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सहायक निदेशक
मुख्य खाता निदेशक
भारतीय डाक, लखनौ



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DURATION : 01Y.01M.13D.

IN THE COURT OF CHIEF JUDICIAL MAGISTRATE THANE
AT : THANE.

R.C.C.NO.381/2009
(Old No.231/2009)
EXH.NO. 79

Maharashtra Pollution Control Board,
Represented by Shri Shankar Waghmare
I/c.Sub Regional Officer, Thane-II,
Office Complex Bldg., 5th floor, Wagle Estate
Near Mulund Check Naka,
Thane - 400 604

... Complainant.

V/s..

1. Virar Municipal Council
(Summons to be served through
Shri D.G.Pawar)
Chief Officer, Virar Municipal Council,
Virar, Tal. Vasai. Dist-Thane.
2. Shri D.G.Pawar,
Chief Officer,
Virar Municipal Council,
Virar, Tal. Vasai, Dist-Thane.

... Accused.

3. Sanitary Inspector, (Discharged as per order
 Shri Vasant Mukane below Exh.1 dt.26/11/2009)
 Virar Municipal Council,
 Virar, Tal. Vasai, Dist-Thane. ... Accused.

Complaint Under Section 41(2),
 43 & 44 r.w.s. 33-A,24/25/26 of
 the Water (Prevention & Control
 of Pollution) Act, 1974 (With Act
 No.53 of 1988)

Adv. Shri. B.M. Jethani for the Complainant
 Adv. Shri. S.B. Sadekar, for the Accused



: J U D G M E N T :

(Delivered in open Court on 03 rd March, 2010)

Maharashtra Pollution Control Board (Hereinafter referred as 'The Board') has filed complaint against accused u/sec. 41(2), 43 and 44 of The Water (Prevention of Control of Pollution) Act 1974 (Hereinafter referred as 'the Act')

2. Shri. Shankar Waghmare, then in-charge Sub-Regional Officer, (Thane II) of the Board, is authorized u/sec. 49 of the Act to file present complaint. Accused no.1 is Municipal Council, accused no.2 is the Chief Officer and accused no.3 is

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sanitary inspector of accused no.1 Council. They are the persons in-charge and responsible for the conduct of business of council and also responsible for non-compliance of Provision of the Act.

3. Accused no.1 Council, had not taken any effective steps for treatment and disposal of municipal sewage, hence the Board has issued direction u/sec.33A of the Act to provide adequate suitable sewerage and collection system by letter dt. 20/07/2007. However, as accused no.1 not complied with direction, hence, the Board has refused a consent to council sought by them u/sec.25 and 26 of the said Act.

4. Board in order to know the quality of sewerage being discharged by council, collected the sample on 28/11/08 by following due procedure u/sec. 21 of the Act, in presence of representative of accused no.1 from a Nalla situated within a area of council wherein councils discharged the untreated domestic effluent. Said samples were got analyzed from the Central Laboratory and it revealed that accused no.1 was not meeting the vital standards like S.S.,BOD and Oil and Grease. A report of sample was sent to accused no.1 by letter dt.15/12/2008.

5. Thus, accused did not take adequate steps to provide sewage treatment plant, not complied with the various provision of the Act, and thereby committed an offence punishable u/sec. 41(2) r.w.s. 33A, 43 r.w.s.24 and 44 r.w.s. 25/26 of the Act.

6. On receipt of complaint, my Ld. Predecessor has taken cognizance of offence and issued a process against all accused u/sec.41(1),43 & 44 of said Act. In response to same accused no. 2 & 3 appeared. My Ld. Predecessor in chair released them on bail.

7. Complainant examined in all six witnesses u/sec.244 of Cr.P.C. before charge. After hearing both parties, this court has passed order on 26/11/2009 and discharged accused no.3 whereas framed charge against accused no. 1 & 2 vide Exh.61 u/sec. 41(2) & 43 of the Act only. The contents of the charge were read over to accused which they plead not guilty and claimed for trial.

