

2012 C L D 1696

[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

**RAEES-UL-HASSAN, CHIEF EXECUTIVE OFFICER, HABIB SUGAR MILLS,
NAWABSHAH---Respondent**

Complaint No.3 of 2010, decided on 27th May, 2011.

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

---Ss. 11, 16, 17, 21 & 22---Complaint against spreading pollution---Case of prosecution was that it had received complaints against accused/mill in respect of spreading pollution and it took samples---Prosecution had not cited the private complainant as witness---Allegation in the complaint was that due to pollution caused by the mill it had affected the ecology of the area; and also causing waterborne diseases to a large section of the population residing in the vicinity in the down-stream towns and villages, but no such evidence had been brought on record by the prosecution side to support the contents of complaint---Evidence and the material placed on record had shown that there was glaring violation of procedural Rules, committed by the prosecution witnesses, right from the beginning of initiating process against the mill, till submission of the complaint before the Tribunal---Inordinate delay occurred in sending the wastewater sample to the Laboratory---Head Research Analytic Service, had categorically stated that samples were received in the Laboratory after seven days of their collection---No reason was provided for such delay, which delay was fatal to the case of prosecution and had hampered the whole case of prosecution---Neither chain of custody of

samples was established nor samples were sent to Laboratory in time---No reliance could be placed on the test report, in circumstances---Case of prosecution was that there had been violation of S.11 of Pakistan Environmental Protection Act, 1997, but neither any notice of said violation had been issued; nor the mill had been given any opportunity of hearing as required under S.16(1) of said Act---No Environmental Protection order was issued; and case was directly sent to the Tribunal without fulfilling the legal requirements---Prosecution, in circumstances, had failed to prove the charge against the mill---Chief Executive Officer of the mill was acquitted, in circumstances.

Waqar Ahmed v. Shaukat Ali and others 2006 SCMR 1139; Qurban Hussain alias Ashiq v. The State 2010 SCMR 1592; Muhammad v. The State 2006 PCr.LJ 526; Muhammad Rafiq v. The State 2005 YLR 3247 and Jameel Khan Afridi v. The State 2004 MLD 542 ref.

Karim Nawaz Qureshi, Deputy District Public Prosecutor for SEPA.

Zulfiqar Ali Noorani for Respondent/Accused.

Date of hearing: 27th May, 2012.

JUDGMENT

1. This judgment will dispose of Complaint No.3 of 2010 filed by the Director General, Environmental Protection Agency, Sindh under section 21(3)(a) of the Pakistan Environmental Protection Act, 1997 read with section (5) of Criminal Procedure Code, 1898, against Habib Sugar Mills Nawabshah through its Chief Executive Officer, Raees-ul-Hasan.

2. The case of prosecution in a nutshell as per complaint is that the respondent is the incharge of operation of the Habib Sugar Mill, located in District Nawabshah/Shaheed Benazirabad. The Environmental Protection Agency, Sindh while keeping in view the potential impact of sugar mills on environment and also because of general complaints, got this industry inspected by a team of Environmental Protection Agency, Sindh vide order dated 15-4-2008. Accordingly the team collected the samples on 17-4-2008 and got the wastewater tested in Environmental Protection Agency Laboratory. As per result it was observed that the level of Biological Oxygen Demand (BOD), Chemical Oxygen Demand (COD), Total Suspended Solids, Oil and Grease were in excess of National Environmental Quality Standards. In view of above analysis report the Director General, Environmental

Protection Agency, Sindh issued a notice on 12-5-2008 for personal hearing to the Chief Executive Officer/General Manager of Habib Sugar Mill, District Nawabshah. On 19-5-2008 Muhammad Yousuf, Resident Director and General Manager, Distillery, Habib Sugar Mill appeared before Director General, SEPA and assured that necessary mitigation measures were being taken to address the environmental issues and environmental laws will be complied with. After hearing him the Director General, SEPA directed him to submit Environmental Management Plan and same was submitted in compliance of the order of Director General, SEPA.

