

M. C. Mehta

Vs

Kamal Nath and Others

Writ Petition (C) No. 182 of 1996

[S. SAGHIR AHMAD, J.]

12.05.2000

ORDER

This case, which was finally decided by this Court by its judgment dated December 13, 1996 has been placed before us for determination of the quantum of pollution fine. It may be stated that the main case was disposed of with the following directions:

1. The public trust doctrine, as discussed by us in this judgment is a part of the law of the land.
2. The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated November 24, 1993 and the lease-deed dated April 11, 1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease-deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original natural conditions.
3. The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the river bed and the banks of the river Beas has to be removed and reversed. We direct NEERI through its Director to inspect the area, if necessary, and give an assessment of the cost which is likely to be incurred for reversing the damage caused by the Motel to the environment and ecology of the area. NEERI may take into consideration the report by the Board in this respect.
4. The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel.
5. The Motel shall construct a boundary wall at a distance of not more than 4 meters from the cluster of rooms (main building of the Motel) towards the river basin. The boundary wall shall be on the area of the Motel which is covered by the lease dated September 29, 1981. The Motel shall not encroach/cover/utilise any part of the river basin. The boundary wall shall separate the Motel building from the river basin. The river bank and the river basin shall be left open for the public use.
6. The Motel shall not discharge untreated effluents into the river. We direct the Himachal Pradesh Pollution Control Board to inspect the pollution control devices/treatment plants set up

by the Motel. If the effluent/waste discharged by the Motel is not conforming to the prescribed standards, action in accordance with law be taken against the Motel.

7. The Himachal Pradesh Pollution Control Board shall not permit the discharge of untreated effluent into river Beas. The Board shall inspect all the hotels/institutions/factories in Kullu-Manali area and in case any of them are discharging untreated effluent/waste into the river, the Board shall take action in accordance with law.

8. The Motel shall show cause on December 18, 1990 why pollution-fine and damages be not imposed as directed by us. NEERI shall send its report by December 17, 1996. To be listed on December 18, 1996." Pursuant to the above Order, notice was issued requiring the Motel to show cause on two points; (i) why the Motel be not asked to pay compensation to reverse the degraded environment and (ii) why pollution fine, in addition, be not imposed. Mr. G.L. Sanghi, learned Senior Counsel, appearing for M/s. Span Motel Private Ltd., has contended that though it is open to the Court. In proceedings under Article 32 of the Constitution to grant compensation to the victims whose Fundamental Rights might have been violated or who are the victims of an arbitrary executive action or victims of atrocious behaviour of public authorities in violation of public duties cast upon them, it cannot impose any fine on those who are guilty of that action. He contended that the fine is a component of Criminal Jurisprudence and cannot be utilised in civil proceedings especially under Article 32 or 226 of the Constitution either by this Court or the High Court as imposition of fine would be contrary to the provisions contained in Articles 20 and 21 of the Constitution. It is contended that fine can be imposed upon a person only if it is provided by a statute and gives jurisdiction to the Court to inflict or impose that fine after giving a fair trial to that person but in the absence of any statutory provision, a person cannot be penalised and no fine can be imposed upon him. Mr. M.C. Mehta, who has been pursuing this case with the usual vigour and vehemence, has contended that if a person disturbs the ecological balance and tinkers with the natural conditions of rivers, forests, air and water, which are the gifts of nature, he would be guilty of violating not only the Fundamental Rights, guaranteed under Article 21 of the Constitution, but also be violating the fundamental duties to protect environment under Article 51-A(g) which provides that it shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to show compassion for living creatures.

9. The planet Earth which is inhabited by human beings and other living creatures, including animals and birds, has been so created as to cater to the basic needs of all the living creatures. Living creatures do not necessarily mean the human beings, the animals, the birds, the fish, the worms, the serpents, the hydras, but also the plants of different varieties, the creepers, the grass and the vast forests. They survive on fresh air, fresh water and the sacred soil. They constitute the essential elements for survival of "life" on this planet. The living creatures, including human beings, lived peacefully all along. But when the human beings started acting inhumanly, the era of distress began which in its wake brought new problems for survival.

