

CHAPTER 7
PENALTIES AND PROCEDURE
SECTIONS 41 TO 50

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7.1. Scope and scheme.

Chapter 7 of the Water Pollution Act contains provisions relating to penalties and procedure. As amended in 1988, the Chapter comprises 11 sections (Sections 41 to 50), including Section 45A added in 1988. The sections in this Chapter fall into the following principal divisions, namely, -

- I. Sections relating to offences and laying down the penalties for the same - Sections 41 to 45A.
- II. Sections creating vicarious liability - Sections 47-48.
- III. Sections of an ancillary character - Sections 50.
- IV. Sections dealing with procedural or miscellaneous provisions - Section 50.

7.2. Section 41: Failure to comply with directions and orders: Need for amendment.

Amongst the penal provisions proper, one can first come to Section 41, which punishes failure on the part of any person (note the word 'whoever') who fails to comply with certain directions or orders. In certain cases, continued failure to do so after conviction becomes punishable with a more severe punishment - see Section 41(3).

A point needs to be made, for the offence under Section 41(1), which relates to non-compliance with a direction made under Section 20. It is necessary that there should be a time specified in the direction. But Section 20 itself is silent on the point¹ whether the direction thereunder should specify a time limit. Section 20 should be amended, so to provide.² In the alternative, Section 41(1) should be enlarged to ensure that where no time limit is specified in the direction under Section 20, then the direction must be complied with, within reasonable time. But the second alternative may not be very satisfactory from the point of view of workability, as the work "reasonable" would lead to imprecision.

7.3. Section 42: Penalty for certain acts.

Certain acts in the nature of damage to property used or useful in connection with the checking of water pollution are made punishable by

Point for amendment.

Cf. para 5.3. *supra*.

Section 42. Some of the acts so covered overlap acts covered by the sections of the Indian Penal Code relating to mischief (Sections 425 et seq.). But there may be utility in specific mention of certain acts.

7.4. Section 43: Contravention of Section 24.

Section 43 punishes certain acts committed in violation of Section 24, which prohibits certain types of activities causing pollution.

7.5. Section 44: Contravention of Sections 25 and 26.

Section 44 punishes contravention of the provisions of Sections 25 and 26, these being concerned with prohibition of discharge of effluents.

7.6. Section 45: Enhanced penalty for certain contraventions.

Section 45 provides enhanced penalty for repeated offence under Section 24, 25 or 26.

7.7. Section 45A: Contravention of other provisions: Need to amend.

Section 45A punished (a) contravention of any provision of the Act, (b) failure to comply with any order or direction under the Act, for which no penalty has been elsewhere provided in the Act. There is need to add, in this section, express mention of contravention of *a rule made under the Act*.³

7.8. Section 46: Publication of names of offenders: Point for amendment.

Section 46 deals with the publication of names of offenders. The material part of the section reads as under:

"If any person convicted of an offence under this Act commits a like offence afterwards, then his name may be published,"

The word "like" could lead to uncertainty in interpretation and it seems better to substitute some more appropriate phraseology.⁴ The intention of the legislature presumably is that the second offence may be any offence under this Act. If so, the opening words of Section 46 should read as under:

"If any person, convicted of an offence under this Act, *commits any other offence punishable under this Act*"

7.9. Section 47: Offences by companies.

Section 47 of the Water Pollution Act contains the usual provision as to offences by companies. This is now a familiar provision in Central Acts.

3. Point for amendment.

4. Point for amendment.

Recent cases on this provision (or on comparable provisions in other Central Acts) show that the investigating agency, the prosecuting machinery and others concerned with law enforcement, tend to miss some of the important ingredients of the provision. Hence it may not be out of place to draw attention, in the present study, to some of the essential ingredients of the Section.

(i) The first proposition which flows from Section 47(1), main paragraph, is that the person vicariously liable thereunder (subject to the proviso) must be one who was in charge of, and was responsible to, the company for the conduct of the business of the company. Being an essential requirement, this had to be mentioned specifically in the charge and also established either directly or inferentially.

(ii) By virtue of Section 47(1), proviso, such a person becomes immune from liability, 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.

(iii) While the above two propositions are relevant for persons who are in charge of, and responsible to, the company for the conduct of its business, Section 47(2) contains an additional provision, to deal with cases where (in the case of an offence committed by a company) 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. It provides that such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(iv) It will be noted that in the case mentioned as (iii) above, there is no presumption against the director etc. His consent, connivance or neglect must first be proved, before Section 47(2) can be pressed into service.

7.10. Cases on Section 47

Some cases on Section 47 may be noted. In a prosecution of Manager of company under Section 25, the Manager cannot evade liability only on the plea that he has been described as "Manager" and nothing more has been said as regards his responsibilities in the petition or complaint. Liability has been fixed upon every person who was in "charge" of, and responsible for, the conduct of the business of the company" (regarding the offences committed by the company) under Section 47. A person lesser than a Manager could possibly plead that he was not in charge of and responsible to the company for the business of the company. But a Manager who undoubtedly was a person liable for the management of the affairs of the factory could not evade the liability, merely on the plea that he had been described as a Manager and nothing more had been said as regards his responsibilities in the petition of

complaint filed against him for the offences committed by the company. In fact, the averments made in the petition of complaint that he was the Manager of the factory *prima facie* makes him liable. Whether or not the manager was, in fact, in overall charge of the affairs of the factory and whether or not he had any knowledge of the commission of the offence, were questions of fact which could be conveniently considered at the trial. Consequently, the application filed by the Manager for quashing the proceedings pending before the trial court would be liable to be dismissed.⁵

