BEFORE THE NATIONAL GREEN TRIBUNAL
(WESTERN ZONE) BENCH, PUNE

M.A. NO. 160/2014
APPEAL No. 30/2014(WZ)

CORAM:

Hon'ble Mr. Justice V.R. Kingaonkar
(Judicial Member)
Hon'ble Dr. Ajay A. Deshpande
(Expert Member)

B E T W E E N:

M/s. Champ Energy Ventures Pvt. Ltd.
Plot No.7, Gat No.399/1-2-3 B,
Village Bhare, Tql. Mulshi,
Pune 412 106.

....Appellant

A N D

1. **Ministry of Environment and Forest (MoEF)**
   Through Its Principal Secretary,
   Paryavaran Bhavan, CGO Complex,
   Lodhi Road, New Delhi 110 003.

2. **Central Pollution Control Board,**
   Parivesh Bhavan, East Arjun Nagar,
   Delhi 110 032.

3. **State of Maharashtra,**
   Through the Ministry of Environment
   And Forest),
   Mantralaya, Mumbai 400 032

4. **Member Secretary,**

Maharashtra Pollution Control Board,
Kalpataru Complex, Sion, Mumbai.

5. Maharashtra Pollution Control Board,
Through the Regional Officer,
Office at Jog Centre, 3rd Floor,
Mumbai-Pune Road, Wakadewadi,
Pune

6. The Automotive Research Association Of India, S.No.102, Vetal Hill,
Off Paud Road, Kothrud,
Pune 411 038.

...Respondents

Counsel for Appellant :
Dr. Sadhana Mahashabde, Adv.

Counsel for Respondent No. 1:
Ms. Shweta Busar, Adv. holding for
Mr. Ranjan Nehru, Adv.

Counsel for Respondent No. 2:
Ms. Manda Gaikwad, Adv.

Counsel for Respondent No.4 & 5 :
Mr. Saurabh Kulkarni, Adv.

Counsel for Respondent No. 6:
Mrs. Supriya Dangare, Adv.
Mr. Y.K. UPadhyay, ARAI,

DATE : April 16th, 2015

JUDGMENT

1. The present litigation is the second round of litigation between the parties. Originally, the Appellant herein had filed Application No.21/2014 before this Bench which was disposed of by order dated 1st May 2014 with certain directions. The Appellant has now approached this Tribunal with a submission that the directions given by this Tribunal have not been complied with and has challenged the impugned directions of closure issued to the Appellant's Industry by the Respondent No.2-CPCB on 30-12-2013 and subsequently on 28-11-2014 under Section 5 of Environment Protection Act, 1986.

2. The Appellant M/s. Champ Energy Ventures Pvt. Ltd. (Champ Energy) is manufacturer of petrol and LPG driven gensets, situated at plot No.7, Gat No.399/1-2-3 B, of village Bhare, Tal. Mulshi, District Pune. The Appellant was manufacturing twenty two (22) models of Petrol and Petrol start LPG run Generator sets of which six (6) were petrol start and petrol run while twelve (12) were petrol start LPG run gensets; besides two (2) were LPG start LPG run gensets. Out of these varieties, the Appellant was manufacturing the gensets 3, 6 and 1 type respectively in above categories for M/s. Bajaj. The Appellant submits that the Officers of the Respondent No.2 i.e. CPCB visited the industrial premises of the Appellants on 20th November 2013 to investigate a complaint received by CPCB against their industry and for verification of compliance

of environmental norms. Subsequently, the Chairman of Respondent No.2 CPCB issued directions under Section 5 of the Environmental Protection Act, 1986 on 30-12-2013 to stop manufacturing and sale of generator sets, if any, at their premises with immediate effect. This order was challenged in Application No.21/2014 in NGT which was disposed of vide order dated 1st May 2014 wherein the Appellant was allowed to manufacture three (3) petrol start/petrol run generator sets up to September 2014 and Respondent No.2 was directed to reconsider the closure order or any prohibitory order passed against the Appellant and recall the same. The Appellant submits that as per the directions of the NGT, hearing was given by the Member Secretary, CPCB to the Appellant-industry on 26-5-2014 and the minutes of the hearing were circulated by letter dated 16-6-2014. Through the same minutes, CPCB informed to the Appellant to recall all non-compliant Generator sets either by providing Type Approved Generator sets in place of old Generator sets or by recalling the complete Generator sets. The Appellant claims to have informed the non feasibility of such compliance vide letter dated 2-7-2014. Subsequently certain exchange of correspondence was made between the Appellant-Industry and the CPCB i.e. Respondent No.2. Thereafter, Chairman, CPCB issued directions under Section 5 of Environment Protection Act, on 17-11-2014, keeping the directions issued on 30-12-2013 in suspension and further fixing another personal

hearing before the Member Secretary on 25-11-2014. Thereafter, the Chairman CPCB issued the final directions under Section 5 of the Act on 28-11-2014 being following order:

> "*You are directed to recall all the non-Type Approval Generator Sets which you have sold in market immediately within six (6) months with a submission a Bank guarantee of Rs.2 crores. The Bank guarantee should be submitted to CPCB along with Application of Type Approval*".

3. The case of the Appellant is that the Ministry of Environment and Forest (MoEF) has notified the standards of Air and noise emissions for specified types of Generator Sets wherein certain restrictions have been placed on manufacturing or assembling or import or sale of diesel, petrol and kerosene driven generators by placing a mechanism of having Type Approval from one of the specified testing agency. The Notification also designates CPCB as nodal agency for compliance of such standards and notification. It is the stand of the Appellant that they have the Type Approval for petrol start and petrol run Generator sets. The Notifications of MoEF dated 25-9-2000, 5-10-1991 and 7-8-2013 do not include standards or restrictions regarding the duel fuel generator sets like petrol start/LPG run generator sets which are manufactured by the Appellant. It is, therefore contention of the Appellant that the restriction of manufacture for assembly or import of Generator sets as envisaged or stipulated in the

Notifications mentioned above are not applicable to duel fuel gensets. Similarly, it is contended that the LPG start, LPG driven generator sets also do not have requirement of such Type Approval. The Appellant further contends that in any case, it is well known and established that the LPG will cause lesser emissions than petrol, diesel or kerosene and therefore, use of LPG is more environment friendly. The Appellant, therefore, prays for quashing the directions of the CPCB for closure of the unit, submission of the Bank guarantee for recalling the non Type Approved gensets and also communications of CPCB to ARAI for not considering their Application for the Type Approval.

4. CPCB vide Affidavit dated 16-10-2014 took a stand that hearing was given on 21st May, 2014 to the Appellant. Subsequently, the matter was heard again on 11th November 2014. It was revealed that the CPCB had not considered the submissions of the Appellant in the earlier personal hearing. Subsequently, CPCB filed another Affidavit dated 4th December 2014 wherein the directions of CPCB dated 17th November 2014 were placed on record. Thereafter, the Tribunal directed CPCB and ARAI to conduct a scientific study and analysis of the disputed gensets and to examine the claim of the Appellant that the gensets which are being claimed by CPCB as operating without Type Approval are indeed bifuel generator sets and what are the internal mechanisms of gensets for control of regulation of fuel supply etc. This was necessary as

the main contention of the CPCB seems to be that though the gensets are labelled as petrol start/ LPG run, they are factually designed to operate on petrol and as such are regulated by the notifications referred to above by the CPCB. Such report was placed before the Tribunal on 13-2-2015.

5. Respondent No.6-ARAI filed Affidavit and submitted that role of ARAI is restricted to examine the gensets in order to verify the emissions in order to grant type approval in conformity with the MoEF notifications. It is the stand of ARAI that fixing of standards as well as deciding the scope of notifications i.e. type approval of Generator sets is the domain of MoEF and the Nodal Agency i.e. CPCB and ARAI do not have any role in this matter. It is further submitted that as the CPCB is the nodal agency for implementation of the notifications, they are required to comply the directions of CPCB dated 29th August 2014 for not proceeding with the Type Approval Application of the Appellant. The ARAI submits that their role only limited to as testing agency and also a technical resource organisation and they will comply the directions of the Tribunal in the matter.

6. Respondent No.1-MoEF has filed an affidavit on 4-12-2014 and submits that the Ministry is working on the draft standards submitted by CPCB for bifuel gensets, including LPG run gensets. MoEF further submits that the draft Notification is circulated to various technical institutes and

stake- holders and will be placed before the newly constituted Expert Committee.

7. Heard learned Counsel for the parties. We have carefully gone through the record. Considering the documents on record and also arguments advanced by Ld. Counsel for the parties, we are of the opinion that following points arise for final adjudication of the present Application/Appeal.