8. Accused after framing of charge called upon p.w.1 Waghmare, and p.w.2 Kilikar for further cross-examination.

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Case No. 14

Date: 14/11/2019

Complainant has also examined p.w.7 Shri Gandhi after framing of charge.

9. I have examined accused u/sec.313 of Cr.P.C. Their defence is of denial. According to accused no.2, he is not responsible for the any act or omission constituting an offence under the Act as he is not "head of the department". It is contended that CIDCO is responsible for not installing E.P.P. To prove a defence accused himself has also examined on oath. He also examined D.W.2 Arun Nirbhavane.



10. Heard, Ld. advocate Shri. B.M.Jethani, for complainant Board and Ld. Adv. Shri. S.B. Sadekar, for accused. Complainant has also placed on record synopsis of written argument.

11. On the basis of evidence adduced and case put forth with a submission of both Ld. Counsels, following points arose for my determination. My findings thereon followed by reason thereof are as under

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POINTSFINDINGS

1. Does complainant prove that accused no.1 council not provided adequate Sewage treatment plant within a time bound programme in spite of direction by Board under section 33-A of the Act?
2. Does complainant prove that accused no.1 council on or before 28/11/2008 at about 05.45p.m. knowingly allowed or caused to discharge untreated sewage or effluent into Nallas, situated near Sairaj Classic building, Virar & thereby polluted a stream in a water of Vasai Creek?
3. Does complainant prove that accused no.2 is responsible for the act of accused no.1 as 'head of the department'?

Yes

Yes

Yes



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4. What offence if any committed? Offence punishable
u/s.42(1) & 43 of the Act,
5. What order? As per final order.

: REASONS :

POINT NO.1 :-

12. P.W.1 Shankar waghmare testified that the Board has issued direction U/S. 33-A to provide Sewage treatment plant and not to discharge effluent not confirming the standard prescribed by the Board. Such direction were issued by the then member secretary of the Board. P.W.5 Dr. Yeshwant Sontakke testified that on behalf of member secretary he has issued letter to council of Virar, Navghar and Manikpur of refusal of consent applied by the concerned council.

13. The Board has placed on record application Exh. 21 preferred by accused no.1 council to obtain consent u/sec.25 & 26 of the Act and u/sec.21 of the (Prevention and Control of Pollution) 1981 with rule 5 of Hazardous wastes (Management and Handling) Rules, 1989. By letter dt. 15/04/2008 ,Exh.22, the Board has intimated refusal of the consent , whereas by letter dt.

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20/7/2007 Exh.20 the Board has given the direction to a council u/sec.33-A of the Act and one of the direction for compliance was to submit a complete proposal for providing adequate and suitable sewage collection, treatment and disposals system along with time bound programme within a period of 15 days from the receipt of the letter. It is tried to bring on record during cross-examination that such directions were not received by the council, however, defence could not succeed to shutter testimony of the witnesses on this point. Moreover, though accused no.2 has examined himself on oath not denied about receipt of the said letter by counsel in respect of the directions from the Board. It is also not a case of accused that a proposal to set up E.T.P. was submitted to the Board. Therefore, from the evidence produced on record by complainant it is sufficient to hold that accused no.1 council has not complied with the direction given by the Board u/sec. 33-A of the Act. In result, I answer point no. 1 in affirmative.

POINT NO.2 :-

14. Accused are also prosecuted for contravention of Sec. 24 of the Act. Sec. 24 of the Act is in respect of prohibition of

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an use of stream or well for disposal of polluting water. As per provision of sec. 24 no person shall knowingly cause or permit any poisonous, noxious or polluting matter determined in accordance with such standards as may be laid down by the State Board to enter into stream or well or sewer of on land. To ascertain whether any water poisonous, noxious or polluting matter in any stream or well or sewer or land material evidence is a report of sample collected by the Board from Stream, nalla, well etc.

