

CHAPTER 7
PENALTIES AND PROCEDURE:
SECTIONS 37 TO 45

CHAPTER 7

PENALTIES AND PROCEDURE SECTIONS 37 TO 46

7.1. *Scope of the Chapter*

Sections 37 to 46 of the Air Pollution Act constitute Chapter 7 thereof. The matters dealt with are the following:-

- (a) Certain offences, and penalties for the same (sections 37 to 38).
- (b) Offences by companies and Government Departments (sections 39 to 41).
- (c) Protection of action taken in good faith (section 42).
- (d) Cognizance of offences (section 43).
- (e) Members etc. to be public servants (section 44).
- (f) Reports and Returns to be furnished by the Board whenever required by the competent Government or authority (section 45).
- (g) Bar of jurisdiction (section 46).

Strictly speaking, the provisions at (d) and (e) above should have been placed after those at (a) to (c) above, being connected with offences and procedure relating to such offences.

7.2. *Offences: sections 37 to 39: Amendment to be considered*

(a) Sections 37 to 39 are the principal sections of the Act, creating offences. Section 37 punishes non-compliance with the provisions of section 21 or section 22 (these relate to illegal establishment of industries in air pollution control areas or illegal emission of pollutants in those areas or non-compliance with a direction issued under section 31A). It may be recalled that section 31A empowers a Board to issue written directions to any person, officer or authority, including directions to stop any industry etc. or to discontinue any service. Higher penalty is laid down for continued failure after conviction.

(b) Section 38 lays down penalties for certain specified acts (seven in number) which are in the nature of destruction of pillars etc. obstructing any person acting under the directions of "the Board", damage to property of the Board, failure to furnish certain information or false statements made while giving information or false statements made for obtaining any consent under section 21.

(c) The residuary penal provisions to be found is section 39, which punishes contravention of-

- (i) any of the provisions of the Act, or
- (ii) any order issued under the Act, or
- (iii) any direction issued under the Act, for which no penalty has been provided elsewhere in the Act. Continued contravention is punishable

with higher punishment. The directions referred to in section 39 would be those issued under section 17(2) (e). The directions issued under section 31A are already taken care of by section 37.

(d) It may be mentioned that no penalty is laid down for contravention of a rule made by the State Government in exercise of its power to make rules under section 54(1) "to carry out the purposes of the Act". It seems that Parliament did not envisage the possibility of any such rules being made by the State Government. However, if the intention be otherwise, the necessary provision should be added, either in section 39 or in section 54.¹

7.3. Companies and Government Departments: sections 40 and 41

Sections 40 and 41 of the Air Pollution Act contain provisions imposing criminal liability on officers of companies and heads of departments of Government in certain circumstances. These have, by now, become familiar and do not need any special comments in the context of this particular Act.

With reference to section 40, it has been held that Chairman of a company and the Deputy Chairman are not to be regarded as persons "directly in charge of" and responsible to the company for the conduct of its business within the meaning of section 40, if there is nothing on record to connect them with the business of the company.²

7.4. Protection of action taken in good faith: section 42: Amendment needed

Section 42 provides that no suit, prosecution or other legal proceeding shall lie against-

- (a) the Government or any officer of the Government, or
- (b) any member, officer or other employee of the Board,

in respect of any thing which is done or intend to be done in good faith in pursuance of rules made thereunder.

Since this is now a provision inserted as a matter of routine in most Central Acts, it would be out of place in this specialised study to say anything about its principle. Assuming that the provision is to be retained, some matters of detail need to be pointed out. In the first place, the section (as it now stands) gives no protection to the Board itself, though its officers etc. are protected. This is anomalous. Secondly, while the rules are mentioned, orders and directions issued under the Act are not mentioned. These need to be added.

To incorporate the above points, the section can be revised as under³:-

"42. No suit, prosecution or other proceeding shall lie against-

1 Point for amendment.

2 *N.A. Palkhiwala v. M.P. Pradushan Niwaran Mandal, Bhopal*, (1990) Cri. L.J. 1856 (M.P.), (Gulab C. Gupta, J.).

3 Point for amendment.

- (a) the Government or any officer of the Government, or
 - (b) a Board or any member or any officer or other employee of a Board,
- in respect of anything which is done or intended to be done in good faith in pursuance of-
- (i) this Act, or
 - (ii) orders made or directions issued under this Act, or
 - (iii) rules made under this Act."

