

(1952) 12 CAL CK 0006

In the Calcutta High Court

Case No : A.F.O.O. (Mandamus) No. 71 of 1951

Ajit Kumar Addy and Others

APPELLANT

Vs

S.M. Maitra, Collector, 24-Parganas

RESPONDENT

Date of Decision : 03-12-1952

Acts Referred:

Bengal Embankment Act, 1882 — Section 7, 7(1), 8, 9
Constitution of India, 1950 — Article 226

Citation : AIR 1953 Cal 653

Hon'ble Judges : Lahiri, J;Guha Ray, J

Bench : Division Bench

Advocate : Nirmal Chandra Chakravartty and Sailendra Nath Roy, for the Appellant;J. Majumdar, A.G.P. and M.K. Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

Guha Ray, J.—The appellants are the joint receivers of the Auddy Estate, Chetla, who are the settlement holders from the Government in respect of certain Sundarban lands, known as Mouza Sridharnagore in P. S. Mathurapore in the district of 24-Parganas. One of the terms of the lease is that the lessees are responsible for the efficient maintenance of the existing embankments, sluice gates, etc. to the standard which is necessary for keeping the lot under cultivation and it was open to the Collector, in whose favour the lease was executed, to give notice to the lessees calling upon them to remedy the breach of any " condition including the condition relating to the efficient maintenance of the embankment.

2. On 4-5-1950, on receipt of a telegram from a number of cultivating tenants of the said lot, the Collector called for a report from the Assistant Engineer and the report of the Assistant Engineer, printed at page 11 of the paper book, is to the effect that there were several breaches in both the western and southern boundary embankments of village Sridharnagore on 2-5-1950, and the breaches in one of the embankments were being mended, and although the breaches in

the other had been mended, they had not been mended so strongly, with the result that breaches occurred again therein on 31-5-1950, and upto 1-6-1950, they were all left to the mercy of the weather and the saline water was entering the paddy field.

3. On the receipt of the said report, the Collector, on 15-6-1950, directed a copy of it to be forwarded to the receivers of the Auddy Estate for taking immediate action and report compliance by 20-7-1950. There was no response from the Auddy Estate till 10-3-1950, when they filed a petition before the Collector, printed at page 13 of the paper book, saying that the chakdars under them were responsible for the maintenance and repair of the embankments of their chaks under their contract with the lessees, and that the said chakdars had so long been maintaining the said bheris in pursuance thereof and it was their prayer that the Collector should call upon those chakdars to show cause for their wilful negligence in the works of repair.

4. The Collector by his order, dated 10-8-1950, observed that the responsibility to maintain the embankment lay on the lotdars, that is, the Auddy Estate, but as a concession to the prayer of the lotdars he directed notices to be issued on the chakdars calling upon them to take up repairs & report compliance by 15-9-1950. Only one of the chakdars appeared and he denied his liability in the matter. When on 21-12-50 on behalf of the lotdars an undertaking was given that they would carry out substantial repairs before the end of February 1951 and agreed to file a written petition to that effect in two days" time, the Collector ordered that the papers should be put up on 2-3-1951 on which date appearance was to be put in by both the parties for assessment of the repair work carried out by the lotdars.

5. On 2-1-1951, however, he passed the following order:

"Whereas the private embankment of Sridharnagar L. Plot P.S. Mathurapur (western and southern side) was badly damaged by the cyclone and flood in September last and it is necessary for the protection of life and property that repair work should be taken up immediately.

"And I am of opinion that the delay in the execution of the work occasioned by proceedings commenced by a general notice under the 7th and following sections of the Act would be attended with grave and imminent danger to life and property. I do not (sic) hereby order that the execution of the work should be taken up forthwith u/s 25 of the Embankment Act in anticipation of the completion of the proceedings.

"Issue notices under Sections 25 and 7/8 of the Act fixing 22-2-51 for enquiry and hearing objection if any. A. E. will furnish the names of Mouzas to be benefited."

6. The actual notice issued in pursuance of this order is printed at page 22 of the paper book. This was issued on 4-1-1951. On the same date another notice,

printed at pages 26-27 of the paper book, was also issued and this was u/s 7.

7. On 2-2-1951, evidently on the prayer of the receivers to stop the work under the Embankment Act, the Collector passed an order saying that he was not prepared to stop the work under the Bengal Embankment Act.

