

(2016) 02 J&K CK 0014

In the Jammu And Kashmir High Court

Case No : WPIL Nos. 19 of 2014 & 20 of 2013, c/w CPIL Nos. 3 of 2013, 7 of 2013 & 4 of 2015

Balbir Singh & Ors.

APPELLANT

Vs

State of J&K & Ors.

RESPONDENT

Date of Decision : 12-02-2016

Acts Referred:

Water Resources (Regulation and Management) Act, 2010 — Section 150, 172, 3

Citation : (2016) 1 JKJ 65

Hon'ble Judges : Mr. N. Paul Vasanthakumar, C.J. and Mr. Tashi Rabstan, J.

Bench : Division Bench

Advocate : Mr. Abhinav Sharma with Mr. B.R. Manhas and Mr. O.P. Thakur, Advocates. in CMA No. 251 of 2014 in WPIL No. 19 of 2014, Mr. A.K. Sawhney with Mr. Aseem Sawhney, Advocates. in CMA No. 183 of 2014 in WPIL No. 19 of 2014, Mr. Amil Gupta, Advocate. in CMA No

Final Decision : Disposed Off

Judgement

Tashi Rabstan, J.—Through the medium of both the Public Interest Litigation's, the petitioners are seeking a direction to the respondents to

strictly implement the Jammu & Kashmir Water Resources (Regulation and Management) Act, 2010 and prepare State Water Policy and Plan for

development, management planning, utilisation and monitoring of water resources in the State; thereby demolishing the unauthorized

constructions/obstructions made by anybody including removal of encroachment from a Nallah/Stream passing through Sharma Resorts to Haji

Basti, Village Sunjwan, Sainik Colony, Jammu and to take appropriate action against the encroachers; to impose complete ban on encroachment

of water bodies, wetlands, water courses; to stop flow of waste and toxic water in the River Tawi emanating from the illegal colonies constructed

between Sidhra Bridge and Nikki Tawi Bridge and, by issuance of a notification, to declare all the water bodies, wetlands and water course; as

property of the Government of J&K in terms of Section 3 of the Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010.

2. Since common question of facts and law are involved in both the public interest litigations, we deem it proper to decide the same by this common judgment.

3. The facts which led to the filing of both the petitions in public interest and as are projected therein are with regard to the conversion of State

lands in the shape of flood channels, nallahs, wetlands/marsh lands as also the lands recorded as ""Khads"" in the revenue record, into residential and commercial land.

4. It is averred that with a view to preserve and safety of water bodies, wetlands, water courses, drainage, lakes and springs as well as State land

in the shape of ""Khads"". from being encroached by anti-social elements/land mafia/builders, the Jammu & Kashmir State Legislature enacted

Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010 (hereinafter for short, J&K Water Resources Act) and it was to

be regulated by the J&K State Water Resources Regulatory Authority. The object behind enactment of such an Act was with regard to the use of

water, the measurement, construction, control and management of works with respect to water storage, conservation & protection, irrigation,

water supply, drainage, flood control & prevention, improvement in the flow of water, protection & improvement in the physical integrity of water

courses, lakes & springs etc. It is averred that one of the objectives of enactment of the Act as defined under Clause (zw) of Section 4 is

imposition of complete ban on encroachment of water bodies, wetlands, water courses, and reclamation of such water bodies, wetlands and water

courses. It is contended that even after the enactment of J&K Water Resources Act, the State Water Resources Regulatory Authority has not

been stopping the encroachments of such lands nor any action as contemplated under the aforesaid Act is being taken.

5. It is contended that the petitioners have been compelled to file the present Public Interest Litigation's owing to the fact that the J&K State Water

Resources Regulatory Authority has completely failed in discharging its functions

as discussed herein-in-above and as defined in the J&K Water Resources Act, rather various anti-social elements, land mafia and builders in active connivance with the officers/officials of concerned departments have been indulging in encroaching upon, grabbing and converting these very wetlands, nallahs, khads into lands for residential and commercial purposes by raising obstruction the free flow of natural water paths/courses, thereby changing the land use by fraudulent means. One such example cited by the petitioner in WPIL No. 19/2014 is with regard to the land measuring 35 kanals, falling under Khasra No. 773, situated in Village Sunjwan, Jammu, recorded as 'khad' in the revenue record, which as per petitioner has been encroached upon by some anti-social elements/land mafia in active connivance with the officers/officials of Revenue, Flood Control and Irrigation Departments in gross violation and against the very intent of the J&K Water Resources Act, 2010. It is averred that the said land has been sold for huge price and exchanged hands many a times, even despite the fact that the State Government has put complete ban on sale of such khads.