10. The industrial revolution brought an awakening among the men inhabiting this Earth that the Nature, with all its resources was not unlimited and forever renewable. The uncontrolled industrial development generating tonnes of industrial waste disturbed the ecological balance by polluting the air and water which in turn, had a devastating effect on the wildlife and, therefore,

the early efforts to protect the environment related to the protection of wildlife. But then the two world wars, the first world war (1914-1918) and the second world war (1939 to 1945) during which atomic bombs were exploded resulting in the loss of thousands of lives and burning down of vast expanses of forests made the man realise that if the environmental disturbances were not controlled, his own survival on this planet would become impossible. The United Nations, therefore, held a Conference on human environment at Stockholm in 1972. In the wake of the resolutions adopted at that Conference, different countries at different stages enacted laws to protect the deteriorating conditions of environment. Here in India, the Legislature enacted three Acts, namely. The Water (Prevention and Control of Pollution) Act, 1974; the Air (Prevention and Control of Pollution) Act, 1981 and The Environment (Protection) Act, 1986. It also enacted the Water (Prevention and Control of Pollution) Cess Act, 1977. Under these Acts, Rules have been framed to give effect to the provisions thereof. They are: The Water (Prevention and Control of Pollution) Rules, 1975; The Water (Prevention and Control of Pollution) Cess Rules, 1978; The Air (Prevention and Control of Pollution) Rules, 1982. The Air (Prevention and Control of Pollution) (Union Territories) Rules, 1983; The Environment (Protection) Rules, 1986; The Hazardous Wastes (Management and Handling) Rules, 1989; The Manufacture, Storage and Import of Hazardous Chemicals Rules, 1989. The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1996 and hosts of other Rules and Notifications.

11. In addition to these Acts and Rules, there are, on the Statute Book, other Acts dealing, in a way, with the Environmental laws, for example, the Indian Forest Act, 1927; The Forest (Conservation) Act, 1980; The Wildlife (Protection) Act, 1972 and the Rules framed under these Acts. Various States in India have also made their Environmental laws and rules for the protection of environment.

12. Apart from the above Statutes and the Rules made there under, Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51A(g) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. These two Articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution.

13. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect the "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for

closure of certain hazardous industries, the directions for closure of slaughter-house and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the Industries located in Delhi, the directions to Tanneries etc., are all judgments which seek to protect environment.

14. In the matter of enforcement of Fundamental Rights under Article 21 under Public Law domain, the Court, in exercise of its powers under Article 32 of the Constitution has awarded damages against those who have been responsible for disturbing the ecological balance either by running the industries or any other activity which has the effect of causing pollution in the environment. The Court while awarding damages also enforces the "POLLUTER PAYS PRINCIPLE" which is widely accepted as a means of paying for the cost of pollution and control. To put in other words, the wrongdoer, the polluter, is under an obligation to make good the damage caused to the environment.

15. The recognition of the vice of pollution and its impact on future resources was realised during the early part of 1970. The United Nations Economic Commission for Europe, during a panel discussion in 1971, concluded that the total environmental expenditure required for improvement of the environment was overestimated but could be reduced by increased environmental awareness and control. In 1972, the Organisation for Economic Co-operation and Development adopted the "POLLUTER PAYS PRINCIPLE" as a recommendable method for pollution cost allocation. This principle was also discussed during the 1972 Paris Summit. In 1974, the European Community recommended the application of the principle by its member States so that the costs associated with environmental protection against pollution may be allocated according to uniform principles throughout the Community. In 1989, the Organisation for Economic Co-operative and Development reaffirmed its use and extended its application to include costs of accidental pollution. In 1987, the principle was acknowledged as a binding principle of law as it was incorporated in European Community Law through the enactment of the Single European Act, 1987. Article 130r 2 of the 1992 Maastricht Treaty provides that Community Environment Policy "shall be based on the principle that the polluter should pay."