8. On 21-2-1951, the receivers applied to this Court under Article 226(1) of the Constitution of India for a writ of Mandamus directing the opposite party to rescind the entire proceedings in R. M. Case No. 249-1950-51 (8), or at any rate, to rescind the order, dated 2-2-1951, in the said case. There was in the application a prayer for staying further proceedings but this prayer was not pressed, with the result that the work of repair which was directed by the Collector's order, dated 2-1-1951, was not stopped.

9. The application for a writ of mandamus was refused by Bose, J. and this appeal directed against that order.

10. On behalf of the appellants Mr. Chakravartty has argued first that section 7. Bengal Embankment Act, has no application to this case, because, in the first place, as stated in the notice u/s 25, all the villages affected by the work were Sridharnagore and Rakhalpur, which appear from a copy of the lease executed by the Auddy Estate in favour of the Collector to be two of the Mouzas leased out to them, and the expression "neighbouring country" in Section 7 (1) and 7 (1a) excludes these Mouzas. In the second place, he has argued, that Section 7 has no application, because the embankment in question does not satisfy the requirements of the various subsections of Section 7.

11. He has next argued that the action taken u/s 25 is bad, because no notice had been issued u/s 7 previously to the initiation of proceedings u/s 25. On this point he has further argued that nothing happened between 21-12-1950, and 2-1-1951, to lead the Collector to apprehend an emergency as contemplated in Section 25.

12. Thirdly, he has argued that the Collector's action was mala fide.

13. On the first and the third points I might at once say that I could not persuade myself as to the correctness of Mr. Chakrayarty's contentions. The expression "neighbouring country" in Section 7 (1) and 7 (1a) obviously means the country neighbouring the embankment in question and there is nothing in the terms of the section even to suggest that this neighbouring country excludes the Mouzas leased out, if they, as must normally be the case, happen to adjoin the embankment.

14. As to the second branch of this contention of Mr. Chakravartty, it is impossible to express any opinion, because the facts necessary for its determination have not been investigated, as this, point was not raised before Bose J.

15. As to the third point namely, whether the Collector's action was mala fide,

there is nothing, whatever to suggest that the Collector's action was anything but honest, although it might have been negligent. This contention, therefore, cannot succeed.

16. The second branch of Mr. Chakravarty's argument on the second point is that it is quite clear from the counter-affidavit of the Collector that nothing happened between 21-12-1950, and 2-1-1951, to justify the Collector changing the order he had passed on 21-12-1950, under which the appellants were given time upto March 2, to have the embankment repaired and to undertake the work of repair u/s 25. As far as I could make out from the materials before the Court, this contention is not altogether unjustified and it seems as though the Collector was trying to make up by his order dated 2-1-1951, for the time he had lost in acting on the prayers of the appellants.

17. This takes me to the second branch of Mr. Chakravarty's second contention which raises a very important question, namely the construction of Section 25 of the Bengal Embankment Act. The first thing to notice about the Bengal Embankment Act is that it defines in Section 3 "embankment" as well as "public embankment". Public Embankments are those maintained by the servants of the Government. The next important point to notice is that Chapter II of the Act deals only with embankments which are not public. In order to appreciate the correct meaning of Section 25, it is necessary to examine the sections in part II. Section 7 of which Sub-section (1a) only concerns us, runs as follows:

"Subject to the provisions of Part III, whenever it shall appear to the Collector that any of the following acts should be done, or works (including any work of repair) executed, that is to say:

(1) that any embankment which connects public embankments, or forms by junction with them part of a line of embankments, or that any embankment or watercourse which is necessary for the protection or drainage of the neighbouring country, should be taken charge of and maintained by the officers of Government;

(1a) that any embankment which connects public embankments or forms by junction with them part of a line of embankments or is necessary for the protection of the neighbouring country should be repaired;

(2) that any embankment, or any obstruction of any kind, which endangers the stability of a public embankment or the safety of any town or village, or which is likely to cause loss of property by interfering with the general drainage or the flood drainage of any tract of land, should be removed or altered;

(3) that the line of any public embankment should be changed or lengthened, or that any public embankment should be renewed or that a new embankment should be constructed instead of any public embankment, or that any embankment should be constructed for the protection of any lands or for the improvement of any water-course, or that a sluice in any public embankment

should be made;

(4) that any sluice or water-course should be made, or that any public water-course should be altered for the improvement of the public health, or for the protection of any village or cultivable land;

(5) that any road which interferes with the drainage of any tract of land should be altered, or that any watercourse under or through such road should be constructed;

he shall cause to be prepared estimates of the cost of such works, including such proportion of the establishment charges as may be chargeable to the works in accordance with the rules for the time being in force under this Act, or as may be especially ordered by the State Government together with such plans and specifications of the same as may be required. He shall also cause to be prepared from the survey map of the district a map showing the boundaries of the lands likely to be affected by the said acts and works, and he shall cause a general notice to be given of his intention to cause such works to be executed."

