

2012 CLD 2004

[Environmental Protection Tribunal, Karachi]

Before Mrs. Ashraf Jahan, Chairperson and

Abdul Karim Memon, Member Legal

DIRECTOR-GENERAL, ENVIRONMENTAL PROTECTION

AGENCY, GOVERNMENT OF SINDH—Complainant

versus

MOHSIN TABANI, CHIEF EXECUTIVE OFFICER,

TMK SUGAR MILL—Respondent

Complaint No. 5 of 2010, decided on 22nd December, 2011.

(a) Pakistan Environmental Protection Act (XXXIV of 1997) -

—Ss. 11, 16, 17 & 21(3)(a)—Environmental samples Rules, 2001, R.8(2)—Discharge or emit any effluent or waste—'Complaint against—Appreciation of evidence— Wastewater samples were analyzed and tested in Laboratory of Environmental Protection Agency and it urns observed, that level of Biochemical Oxygen Demand (BOD), and Chemical Oxygen- Demand (COD), were in excess of National Environmental Quality Standards— Complaint was filed against the Sugar Mill to the effect that as it had clearly been established that management of Mill had violated Ss.11 &16 of Pakistan Environmental Protection, Act, 1997, Tribunal could take cognizance of the offence under 8.17(1) of said Act— Evidence and the material placed on. record, had shown that there were glaring violations of procedural Rules committed by the prosecution witnesses, right from, the beginning of initiating process against the mill, till submission of complaint before the Tribunal—Most of all, there was inordinate delay in sending wastewater samples to the. laboratory, which fact was admitted by all witnesses—Test report and certificate of test or analysis produced on

record, had revealed that sample number was mentioned as 'NIL'—From said certificate it could not be ascertained as to how it pertained to the mill, as nowhere any reference or name of that mill was mentioned; and no plausible explanation had been brought on record in that regard by the department—Samples were sent to -the laboratory after 48 hours in violation of R. 8(2) of Environmental Samples Rules, 2001 and said inordinate delay was fatal to the case of prosecution—Neither the claim of custody of samples was established in the case nor the samples were sent to the laboratory in time.—No reliance could be placed on the test report, in circumstances—Prosecution having failed to prove the charge against Chief Executive Officer of the mill, he was acquitted in the case, in circumstances, [pp. 2006, 2013] A, C, D & E

2010 SCMR 1592; 2006 PCr.LJ 46 and 2011 SCMR 11 **ref.**

(b) Criminal trial—

—Burden of proof—Prosecution had to prove its case independently beyond any shadow of reasonable doubt. (p. 2012] B

Karim Nawaz. Qureshi, Deputy District Public Prosecutor for SEPA.

Zulfiqar All Noorani for Respondent/Accused.

JUDGMENT

The present complaint under section 213(a) of Pakistan Environmental Protection Act, 1997 read with section 5 of Cr.P.C. Is filed by Director .General, Environmental Protection Agency, Sindh on 26-2-2011, against Mr. Mohsin Tabani, Chief Executive Officer, TMK Sugar Mills.

2. The facts in a nutshell as per complaint are that the respondent Mr. Mohsin Tabani, Chief Executive Officer, TMK Sugar Mill is in charge of the operation of the TMK Sugar Mills/Venus Chemical (Pvt.) Ltd. located in District Tando Muhammad Khan, it was inspected by the officials of Environmental Protection Agency, Sindh for checking Environmental Pollution. It Is the case of complainant that in view of potential impact of

Sugar Mills on Environment and also because of general complaint, HRO2119 of 2006 application filed by Niaz Khaskheli, District Organizer JISQM, Talpur Colony, TMK, the Director-General, Environmental Protection Agency got this industry inspected by the team of Environmental Protection Agency, Sindh vide order dated 23-2-2008. On 28-2-2008 the team collected samples, prepared form-B and also compiled information about the Industry in questionnaire for industrial monitoring survey. The samples of wastewater were analyzed and tested in the Laboratory of Environmental Protection Agency and it was observed that the level of BOD, COD, TSS Oil and Greece (Ph acidic) were in excess of National Environmental Quality Standards. Therefore in view of samples analysis report Director-General, Environmental Protection Agency issued notice of personal hearing to the Chief Executive, General Manager of TMK Sugar Mill, while the Environmental Protection Order was already issued on 11-9-2007. On 14-5-2008 Mr. Ghulam Sarwar Chandio, General Manager Admin, TMK Sugar Mill appeared before the Director-General and assured that all Environmental Laws will be complied with. After, hearing him the Director General directed that Environmental Management Plan shall be submitted. In compliance of order of the Director-General, the respondent submitted the Environmental Management Plan, but subsequently on receipt of fresh complaints through media the officials of Environmental Protection Agency. Sindh again Inspected TMK Sugar Mill on 9-1-2010, collected samples, filled form-B, and questionnaire for industrial monitoring survey. The wastewater samples were analyzed and tested from PARAC Research and Development Foundation and as per result it was observed that level of Biochemical Oxygen Demand (BOD), Chemical Oxygen Demand (COD) were in, excess of National Environmental Quality Standards. As the wastewater generated by this mill is being discharged in the environment without any in-house treatment, thus being in excess of National Environmental Quality Standards it is adversely contaminating water quality of canals and affecting the ecology of the area. In view of above it is clearly established that management of TMK. Sugar Mill has violated sections 11 and 16 of Pakistan Environmental Protection Act, 1997 hence this complaint with request that Tribunal may take cognizance of this offence under section 17(1) of Pakistan Environmental Protection Act, 1997.

