
(1969) 07 P&H CK 0006
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 589 of 1965

Bhagwana

APPELLANT

Vs

The Divisional Canal Officer and Others

RESPONDENT

Date of Decision : 28-07-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Northern India Canal and Drainage Act, 1873 — Section 30A(2), 30B(1)

Citation : AIR 1970 P&H 539

Hon'ble Judges : Bal Raj Tuli, J

Bench : Single Bench

Advocate : B.S. Gupta, for the Appellant; S. Sarup, for A.G. and H.R. Aggarwal, for the Respondent

Final Decision : Allowed

Judgement

1. The petitioner, Bhag-wana, and respondent 3, Jagde, are landowners in village Jandli Kalan, tehsil Fatehabad, district Hissar, while respondents 4 and 5, Roop Chand, and Chhabil Dass, are residents of village Khazuri-Jati. Both the villages adjoin each other. The lands of the petitioner and respondents 3 to 5, along with some others, are irrigated through an outlet R. D. 41250 (T.L.-Tail Left). Khazuri Distributary of the Fatehabad Branch System. Respondents 3 to 5 irrigate their lands through a watercourse running along the line between rectangles Nos. 186 and 200, 201 and 200, 203 and 204 and 203 and 219, marked as L M B C on the copy of the Chakplan attached to the petition as Annexure "A". This watercourse L M B C is working since the time Khazure Distributary came into operation. The lands of the petitioner situate in Rectangles Nos, 199 and 205 are irrigated from a watercourse running along the eastern line of Rectangle No. 199 and Killa Nos. 5 and 6 of Rectangle No. 205 marked as L A.

2, On May 14, 1964 respondents 3 to 5 gave an application to the Sub-Divisional Canal Officer, respondent 2, praying, (i) that the existing watercourse L A be extended to the point marked A on the Chak-plan (Annexure "A") along the

eastern line of Killa Nos. 15, 16 and 25 of Rectangle No. 205, and (ii) that the abandoned watercourse A B be sanctioned so that it may join upto point C. Respondents 3 to 5 are the only persons Interested in this matter but they secured the signatures of a number of other persons on the application. On receipt of this application the Sub-Divisional Canal Officer, respondent 2, referred the application to the Zileadar. Bhuna, for a report after investigation. The Zileadar, Bhuna on September 18, 1964, recorded the statement of Jagde Lambardar, respondent 3, In support of the application and also obtained the signatures of Pandit Roop Chand, respondent 4, thereon. There is said to be a statement purporting to have been made by the petitioner on October 29, 1964 on the file of the case to the effect that the petitioner is not agreeable to the suggestion of extending the existing watercourse along Killa Nos. 15, 16 and 25 of Rectangle No. 205. Underneath this statement it has been noted that the petitioner refused to sign his statement. The petitioner alleges that he never knew about the investigation being made by the Zileadar nor did he appear before him nor did he make any such statement. His grievance is that the Zileadar made the record to favour respondents 3 to 5. On November 8, 1964, the Zileadar. Bhuna, sent his report to the Sub-Divisional Canal Officer, recommending the extension of the existing watercourse as pray-i ed for by respondents 3 to 5 in their application dated May 14, 1964. On receipt of the above report, the Sub-Divisional Canal Officer, on December 1. 1964, Issued notices purporting to be u/s 30A of the Northern India Canal and Drainage Act, 1873 (hereinafter called the Act), fixing December 22, 1964, as the date for hearing of the objections before him as Suniana Rest House. The petitioner states that although he was the most vitally affected person by the proposed action of the Sub-Divisional Canal Officer, no notice was ever sent to or served upon him nor were the mandatory provisions of law complied with. On December 22. 1964, the Sub-Divisional Canal Officer announced his decision sanctioning the watercourse L A and B C under Sections 30-A to 30-F of the Act subject to confirmation and modification by the Divisional Canal Officer, Tohana, respondent 1. as requested by respondents 3 to 5. A copy of the order is Annexure "B" to the writ petition.