3. Thereafter on receipt of fresh complaints from Syed Wasi Hyder Shah and Maqsood Ali son of Abdul Ghafoor in the year 2009, the Officials of SEPA again inspected Habib Sugar Mill on 5-1-2010 vide orders conveyed through Letter No.EPA/LAB/HSM/09/24/99 dated 4-1-2010, collected samples, filled Form-B and Questionnaire for Industrial Monitoring Survey. The wastewater sample was got tested from PERAC Research and Development Foundation on 12-1-2010 and as per result it was observed that the level of Biological Oxygen Demand (BOD), Chemical Oxygen Demand (COD) and pH (acidic) were in excess of National Environmental Quality Standards.

4. It is further the case of the prosecution that wastewater being generated by this sugar mill is discharged in the environment without any in-house treatment, thus being in excess of National Environmental Quality Standards, it is adversely contaminating the water quality of the canals. It is not only affecting the ecology of the area but also causing water borne diseases to a large section of the population residing in the vicinity in the down-stream towns. Thus the management of Habib Sugar Mill has violated Sections 11 and 16 of the Pakistan Environmental Protection Act, 1997, hence this complaint.

5. Upon receiving this complaint notices were issued to the respondent, he appeared on 7-4-2010 before this tribunal, copies of complaint along with its annexures were supplied to him vide receipt dated 7-4-2010 as exhibit-1. The Charge against the present respondent was framed on 3-6-2010 as exhibit-2 under section 11 of the Pakistan Environmental Protection Act, 1997 punishable under section 17(1) of the said Act, to which the accused pleaded not guilty and claimed for trial vide Plea as exhibit-3.

6. The prosecution in support of its case has examined complainant along with six witnesses. P.W.1 Muhammad Soomar Khaskhely Assistant Director is examined as exhibit-4, he has produced Authorization Order dated 4-1-2010 as exhibit-4-A, Industrial Monitoring Survey along with Questionnaire as exhibit-4-B, Form-B dated 5-1-2010 as exhibit-4-C and Form-C dated 11-1-2010 as exhibit-4-D. P.W.2 Kamran Ali Environmental Inspector is examined as exhibit-5. P.W.3 Ziauddin Siddiqui Head Research Analytic Services is examined as exhibit-6 he has produced Test Report dated 19-1-2010 as exhibit-6-A and Certificate of Test or Analysis dated 22-1-2010 as exhibit-6-B. P.W.4 Syed Muhammad Yahya Director Laboratory is examined as exhibit-7. Complainant Mr. Naeem

Ahmed Mughal, Director General, SEPA is examined as exhibit-8, he has produced letter dated 15-4-2008 issued by the then Director-General Environmental Protection Agency, Sindh to Managing Director/Chief Executive Officer of Habib Sugar Mills as exhibit-8-A, notice dated 12-5-2008 as exhibit-8-B, copy of application of Syed Wasi Hyder Shah as exhibit-8-C, present complaint as exhibit-8-D and minutes of meeting regarding the contravention of Pakistan Environmental Protection Act, 1997 by the sugar industries as exhibit-8-E. P.W.5 Jehangir Asad Chemist (Air) is examined as exhibit-9, he has produced Form-B dated 17-4-2008 as exhibit-9-A, Form-C dated 18-4-2008 as exhibit-9-B and report dated 26-4-2008 issued by EPA Laboratory as exhibit-9-C. P.W.6 Mir Mureed Ali Talpur Chemist (water) is examined as exhibit-10. Thereafter the prosecution closed its side vide statement dated 15-12-2010 as exhibit-11.