3. After receiving this complaint notices were Issued to the respondent who appeared before the Tribunal, copy of complaint along with annexure were supplied to him on 7-4-2010 and receipt was obtained as Exh.I on record. On 4-5-2010 learned counsel for the respondent submitted comments cum legal objections on behalf of respondent, wherein he challenged the maintainability of the complaint and further stated that the reports of 2008 and 2010 support their stand as respondent is making efforts to make compliance of Pakistan Environmental Protection Act, 1997. At the same time he requested that the time for making compliance under the said Act may kindly be extended till 2012 as per Environmental Management Plan already submitted to the concerned agency.

4. The charge in the present case was framed on 14-6-2010 for violation of section 11 of Pakistan Environmental Protection Act, 1997 to which the accused pleaded not guilty and claimed for trial. Prosecution in support of its case has examined P.W. Kamran All as Exh.4 who produced on record Form-B dated 9-1-2010 as Exh. 4(a), P.W. Mir Mureed All Talpur is examined as Exh.5 he has produced test report pertaining to the year 2008 as Exh. 5(a), P.W. Ziauddin Siddiqui is examined as Exh. 6, he has produced test report dated 19-1-2010 as Exh. 6(a), certificate of test or analysis as Exh. 6(b). P.W. Muhammad Yahya is examined as Exh.7 who has produced form-D as Exh. 7(a), Authorization order as Exh. 7(b), form-C dated 12-1-2010 as Exh. 7(c). P.W. Soomar Khaskhely is examined as Exh.8, P.W. Ashiq All Langha is examined as Exh.9 he has produced authorization order dated 23-2-2008 as Exh. 9(a), questionnaire for industrial monitoring survey as Exh.9(b), Form-B dated 28-2-2008 as Exh.9(c), Form-C dated 28-2-2008 as Exh.9(d). P.W. Imran All Abbasl is examined as Exh. 10 he has produced Industrial monitoring survey report as Exh.10 (a) along with questionnaire. P.W. Muhammad Iqbal and P.W. Abdullah were given up by the prosecution as Exh. 11 on record. Complainant Naeem Ahmed Mughal is examined as Exh. 12 he has produced Environmental Protection Order (EPO) dated 11-9-2007 issued under section 16 of Pakistan Environmental Protection Act, 1997 as Exh.12(a), present complaint as Exh.12(b). P.W. Jahangir Asad is examined as Exh. 13 who has produced air test report as Exh. 13(a) and side for the prosecution was closed vide Exh. 14 on record.

5. Statement of accused under section 342, Cr.P.C. was recorded as Exh.

15 wherein he has denied to the case of prosecution and further stated that they are working to comply Environmental Protection Order dated 11-9-2007 and they have submitted such plan in court. However, he did not examine any witness in his defence and also declined to be examined on oath.

6. We have heard the learned Deputy District Public Prosecutor for Sindh Environmental Protection Agency and learned counsel for the accused and have perused the case, record. Now the points of determination before us are as under:--

POINTS FOR DETERMINATION

1. Whether TMK Sugar Mill has committed violation of section 11 of Pakistan Environmental Protection Act, 1997?
2. What should the order be?

FINDINGS

POINT NO. 1 not proved.