15. In the present case in hand Regional Officer p.w.1 Waghmare and p.w.2 Kerlikar has collected a sample on dt. 28/11/2008 from a Nalla passing within a area of council. The result of any sewage or trade effluent collected from nalla u/s. 21(1) shall be admissible in evidence only a provision of Sub section (2)(3)(4) & (5) of Sec.21 are complied with. It will appropriate on my part to refer relevant provisions of sec. 21 of the Act applicable to the fact in the present case.

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(2) The result of any analysis of a sample of any sewage or trade effluent taken under sub-section (1) shall not be admissible in evidence in any legal proceeding unless the provisions of Sub-sections (3), (4) and (5) are complied with.

(3) Subject to the provisions of sub-sections (4) and (5), when a sample (composite or otherwise as may be warranted by the process used) of any sewage or trade effluent is taken for analysis under sub-section (1), the person taking the sample shall-

(a) serve on the person in charge of, or having control over, the plant or vessel or in occupation of the place (which person is hereinafter referred to as the occupier) or any agent of such occupier, a notice, then and there in such form as may be prescribed of his intention to have it so analysed;

(b) in the presence of the occupier or his agent, divide the sample into two parts;

(c) cause each part to be placed in a container which shall be marked and sealed and shall also be signed both by the person taking the sample and the occupier or his agent;

(d) send one container forthwith,-

(i) in a case where such sample is taken from any area situated in a Union territory, to the laboratory established or recognised by the Central Board under Sec.16 and;



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(ii) in any other case, to the laboratory established or recognised by the State Board under Sec.17;

(e) on the request of the occupier or his agent, send the second container-

(i) in a case where such sample is taken from any area situated in a Union territory, to the laboratory established or specified under sub-section (1) of Sec.51; and

(ii) in any other case, to the laboratory established or specified under sub-section (1) of Sec.52.

(4) When a sample of any sewage or trade effluent is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent, a notice under Cl.(a) of sub-section (3) and the occupier or his agent willfully absents himself, then,-

(a) the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (i) or sub-clause (ii), as the case may be, of Cl.(e) of sub-section (3) and such person shall inform the Government analyst appointed under sub-section (1) or sub-section (2), as the case may be, of Sec.53, in writing about the willful absence of the occupier or his agent; and

(b) *the cost incurred in getting such sample analysed shall be payable by the occupier or his agent and in case of default of such payment, the same shall be recoverable from the occupier or his agent, as the case may be, as an arrear of land revenue or of public demand:*

Provided that no such recovery shall be made unless the occupier or, as the case may be his agent has been given a reasonable opportunity of being heard in the matter.

(5) *When a sample of any sewage or trade effluent is taken for analysis under sub-section (1) and the person taking the sample serves on the occupier or his agent a notice under Cl. (a) of sub-section (3) and the occupier or his agent who is present at the time of taking the sample does not make a request for dividing the sample into two parts as provided in Cl.(b) of sub-section (3), then, the sample so taken shall be placed in a container which shall be marked and sealed and shall also be signed by the person taking the sample and the same shall be sent forthwith by such person for analysis to the laboratory referred to in sub-clause (i) or sub-clause (ii), as the case may be, of Cl.(d) of sub-section (3)*



16. Much stress have been for not drawn sample in two parts as prescribed in clause (a) of sub. sec.(3) of Sec. 21 and not serving notice upon accused no.2. a Chief Officer ,of accused no.

1. I would like to state that a notice filed on record clearly—

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indicates that same was served in the office of council and accused's employee, sanitary inspector, was present at the time of taking sample. Ld. advocate Sadekar brought my attention to clause (b) of sub sec.(3) of Sec. 21 and submitted that it was necessary on the part of council to divide the sample into two parts. However, the sample was collected only in one part and sent to Laboratory for analysis, hence deprived a valuable right of accused to get analyze the said sample from the Laboratory established under sub sec.(4) of Sec.21.