3. Thereafter, the Sub-Divisional Canal Officer submitted the papers of the case to the Divisional Canal Officer. Tohana, respondent 1, for his approval u/s 30B(2) of the Act The petitioner came to know about this matter from a person of his village and since he was adversely affected by the proposed recommendation of the Sub-Divisional Canal Officer, he approached the Divisional Canal Officer by way of appeal (although there Is no provision of law providing for an appeal) in the hope that he would get justice from the Divisional Canal Officer who was to sanction that scheme proposed by the Sub-Divisional Canal Officer. The Divisional Canal Officer sanctioned the scheme by his order dated February 7, 1965 and a copy of this order is Annexure "C" to the writ petition. The petitioner then filed the present writ petition in this Court on March 4, 1965, which was admitted the following day.

4. He has challenged the entire proceedings culminating in the order dated

February 7, 1965, passed by the Divisional Canal Officer, respondent 1, as being void, illegal and without jurisdiction for the following reasons:--

"(i) That in a recent authority reported in (1965) 67 PLR 212 it has been held by this Hon'ble High Court that before any action u/s 30-A of the Act can be taken, regular procedure prescribed in Sections 30-A(2) and 30-B to 30-D read with the relevant rules framed by the State Government must be followed.

In the present case where action has been admittedly taken u/s 30-A of the Act, the above mentioned mandatory provisions of law have been completely ignored.

(ii) That no draft scheme at all was prepared by the Sub-Divisional Canal Officer, although it was incumbent upon him to do so as required by the provisions of Section 30-A(1).

(iii) That even if the notice dated 1-12-1964 issued by respondent 2, in itself be taken as a draft scheme prepared by him, It failed to comply with the essential mandatory requirements of Section 30-A(2) of the Act which reads:

"Every scheme prepared under sub-section (1) shall, amongst other matters, set out the estimated cost thereof, the alignment of the proposed watercourse or realignment of the existing watercourse, as the case may be the site of the outlet, the particulars of the share-holders to be benefited and other persons who may be affected thereby, and a sketch plan of the area proposed to be covered by the scheme."

The aforesaid notice does not mention at all (i) the estimated cost of the proposed scheme, (ii) the alignment of the proposed watercourse, (iii) the particulars of the share-holders to be benefited and persons affected thereby and (iv) a sketch plan of the area proposed to be covered by the scheme.

These details were not mentioned in the notice deliberately by the Sub-Divisional Canal Officer, respondent 2, with a view to push through the scheme to benefit respondents 3 to 5 illegally.

(iv) That Clause (1) of Section 30-B of the Act provides that-

"Every scheme shall, as soon as may be after its preparation be published in such form and manner as may be prescribed by rules made in this behalf inviting objections and suggestions with respect thereof within 30 days of the publication"; and definite modes of publication of the scheme have been provided by Rule 2 of the Rules made to carry out the provisions of Sections 30-A to 30-G of the Act.

None of these requirements was followed; so much so that only about 15 days" time was given to invite objections with regard to the matter in hand whereas it was mandatory for the Sub-Divisional Canal Officer to give clear 30 days from the date of publication for that. This will be apparent from a bare look at the file. Notice dated 1-12-1964 issued by respondent 2 speaks for itself.

(v) That it has been judicially held time and again that the provisions like Sections 30-A to 30-F and the rules made to carry out those provisions are mandatory in character and an exact compliance of them all is absolutely necessary to give jurisdiction and authority to the canal authorities to pass orders u/s 30-A of the Act.

(vi) That the levels of the land through which the watercourse LAA" passes are 8.6, 8.8 and 9.0 upto the point A and thereafter the level is 12.7 upto A". This means that the level of the land through which AA" passes is about 4 feet high as compared to the land through which LA passes. On the other hand the existing watercourse 1MB passes through the land which is of the same level.

As a result of the difference of 4 feet as mentioned above, the digging and maintenance of the extended watercourse *AA" would mean the spoilage of the whole of the petitioner's land. As a result the petitioner would suffer an irreparable loss and injury.

(vii) That the order in question could not be legally passed even on technical grounds of better irrigation. This has been done only because Shri Manphool Singh, Congress M.L.A. from Tohana Constituency exerted his political pressure and prevailed upon the Divisional Canal Officer, respondent 1, to favour respondents 3 to 5.

(viii) That the result of the passing of the order in question would be that respondents 3 to 5 will irrigate their lands through both the watercourses, namely LMB and LAA"B receiving water from the same outlet, namely RD 41250 T.L. and this would mean a decrease in the supply of water to the petitioner's land.