16. "POLLUTER PAYS PRINCIPLE" has also been applied by this Court in various decisions. In Indian Council for Enviro Legal Action v. Union of India, AIR 1996 SC 1446 : (1996) 2 SCR 503 : (1996) 3 SCC 212 : (1996) (2) JT (SC) 196 : (1996) AIR SCW 1069) it was held that once the activity carried on was hazardous or inherently dangerous, the person carrying on that activity was liable to make good the loss caused to any other person by that activity. This principle was also followed in Vellore Citizens Welfare Forum v. Union of India, AIR 1996 SC 2715 : (1996) 5 SCC 647 : (1996) 7 JT (SC) 375 : (1996) AIR SCW 3399 which has also been discussed in the present case in the main judgment. It was for this reason that the Motel was directed to pay compensation by way of cost for the restitution of the environment ecology of the area. But it is the further direction why pollution fine, in addition, be not imposed which is the subject matter of the present discussion.

17. Chapter VII of the Water (Prevention and Control of Pollution) Act, 1974 contains the provisions dealing with penalties and procedure. This Chapter consists of Sections 41 to 50. Sub-sections (2) and (3) of Section 41 provide for the punishment and imposition of fine. They are quoted below:

"41.(2) Whoever fails to comply with any order issued under Clause (e) of sub-section (1) of Section 32 or any direction issued by a Court under sub-section (2) of Section 33 or any direction issued under Section 33-A shall in respect of each failure and on conviction, be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day during which such failure continues after the conviction for the first such failure.

(3) If the failure referred to in sub-section (2) continues beyond a period of one year after the date of conviction, the offender shall, on conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine."

18. Similarly, Section 42 provides that a person shall be liable to be punished with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both.

Sub-section (2) of Section 42 also contemplates imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 43 contemplates penalty for contravention of the provisions of Section 24. Section 44 contemplates penalty for contravention of Section 25 or Section 26. They also contemplate imposition of fine. Section 45 provides that if a person who has been convicted of any offence under Section 24 or Section 25 or Section 26 is again found guilty of an offence involving a contravention of the same provision, he shall, on the second and on every subsequent conviction, be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine. Section 45-A provides that whoever contravenes any of the provisions of this Act or fails to comply with any order or direction given under this Act, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment which may extend to three months or with fine which may extend to ten thousand rupees or with both and in the case of continuing contravention or failure, he may be punished with an additional fine. Section 47 contemplates offences by Companies while Section 48 contemplates offences by Government Departments.

19. Section 15 of the Environment (Protection) Act, 1986 provides for penalty for contravention of the provisions of the Act and the rules, orders and directions made thereunder. Sub-section (1) of Section 15 speaks of imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and in case the failure or contravention continues, with additional fine which may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention. Section 16 of the Act contemplates offences by the Companies while Section 17 contemplates offences by Government Departments.

20. Chapter VI of the Air (Prevention and Control of Pollution) Act, 1981 contains the provisions for penalties and procedure. This Chapter consists of Sections 37 to 46. Section 37 provides penalties for failure to comply with the provisions of Section 21 or Section 22 or with the directions issued under Section 31-A. It provides that the person shall be punishable with imprisonment for a term which shall not be less than one year and six months but which may extend to six years and with fine, and in case the failure continues, with an additional fine which may extend to five thousand rupees for every day. Sub-section (2) of this Section provides that if

the failure continues beyond the period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which shall not be less than two years but which may extend to seven years and with fine. Section 38 also provides penalties for certain acts and it provides that for such acts as are referred to in that Section, a person shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both. Section 39 contemplates penalty for contravention of certain provisions of the Act and it provides for imprisonment for a term which may extend to three months or with fine which may extend to ten thousand rupees or with both, and in the case of continuing contravention, with an additional fine which may extend to five thousand rupees for every day during which such contravention continues after conviction for the first such contravention. Section 40 speaks of offences by Companies while Section 41 speaks of offences by Government Departments.