17. The panchanama, Exh.26, clearly indicates that there was no request made by the representative of accused no. 1 present at the time of sample to divide the sample in two parts and therefore, sample was taken only in one part. It is pertinent to note that there is also specific note in the panchanama before signing by representative of accused no.1 that the procedure and contents made therein are true to their knowledge. The representative of the council who signed a panchanama is sanitary inspector of the council. Therefore, it did not appeal to my mind that person holding a post of sanitary inspector without reading the panchanama or the report, and understanding the

consequences of it would sign it. Therefore, in my humble judgment the compliance is properly made.

18. Both p.w.1 Waghmare and evidence of p.w. 2 Kerlikar testified that in presence of representative of accused no.1 after rinsed a bucket in nalla a water was poured in a can and care was taken that there should not be any bubble and then it was tightly closed and sealed and a signature of representative of council present at the time of collecting sample obtained on tagged label. I would like to state that this version of both witnesses has not been strongly not challenged. Thus, a compliance of Sub Clause (b) of Sub.sec. 21 was made.

19. It has been vehemently argued by Ld. Adv.Shri Sadekar that there is no any evidence to show that accused on 3 is a duly appointed agent or the representative council to remain present at the time of collecting law sample. He also vehemently submitted that the compliance of clause (a) of Sub Sec.(3) of Sec. 21 of the Act of serving a notice about intention of collecting sample was not properly made. He has much stressed upon a phrase "Then and There" He submitted that the Act mandated



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that a notice of intention to collect sample is to be served on the spot from where sample were is to be collected. Whereas, in the present case notices were served in the office of the councils. A panchanama Exh. 26 read with evidence of p.w.1 Waghmare and p.w.2 Kerlikar very much specific to state that a notices were served to a sanitary inspector in the office of the council. However, it further clearly speak that a clear intention were given from where sample is to be collected and thereafter both witnesses along with sanitary inspector went on the spot and collected the sample. The span between issuing notice and collecting the evidence sample from the spot if taken into consideration, in my humble judgment it would not make much difference for not serving the notice on the spot where sample was collected. I do not also found substance in the argument of defence that sanitary inspector, accused no.3. was not a representative appointed by Council. On consideration of provision of Maharashtra Municipal Councils, Village Panchayat and Industrial Township Act, 1965. (hereinafter referred as to Municipal Council Act") in respect of duties of sanitary inspector, there would be no hurdle to say that he is a representative or council. It is also vehemently submitted that

complainant ought to have examined sanitary inspector (accused no.3) to show that he was representative or the agent of the council. I would like to state that complainant filed a prosecution even against accused no.3. However he was discharged u/sec., 245 of CR.P.C. In such circumstances, in my humble judgment accused was also having opportunity to examine him to show that he was not an agent of accused council.

20. Ld. Adv. Shri Sadekar has also vehemently submitted that complainant failed to produce a can in which sample was taken or a record to show that a can was taken by him from the store. P.W.2 Kerlikar testified in the cross that he was carrying 10 plastic cans to collect sample, by taking it from store department. The said store room is in a control of a Board. In my humble judgment non production of can or its documents would not fatal to the complainant's case because neither the Act nor rules made thereunder prescribes such provision to produce one of the part of the sample whereas a cogent reading of sub sec.(3) of sec.21 and sub sec. (5) of sec. 21 of the act, it makes very clear that in case, there is no request of agent or occupier then a sample has to be collected in single container, which required to

be forwarded to a laboratory as mentioned in sub sec(4) of the sec. 21 of the Act.