In this way the respondents would be getting undue advantage and harm the interests of the petitioner."

5. Separate returns to the writ petition have been filed by respondent 1 and respondents 3 to 5. In the return filed by respondents 3 to 5 some preliminary objections have been taken,

6. The first objection is that besides respondents 3 to 5 there are several other right-holders whose list is attached as Annexure "R-I" to the return, who are affected by the decision in this writ petition because their lands will also be irrigated by the disputed watercourse. Those persons not having been made parties to the writ petition, it is liable to be dismissed. I do not find any merit in this objection. It is not stated that these persons were mentioned in the scheme as the persons interested in or affected by the proposed scheme. The record has not been produced before me to verify this fact. It is the case of the petitioner that although the lands of other persons are irrigated by this watercourse, the persons really interested are respondents 3 to 5 and the petitioner. There is not sufficient material on the record of this case to dismiss this writ petition on this ground.

7. The second preliminary objection is that the petitioner along with his brother Bir Singh instituted a civil suit in the Court of a Subordinate Judge at Hissar, for a permanent injunction restraining the defendants of that suit from digging the watercourse which is a matter in issue in the writ petition. The plaintiffs applied for a temporary injunction restraining the defendants from digging the watercourse. The learned Subordinate Judge passed an order that in case the watercourse had been sanctioned by the Canal authorities, the defendants had the right to dig the same. No reference to the suit was made in the writ petition and since this material fact was suppressed the writ petition should be dismissed on this ground. Again, I find myself unable to accede to this request. This writ petition is only on behalf of Bhag-wana and Bir Singh and Bhafiwana are not brothers as is clear from the plaint, a copy of which has been filed by respondents 3 to 5 along with their written statement. Bhagwana is the son of Matu while Bir Singh is the son of Kanshi. Bhagwana swore the affidavit to be filed in support of the writ petition on February 22, 1965. His counsel drafted the writ petition on the basis of the sworn affidavit and issued notices of motion to the respondents on February 26, 1965 intimating that the petition would be filed in this Court on March 4, 1965 when prayer for ad interim stay would be made. According to that notice he filed the writ petition in this Court on March 4, 1965. It appears that Jagde respondent 3, and his two brothers threatened to dig the watercourse probably because they had come to know that the petitioner was going to file a writ petition. That suit was filed to restrain the defendants from digging the watercourse. The suit was not directed against respondents 1, 2, 4 and 5 of the writ petition and was not filed to have the orders of respondents 1 and 2 set aside. In view of these facts, I do not think that it was necessary to make a mention of that suit in the writ petition. The learned Single Judge declined to issue the stay order on the ground that the suit was pending and a temporary injunction had been refused. I do not, think it fair to dismiss the writ petition on that ground.

8. The next preliminary objection is that the writ petition is not competent as the petitioner did not pursue other remedies available under the Act but it is not shown what other remedy was available to the petitioner. This objection is also repelled.

9. On merits, it has been pleaded that the procedure prescribed under Sections 30-A and 30-B of the Act was followed in principle although not exactly. Sections 30-A and 30-B of the Act as were in force in 1964 when the impugned orders were passed by respondents 1 and 2 read as under: --

"30-A. (1) Notwithstanding anything contained to the contrary in this Act and subject to the rules prescribed by the State Government in this behalf, the Sub-Divisional Canal Officer may, on his own motion or on the application of a shareholder, prepare a draft scheme to provide for all or any of the matters, namely:--

(a) the construction, alteration, extension and alignment of any watercourse or realignment of any existing watercourse;

(b) re-allotment of areas served by one watercourse to another;

(c) the lining of any watercourse;

(d) any other matter which is necessary for the proper maintenance and distribution of supply of water from a watercourse. (2) Every scheme prepared under Subsection (1) shall, amongst other matters, set out the estimated cost thereof, the alignment of the proposed watercourse or realignment of the existing watercourse, as the case may be, the site of the outlet, the particulars of the shareholders to be benefited and other persons who may be affected thereby, and a sketch plan of the area proposed to be covered by the scheme,

30-B. (1) Every scheme shall, as soon as may be, after its preparation be published in such form and manner as may be prescribed by rules made in this behalf inviting objections and suggestions with respect thereof within 30 days of the publication.

