not been placed before this Court for our perusal. Needless to say that the provisions of the Act can be made applicable only if the analysis shows the effluent to be polluted. The Analyst's report being the basis for taking action under the various provisions of the Act, non-compliance with the provisions to supply copy of the report will render the Board's action as illegal and arbitrary. Therefore, we hold that the Board violated the statutory provisions of the Act as well as the principle of natural justice for which the impugned direction should be set aside.

13. The petitioner must have been directed to close down his hotel under Annexure -15 on the ground that it did not comply with the direction to install its own treating plant by 31-12-1995. The Board thought it urgent to take the stringent action because of the direction of the Supreme Court in the case of Rajan Deb (supra) vide para-3 of the counter. If it thought the matter that urgent, then instead of procrastinating the matter, it should have taken prompt action to get the effluent analysed and should have refused the consent within four months from 20-7-1994, the date when the petitioner deposited Rs. 1000/- towards the consent fee pursuant to his application. But, after receiving the consent application on 7-7-1994 (in worst case, 20-7-1994 when the amount was deposited) the Board collected the sample on 25-9-1995, that is almost 14 months after the application for consent. This shows lack of seriousness in Board's action. If the Board took 14 months to get a mere sample of the trade effluent analysed in the laboratory situated within the State, it is difficult to apprehend that the petitioner, a business concern, should be in a position to

comply with the direction of the Board for establishing its own treating plant within a period of three months as directed under Annexure-12. The time given cannot be said, in the present context of the things, to be a reasonable one particularly when the petitioner has been, as rightly contended by Mr. Mukherji, co-operating with the Board in the matter from even the initial stage of applying for consent.

14. In the result, the writ petition is allowed. Annexure-15 is quashed. The direction of the Board to close down the hotel is set aside. This, however, will not debar the Board to take further action in the matter after following due procedure of law prescribed under the Act if circumstances so demand. No cost.

P. Ray, J.

I agree.