21. Much has been argued about the spot of sample. It is submitted that complainant has to prove his case beyond reasonable doubt. It is vehemently submitted that complainant failed to show that the spot from where sample was collected is within the jurisdiction of council and therefore, the reliance can not be placed upon analysis report Exh.27. I would like to state that a oral as well as documentary evidence sufficient to conclude that at the time of taking sampling the agent of occupier i.e. Accused no.1 council was present. He is not only a employee of council but holding a charge of sanitary inspector of council. In a notice of intention to collect sample Exh.25 served upon council which is duly acknowledged by sanitary inspector of council and the same person remained present at the time of sampling, though a specific spot of sampling is mentioned have not raised any objection. It is pertinent to note that even a accused no.2 who then admittedly a Chief Officer of the council though examined himself has also not denied this fact on oath, that the spot is not within jurisdiction of his council. Therefore,

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in my humble judgment a theory placed by defence to doubt case of complainant about spot of taking sample is devoid of substance.

22. It has been also argued that the spot of sampling is very closed to creek and therefore, a possibility of polluting the water during high tide by back water can not over ruled, therefore on the basis of sampling it can not be held that the water is polluted due to the drainage flow from a nalla. It is further submitted that the water taken is not starting point of nalla and there is no evidence of its starting point of said Nalla and therefore council can not be held responsible even if water is found to be polluted. Ld. Adv. For complainant has submitted that there is no possibility of polluting the water during high tide. Defence succeed to bring possibility of polluting water due to high tide back water, in a cross-examination of complainant's witnesses. It is a case of complainant that the Nalla from which water was taken for sample meet to Vasai Creek. Thus, there is a continue flow of water. This circumstances is taken into consideration, in absence of any suggestion that the sample was taken immediately or during a



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short span of period after high tide, I do not found merit in the argument of defence that the water collected for sample may be polluted due to high tide.

23. A report of Board Analyst Exh.27 speaks that a sample exceeds prescribed parameters and thus it polluted water. Therefore, in view of my forgoing discussion, I hold that accused no.1 council has failed to comply direction given by the Board u/sec.33-A of the Act and further contravened sec.24 of the Act. In result I answer point no. 1 & 2 in the affirmative.

POINT NO. 3 :-

24. The question now crop for determination is, who is responsible for such contravention. Accused no.2 a C.O. of council is arrayed as an accused in the complaint and furthermore after complainant adduced evidence before charge, a charge is also framed against him for the offence committed by him as he was then 'head of the department'. Before proceeding further, to consider rival submissions of the parties it would appropriate to refer Sec. 48 of the Act.

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"Where an offence under this 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 :

Provided that nothing contained in this section shall render such Head of the Department liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offences. "

25 Ld. Adv. Shri Sadekar vehemently submitted that accused no.1 council is no way concern with the development of council and therefore it is sole responsibility about maintenance of sewage and to install effluent treatment plant by a special planning authority. In support his contention he has referred sec. 40 & 113 of Maharashtra Regional Town Planning Act, 1966 (here-in-after referred as to MRTP Act) Moreover, he has also placed on record a draft plan of 1998, 1977 & 2001 prepared by CIDCO. Per contra Ld. Adv. Shri Jethani submitted that even after appointment of special planning authority a statutory obligatory cast upon its council and its C.O. to maintain drainage and environmental aspect as well as to install E.T.P. In support of his submission, he has referred a Preamble of Development



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Control Regulation, 2001 for Vasai Virar Sub Region and annexe thereto. Defence Ld. counsel Shri Sadekar has also referred the said regulation and submitted that it is still a duty of special planning authority i.e. CIDCO and therefore council can not be held responsible for non installation of E.T.P. and for cause any pollution through water in nalla.