1) Whether it is established that 17026 units of gensets sold by the Appellants fall within the restrictions imposed by the above Notifications issued by the MoEF ?

2) Whether the CPCB has correctly concluded that these duel fuel gensets are mainly petrol duel gensets and require type approval ?

3) Whether the CPCB is entitled to issue directions for recall of gensets and to seek bank guarantee in lieu thereof ?

4) Whether the directions dated 28-11-2014 stand the tests of legality, correctness and propriety ? If not, the directions deserve to be quashed ?

8. Before embarking on deciding above points, it will be pertinent to note that the Government of India in the MoEF have notified certain restrictions and regulations for manufacture, assembly and sale of the gensets, in view of its increasing use, due to various compelling reasons, including shortage of electricity and such wide spread use of the generator sets is leading to multiple point sources of air and

noise pollution. Such Notification was initially issued on 5-10-1999 and subsequently on 25-5-2000 and 7-8-2013. As the entire arguments of the main contesting parties revolve around interpretation and applicability of this notification, it will be prudent to reproduce some of the important provisions of the Notification dated 7-8-2013. This Notification is issued for notifying the standards for generator sets run on petrol and kerosene at entry No.88 of the Environmental Protection Rules, schedule-I.

MINISTRY OF ENVIRONMENT

NOTIFICATION

New Delhi, the 7th August, 2013

G.S.R. 535(.E) - - - - - -

A. Emission Standards.- - - - -

B. Noise Limits.- - - - - - - -

C. General Conditions.-

1. Applicability.- *The stipulations in respect of emissions and noise referred to in entry A and entry B shall apply to all new generator sets using petrol and kerosene as fuel, manufactured in or, imported into India.*

Provided that this provision shall not apply to.-

(a) Genset manufactured or, imported for the purpose of exports outside India; or;

(b) Genset intended for the purpose of Research and Development and not for sale or, captive use in India.

2. Requirement of Certification.- *Every manufacturer or importer (hereinafter referred to as manufacturer) of genset (hereinafter referred to as product) to which these conditions apply shall have a separate valid certificate of type approval*

for all the product models for emission as well as noise norms being manufactured or imported.

3. *- - - - - - - - - - - -*

4. Sale of generator sets not complying with these conditions *.- The sale of product model, not having valid type approval certificate, or not complying with the emission or noise norms, as determined by the verification for conformity of production, shall continue to be prohibited in India.*

5*. - - - - - - - - - -*

6*.* ***Nodal agency.****-(1) The Central Pollution Control Board shall be the nodal agency for implementation of these stipulations.*

(2) In case of any dispute or difficulty in implementation of these rules the matter shall be referred to the nodal agency.

(3) The nodal agency shall constitute a Standing Committee for emission related issues and a National Committee for noise related issues, respectively to advice it on all matters related to the implementation of these rules including the dispute, if any.

7. Compliance and testing procedure.*- (1) The compliance and testing procedure as published from time to time, if reviewed by Central Pollution Control Board shall be followed.*

(2) The Central Pollution Control Board may revise the compliance and testing procedure.

(3) The institutes referred to in paragraph A and B above shall submit the testing and certification details in respect of emission or, noise, as applicable to the Central Pollution Control Board, annually and the Central Pollution Control Board shall be free to depute its official(s) to oversee the testing".

(b) serial number 91 and entries relating thereto shall be omitted".

Point Nos.1 and 2 :

9. In the present Appeal, main contention of the Appellant is that the above notification stipulates certain restrictions, including mandatory type approval for certain types of gensets which are clearly defined in the title of the notification which manifests that the notification is applicable to generator sets run on petrol and kerosene only. The Appellant further submits that the gensets which have been directed to be recalled by the CPCB are in fact, bi-fuel i.e. petrol start and LPG run type of gensets. The Appellant submits that there are no standards or restrictions or any impediment for manufacture and sale of such gensets. Appellant further submits that the other products are LPG start and LPG run gensets which are also outside the purview of the said notification. It is the case of the Appellant that the gensets as identified by the CPCB are in fact bi-fuel i.e. petrol start, LPG run at the stage of manufacture and therefore, the notification is not applicable in the instant case.