POINT NO. 2. Accused Moshin Tabani, Chief Executive Officer of TMK Sugar .Mill acquitted under section 265H(I), Cr.P.C

REASONS

POINT NO. 1:

7. In the present complaint the allegations of violation of section 11 of Pakistan Environmental Protection Act, 1997 are alleged against the present respondent on account of two sets of samples, first collected In the year 2008 and the second collected In the year 2010. Before discussing the evidence for the sake of convenience and ready reference section 11 of Pakistan Environmental Protection Act, 1997 is hereby reproduced as under:—

“11. Prohibition of certain discharges or emissions.(1) Subject to the provisions of this Act and the rules and regulations no person shall discharge or emit or allow the discharge or emission of any effluent or waste or air pollutant or noise in an amount, concentration or" level which is in excess of the National Environmental Quality Standards or, where applicable, the standards established under Sub-clause (1) of clause (g)of subsection (1) of section 6.

- (2) The Federal Government may levy a pollution charge on any person who contravenes or fails to comply with the provisions of subsection (1), to be calculated at such rate, and collected in accordance with such procedure as may be prescribed.
- (3) Any person who pays, the pollution charge levied under subsection (2) shall not be charged with an offence with respect to that contravention or failure.
- (4) The provisions of subsection (3) shall not apply to projects which commenced industrial activity on or after the thirtieth day of June, 1994."

8. The bare reading of above-mentioned provision of law goes to show that it deals with the pollution, discharge or emission of any effluent or waste or air pollutant or noise in an account, concentration or level, which is, in excess of National Environmental Quality Standards.

9. It is contended by learned Deputy District Public Prosecutor that prosecution in this case has-examined in all 9 P.Ws., the team of Environmental Protection Agency; Sindh, in the year 2008 as well as in the year 2010 both times have violated the Environmental Sample Rules 2001. Apart from it there are contradictory statements given by the P.Ws. on important issues, therefore, he concedes that prosecution has failed to prove the charge against the present respondent.

Against this Mr. Zulfiqar Noorani learned counsel for the respondent/ accused has argued the matter at length and submitted that all the P.Ws. have given contradictory statements, the case of Prosecution is full of lacunas. Not only this but mandatory provisions of

Environmental Sample Rules 2001 have been violated, therefore prosecution has miserably failed to prove the case against the present respondent. In support of this contention he has relied upon following case-law.

2010 SCMR Page 1592,

2006 PCr.LJ Page 46,

2011 R Page 11

10. In the present case so far as the allegations in respect of collection of samples in the year 2008 are concerned the prosecution has examined complainant along with P.W. Mir Mureed All Talpur, P.W. Muhammad Yahya, P.W. Ashiq All Langha and P.W. Jahangir Asad. First of all we will discuss the evidence of complainant Mr. Naeem Ahmed Mughal, in his evidence though he has deposed that samples collected in the year 2008 were tested in the lab of Environmental Protection Agency and after test report notice of personal hearing was given to the respondent, in response they appeared and filed Environmental Management Plan, but his evidence is silent as to whether after receipt of Environmental Management Plan what action was taken by the Environmental Protection Agency Sindh. It is also an admitted position that since year 2008 till the date of filing of present complaint no action was taken against TMK Sugar Mill. His evidence is also silent on the point as to whether implementation status of Environmental Protection Order dated 11-9-2007 was checked by the Environmental Protection Agency or not. The complainant during the evidence has deposed that a Human Right petition was filed before the Hon'ble Supreme Court of Pakistan bearing No. HRC2119/2006, but neither he has produced the copy of petition, nor the fate of above proceedings pending before the Hon'ble Supreme Court of Pakistan have been brought on record. He has simply deposed that in the year 2008 the samples were collected and checked in the lab of Environmental Protection Agency which were found in violation of National Environmental Quality Standards and same practice was repeated in the year 2010 also. The complainant who is Director-General, Environmental Protection Agency, Sindh surprisingly was not sure whether the laboratory of Environmental Protection Agency was certified in the year 2008 or not. Even during cross-examination he admitted that the

present complaint is in respect of 2010 lab test results. He has also showed his Ignorance in respect of the fact that in present case samples of wastewater to the laboratory were sent after three days. He has also admitted that has not given any hearing to the management of TMK Sugar Mill in the year 2010. He was not even sure about anything conveyed to the management of TMK Sugar Mill in respect of Environmental Management Plan filed by them in March 2009. The evidence of complainant and his cross-examination goes to reveal that the complainant himself is not sure as to whether the present complaint is filed on the basis of results of 2010 lab report or it also includes the results of 2008. Same type of evidence has been adduced by the other P.Ws., they themselves are not¹ sure whether the present complaint is the outcome of the results conducted in the year 2010 only or the lab reports/results pertaining to the year 2008 are also part and parcel of this complaint. It is also, not understandable that when Environmental Protection Order was issued in the year 2007 and some specific directions were given to the respondents then why the implementation status of those directions/orders was not verified/checked by the Environmental Protection Agency. Admittedly the tests were conducted in the year 2008, in response the respondent filed its Environmental Management Plan in the year 2009 but strangely the Environmental Protection Agency authorities did not take any action to verify as to whether in actual the above Environmental Management Plan has been implemented or it is merely a piece of paper. Same conduct is adopted by the Environmental Protection Agency in 2010 neither the implementation status in respect of Environmental Protection Order issued in the year 2007 is brought on record nor any Environmental Protection Order was issued in the year 2008 or even in the year 2010 and without completing the legal procedure they have straight away sent this complaint to the Tribunal. It is noticeable that no valid justification is given by the Environmental Protection Agency in this regard.