26. Sec.49 of the Municipal Council Act laid downs duties and function of the council which are in form of obligatory and discretionary. Those duties are exhaustively specified in sub-section(2) and (3) of sec. 49 of the Municipal Council Act. One of such obligatory duty is protection of the environment, constructing, altering, maintaining drains, Sewers, drainage work, sewage works, and obtaining a supply or additional supply of water proper proper and sufficient for preventing danger to the health of the inhabitants from the Act insufficiently or unwholesomeness of existing supply when such supply or additional supply can be obtain at reasonable cost. Chapter XIII of the Municipal Council Act in respective of drainage sub sec-1 of Sec.200 of the Municipal Council Act state that drain sewers, water closes, gutters within the municipal area

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shall be under survey and control of the council. Therefore, if all the relevant provisions of the Municipal Council Act in respect of disposal of effluent and sewage, it makes clear that it is the council who has to discharge its obligatory duties towards public. Whereas Chapter XII of the Municipal Council Act states the provisions about control over buildings in relation to permission refusal etc.

27. It is not disputed that after the notification in the year 1977, CIDCO is appointed as a Special Planning Authority u/sec. 40 (1)(b) of M.R.T.P. Act for Vasai-Virar sub region. A draft plans referred makes very clear that said CIDCO was appointed for purpose of planning and developing said sub region as it was not possible for the council to provide a amenities to public in urban sector. Much stress has been given by Ld. Adv. Shri Sadekar in respect of sub sec (5) of Sec. 113 of MRTP Act. Sub sec, (5) of Sec.113 states that on constitution of development authority the local authority functioning within the areas, immediately ceased to exercise the powers and forms the functions and duties which said development authority is competent to exercise and perform under MRTP Act.



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Admittedly, the CIDCO is appointed as a Special Planning Authority u/sec. 113 (3A) of the MRTP Act. Sub sec.(7) of Sec.2 of the MRTP Act defines 'development.' It speaks specifically in respect of building related to its construction, changes, erection, reclamation, and for re-layout and sub division of any land. Therefore, considering the definition of sub sec. 2(7) in context with sub sec. 3(A) of Sec.113 and sub sec. (5) of Sec.113 of the MRTP Act, I do not found force in the submission of defence that all the rights and liabilities in respect of maintaining drainage, sewerage and related aspects ceased. By virtue sub sec. (5) of Sec. 113 of MRTP Act, what is taken away is the power of local authority to have control on erection or re-erection of building. This is done with a purpose to permit the special planning authority designated under MRTP Act to develop new town in a plan and systematic matter. Consequently, authority vested in the local authority inclusive municipal council under the relevant municipal law is taken away so as to permit plan development and effect of it is only to take away powers of related to erection and re-erection of building. Thus in respect of accused no.1 municipal council powers vested with it under Chapter XII of the Municipal Council Act are only taken away. In this

respect reference can be made to a Judgment in case BIMA Office, Premises Co.Opp. Society Vs. Kalamboli Village Panchayat by Hon'ble High Courts Bombay (Divisional Bench) reported in AIR 2001 Bombay -83.

28. Ld. Adv. For defence vehemently submitted that if the provisions of the Municipal Council Act is taken into consideration, it is very clear that Chief Officer is not head of the Department' i.e. Council but President is the 'head of the department'. Ld Adv. Shri. Sadekar in support of his submission referred Sec.58 & Sec.77 of the Municipal Council Act which speaks about functions of President and power and duties of Chief Officer respectively. He submitted that it is a President who has over all control not only on council but also supervise and control the acts of Chief Officer. Per contra ld. Advocate for complainant submitted that the President is elected representative by the people and therefore he can not said to be a 'head of the department'.

29. Sec.58 of the Municipal Council Act described functions of the President which is specified in Clause (a) to (e).



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Amongst them, President shall watch over financial and executive of the council and also to exercise to supervision and control over the acts and proceeding of Chief Officer of the Council if the matter of Executive officer and a matters of concerning the accounts and record council. Sub Sec. (1) of sub.sec.77 states that Chief officer subject to the control, directions and supervision of the President supervised the financial and executive administration of the council and exercise such power and such duties and function as may be confirmed and imposed upon him or allotted to him by order the Municipal Council Act. No doubt, on cogent reading of sec. 58 with Sec. 77 it appears to be that President is having supervision and control over the Chief Officer. However, it is to be noted that the said supervision and control is only o in respect of matters of executive administration and concerning the accounts and record of the council.