10. The learned Advocate for the Appellant further submits that the Appellant had approached the ARAI in the year 2004 seeking details of requirement of type approval for such product. The ARAI had communicated them that the procedure for type approval is not stipulated for such bi-fuel gensets and therefore, they have gone ahead with the

manufacture. The Appellant-Industry has necessary consent of the State Pollution Control Board (SPCB) and has necessary Pollution Control arrangements. The learned counsel further submits that this is a case of typical highhandedness, may be a sort of vindictiveness against the Industry because the Industry has resisted the initial directions of December 2013 through an Appeal before the NGT. The learned counsel submits that even the directions of 30th December 2013 were issued, in utter disregard of the procedure laid down in the Environment (Protection) Rules 1986, particularly Regulation 4 therein, and therefore, the Tribunal had to issue certain directions by its order dated 1st May 2014 to the CPCB. Even subsequent events indicate certain biased approach of the CPCB Officers while dealing with the case and the Tribunal had correctly issued certain orders and as a matter of fact, certain internal inquiry had been initiated against the concerned officers by the Chairman of the CPCB, though neither the final findings of such inquiry are placed on record by the CPCB, nor the concerned officers were dissociated from handling the matter at subsequent stage. She therefore contended that continuation of such officers in handling the matter is against the principles of natural justice.

11. The learned counsel further argues that it is a clear case where the CPCB has not arrived at its finding that the identified gensets are covered by the notification by certain technical and analytical evaluation. Only based on the

apprehensions of the officers which were raised in the personal hearing itself, such conclusions have been drawn during the meetings. Though, the Inspection Report was prepared by visiting CPCB officials on 20-11-2013, such report was not made available to the Appellant-Industry. Even such report does not have any such conclusions which can conclusively prove that the identified gensets attracts the provisions of the notifications. The only conclusion which may be relevant in the said visit report is as under :

> "It is very clear from the photographic evidence that fuel tanks which are meant for petrol are being installed in the LPG driven generators and thereby making provision for petrol also as fuel in the LPG generators and sold in the name of LPG generator's".

12. The learned counsel therefore argues that the Visiting Officers of the CPCB who have prepared this report after the site visit, without the knowledge of the Appellant and without sharing the same with the Appellant, have committed patent error of not evaluating or appraising the final product of the petrol start/LPG driven gensets to arrive at an objective conclusion. Only certain hypothetical apprehensions have been construed into such remarks which cannot be considered as conclusion or findings. Even in the backdrop of such a fact, the CPCB should have inspected the final product and objectively evaluated the gensets on various technical grounds such as fuel tank capacity, switching over of the fuel,

regulators and the engine details. So also, they could have taken assistance of ARAI which is available in Pune city itself for such purpose. CPCB has even not considered it necessary to evaluate whether such gensets are causing the pollution by checking emission levels in terms of the notification to prove their point. The learned counsel further argued that the Tribunal earlier correctly directed the CPCB and the ARAI to conduct such technical evaluation by order dated December 20.12.2014. The joint report placed on record by the CPCB which is submitted on 9th February 2015 is the first technical evaluation report. The summary of the observations indicate that the gensets is not required to start first on petrol before switching over to the LPG and during the warm condition, the generator can be started directly on LPG mode. The counsel further submits that though such observations are made, the concluding page of the report, which is different from the body of the report, conclude that the gensets can run either by petrol or by LPG independently and therefore, as a mandatory requirement the Industry must obtain type approval certificate for petrol operation.

13. The CPCB has taken a stand that though the industry claims that the identified DG sets are petrol start LPG run gensets, this fact is not found to be correct during the field inspection on 20-10-2013. The CPCB had obtained certain information from the Appellant-Industry and has also given opportunity of personal hearing to the Industry twice i.e.

on 26-5-2014 and 25-11-2014. It is stance of the CPCB that as per the averments made by the Industry representative, the identified gensets can also be run by petrol, kerosene and LPG as engine is basically a petrol engine and such submissions itself indicate that for such type of gensets the type approval and subsequently CoP is necessary as per the Rules. The counsel for CPCB further informed that the joint inspection report of CPCB and ARAI submitted on 9th February 2015 is very elaborate and clearly conclude that such type of gensets must obtain type approval certificate for petrol operations.