18. Then Section 8 says that the general notice to be issued u/s 7 shall as far as possible be in the form, and state the particulars mentioned in Schedule III to this Act annexed, and to this notice shall be annexed a list of all estates and villages, as far as is known, which are likely to be affected by the proposed work and to be chargeable in respect of the expenses of executing the same, and a copy of the said estimates specifications and plans together with a copy of the map as aforesaid shall be deposited in the office of the Collector and shall be open to the inspection of any persons interested, who shall be allowed to take copies thereof.

19. Then Section 9 runs as follows:

"Every such general notice shall be published in the manner provided by section 80 not less than 30 days before the day appointed for hearing the persons interested."

20. Stopping here for a moment to examine these three sections, one at once sees that before the Collector can proceed under these sections, which empower him to take up the repair etc. of certain kinds of embankments mentioned in the different sub-sections of the sections, he will have to form an opinion that the acts in question are necessary in respect of these embankments which, as I have said already, are not public embankments. Then he has got to cause to be prepared estimates of the costs of such works together with such plans and specifications of the same as may be required. He has also to cause to be prepared from the survey map of the district a map showing the boundaries of the lands likely to be affected by the said acts and works and lastly he has to cause a general notice to be given of his intention to cause such works to be executed.

21. Section 8 prescribes the form of the notice and Section 9 the method of its

publication. It is clear from the form of the notice as given in Schedule III that the first part gives publicity of the intention of the Collector to have a particular item or items of work done. The second part says that the estimates of the proposed work with the necessary specifications and plans together with a copy of the survey map showing the lands likely to be affected by the said work are open for inspection at the Collector's office by any interested person who is allowed to take copies thereof. The third part gives an estimate of the total probable cost.

22. It will be convenient at this stage to dispose of the contention of Mr. Majumdar that the items of work referred to in Section 7 have to be done in the order in which they are mentioned, namely, that after the Collector is of opinion that certain items of work mentioned in the various subsections of Section 7 have got to be done, he shall cause to be prepared the estimates etc. Secondly, he shall cause to be prepared a plan and thirdly, he has got a general notice of his intention to cause such works to be executed to be given. The form of the notice itself goes to show that there is no substance in this contention. As a matter of fact, it is perfectly clear from the scheme of this part of the Act that what is of prime importance is the service of a general notice of the Collector's intention to cause such works to be executed. The reason for this is not far to seek. As already stated, part II deals with embankments which are not public and so unless the Collector causes the general notice referred to in Section 7 to be served, the people interested cannot possibly know that the works with which they were entrusted under the lease would really be done at the instance of the Collector.

23. Section 10 empowers the Collector to hold an enquiry and hear the objections of any persons who may appear and u/s 11 after the enquiry he has to form an opinion as to whether the work, is really necessary or not. In case he should be of opinion that the work is not necessary, the matter ends there. If, however, he is of opinion that the work has got to be done, he cannot proceed straightway to order commencement of the work. What he has got to do is to report to the Commissioner of the Division. u/s 12, the Commissioner is also entitled to hold an enquiry if he thinks proper and after he has formed an opinion of his own as the result of an enquiry made by himself, or on the report of the Collector if he thinks no such enquiry is necessary, he has further to report to the Government and u/s 14 after the Government has made up its mind, that the work is really necessary, it, passes the final order and it is after this final order is published in the Official Gazette that the work can be taken up. It is thus obvious that, between the service of a general notice u/s 7 and the commencement of the work under the normal procedure outlined in this part of the Act, there is a large gap and it is this which is likely to cause the delay referred to in Section 25 with which, I shall deal presently.

24. Section 25 runs as follows:

"Whenever the Collector shall be of opinion that the delay in the execution of any

work occasioned by proceedings commenced by a general notice under the 7th and following sections of this Act would be attended with grave and imminent danger to life or property, he may forthwith cause the execution of such work to be begun in anticipation of the completion of such proceedings:

Provided that he shall without delay cause to be prepared the estimates, specifications and plans of the proposed works, together with a copy of the map as provided in Section 7, and shall cause general notice to be given that the work mentioned therein has already been commenced; and thereupon such proceedings and inquiries shall be had as in and by Part II of this Act are directed."