The manager of a company had taken the responsibility of being the officer in charge of affairs of the company, without exception or objection though his name was not mentioned in the complaint. Prosecution or cognizance against him is not illegal. In the correspondence that took place between the Bihar State Water Pollution Control and Prevention Board and the accused company, the legal obligation and the duties, both of the company and of the management, and also the penal consequences under the Act, had been set out and were within the knowledge of the company and its officers. It was held that in the circumstances of the case, the petitioner (Manager) had taken the responsibility of being the officer in charge of the affairs without any exception or objection and therefore the prosecution and cognizance against the petitioner could not be said to be illegal.⁶

For pollution by an industrial unit, prosecution was of the Chairman, Managing Director and other Directors of the company. Wilful default of industrial unit in furnishing details was the charge. Name of the company was wrongly described in the complaint. This was no ground for quashing the complaint against the Chairman etc. Where an offence has been committed by a company, every person who, at the time of the commission of the offence, was in charge of and responsible to the company for the conduct of the business of the company, as well as the company, shall be liable to be proceeded against and punished accordingly. The Act, however, engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.⁷

Complaint was by the Pollution Board against certain officers of the company. Officers of the Pollution Board are public servants in view of Section 50 of the Act of 1974. Hence the Magistrate need not examine the complainant and its witnesses.

5. *K.S. Nandi v. Amitabha Banerjee*, (1983) Cri. L.J. (Cal.) (S.C. Chakraborti. J.).

6. *Dr. Z. Kotasek v. The State of Bihar*, (1984) Cri.L.J. 683 (Pat.) (Anand Prasad Sinha, J.).

7. *U.P. Pollution Control Board v. M/s Modi Distillery*, (1988) Cri. L.J. 1112 (SC) ; A.I.R. 1988 S.C. 1128 (A.P.) Sen and S. Natrajan, JJ.).

7.11. Section 48: Offences by Government Departments: Need for amendment.

Section 48 provides that where any offence under the Act has been committed by any department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. The proviso to the section lays down that the Head of Department shall not be liable if he proves that the offence was committed without his knowledge or that he exercised due diligence to prevent its commission. Comment needs to be made at this stage about the opening words "Where an offence has been committed by any Department of Government". These words seem to assume that a "Department" is capable of committing an offence. But the difficulty is that a Department is not a juristic person or an artificial legal entity. The words "whoever" used in Sections 41 to 44, 45A etc. of the Act have to be construed as covering only legal personalities. A Department is a conglomeration of persons (who may even be fluctuating). It cannot commit an offence. In this sense Section 48 needs verbal amendment.⁸

7.12. Section 49: Cognizance of offence.

Section 49(1) provides that a court shall not take cognizance of an offence under the Act except a complaint made by -

- (a) a Board or its authorised officer,
- (b) a person who has given 60 days' notice of his intention to make a complaint.

A court inferior to judicial magistrate of the first class cannot take cognizance.

Section 49(2) provides that where a complaint has been made under Section 49(1)(b), the Board shall, on demand by such a person (i.e. the complainant) make available the relevant reports in its possession to that person. But the proviso to Section 49(2) lays down that the Board may refuse to make any such report available to such person, if the same is "in its opinion, against public interest".

Section 49(3) enhances the sentencing powers of Magistrates.

7.13. Section 49(2): Need for amendment.

Section 49(2), summarised in the preceding paragraph, requires some scrutiny. It may be quoted in full:-

8. Point for amendment.

"(2) Where a 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."

Following comments can be offered in regard to Section 49(2):

(i) There is no time limit prescribed within which the report is to be made available. There should be a time limit, say, one month.

(ii) The proviso seems to be going too far. The *ipse dixit* of the Board about the public interest, ought not to be conclusive. The Board must be at least required to intimate which head of public interest is likely to be impaired.

(iii) Again, in the proviso, the words "same is against the public interest" are not apt. What is intended is that *disclosure* is against public interest. This should be made clear.⁹

Under Section 49, sanction of the Board is required for prosecution. When the complainant was the Board itself (and not any of its officers), and the Board had passed a resolution for filing a complaint against the accused company, then there was complete compliance with the provisions of Section 49. There would be no infirmity or illegality in taking cognizance, so far as the element of sanction, both for presenting the complaint petition and for taking cognizance is concerned.¹⁰

7.14. Section 50: Public servant: Need to amend.

Section 50 provides that members etc. of the Board shall be deemed to be public servant, when acting in pursuance of the Act or of rules made thereunder. There is no mention of action taken in pursuance of *directions* issued under the Act. These should be added.¹¹

7.15. Writ petition.

In a Madhya Pradesh case relating to industrial pollution, objections were made to the setting up of an industrial plant for the manufacture of fertilizers. The requisite permissions, sanctions etc. of the concerned departments/authorities were secured. Hazardous nature of the impugned industrial activity was raised by the petitioners who were actuated by ulterior selfish motives. It was held that the writ petition was liable to be dismissed with costs.¹²

9. Points for amendment.

10. Dr. Z. Kotasek v. The State of Bihar, (1984) Cri. L.J. 683 (Pat.) (Anand Prasad Sinha, J.).

11. Point for amendment.

12. Jayant Vitamins Ltd. v. Rampur Distillery and Chemicals Company Ltd., (1992) Comp. L.J. 1 (M.P.) (S.D. Jha and V.S. Kokje. JJ.).