7. It will be relevant to mention that Mr. S.M. Raza, advocate filed an application under section 493, Cr.P.C. on behalf of Syed Wasi Hyder Shah with a request that he may be allowed on behalf of Syed Wasi Hyder Shah to assist the prosecution in the matter as name of Syed Wasi Hyder Shah is already mentioned in the complaint. Notice of this application was given to the other side but when it was fixed for argument the learned counsel along with Syed Wasi Hyder Shah repeatedly remained absent without any intimation, therefore, application was dismissed for non-prosecution on 15-12-2010. Again on 15-1-2011 application for recalling of order dated 15-12-2010 was filed. On the same day they have also filed legal objections and requested that the proceedings may be stayed till the final disposal of the complaint filed by the Syed Wasi Hyder Shah before the honourable High Court of Sindh. The learned counsel also filed application for grant of time to submit the certified copy of order of Member Inspection Team of High Court of Sindh in the said application. He was directed to furnish the copy of the order but he failed and remained absent without intimation. Since no cogent reason for the absence of the party or advocate was disclosed in the application dated 15-1-2011, therefore, the same was dismissed vide order dated 26-3-2011.

8. Statement of accused/respondent under section 342, Cr.P.C. was recorded on 15-1-2011 as exhibit-12. In support of his contention he has produced Environmental Management Plan along with covering letter dated 5-3-2009 as exhibit-12-A, certified copy of order dated 17-8-2002 passed by the Labour Court, Sukkur in Application No.3 of 2002 under section 25-A of I.R.O. 1969 as exhibit-12-B, comments of Minister of Environment dated 31-1-2009 and comments of Director-General Environmental Protection Agency, Sindh dated 21-11-1995 as exhibit-12-C. In his statement accused/respondent has wished to examine Rafiq Mangi and Javed Shah as Defence Witnesses but subsequently vide statement dated 23-2-2011 as exhibit-13, he withdrew the names of defence witnesses and requested to proceed with the matter.

9. This tribunal on 15-4-2011 in order to arrive at the correct conclusion to meet to ends of justice ordered for appointment of commissioner for inspection of respondent mill and accordingly Dr. Shamsul-Haq Memon Ex-Secretary Forest and Wildlife, Ex-Secretary Environment and Alternate Energy, Consultant Agricultural, Planning and Engineering, Sindh Coastal Development Authority, Karachi, was appointed as Commissioner to visit the

Habib Sugar Mill in presence of respondent and to submit his report on the following parameters:--

- (i) Total pollution load from the mill with sources, (solid, liquid and gaseous).
- (ii) Handling and final disposal of all type of wastes.
- (iii) To verify the implementation status of Environmental Management Plan produced by the respondent.

10. The commissioner submitted his report on 4-5-2011, copies of which were supplied to the parties. Learned counsel for the respondent/accused filed objections to the commissioner report, however, it was ordered that the same will be decided at the time of final adjudication of this complaint.

11. We have heard the arguments advanced by Mr. Karim Nawaz Qureshi, Deputy District Public Prosecutor for Environmental Protection Agency, Sindh and Mr. Zulfiqar Ali Noorani, advocate for the respondent/ accused and have perused the case record. Now the points for determination before this Tribunal are as under:--

POINTS FOR DETERMINATION

- (1) Whether the Habib Sugar Mill has committed violation of section 11 of the Pakistan Environmental Protection Act, 1997?
- (2) What should the order be?

12. Our findings with reasons on the above-mentioned points are as under:--

FINDINGS

Point No.1 Not proved

Point No.2 Accused is acquitted under section 265-H Cr.P.C.

REASONS

Point No.1

13. As per present complaint the allegations of violation of section 11 of the Pakistan Environmental Protection Act, 1997 are alleged against the 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 the Pakistan Environmental Protection Act, 1997 is hereby reproduced as

"Section 11. Prohibition of certain discharges or emissions:---(1) Subject to the provisions of this Act and the rules and regulations no persons 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 (10) of clause (g) of subsection (1) of section 6."

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 amount, concentration or level, which is in excess of National Environmental Quality Standards.