6. Similarly, in WPIL No. 20/2013 it has been averred that a portion of a Nallah/ Stream passing through Sharma Resorts to Haji Basti, Village

Sunjwan, Sainik Colony, Jammu has been encroached upon by respondents 8 and 9 therein to a large extent, and this fact has even been admitted

by respondents in Annexure 'G' to the petition.

7. It is contended that the natural groundwater recharge structures in the shape of khads, nallahs and other smaller wetlands/marsh lands in and

around Jammu City as well as in Village Sunjwan have been disregarded and the natural course of water has been tampered with, thereby treating

the same as wasteland. And, this is one such example for urban Hooding in the urban and peri-urban areas. It is, thus, contended that unauthorized

rapid changes in habitat and change in land use are major threats to such wetlands and khads, which will not only make Jammu City prone to urban

flooding but would also decrease its ground water as well as underground water recharge process. And, ultimately this would lead to man-made

disasters due to complete disrespect to basic urban planning and hydrological cycle. It is stated that in recent years a large number of human lives

were lost in the devastating floods in both the provinces of Jammu as well as

Kashmir only due to the interference of man in the natural flow of water for their petty gains.

8. It is stated that Section 3(1) of J&K Water Resources Act provides that every water source in the State is and shall remain the property of the Government and any proprietary or ownership rights of any persons in such water sources shall be deemed to have been terminated with the commencement of the Act and vested with the Government. Further, it is stated that 'khad' is also included in the definition of 'Water

Course' as defined in Section 2(zzc) of the Act, whereas 'water course' has been included in the definition of 'Water Source' as

defined in Section 2(zze) of the Act. Thus, it is contended that 'khads' are also natural groundwater recharge structures, which not only

prevents the extreme flow of water during heavy rains but also serves for the sustenance of human lives and other living beings. Not only this,

khads are also very useful for increasing the natural underground water level.

9. Learned counsel appearing for petitioners thus contended that some anti-social elements, land mafia and builders in active connivance with the

officers/officials of concerned departments are illegally selling such lands including the lands, recorded as 'khads' in the revenue record, to

innocent buyers with full knowledge that the same have become the property of the State Government and cannot be sold land in view of the

enactment of the aforesaid Act. It is contended that due to illegal occupation of khads on both sides of River Tawi from Sidhra Bridge to Nikki

Tawi Bridge huge unauthorized colonies have come up with the active connivance of officers/officials of Revenue Department, Irrigation and Flood

Control Department, PWD Department, Jammu Development Authority, Jammu Municipal Corporation and other instrumentalities of the State.

Further, it is contended that dirty, polluted and toxic water emanating from these colonies is entering river Tawi, virtually making it a nallah.

Learned counsel for petitioners thus culminated that such water channels in the shape of khads, nallahs and other smaller wetlands/marsh lands in

the whole State are required to be made encroachment-free and restored to their original position at war footing.

10. Objections have been filed on behalf of respondents. Objections filed on behalf of Deputy Commissioner, Jammu seems to be evasive. On one

hand it is averred that respondents 8 & 9 in WPIL No. 20/2013 have raised constructions on the land purchased by them through registered Sale

Deeds, whereas, on the other hand, it is averred that whether the constructions raised by them are on the encroached land or not can only be

decided by the Chief Engineer, Irrigation & Flood Control Department. Further, it is averred that the notification specifying the width of Nallah has

not been issued so far. However, it is specifically admitted by the Deputy Commissioner in paragraph-16 of the objections that respondents 8 & 9

have raised their houses and constructed few shops on â??Gair Mumkin Khadâ??.

