No. 60865 Reversed and remanded
Appellate Court of Illinois, First District. Fourth Division

Bulk Terminals Co. v. Environmental Protection Agency

29 Ill. App. 3d 978 (Ill. App. Ct. 1975) · 331 N.E.2d 260
Decided Jun 11, 1975

No. 60865 Reversed and remanded.

979 June 11, 1975. *979

APPEAL from the Circuit Court of Cook County; the Hon. ARTHUR L. DUNNE, Judge. presiding.

Lord, Bissell Brook, of Chicago (Robert A. Knuti and R.R. McMahan, of counsel), for appellants.

William J. Scott, Attorney General, of Springfield, and Bernard A. Carey, State's Attorney, of Chicago (Dennis R. Fields, Assistant Attorney General, of counsel), for appellees.

Mr. JUSTICE BURMAN delivered the opinion of the court:

This is an appeal by the plaintiffs, Bulk Terminals Company and Gerald L. Spaeth, from an order of the Circuit Court of Cook County, dismissing their complaint. The complaint requested the court to halt proceedings pending before the Illinois Pollution Control Board charging them with violations of the Illinois Environmental Protection Act and air pollution regulations.

Plaintiff, Bulk Terminals Company (hereinafter Bulk), operates a bulk storage facility at 12200 South Stony Island Avenue in Chicago. Plaintiff, Gerald L. Spaeth, is the president of the firm and is in charge of its daily operations. For several months Bulk stored in its tanks a chemical, silicon tetrachloride, which was owned by Cabot Corporation. On April 26, 1974, a leak developed in one of the storage tanks containing the chemical, and as it reacted with the moisture in the air, it formed hydrochloric acid vapor and silicon dioxide.

Thereafter the city of Chicago served Bulk and Spaeth with a series of complaints alleging violations of section 17-2.6 of the Municipal Code of the city of Chicago.[1] The City alleged that the 980 emissions of *980 hydrochloric acid vapor and silicon dioxide, commencing on April 26, 1974, and continuing through and including May 26, 1974, constituted "atmospheric" pollution in violation of that section. The complaints were entitled "In the Name and by the Authority of the People of the State of Illinois — City of Chicago a municipal corporation, Plaintiff v. Bulk Terminals Company."

[1] Section 17-2.6 of the Municipal Code of Chicago (1973) provides:

> "It shall be unlawful within the City of Chicago and within one mile of the corporate limits for any person, owner, agent, operator, firm or corporation to permit to cause, suffer or allow the discharge, emission or release into the atmosphere from any source whatsoever of such quantities of soot, fly ash, dust, cinders, dirt, oxides, gases, vapors, odors, toxic or radioactive substances, waste, particulate, solid, liquid or gaseous matter or any other materials in such place, manner or concentration as to constitute atmospheric pollution."

Section 17-2.1 defines "atmospheric pollution" as:

> "The discharging from stacks, chimneys, exhausts, vents, ducts, openings, buildings, structures, premises, open fires, portable boilers, vehicles, processes, or any other source, of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gases, vapors, odors, toxic or radioactive substances, waste, particulate, solid, liquid or gaseous matter, or any other materials in such place, manner or concentration as to cause injury, detriment, nuisance, or annoyance to the public, or to endanger the health, comfort, repose, safety or welfare of the public, or in such a manner as to cause or have a natural tendency to cause injury or damage to business or property."

On July 19, 1974, a trial was held in the Circuit Court of Cook County and Bulk was found guilty of violating section 17-2.6 on each and every day from April 26, 1974, up to and including May 9, 1974. The court assessed fines for the violations, and Bulk has paid them.

On or before July 31, 1974, all silicon tetrachloride previously stored by Bulk had been removed from the premises.