14. In the present case so far as the allegations in respect of collection of sample in the year 2008 are concerned the prosecution has examined complainant along with two witnesses namely P.W-Jehangir Asad Chemist (Air) as exhibit-9 and other P.W-Mir Mureed Ali Talpur Chemist (water) as exhibit-10. The complainant Mr. Naeem Ahmed Mughal in his evidence though has deposed that samples collected in the year 2008 were tested in Environmental Protection Agency Lab, and after test report notice for personal hearing was given to the respondent, in response they appeared and filed Environmental Management Plan as per directions but his evidence is silent as to whether after receipt of Environmental Management

Plan what action was taken by the Environmental Protection Agency Sindh. However, in his cross-examination it has been admitted that from May 2008 till the date of filing of present complaint no action was taken against the Habib Sugar Mill. At the same time he has deposed that they have mentioned the result of 2008 but the basis of present complaint are the result conducted in the year 2010. Even the complainant who is Director General of the Environmental Protection Agency, Sindh was not aware if the Environmental Protection Agency, Lab was certified in the year 2008 or not. Same pattern of evidence is adopted by other prosecution witnesses so far as the allegations in respect of 2008 are concerned. Both the P.Ws. had gone to collect the samples but have given contradictory statements for example P.W-Jehangir Asad (Chemist Air) has deposed in his examination-in-chief that this mater is very old and he did not remember much about this case. Further he also showed his ignorance about the certification of Lab in the year 2008. Even during the cross-examination by the court he replied that he had come in court without going through the file. The court took serious notice of the demeanor of the witness and he was warned to be careful.

15. The other P.W-Mir Mureed Ali Talpur Chemist (water), who issued report in this case, during the cross-examination has admitted that in the test report (exhibit-9-C) nowhere it is mentioned as to when the sample was received in the lab. He has also admitted that nowhere he had mentioned in the report that on which date he had conducted the test. He was not sure as to whether the lab of EPA was certified in 2008 or not. Same evidence is brought by the other prosecution witnesses such as P.W-Syed Muhammad Yahya Director Laboratory, who has deposed in clear words that the basis of present complaint are the result of 2010.

16. The analysis of evidence brought by the prosecution on this count reveals that the witnesses who have appeared on behalf of prosecution were not even sure about the date when the samples were sent to the Laboratory or even about the fact as to whether the laboratory was certified at that time or not and repeatedly the P.Ws. including the complainant have stated that the cause of action for filing complaint against Habib Sugar Mill is the test conducted in the year 2010. Not only this but they have admitted the submission of Environmental Management Plan in the year 2008 in the month of May, as per direction of then Director General but thereafter the case of prosecution is silent as to what action/decision was taken by the Environmental Protection Agency, Sindh against the present respondent.

17. In view of above, it is established that the prosecution itself is not pressing the allegations in respect of test report pertaining to the year 2008 and therefore so far as the charge of violation of section 11 of the Pakistan Environmental Protection Act, 1997, in the year 2008 is concerned the same is not proved.

18. Now we will examine and analyse the case of prosecution in respect of test conducted in the year 2010, which as alleged by the prosecution is the basis of present complaint.