11. The other P.W. Mir Mureed Ali Talpur, Chemist who has issued the report in the year 2008 has deposed that he analyzed the samples collected in the year 2008 but at the same time he admitted that the Lab of Environmental Protection Agency was not certified in the year 2008, Similarly P.W. Ashiq Ali Langha who is examined as Exh.9 has¹ deposed that they have collected the wastewater sample from the respondent factory in the year 2008, this

witness has also admitted that the lab of Environmental Protection Agency was not certified in the year 2008 and lastly P.W. Yahya who is Director Lab of Sindh Environmental Protection Agency In his cross-examination has admitted that their Lab was not certified in the year 2008 and also deposed that the present complaint is only in respect of the results pertaining to the year 2010. In view of above position It appears that prosecution itself is confused as to whether the present complaint is in respect of results of 2008 or only in respect of result pertaining to 2010, This being the position we are of the considered view that so far as, the charge of violation of section 11 of Pakistan Environmental Protection Act, 1997 in the year 2008 is concerned, the same is not proved.

12. Now we will discuss and analyze the case of prosecution in respect of tests conducted in the year 2010, which as alleged by the prosecution Is the basis of present complaint. It is established principle of law that prosecution has to prove its case independently beyond any shadow of reasonable doubt. In the present case it is the case of prosecution that they have, received complaint against the respondent mill in respect of pollution, therefore, they took samples in the year 2010 but no such application has been produced on record not any witnesses is examined to support the version of prosecution. The perusal of complaint goes to show that there Is mention about allegations that due to pollution caused by the respondent mill it has affected the ecology of the area and also causing wafer borne diseases to a large number of population but no such evidence has been brought on record by the prosecution to support the contents of the complaint.

13. Apart from it the perusal of evidence and the material placed on record goes to show that there are glaring violations of procedural rules committed by the prosecution witnesses, right from the beginning of initiating process against the respondent mill till submission of complaint before the Tribunal. Most of all there is inordinate, delay in sending wastewater samples to the laboratory which fact is admitted by all the concerned witnesses. In this regard the evidence of P.W. Ziauddin Siddiqui Is of material value, the relevant portion of his cross-examination is hereby reproduced for ready reference as under:

"It is correct that test was not conducted by Chief Analyst himself, voluntarily says chemist used to conduct the test but he is supervised by chief analyst. I have no knowledge as to whether this sample was collected seventy-two hours ago. It is correct that as per law sample is to be tested within forty-eight hours. It is correct that as per law if the sample is tested after forty-eight hours it has no varsity. I have produced Form-D before the Court during my examination-in-chief. It is correct that on exhibit-6-B which is certificate of test or analysis there is- no signature of min; it is correct that the above certificate exhibit-6-B nowhere makes mention as Form-D. It is correct that in clause-2 the sample identification is mentioned as "Nil". Voluntarily says as Form-G did not bear any reference number therefore it was mentioned as "Nil" it, is correct that as per exhibit-6-B there is no reference or mention in respect of name of respondent mill or respondent himself. It is correct that the place mentioning about the time is left blank in this certificate. It is correct that as per exhibit-6-B nowhere it is mentioned that BOD and COD were beyond the required limits. It is incorrect to suggest that since I have not signed exhibit-6-B therefore' I cannot deposes in this case, voluntarily says that it bears my initials."

14. The perusal of test report Exh. 6(a) also goes to show that in, the column of customer's reference there is only mention "letter" and then perusal of certificate of test or analysis produced, on record as Exh. 6b reveals that sample number is mentioned as Nil. Thus from the perusal of this certificate it cannot be ascertained as to how it pertained to respondent" mill as nowhere any reference or name of this mill is mentioned and no plausible explanation has been brought on record in this regard by the prosecution side.