7.5. Cognizance of offences: section 43(1): Amendment needed

Section 43(1), *inter alia*, prohibits a court from taking cognizance of an offence under this Act except on a complaint made by a Board or its authorised officer or "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".

In this part of section 43(1), the phraseology is not quite happy. The words "notice of the alleged offence" do not appear to be accurate. In strictness, notice is not given *of the offence*, but of the intention to complain. A better course would be to revise section 43(1) (b) as under¹:-

"(b) any person who has, in the *prescribed* manner, given to a Board or any officer authorised as aforesaid, not less than sixty days' notice of his *intention* to make a complaint *of the* alleged offence."

7.6. Supply of papers to complainant: section 43(2): Amendment needed

Section 43(2) provides as under:-

"(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 made any such report available to such person if the same is, in its opinion, against the public interest."

Certain flaws of drafting appear, on a careful reading of the sub-section. In the first place, the person to whom the words "such person" refer, can be explicitly mentioned. Secondly, in the proviso, the phraseology used is "*the same* is against the public interest". Literally, the pronoun "same" would be taken as referring to "the report". Now, a report cannot be against the public interest. Its *disclosure* may conceivably be regarded by the Board as against the public interest. That should be brought out.

Apart from these points of wording, there is the most important question of substance. The opinion of the Board that disclosure would be against the public interest cannot be final, according to modern concepts of administrative law. At -

1 Point for amendment.

least the court's power to order production and disclosure should be mentioned in the section, in appropriate language. Here is a suggested revised section 43(2)¹:

"(2) Where, *in respect of any alleged offence*, a complaint has been made by *any person* under clause (b) of sub-section (1), the Board shall, on demand by such person, make available to that person the reports in its possession relevant to that offence, *Within a reasonable period*:

"provided that *unless the court* to which the complaint is made directs *otherwise*, the Board may refuse to make available to such person *any report* if, in its opinion, *disclosure thereof to such person would be against the public interest*."

7.7. Members etc. to be public servants: section 44: Amendment needed

By section 44, the members etc. of a Board are declared to be public servants within the meaning of section 21 of the Indian Penal Code, "when acting or purporting to act in pursuance of the provisions of this Act or the rules made thereunder".

In this section, the non-mention of "orders" and "directions" issued under the Act renders the section incomplete, when rules have been expressly mentioned. Hence, for the words "rules made thereunder", the words "*directions or orders issued or rules made under this Act*" should be substituted."

7.8. Reports and returns: section 45

Section 45 is concerned with reports and returns to be submitted by the Central Board or a State Board.

7.9. Bar of Jurisdiction: section 45: Amendment needed

Section 46, concerned with the bar of jurisdiction, really consists of two parts. The first part, which is of a general nature, provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of which an appellate authority constituted under this Act is empowered by or under this Act to determine. This part totally bars the suit at the very threshold. The appellate authority, it may be recalled, is constituted under section 31. The second part of section 46 is concerned with the specific relief of injunction. It provides that no injunction shall be granted "by any court or other authority" in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act". The exact object and utility of the second part of the section are not very clear. If the action taken is strictly in accordance with the Act, an injunction cannot be granted at all under the general law, and no specific prohibition is needed. If, on the other hand, the action taken or proposed is illegal (by reason of its not falling within the four corners of a power conferred by the Act), then a bar against the issue of an injunction is uncalled for. An injunction is issued only when certain conditions exist. A *prima facie* case in favour of the party applying for it must be established. The court must also consider the balance of convenience. It must, in

1 Point for amendment.

particular, be satisfied that by not granting the injunction, serious harm would be caused to the party applying. If these conditions are satisfied, a temporary injunction would be the proper remedy when the litigation is pending. To deprive the court of that power is to pave the way towards injustice. As regards a permanent injunction, it is granted under the Specific Relief Act, 1963 only when there is breach of legally enforceable duty. If section 46 is taken as categorically providing that "no injunction shall be granted" in respect of even *an illegal* act, it would not be justifiable. Thus, section 46, second half, is either redundant (if it is meant to bar the grant of injunction where the act complained of is legally valid) or unjustifiable (if it is meant to bar injunctions restraining illegal acts). It needs to be deleted, on either view.¹

1 Point for amendment.