19. In this regard it is contended by the learned counsel for the respondent that the respondent mill is observing complete compliance of all environmental standards and this fact is evident from the remarks of Minister for Environment and Director-General Environmental Protection Agency, Sindh produced on record as exhibit-12-C. He has vehemently argued that in the present case prosecution has not only failed to prove the charge but its case is full of material contradictions and lacunas. The burden of proof lies upon the prosecution and it is the prosecution who has to establish its own case independently instead of depending upon the weakness of the defence, if any. In support of his contention she has relied upon the case of Waqar Ahmed v. Shaukat Ali and others, 2006 SCMR page 1139, Qurban Hussain alias Ashiq v. The State, 2010 SCMR page 1592, Muhammad v. The State, 2006 PCr.LJ page 526 and lastly the case of Muhammad Rafiq v. The State, 2005 YLR page 3247. He has further contended that not only this but there are procedural lapses as the prosecution has not followed the Sample Rules, there are contraventions of Rule 4(1), rule 7(1)(2)(5) and rule 10(5)(a) of Sample Rules, 2001 coupled with violation of section 16(1) of the Pakistan Environmental Protection Act, 1997 etc. The procedural requirements of the law are not mere formalities but they are to be followed with due care to ensure fair proceedings and in this regard he relied upon the case of Jameel Khan Afridi v. The State, 2004 MLD page 542. He has further submitted that if a particular thing is required to be done in a particular manner then it should be done in that manner or it should not be done at all. He has also drawn the attention of this tribunal towards the inordinate delay in sending the sample to the laboratory and has argued that the samples which are the only piece of evidence against the respondent were collected on 5-1-2010 and admittedly were sent to the Laboratory on 12-1-2010, which fact is admitted by the P.W-Ziauddin Siddiqui and other witness that because of this inordinate delay of seven days in sending the samples to the laboratory, which otherwise were required to be sent within forty-eight hours, the results cannot be relied upon at all. He has further submitted that the respondent was not given any opportunity of being heard, it is a matter of record that no hearing was provided to the respondent after collecting the wastewater samples in 2010 till the filing of the subject complaint. He has also referred before us contradictory evidence adduced by the prosecution witnesses and has prayed that the respondent may be acquitted in the present case.

20. On the other hand the learned DDPP for the SEPA has conceded to the violation of rules (8)(2), 10(5)(a) of Samples Rules, 2001. He has also conceded to the fact that the samples were sent to the laboratory after delay of seven days, therefore, the results of test report cannot be relied upon and in the end he has given his no objection if the accused is acquitted in the present case.

21. It is established principle of law that the prosecution has to prove its own case independently beyond any shadow of reasonable doubt. In the present case it is the case of prosecution that they have received complaints against the respondent mill in respect of spreading pollution therefore they took samples in the year 2010 and such application has also been produced on record through complainant but surprisingly the prosecution has not cited the private complainant as witness. Further perusal of complaint goes to show that there is mention about the allegation that due to pollution caused by the respondent mill it has

affected the ecology of the area and also causing water borne diseases to a large section of the population residing in the vicinity in the down-stream towns and villages but no such evidence has been brought on record by the prosecution side to support the contents of complaint.

22. 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 the wastewater sample to the laboratory, which fact is admitted by all concerned witnesses. In this regard, the evidence of P.W-Ziauddin Siddiqui Head Research Analytic Services is relevant, who has categorically stated that the samples of Habib Sugar Mill were received in the laboratory on 12-1-2010. The relevant portion of his cross-examination is hereby reproduced for ready reference:--

"It is correct that sample was received in the lab after seven days of its collection. It is correct that as per law it should be received within forty eight hours. It is correct that as per law we cannot rely upon this sample."

23. Thereafter the perusal of the test report also goes to show that in column of customer's reference there is only mention word 'Letter' and then the perusal of, 'certificate of test or analysis' produced on record as exhibit-6-B reveals that sample number is mentioned as 'Nil' and from the perusal of this certificate it cannot be ascertained that as to how it pertains to Respondent Mill as nowhere any reference or name of this Mill is mentioned. The explanation given by the P.W-Ziauddin Siddiqui in this regard it is very strange as he has stated in his cross-examination that due to some internal arrangement they used to mention it as 'Nil'.

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

"I have received the sample in the year 2010. I have not myself checked the label on the sample, voluntarily says this work was done by my subordinate staff. However, I have dispatched the sample to the PERAC. It is correct that the sample was sent after expiry of 48 hours as required by the law. It is correct that besides the present sample no other sample was received or dispatched by me. It is incorrect to suggest that I have tampered with the sample. I have not filled the Form-C. I do not remember the name of staff, who had filled Form-C. I have not filled Form-B in the year 2010. It is correct that we have not provided Form-C and D to the respondent, voluntarily says we do not deal directly. I do not know since the sample

was sent after expiry of 48 hours therefore legally we have no case against the respondent."