Complaints were also filed against Bulk before the Illinois Pollution Control Board (hereinafter Board) by Citizens for a Better Environment (hereinafter CBE) and the Environmental Protection Agency (hereinafter EPA), defendants herein, in connection with the storage tank leak. In the CBE's complaint, Bulk is charged with violations of section 9(a) of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1973, ch. 111 1/2, par. 1009(a)) and related Rule 102 of chapter 2 of the Illinois Pollution Control Board Rules and Regulations for causing air pollution as a result of the leak.[2] Gerald L. Spaeth, Bulk's
981 president, is named as *981 a co-defendant in the CBE's complaint, and is alleged to have been responsible for the maintenance of Bulk's storage facilities. In the EPA complaint Bulk is also charged with violations of section 9(a) of the Environmental Protection Act, and with a violation of Rule 102 of chapter 2 of the Rules and Regulations. Both actions were consolidated before the Board. Bulk and Spaeth filed answers to the complaints with the Board and therein set forth facts relating to the prosecution by the City of Chicago, alleging thereby that the prosecution pending before the Board was barred by the doctrine of double jeopardy and res judicata. In addition, Bulk and Spaeth filed before the Board a motion to dismiss and an amended motion to dismiss predicated on the above defenses. The amended motion to dismiss was denied by the Board on September 5, 1974.

[2] Section 9 of the Environmental Protection Act provides in part:

"No person shall:

> (a) Cause or threaten or allow the discharge or emission of any contaminant into the environment in any State so as to cause or tend to cause air pollution in Illinois, either alone or in combination with contaminants from other sources, or so as to violate regulations or standards adopted by the Board under this Act;

> (b) Construct, install, or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, of any type designated by Board regulations, without a permit granted by the Agency, or in violation of any conditions imposed by such permit;"

Section 3 of the Act contains the following definitions:

* * *

> (b) "Air Pollution" is the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property.

* * *

> (d) "Contaminant" is any solid, liquid, or gaseous matter, any odor, or any form of energy, from whatever source." Ill. Rev. Stat. 1973, ch. 111 1/2, par. 1003(b)(d).

* * *

Other alleged violations in the CBE complaint relate to plaintiffs' failure to obtain an "operation permit" for a "new emission source," *i.e.,* the leak.

Thereafter Bulk and Spaeth filed an action in the circuit court praying for a declaratory judgment with injunctive relief and a writ of prohibition against the EPA, the CBE, and the Board. By this action they sought to terminate the CBE and EPA actions before the Board. It was contended that the State of Illinois should be prevented from twice prosecuting them for the same offense. The trial court held, on defendants' motion to dismiss, that the action was premature since the plaintiffs had not exhausted all remedies under the Environmental Protection Act and the Administrative Review Act. The plaintiffs action was therefore dismissed, and this appeal followed.

The plaintiffs, herein Bulk and Spaeth, contend that both the Illinois and United States constitutional safeguards against double jeopardy (U.S. Const. amends. V and XIV; Ill. Const. art. I, sec. 10 (1970)), and the doctrine of res judicata, preclude the actions pending before the Pollution Control Board. Double jeopardy is said to have applicability because the plaintiffs are being exposed to punishment for alleged unlawful conduct which they have already been punished for once by the State of Illinois through its political subdivision, the city of Chicago. Res judicata is said to have applicability because both the city action and the Board actions arise from the same subject matter, are in essence the same cause of action, and involve the same parties. It is further urged that this is a proper case for the exercise of the circuit court's power to issue a writ of prohibition or to order injunctive relief, and that the relief requested is not precluded by the failure to obtain first a final order from the Board.

The defendants respond first that the relief sought is premature, and that the proper procedure is an appeal to this court from a final decision of the Board. It is further urged by the defendants that, in any event, 982 *982 the constitutional mandate against double jeopardy and the doctrine of res judicata are for various reasons inapplicable as a bar to the Board proceedings.

We hold herein that, in view of the previous prosecution and fine under the city ordinance, the pending proceedings before the Board are barred either under a theory of double jeopardy or res