14. We have perused the documents on record and also heard the counsel. The limited question which needs to be settled here is that whether the CPCB had enough of technical and documentary evidence to establish that the identified gensets squarely falls within the definition and coverage of gensets regulated by the 2013 Notification? The Notification as mentioned above is for the generator sets run on petrol and kerosene. The notification also puts a restriction by Clause-IV on selling generator sets not complying with the conditions in the notification. More importantly, the Clause IV clearly stipulate that the sale of product model not having valid type approval certificate, or not complying with emission or noise norms, as determined by verification for conformity of production, shall be prohibited for use in India. It is abundantly clear from this regulation that, the notification has considered two (2) aspects i.e. having a valid type

approval and secondly, compliance of emission or noise norms. In the instant case, the first criteria i.e. having type approval is being challenged by the Appellant on certain grounds. However, it is not even the case of CPCB that the identified gensets are not complying with the emission or noise norms. In fact, even after the specific directions of the Tribunal, related to evaluation of identified gensets, the CPCB, for reasons best known to them, have not carried out the emission or noise norms compliance tests.

15. As far as having valid type approval is concerned, the Appellant has come up with a case that they sold these gensets with petrol start and LPG run composition, with necessary support equipments and other ancillary structures. The Appellant claims that the actual use of such bi-fuel gensets may be and can be varied by the actual users, based on available fuel and their convenience. The learned counsel for Appellant also draws some similarity between kerosene run petrol vehicles which we do not agree. The joint inspection report of CPCB and ARAI also indicate that there are two (2) separate fuel tanks and the gensets can operate either on petrol or on LPG independently. And therefore, the gensets can be run either by petrol or LPG. It can be seen from these observations and conclusion that even the joint inspection report summarised that the gensets have two tanks, separately meant for petrol and LPG. The petrol tanks are of capacity of six (6) ltrs to 12 ltrs and for LPG supply,

regular cylinders are intended to be used. The gensets has both the petrol and LPG system components including two (2) stage LPG regulator, gas air mixture, LPG cylinder regulator for LPG system, whereas petrol filter, air filter, petrol carburettor for the petrol system. In our opinion, the report indicates that the identified gensets can be operated either on petrol or LPG independently. However, the report does not conclude that the gensets can be run exclusively on petrol and cannot be run on LPG. The impugned directions of the CPCB dated 28th November 2014, clearly record that :

> *"Whereas it is evident from the minutes of the hearing that you have sold petrol run gensets compatible with LPG without obtaining type approval"*

It is, therefore, manifest that even while issuing the directions on 28.11.2014, after initial round of litigation, the CPCB has not come to conclusion that the identified gensets are the petrol driven gensets and no material was placed before the Chairman, CPCB indicating that the identified units are violating in any manner, the air or noise emission norms as specified by the notification and therefore, the directions issued by CPCB are essentially on the ground that the technical formality of having type approval has not been complied with by the Appellant-industry. The purport of the Clause IV of notification as explained above clearly emphasises that such restriction on the manufacture/sale of the gensets has been imposed because of its pollution

potential and therefore, in any case, it would be incumbent on the regulatory authority i.e. CPCB to verify the levels of pollution caused by such identified units. In the instant case, CPCB has not submitted such emission report even after specific directions of the Tribunal.

16. The notification of 7th August 2013, notifies the CPCB as a nodal agency for implementation of stipulation. The Clauses VI (2) and (3) as referred above are very important. In case of any dispute or difficulties in implementation of any rule, the matter is required to be referred to the nodal agency and the nodal agency shall constitute an Expert Committee to give advice on all matters related to the implementation of these Rules including the dispute if any. In the instant case, there is a dispute raised by the Appellant about classification of the identified gensets. No such record is placed before the Tribunal indicating that any such reference was made to such Expert Committee constituted under Clause-VI(2) and (3) of the notification for technical appraisal.

17. Considering the above discussion, we are of the considered opinion that though initially, CPCB has failed to establish that the identified gensets sold by the Appellant is covered under the restrictions imposed by the above notification and therefore, requires the type approval; the findings of joint visit by ARAI-CPCB has established on scientific evaluation that the classified gensets can be operated independently on either petrol and LPG, and

therefore are covered under the notification, yet we are inclined to accept the finding of this report which was submitted in February, 2015, based on the 'precautionary principle'. However, we record that such a report was prepared jointly by ARAI and CPCB on Tribunal's direction and was submitted much after the revised closure direction of CPCB in November, 2014. The point Nos.1 and 2 are therefore, answered in the affirmative.