25. Perusal of evidence of P.W-Syed Muhammad Yahya, reveals that though he had dispatched the sample after delay of seven days but his evidence is silent about the reason of such delay or to the fact as during this period where the samples were lying and who was the custodian of these samples.

26. In this respect we would like to mention that as per, 'sampling procedures for municipal and industrial effluent', issued by the PEPA Central Laboratory for Environmental Analysis, Government of Pakistan maximum with-holding time of BOD is forty-eight hours. Therefore this inordinate delay is fatal blow to the case of prosecution and has hampered the whole case of prosecution. Thus it is proved that neither chain of custody is established in this case at all nor the samples were sent to laboratory in time therefore no reliance can be placed on the test report dated 19-1-2010.

27. Furthermore complainant Mr. Naeem Ahmed Mughal Director General Environmental Protection Agency, Sindh has been examined, he has admitted that in the year 2009 Environmental Management Plan was submitted by the respondent mill but thereafter what action was taken by the SEPA, the case of prosecution is silent upon it. It is the case of prosecution that there had been violation of Section 11 of the Pakistan Environmental Protection Act, 1997 but neither any notice of above violation has been issued nor the respondent had been given any opportunity of hearing as required under section 16(1) of the Pakistan Environmental Protection Act, 1997. No Environmental Protection Order was issued and case was directly sent to the tribunal without fulfilling the legal requirement and responsibility laid down upon the SEPA.

28. The learned counsel for the respondent in the present case filed objections against the report of commissioner. In this regard, it will suffice to say that in order to meet the ends of justice this tribunal has ample powers to pass any appropriate order. The respondent in his statement under section 342, Cr.P.C. has disclosed about the environmental action plan, which has been submitted to the Director General, SEPA in the year 2009. To verify the implementation status of Environmental Management Plan, order for appointment of commissioner was passed. The report of the commissioner has come on record, which speaks about the compliance of Environmental Management Plan along with some other reservations highlighted/recommended by the commissioner which will be off-course helpful to the respondent in order to make his mill strictly in accordance with the environmental laws, rules and regulations. It may be mentioned that the Environmental Protection Tribunal also plays the role of reformatory tribunal and in this capacity has a vast scope and power. Hence the objections on commissioner's report are rejected and such report is taken on record.

29. In view of discussion made above and relying upon the case-law we are of the considered view that the prosecution has miserably failed to prove the charge. Accordingly Point No.1 is answered as not proved.

Point No.2

30. In view of our finding on Point No.1, as the prosecution has failed to prove the charge against Raees-ul-Hassan, Chief Executive Officer, Habib Sugar Mill, he is hereby acquitted in the present case under section 265-H, Cr.P.C.

31. It is relevant to mention here that while prosecuting the present respondent Environmental Protection Agency, Sindh Officials and PRD Lab authorities have failed to discharge their duties in accordance with law and their attitude was very casual and unprofessional. While taking note of this aspect of the case 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, 2011, not taking timely action against the violators as per procedure provided under the law and then preparing a defective case.

(ii) Suitable action under regulation 14 of The National Environmental Quality Standards (Certification of Environmental Laboratories) Regulation, 2000 may be taken against the concerned Laboratory in respect of non- mentioning sample identification in certificate or analysis so that in future occurrence of such incidents may be avoided.

(iii) This order will not come in the way of Environmental Protection Agency, Sindh in case fresh proceedings are initiated against the respondent after fulfilling the legal requirement in accordance with law.

(iv) The Environmental Protection Agency, Sindh is also directed to investigate the cases comprehensively covering all types of pollution after taking composite samples. The relevant law and rules are to be followed strictly.

32. Copy of this judgment be sent to the Secretary, Environmental Alternative Energy Department. The compliance in respect of above observations shall be sent to this Tribunal within forty-five (45) days from the date of receiving the copy of judgment without fail.

33. Announced in open Court.

34. Given under our hand and seal of this Tribunal on this 27th day of May, 2011.

HBT/3/ET

Order accordingly.