25. According to Mr. Chakravartty, the meaning of this section is that it is only after the Collector has started proceedings by a general notice u/s 7 that the Collector can proceed u/s 25, whereas, according to Mr. Majumdar, appearing for the State, the section means that the Collector can initiate proceedings u/s 25 even without a general notice u/s 7 and he wants the Court to hold that the expression "by proceedings commenced by a general notice under the 7th and following sections of this Act" really means proceedings to be commenced by a general notice under the 7th and the following sections of the Act. In other words, his contention is that whenever the Collector is of opinion that the delay in the execution of any work occasioned by such proceedings is likely to be attended with grave and imminent danger to life and property, he may forthwith cause the execution of such work to be begun in anticipation of the completion of such proceedings. Thus, his contention really envisages only one type of circumstances, namely, where the Collector forms this opinion prior to the initiation of proceedings u/s 7. His contention would not cover a case where the Collector forms that opinion after proceedings have been initiated u/s 7 and when it was pointed out to him that normally speaking the far larger number of cases would fall in the second category, he wanted the Court to hold that the expression "proceedings commenced" etc. really means proceedings either to be commenced or proceedings already commenced.

The terms of the section, I must say, do not justify this interpretation of it. The proceedings commenced grammatically mean the proceedings already commenced. Now even according to Mr. Majumdar, even if it were possible to read into the section certain words viz., "to be", or "already" which are not there, the first set of supplementary words that Mr. Majumdar would have the Court read into the section would not really fit in with the scheme of the second part of the Act. Section 25, as much as Section 7 and the succeeding sections, apply, as already stated, to embankments which are not public. Consequently, unless and until the Collector has formed an opinion that the work referred to in Section 7 is really called for in connection with an embankment which is not public and unless and until he has actually notified his intention of causing such works to be done, the public or the persons interested cannot possibly have any idea that such work was intended to be done by the Collector and the Collector

himself cannot possibly have any jurisdiction to proceed u/s 25 unless he has already notified his intention u/s 7. That this is so would be further clear from the use of the word "completion" in Section 23. If Mr. Majumdar's contention were correct, all that the section need have said was that the work might be in anticipation of such proceedings instead of the phrase in anticipation of the completion of such proceedings. The very use of this word "completion" suggests that proceedings have already commenced before action u/s 25 is taken.

26. There is another thing worth noticing in this connection. The proviso to Section 25 makes it obligatory on the Collector to cause without delay to be prepared the estimates, specifications and plans of the proposed work together with a copy of the map as provided in Section 7 and then it says further that the Collector shall cause a general notice to be given that the work mentioned therein has been already commenced. It is significant that the notice spoken of in this proviso is a general notice of the work having already commenced and not a general notice of the Collector's intention to cause such works to be executed as contemplated by Section 7. What I should like to stress here is that this difference is deliberate and it can mean only that whereas the preparation of the estimates, specifications and plans etc. mentioned in Section 7 can be taken even after action has been taken u/s 25, the general notice spoken of in Section 7 which is omitted from the proviso must precede the action u/s 25.

27. The qualifying phrase "subject to the provisions of part III" with which Section 7 opens indicates in the first place that the action to be taken u/s 7 is interlinked with that to be taken u/s 25 and that the latter is not really independent of the former. It is possible to argue, as Mr. Majumdar has argued, that the fact that S. 7 and Section 25 are interdependent does not necessarily mean that action u/s 25 must be preceded by a notice u/s 7, for even after the Collector has directed u/s 25 the work to be executed, he has to take action u/s 7 and the sections that follow in part II. The opening phrase of Section 7, to my mind, furnishes a complete answer to this. It shows clearly that the provisions of part III which consist of only three sections, beginning with Section 25 really constitute a proviso to Section 7, enabling the Collector in an emergency contemplated by Section 25 to skip over the stages lying in between the service of a general notice u/s 7 which should not take more time than the Collector himself thinks necessary and the commencement of the work and to go through these intermediate stages after the work is well on its way.

28. I must confess the words "and following sections" in Section 25 caused at first a certain amount of difficulty, because proceedings are "commenced by a general notice u/s 7", so that these words "and following sections" seemed superfluous. On a closer scrutiny, however, it seems fairly obvious that these words really refer to Sections 8 and 9, which also deal with the general notice in Section 7, the one prescribing its form and the other the mode of its publication.