Point Nos.3 and 4 :

19. Having recorded finding as shown above, the next question is related to directions issued for re-call of the gensets and to seek Bank guarantee in lieu thereof. The CPCB has issued the final directions on 28-11-2014 to recall all the non type approved gensets which have been sold in the market immediately within six (6) months with a submission of Bank guarantee of Rs. 2 crores. These directions are issued under Section 5 of the Environment Protection Act. It will be therefore relevant to read Section 5 of the Environment (Protection) Act, 1986 which is as under;

> 'Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer or any authority and person, officer or authority shall be bound to comply with such directions.
>
> Explanation-- For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct-
> (a) the closure, prohibition or regulation of any industry, operation or

process; or (b) stoppage or regulation of the supply of electricity or water or any other service.'

20. It is therefore, now necessary to verify the legality correctness and propriety of such direction in terms of the letter and spirit of Environment (Protection) Act, 1986. The section 5 of the Act empowers the Authority to issue such directions subject to the provision of Environmental (Protection) Act, 1986, particularly Regulation 4 of Environment (protection) Rules, 1986 and in exercise of its powers and performance of its function under this Act. Needless to say that these directions have been issued to ensure the compliance of the notification dated 7th August 2013. The contention of the counsel for Appellant is that such directions are in excess of the powers conferred upon the CPCB under Section 5 of the Environment (Protection) Act, 1986, more particularly when CPCB has not established that such gensets really could have caused pollution or established non-compliance of the specified emission norms as stipulated by the notification. It is the stand of the Appellant that the gensets are bi-fuel type and if the actual user of genset opts to use a particular fuel, which is not intended at the manufacturing stage, the manufacturer cannot be responsible for such deviation. In any case, the learned counsel argues that the CPCB ought to have come out with a case that such gensets cause pollution which could have justified such action, though the powers to issue

direction do not contemplates such recall. The learned counsel argues that in such event, the powers available to CPCB under section 5 of the Environment Protection Act, 1986, cannot be construed to effectively penalise the Industry for any offence in particular. The direction under section 5 of the Environment (Protection) Act need to be used in exercise of its powers and performance of its function under this Act. And the Act does not envisage punitive action to be taken by the CPCB or the Authority at all. Section 5 of Environment Protection Act is very explicit which even empowers the CPCB to close, prohibit or regulate any industry operation or processes or even disconnection of electricity and power. The learned counsel therefore, submits that the powers of the CPCB under Section 5 of the E.P. Act are exclusively related to the function under the E.P. Act read with the instant notification.

21. The powers under Section 5 of the E.P. Act are quite elaborate and as can be gathered from the wordings, these powers to give direction needs to be essentially used in exercise of its powers and performance of its functions under this Act. In the particular notification dated 7-8-2013 issued under the E.P. Act, mandates a specific responsibility on the CPCB to work as a nodal agency and also the functions are stipulated in clause VI and VII of the notification. In the present case, it is a matter of record that CPCB has not conducted any air emission or noise emission testing of any of

the disputed class of gensets either through itself or through the designated testing agency mentioned in the notification. It is, therefore, manifest that it is not the case of CPCB that such type of gensets can cause actual pollution in terms of the standards specified in the notification and only stand of the CPCB is that such class of gensets are sold by the Appellant-Industry without obtaining type approval which is mandatory by the Notification. The Environment Protection Act in its Section 15 contemplates penalty for contravention of the provisions of the Act and the Rules, orders and directions. Section 15 is reproduce below :

> ***Penalty for contravention of the provisions of the Act and the rules, orders and directions****; (1) whoever fails to comply with or contravenes any of the provisions of this Act, or the rules made or orders or directions issued thereunder, shall, in respect of each such failure or contravention, be punishable with 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 addition 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.*
>
> *(2) If the failure or contravention referred to in sub-section (1) continues beyond a person of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years.*

22. The plain reading of Section 5 of the E.P. Act do not contemplates the power on the authority to take any penal action nor does it confer any power to levy any penalty. There are separate provisions like Section 15 which could reveal that penal action including penalty can be levied as per the procedure prescribed and only Courts can take cognizance of offences under the Act and levy penalty whether by way of imprisonment or fine. Hon'ble Delhi High Court Delhi Pollution Control ... vs Splendor Landbase Ltd. on 23 January, 2012 in LPA 895/2010 has held that:

> 35. The learned Single Judge has held that neither the language of Section 33A of the Water Act nor the language of Section 31A of the Air Act contemplates the power on the State Pollution Boards to levy any penalty. 36. The learned Single Judge has noted the decisions reported as *1975 (2) SCC 22 Khemka & Co. (Agencies) Pvt. Ltd. vs. State of Maharashtra, 1994 (4) SCC 276 J.K.Synthetics Ltd. & Birla Cement Works vs. Commercial Taxes Officer and 1997 (6) SCC 479 India Carbon Ltd. vs. State of Assam* to opine that power to levy penalty has to be conferred by a substantive provision in the enactment. 37. We concur with the reasoning of the learned Single Judge in paras 58 to 64 of the impugned decision and thus do not elaborate any further, but would additionally highlight that the power to issue directions under Section 33A of the Water Act and the power to issue directions under Section 31A of the Air Act, on their plain language, does not confer the power to levy any penalty. We would further highlight that under Chapter VII of the Water Act, and under Chapter VI of the Air Act penalties and procedure to levy the same have been set out. A perusal of the provisions under the Water Act would reveal that penalties can be levied as per procedure prescribed and only Courts can take cognizance of offences under the Act and levy penalties, whether by way of imprisonment or fine. Similar is the position under the Air Act. The legislature having enacted specific provisions for levy of penalties and procedures to be followed has specifically made the offences cognizable by Courts and the power to levy penalties under both Acts has been vested in the Courts. The

role of the Pollution Control Boards is to initiate proceedings before the Court of Competent Jurisdiction and no more.

38. We would be failing not to note that on the issue of a delegatee not being empowered (by law) to further sub-delegate the delegated power, learned counsel for DPCC conceded to said position and thus we leave undisturbed the view taken by the learned Single Judge on the subject.

23. It is also observed from the Notification that in case of any dispute the CPCB is expected to approach the Expert Committees as per clause VI of notification as far as the issue of requirement of type approval or further actions required in the matter. In the instant case, CPCB has referred certain earlier similar directions issued to some other gensets manufacturer. We would not like to comment on those matters as they are not part of the litigation. The Tribunal is expected to verify the legality, propriety and correctness of the impugned orders and nothing else. In the particular case, in our considered opinion, CPCB has not established that the gensets which are not having type approval cause air or non pollution in terms of the standards prescribed in the notification and also, the power to issue directions do not confer the authority on CPCB to take punitive action without approaching the Courts/Tribunal, on 'polluter pays principle'. We therefore find that the directions to issue recall for the machines and take a Bank guarantee in lieu of, cannot be sustained in the eye of Law. Both these directions are onerous, improper and illegal. We, accordingly hold that these directions have been issued without necessary

authority and also, without the necessary justification regarding the pollution caused by such gensets and therefore, the impugned directions dated 28-11-2014 regarding recall of gensets and seeking bank guarantee in lieu thereof, are required to be set aside.

24. Another important contention raised by Appellant is regarding principle of natural justice particularly in view of the officers handling the subject matter. CPCB is on record that certain departmental enquiry was initiated against some officer/s of CPCB due to certain shortcomings in handling the subject matter itself. Advocate for Appellant has shown from record that One Mr. Bala, Additional Director, continued to represent the CPCB in all hearing and also, the committee report. We do find some merit in the objection of Appellant as CPCB has not placed on record the findings of such enquiry against the concerned officer/s. Further, we also record that conduct of CPCB in the subject matter is far from satisfactory as no scientific evaluation and analysis was done of the identified gensets and even the visit report which was surprisingly prepared much after the visit, on which basis first directions were issued, was not shared with industry. All such actions are violating principles of natural justice and are devoid of technical inputs, objectivity and transparency, which are required form national level scientific and technical organisation like CPCB. We would therefore, expect that the

Chairman and Member Secretary will take note of such matter for suitable corrective measures in future.

25. Accordingly, the Appeal along with associated M.A. are disposed of holding that the Appellant Industry is required to obtain type approval for the identified class of gensets claimed to be petrol start and LPG run by the Appellant industry, as per the provision of notification, while the directions issued by CPCB to recall the already sold gensets and seeking bank guarantee in lieu thereof are set aside and quashed.

26. However, considering the facts of the case, we grant liberty to CPCB to issue specific directions, if any of the identified gensets is found to be causing pollution or being operated in violation in terms of notification or approach competent Court/Authority for any suitable action as may be found necessary.

27. While parting with the judgment, we would like to place on record our appreciation for the technical assistance provided by ARAI.

.....,JM
(Justice V. R. Kingaonkar)

....., EM
(Dr. Ajay. A. Deshpande)

Date : April 16th, 2015.
ajp