15. Be that as it may, P.W. Muhammad Yahya who is the Lab, Director in Environmental Protection Agency has been examined by the prosecution, the relevant portion of his cross-examination is hereby reproduced as under:—

“The lab attendant had received the sample in the year 2010. It is correct that I have not checked personally the label, seal Form-B and C in respect of present report voluntarily says this work had done by subordinate staff, usually it is chemist or

inspector. It is correct that sample was sent to PERAC lab after three days. Again says on third day."

16. The perusal of evidence of P.W./Muhammad Yahya reveals that it is admitted position that the samples were sent to the lab alter 48 hours in violation' of rule 8(2) of Environmental Sample Rules 2001. Though In this regard he has tried to improve the date of prosecution by saying that first the samples were sent to GEL Laboratory and there after receiving the instructions from the Director General, he resubmitted the same to the PARAC Laboratory but he has failed to produce any supporting document in this regard and Form-C which is produced on record clearly shows that the sample were sent to the PARAC Laboratory on 12-1-2010 and the same were received on the same date by the PARAC Laboratory and such stamp is affixed mentioning the date of receiving as 12-1-2010. And nowhere is it mentioned that it was submitted to GEL Laboratory first and after withdrawing the same from there it were resubmitted to tile PARAC. In this regard we would like to mention, that as per, 'sampling procedures for Municipal and Industrial effluent', issued by FEPA Central Laboratory for Environmental analysis, Government of Pakistan maximum withholding time of Biochemical Oxygen Demand (BOD)- Is 48 hours. Therefore E this inordinate delay is fatal-blow to the case of prosecution. Thus it is proved that neither the chain of custody is established in this case nor the samples-were sent to the Laboratory m time, therefore, no reliance can be placed on the test report.

17. In view of discussion made above we are of the considered view that prosecution has failed to prove, the charge against the present respondent, accordingly point No. 1 is answered as not proved.

POINT NO. 2

18. In view of our Ending of Point No. 1 as the prosecution has failed to prove the charge against Mr. Mohsin Tabani, therefore, he acquitted in this case under section 265-H(I), Cr.P.C.

19. It is relevant to mention here that while prosecuting the present respondent Environmental Protection Agency, Sindh Officials and PRD Laboratories have failed to discharge their duties in accordance with law and their attitude was very casual and unprofessional. While taking note of the aspect of the due and our findings in this regard we deem it appropriate to make following observations in this case:--

- (i) Secretary, Environment and Alternative Energy Department may probe into the matter and examine the conduct of Environmental Protection Agency, Sindh; officials due to whose negligence sample could not be delivered to the laboratory within forty-eight hours. Simultaneously disciplinary action under Sindh Civil Servant (Efficiency and Discipline) Rules, 1973 may be taken against the officials responsible for violating the Environmental Sample Rules, 2001 by not taking timely action against the violators as per procedure provided under the law and then without following the legal procedure provided under section 16 of Pakistan Environmental Protection Act, 1997 preparing a legally defective case,
- (ii) Suitable action under Regulation 14 of The National Environmental Quality Standards (Certification of Environmental Laboratories) Regulations, 2000 may be taken against the concerned Laboratory in respect of non-mentioning sample identification in certificate of test or analysis, and for issuing certificate dated 22-1-2010 in contradiction of test report dated 19-1-2010, so that in future occurrence of such incidents may be avoided.
- (iii) In the present case, Environmental Protection Order was issued on 11-9-2007 and the respondent has stated that they are working on it; such statement is quite wider in term and vague in nature. Therefore on the basis of such statement it cannot be said that Environmental Protection Order dated 11-9-2007 has been fully implemented. Unfortunately in this respect case of prosecution is also silent, as the case of prosecution has been built only on the basis of wastewater reports. Therefore, it is ordered that Environmental

Audit of the Respondent ' Factory through some reputable company be got Conducted by the respondent and such report be produced within three months from the date of receiving of tills Judgment.

- (iv) This order will not come in the way of Environments) Protection Agency, Sindh, in case fresh proceedings are initiated against the respondent covering all types of pollution, and violations of Pakistan, Environmental Protection Act, 19197 after taking composite samples and fulfilling all the legal requirements, such report be submitted by Environmental Protection Agency, Sindh, within a period of 90 days, from the date of receiving of this Judgment.

20. Let the copy of this judgment be sent to all concerned for information, compliance and report within the time frame mentioned above.

21. Announced in open Court.

22. Given under our hand and seal of this Tribunal on this 22nd Day of December, 2011.

HBT/6/EPT

Complaint rejected.