21. All the three Acts, referred to above, also contemplate the taking of the cognizance of the offences by the Court. Thus, a person guilty of contravention of provisions of any of the three Acts which constitutes an offence has to be prosecuted for such offence and in case the offence is found proved then alone he can be punished with imprisonment and fine or both. The sine qua non for punishment of imprisonment and fine is a fair trial in a competent Court. The punishment of imprisonment or fine can be imposed only after the person is found guilty.

23. In the instant case, a finding has been recorded that M/s. Span Motel had interfered with the natural flow of river and thus disturbed the environment and ecology of the area. It has been held liable to pay damages. The quantum of damages is under the process of being determined. The Court directed a notice to be issued to show cause why pollution fine be not imposed. In view of the above, it is difficult for us to hold that the pollution fine can be imposed upon M/s. Spen Motel without there being any trial and without there being any finding that M/s. Span Motel was guilty of the offence under the Act and are, therefore, liable to be punished with imprisonment or with FINE. This notice has been issued without reference to any provision of the Act.

24. The contention that the notice should be treated to have been issued in exercise of power under Article 142 of the Constitution cannot be accepted as this Article cannot be pressed into aid in a situation where action under that Article would amount to contravention of the specific provisions of the Act itself. A fine is to be imposed upon the person who is found guilty of having contravened any of the provisions of the Act. He has to be tried for the specific offence and then on being found guilty, he may be punished either by sentencing him to undergo imprisonment for the period contemplated by the Act or with fine or with both. But recourse cannot be taken to Article 142 to inflict upon him this punishment.

25. The scope of Article 142 was considered in several decisions and recently in Supreme Court Bar Association v. Union of India, AIR 1998 SC 1895 : (1998) 4 SCC 409 : (1998) AIR SCW 1706) by which the decision of this Court in V.C. Mishra, Re, (1995) 2 SCC 584 was partly overruled, it was held that the plenary power of this Court under Article 142 of the Constitution are inherent in the Court and are "COMPLEMENTARY" to those powers which are specifically conferred on the Court by various statutes. This power exists as a separate and independent basis of jurisdiction apart from the statutes. The Court further observed that though the powers

conferred on the court by Article 142 are curative in nature, they cannot be construed as powers which authorise the court to ignore the substantive rights of a litigant. The Court further observed that this power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the court. Article 142 even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

26. Similarly, in M.S. Ahlawat v. State of Haryana, AIR 2000 SC 168 : (2000) 1 SCC 278 : (1999 AIR SCW 4255 : 2000 Cri LJ 388) it was held that under Article 142 of the Constitution, the Supreme Court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute.

27. Thus, in addition to the damages which have to be paid by M/s. Span Motel, as directed in the main Judgment, it cannot be punished with fine unless the entire procedure prescribed under the Act is followed and M/s. Span Motel are tried for any of the offences contemplated by the Act and is found guilty.

28. The notice issued to M/s. Span Motel why pollution fine be not imposed upon them is, therefore, withdrawn. But the matter does not end here.

29. Pollution is a civil wrong. By its very nature, it is a Tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution has to pay damages (compensation) for restoration of the environment and ecology. He has also to pay damages to those who have suffered loss on account of the act of the offender. The powers of this Court under Article 32 are not restricted and it can award damages in a PIL or a Writ Petition as has been held in a series of decisions. In addition to damages aforesaid, the person guilty of causing pollution can also be held liable to pay exemplary damages so that it may act as a deterrent for others not to cause pollution in any manner. Unfortunately, notice for exemplary damages was not issued to M/s. Span Motel although it ought to have been issued. The considerations for which "fine" can be imposed upon a person guilty of committing an offence are different from those on the basis of which exemplary damages can be awarded. While withdrawing the notice for payment of pollution fine, we direct a fresh notice be issued to M/s. Span Motel to show cause why in addition to damages, exemplary damage be not awarded for having committed the acts set out and detailed in the main judgment. This notice shall be returnable within six weeks. This question shall be heard at the time of quantification of damages under the main judgment.