11. In the objections filed on behalf of Chief Engineer, Irrigation & Flood Control, Jammu in WPIL No. 19.2014, it is averred that the matter has

been taken up with the Tehsildar Settlement and Tehsildar Revenue, Jammu for protecting the land from being encroached falling under River Tawi

and declaring the same as Government property as also making entries to the same effect in the revenue records. It is further averred that FIRs

have also been lodged against some of the encroachers of the land.

12. Heard learned counsel appearing for the parties and perused the files.

13. Section 3(1) of J&K Water Resources Act provides that every water source in the State is and shall remain the property of the Government

and any proprietary or ownership rights of any person(s) in such water sources shall be deemed to have been terminated with the commencement

of the Act and vested with the Government. Further, â??Khadâ?? is also included in the definition of â??Water Courseâ?? as defined in Section

2(zzc) of the Act, whereas â??water courseâ?? has been included in the definition of â??Water Sourceâ?? as defined in Section 2(zze) of the

Act. Section 4 of the Act deals with State Water Policy and Plan, which provides that the Government shall, from time to time, prepare the State

Water Policy and Plan for the development, management, planning, utilisation and monitoring of water resources in the State keeping in view the

objectives as defined therein.

14. However, the petitioners have placed on record some photographs of such lands in and around Jammu City, marked as â??Khadâ?? in the

revenue record, where construction works in the shape of residential and commercial structures/big malls/show rooms have either taken place or

have been taking place. The petitioners have also placed on record copies of

revenue record in which aforementioned Khasra No. 773-Min is recorded as 'Gair Mumkin Khads'.

15. We would like to mention herein that in Annexure Gâ (in WPIL No. 20/2013), i.e., Communication No. FC/Cord/Comp/297/2013,

dated 12.02.2013 addressed to the Deputy Commissioner, Jammu by the Administrative Officer, Relief, it has specifically been mentioned that the

revenue officials and local police have nexus with the land grabbers and that is why the concerned Tehsildar Settlement has submitted false report,

terming the encroachment to be incorrect; meaning thereby some corrupt officials in the concerned Government agencies with oblique motives are

shielding the land grabbers/land mafia for obvious reasons. Even the Assistant Commissioner (Revenue), Jammu in his Communication No.

DCJ/SQ/2013-14/123-126, dated 04.04.2013 has admitted that a huge chunk of land falling under Khasra No. 887 in Village Sunjwan has been

encroached upon, but the then Tehsildar Settlement has submitted a false report.

16. Accordingly, this Court vide order dated 10.07.2014 passed the following relevant interim direction:

Meanwhile, further construction in the areas of water body or abetting the water body shall remain stayed. We also direct that the sale of land

concerning the bed of the river and the land recorded in the revenue records as 'khadâ' shall also remain stayed.

17. During the course of arguments, learned counsel appearing for respondents vehemently argued that the present Public Interest Litigation's are

not maintainable as the petitioners have not followed the PIL Rules/Guidelines while filing both the petitions. In fact, the petitioners have not filed

both the petitions in public interest; rather they have filed the same for their personal gains. Even, the petitioners have not availed the remedy as

envisaged in the Jammu & Kashmir Water Resources (Regulation and Management) Act, 2010 before filing the present petitions. On the other

hand, learned counsel appearing for petitioners submitted that since the PILs have been filed purely in public interest, therefore, the Court ought not

to have gone into strict technicalities merely because of not approaching to the competent authority under the Act before filing the present petition.

18. However, learned Advocate General appearing for the State stated at the Bar that the concerned authorities have already taken steps against

the encroachers and stopped the encroachment of lands, recorded as ""khads"" in the revenue record. He further submitted that in pursuance of the provisions of the Act, formation of State Water Policy and Plan for development Scheme is under process. In support of the same, he has produced a copy of Government Order No. Rev/Lit/218 of 2011 dated 28.11.2011. He further stated that the State Government vide Notification dated 15.10.2012 has also established the State Water Resources Regulatory Authority to exercise the powers and to discharge the functions as assigned to it under the Act.

19. In the compliance report submitted by the Divisional Commissioner, Jammu on 26.10.2015 it has been reported that steps are being taken to stop encroachment on lands recorded as ""khads"" in the revenue record and other water bodies. Even major construction work of flats falling under Khasra No. 280 situated at Village Narwal Bala has been stopped, as the same were being constructed on ""Gair Mumkin khad"". It has further been reported that directions in this regard have already been communicated to the Deputy Commissioners of Jammu Division and the field functionaries for compliance of the direction passed by this Court on 10.07.2014 in letter and spirit.