30. Ld. Advocate for defence brought my attention to admission of Shri. Bipinchandra Gandhi . P.W. & Gandhi asserted that as per the direction of High Court, high power committee was appointed under the chairmanship of Chief

secretary of Government of Maharashtra. On 9/4/2009 in the meeting a decision was taken that as CIDCO a special planning authority, has to take steps for disposal of effluent. Ld. Adv. Shri Sadekar relying his testimony submitted that it makes very clear that council is not responsible for installation of ETP. In view of my forgoing discussion that CIDCO a special planning authority constituted u/sec. 113 (3A) of M.R.T.P. Act is empower only in respect of development of building and plan. Therefore, I do not found substance on merit in the argument advanced by defence.

31. The whole scheme of Municipal Council Act speaks that it is governed by three tyre system. The member of council are elected representative, elects a President amongst themselves. A Chief Officer along with other officers are appointed to control the administration and implement the scheme. Whereas, a director of Municipal Administration and Collectors are given the powers in respect of some of the acts to be perform under the Municipal Council Act. The necessity link between policy making and administration is by council or number of committee established and, a Chief Officer. The President, having a control and supervision over executive



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administration . The act of executive administration by person is to manage authority or organization and to conduct office for design execution of policies and the duties stated by the Act. Moreover, Sub Sec. (1A) of Sec.77 of Maharashtra Municipal Council Act cast duty upon Chief Officer of every council of "A" class of municipal area to place before a council a report of status environment during the year July 31 of every year with respect of last preceding year covering such matters. Though, sec. 58 of the Municipal Council Act empower a President to control and supervise over executive administration to be perform by Chief Officer, he being a elected representative of a council , he can not held to be "head of the department" of the Government. Therefore, the over all scheme of the Municipal Council and the power with Chief Officer to exercise supervision and control over the act and proceeding of all officers and servant of the council, he is a "head of the department" , as contemplated u/sec. 48 of the Act.

32. Sec. 48 of the said Act, state that where as offence under the Act has been committed by any department of Government, the head of the department shall be deemed to be

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guilty of offence. The word "shall be deemed to be" creates a legal fiction. Therefore, now burden shift upon the "head of the department" i.e. Accused no.2 to prove that he did not commit the offence. He can prove the same fact or rebut allegation by bringing on record either through the evidence lead by the complainant or by his own oral or documentary evidence that the said act constituting an offence was committed by him without knowledge or that he exercised due diligence to prevent the commission of such offence.



33. It is pertinent to note that accused no.2 himself has examined on oath. A sum and substance of his oral evidence is that council is not responsible for the act or omission done under the Act and it is a CIDCO who has to performe his duty for development of the council and hence as council is not responsible, he is not responsible. However, he has not stated on oath that the act amounting to a offence under the Act was without his knowledge and he tried to prevent by due diligence. Needless to say that in a Criminal Proceeding it is prosecution, to prove the case against accused beyond reasonable doubt. However, considering the provison u/sec. 48 when complainant

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- 203

succeed to prove that the offence committed by the council, now it is a head of the department i.e. in the present case, accused no. 2, then chief officer of the council has to rebut the allegation. However, accused no.2 not succeeded to bring any iota of material on record either through cross-examination of complainant and it's witnesses that he had taken due diligence to prevent the offence. Moreover, he has not testified on oath about the steps taken to prevent the offence. After receipt of directions u/sec. 33 A of the Act from the Board, there is no material to show that accused no.2 as a Chief Officer has placed the same before the committees or council have made any attempt to get executed the directions by obtaining a proposal through CIDCO as it is claimed that CIDCO is the authority to prepare development plan.