29. The construction of Section 25, therefore, which found favour with Bose. J., is not correct if I may say so with respect & its true meaning is that it is only

after proceedings have started with a general notice under Sections 7, 8 and 9 that the Collector is entitled, in an emergency contemplated by Section 25 to order the commencement of the work in anticipation of the completion of those intermediate steps in part II, other than the service of the general notice with which the proceedings themselves began, which cannot be gone through before action u/s 25 is taken.

30. As Bose, J. accepted the interpretation of Section 25 which was put on it by the Collector and by the State, the question did not arise before him whether a writ of mandamus or a direction in the nature of mandamus can be issued in a case of this nature. On behalf of the State no objection was raised that such a writ or such a direction cannot be issued in a case of this nature, with the result that the question was not gone into. As I have respectfully differed from the construction put upon the section by Bose, J., the question necessarily arises whether such a writ or such a direction should be issued in this case and we have heard Mr. Chakravartty on behalf of the appellants at considerable length on this point.

31. One of the conditions precedent to the issue of a writ of mandamus is that the party applying for it must have a right to enforce. Paragraph 1303 of Halsbury's Laws of England, Vol. 9, Hailsham Second Edition, page 768, says that

"the applicant for a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought. In order, therefore, that a mandamus may issue to compel something to be done under a statute, it must be shown that the statute imposes a legal duty. It is only in respect of a legal right that mandamus will lie. The Court will not, therefore, enforce an equitable right by this remedy."

32. In the case of --" The State of Orissa Vs. Madan Gopal Rungta, (A), the Supreme Court also has laid down that the words "for any other purpose" in Article 226 of the Constitution of India have to be construed with reference to the words that precede the existence of a right is the foundation of the exercise of jurisdiction of the court under this Article. It was a case in which the Orissa High Court had granted a writ, without deciding the question whether the applicants had any right, just in order to enable the applicants to file a suit. The Supreme Court on appeal held that it was not open to the High Court to do so without first deciding whether the applicants had a right or not. In order, therefore, that the applicants in this case may succeed, they must prove the existence of a right.

33. Mr. Chakravartty's contention was that the maintenance of the embankment in a proper state of repair was itself a right. When it was pointed out that it was really a duty or obligation and not at all a right, he argued that if it was a duty in relation to the landlord it was a right in relation to the leasehold. It is difficult to appreciate this argument. If it was a duty in relation to the landlord, it is difficult to see how it could be anything else in relation to the leasehold. If it was a right at all, it would be the option of the lessees to exercise this right or not. But in the

lease it is clearly stated that if the lessees did not carry out this obligation, the landlord would be entitled to re-enter. That in itself shows that it is nothing but a duty pure and simple. The conduct of the applicants themselves when they tried to shift the responsibility on to their chakdars points in the same direction. It is, therefore, quite clear that this is nothing but a duty and that the applicants had really no right.

34. Another condition precedent to the issue of a writ of mandamus is that the party applying for it must not be guilty of any laches. In this case the duty of keeping the embankments in repair lay heavily on the lessee, namely the appellants. But they instead of carrying out those obligations at first tried to shift the same on to their chakdars. It is thus clear that they were guilty to a certain extent of laches, and the writ should not issue in their favour in these circumstances.

35. Another thing which also goes to show that no writ should be issued in favour of the appellants is that the work has been carried out. The Collector refused to stay his hands when the appellants applied before him on 2-2-1951, and as already stated, the application for stay before Bose J. was not pressed, so that in all probability the work was carried out. In order to satisfy ourselves on this point, we asked Mr. Majumdar informally to have the records produced here and it was found that there was a report on the record to the effect that the work was done. Even if, therefore, the writ is issued, it is bound to prove infructuous. Mr. Chakravartty of course argued that his application was in two parts and the first part prayed for a writ to rescind the proceedings u/s 25 and the second part was to rescind the order of the Collector, dated 2-2-1951, refusing to stay his hands. The proceedings u/s 25 really mean the order, dated January 2, 1951, when the Collector said that imminent danger to property and life made it necessary that the work should be forthwith executed. When the work itself has been completed, rescinding the proceedings will be absolutely meaningless and so will the rescission of the order, dated 2-2-1951. In these circumstances, I am of opinion that no writ of mandamus or no direction in the nature of a writ of mandamus should, issue in this case.

36. The appeal is accordingly dismissed. In the circumstances of this case, the parties will bear their own costs in both the Courts.

Lahiri, J.

37. I agree.