20. In the compliance report submitted by the Secretary to Government, Revenue Department, it has been reported that the land recorded as ""Gair Mumkin Khads"" in the revenue records is un-cultural land meant for flow of water being a natural drainage system under the proprietorship of the State and private persons are not authorised to either alienate such type of land or use it for any construction. It is also admitted in the compliance report that despite clear-cut ban on transfer of such lands, transactions are being effected of such Gair Mumkin Khads and even structures/buildings are being constructed over such lands.

21. Encroachment of State lands is a causes of grave concern. The State Government and its functionaries are duty bound to save and prevent the wetlands/marshland as well as lands recorded as ""khads"" in the revenue record and, for this purpose, proper State Water Policy and Plan in terms of Section 4 of the aforesaid Act is required for development, management, utilization, monitoring of such waters resources in the State as well as restoration of such lands by proper demarcation and avoiding

construction work as well as concentration of human population. And this can be done only by good urban planning along with hydrological understanding.

22. Although learned Advocate General has stated at the Bar that steps have already been taken against the encroachers and concerned authorities

have already been directed to stop encroachment of lands recorded as Khadsâ?? in terms of Section 3 read with Section 2(zzc) and 2(zze) of

the aforesaid Act and in view of order dated 10.07.2014 passed by this Court; he, however, stated that the petitioners ought to have approached

the State Water Resources Regulatory Authority and sought redressal of their grievances, if any, in terms of J&K Water Resources (Regulation

and Management) Act, 2010, before approaching this Court. Since the petitioners have failed to approach the competent authority in terms of the

said Act, the present public interest litigation's do not lie.

23. We have gone through the relevant sections of the Water Resources Act. Section 172 of the Act clearly envisages that no court shall take

cognizance of any offence punishable under the Act except upon a complaint in writing made by the Government or any of its officers or the

authority, as the case may be, for this purpose; whereas Section 150(1) of the Act envisages that any person aggrieved by any decision or order

of the authority may file an appeal to the High Court. Further, the State Government vide notification dated 15.10.2012 has issued SRO 339,

whereby State Water Resources Regulatory Authority has been established to exercise the powers and discharge the functions assigned to it under

the aforesaid Act.

24. Section 145 of the Act defines the functions of the State Water Resources Regulatory Authority, whereas Section 146 provides that the

authority shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure. Section 147 provides that all proceedings

before the authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the State Ranbir Penal Code and

the authority shall be deemed to be a Civil Court for the purposes of sections 480 and 482 of the Code of Criminal Procedure.

25. Since the petitioners before filing the present public interest litigations have not approached the competent authority under the Jammu &

Kashmir Water Resources (Regulation and Management) Act, 2010, we are of the

opinion that no writ of mandamus can be issued against the respondents at this stage. However, the petitioners are at liberty to approach before the competent authority for agitating their grievance and, in such an event, competent authority to expeditiously consider and decide the matter accordingly. Since the State respondents have failed to disclose about the framing of State Water Policy and Plan/Scheme in terms of the Act, we direct them to frame such policy/scheme for safety, prevention and restoration of wet-lands/marshland/flood channels as well as lands recorded as 'khads' in the revenue record as also for preserving the sanctity of river Tawi from being polluted by the waste and toxic water emanating from authorised/unauthorised colonies alongside river Tawi by including stringent and effective measures, positively within a period of two months from today, strictly keeping in view the discussion/observations made herein above. While framing such Water Policy and Plan/Scheme, the State respondents would also take into consideration and strictly follow the observations made by the Apex Court in case, titled as, Jagpal Singh v. State of Punjab, AIR 2011 SC 1123, as well as by this Court in case, titled as, Dharm Chand v. State of J&K, 2015 (3) JKJ 39 [HC]. Till the time such policy/scheme is framed by the State Government, order dated 10th July, 2014 and status-quo with respect to such lands/khads shall remain in force.

26. For the above stated reasons, both the PILs as well as contempt petitions are, accordingly, disposed of along with connected MPs.