34. It has been brought on record from D.W.2 Arun Nirbhavane, a executive Engineer of Maharashtra Jeevan Pradhikaran that to install ETP a basic requirement of water supply is 135 lt. per person per day. However, due to non supply of water it was not possible to council to start ETP. However, there is no evidence either of accused himself or D.W.2-Arun

that at any time council have made demand of water supply at the rate of 135 lt. per person for installation of ETP. One of the obligatory duty of the council as enumerated u/sec.49 (2)(j) is to obtain additional supply of water for preventive danger to the health of the inhabitant for insufficiency or unwholesomeness of existing water supply. Therefore, if the evidence adduced by defence is taken into consideration, there is no any whisper to conclude that accused no.2 was not aware about the flow of polluted water through nalla within the jurisdiction of his council which meets to Vasai Creek and he had ever taken any steps for submitting the proposal to install ETP.

35. Therefore, in view of my forgoing discussion the net result can be drawn that the council has committed the breach u/sec. 24 of the Act and 33A of the Act. It has not disputed fact that since July 2009 accused no.1 council amalgamated within, the larger urban area to perform a corporation by name Municipal corporation of City of Vasai Virar. However, even after ceasing the status of 'council' by accused no.1 or otherwise if still it is in existence it would have made no difference because in view of sec. 48, a legal fiction creates that only head of the department

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held guilty for the offence and therefore, accused no.2 as a head of the department is held guilty for such contravention and therefore he is liable for conviction u/sec. 41(2) and 43 of the Act.

36. Therefore, in view of my forgoing discussion, a conviction u/sec.41(2) r.w.s. 33A and Sec. 43 r.w.s. 24 of the Water (Prevention & Control of Pollution) Act, 1974 conviction to accused is unescapable. Hence, I take pause to hear the accused on the point of sentence.

37. Heard accused on the point of sentence. Accused submitted that as an officer of council they have perform their best to discharge duties. And therefore they be released on admonition.

38. Ld.Adv. for accused Shri Surve has submitted that accused no. 2 is Government officer and therefore, an offence is purely technical and only because during the said period they were holding the said post, can not be punished severely and on admonition they be released.

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39. Ld. Adv. for the complainant Shri Jethani has submitted that as per the provision of law accused be dealt with.

40. I have given the anxious consideration to submission of both parties. Pollution of river, stream, creek etc. has considerable importance which ultimately calls for environment aspect. Council is duty bound to make environment quality and shall concern for it as ultimately it harm not only to human being but living beings on earth. Therefore considering scope and object of the law behind implementation of the Act, is taken into consideration, lenient view is not acceptable. Moreover, as the Act prescribed minimum punishment, even if accused hold charge of Chief Officer, during the said period only, I am unable to accept submission of Ld. Adv. Shri. Surve. Considering all these aspects, I proceed to pass following order.

: ORDER :

1. Accused no.2 is hereby convicted of the offence punishable u/sec. 41(2) r.w.s. 33-A and Sec.43 r.w.s. 24 and r.w.s.48 of the Water (Prevention & Control of Pollution) Act, 1974 (With Act No.53 of 1988)(Vide Sec. 248(2) of Cr.P.C.), ⁱⁿ as held _{of the accused not Council} ⁱⁿ ₇₇



- 2. Accused no.2 is hereby ordered to suffer R.I. For Two Years and to pay fine of Rs.1000/- (Rs. One Thousand Only), i/d to suffer further R.I. for One month.
- 3. Bail bonds of the accused stands canceled.
- 4. Copy of Judgment be provided to accused free of cost.



Thane
Date :- 03/03/2010

hjeewes
(S.M.Bhosale)
Chief Judicial Magistrate, Thane.

Fine paid
Rs. 1000/- only
hjeewes
D.C. Nash, 03/03/2010.
S. J. M. Court, Thane.

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खरीदत
11/3/10
सहायक सचिव
मुळा न्यायदालाधिकारी
ठाणे