(2) After considering all objections and suggestions that may have been received by the Sub-Divisional Canal Officer, the Sub-Divisional Canal Officer shall submit the scheme with such amendments as he considers necessary together with his remarks on the objections and suggestions received by him, to the Divisional Canal Officer for his approval.

(3) The Divisional Canal Officer may direct the Sub-Divisional Canal Officer to furnish such information as he may require for the purpose of approving the scheme submitted to him under this section.

(4) The scheme submitted by the Sub-Divisional Canal Officer may be approved by the Divisional Canal Officer either as it was submitted to him by the Sub-Divisional Canal Officer or in such modified form as he may consider fit." The petitioner has categorically stated in his petition that no scheme as envisaged by Section 30-A(2) of the Act was framed and the notice of the scheme was issued on December 1, 1964 and even if that notice is considered as the proposed scheme, it did not mention (i) the estimated cost of the proposed scheme, (ii) the alignment of the proposed watercourse, (iii) the particulars of the shareholders to be benefited and the persons affected thereby and (iv) a sketch of the plan of the area proposed to be covered by the scheme.

10. In the return filed by respondent 1 it is stated in reply to this allegation that a drawing, showing the existing and proposed watercourses, was prepared which was shown to all the persons before inspecting the watercourse in question and announcing the decision. Khaka-plan was also shown by the Zildar while making his recommendation for sanction of the watercourse. Khaka-plan showing all the details except No. 1 -- an estimated cost of the proposed scheme -- was prepared and shown to all persons affected. It is further stated that irregularity in not giving the estimated cost in the draft scheme does not invalidate the scheme as it was not a new scheme but only the extension of the existing watercourse. It is pertinent to note that it has not been denied that the

particulars of the share-holders to be benefited and the persons affected thereby were not stated nor is it denied that the sketch plan of the area proposed to be covered by the scheme had not been published along with the scheme. All that is stated is that a Khaka-plan was prepared which was shown by Zileadar to the right-holders while making his recommendations and it was shown to all persons affected. The record of the case has not been produced for my inspection to verify whether a proper scheme had been prepared or not. From the return it is quite clear that a proper scheme in accordance with Section 30-A(2) was not prepared or published.

11. Section 30-B(1) provided that the scheme should be published and the right-holders affected should be given 30 days" time to file their objections. In this case it is stated that the notice was issued inviting the objections on December 1, 1964 and the date for hearing the objections was fixed as December 22, 1964. It is not stated in the return as to when this notice was published in accordance with Section 30-B and the Rules made under the Act for this purpose but even if the scheme was published within a day or two of issuing the notice, it did not give the right-holders 30 days" time to file their objections. A mandatory provision of Section 30-B(1) of the Act was thus violated prejudicing the petitioner. The result was that the petitioner was not able to file his objections before the Sub-Divisional Canal Officer who decided the matter before the expiry of the period of objections allowed by the Act and made his recommendation to the Divisional Canal Officer. The petitioner filed an appeal stating his objections to the scheme recommended by the Sub-Divisional Canal Officer which was to be sanctioned by the Divisional Canal Officer. No such appeal lay u/s 30-B of the Act but the Divisional Canal Officer has mentioned in his order that the objections of the petitioner were heard on January 25, 1965. It is however, not mentioned what those objections were and why he did not find any force in them. The impugned order does not at all deal with those objections. It cannot, therefore, be said that the opportunity to be heard allowed to the petitioner by the Divisional Canal Officer removed the defect of the Sub-Divisional Canal Officer not affording him due opportunity to file the objections u/s 30-B(1) of the Act. Moreover, the denial of opportunity at the initial stage cannot be cured by an opportunity of being heard afforded at a later or higher stage particularly when no appeal lay in this case. I am, therefore, of the opinion that the scheme as sanctioned by the Divisional Canal Officer is not in accordance with law. The error of law is apparent on the face of the order of respondent 2 as it is clear from that order that 30 days" time for filing objections was not given to the petitioner. The impugned orders are, therefore, liable to be set aside.

12. For the reasons given above, this petition is accepted with costs and the impugned orders of the Sub-Divisional Canal Officer and the Divisional Canal Officer, copies of which are Annexures "B" and "C" to the writ petition, are hereby quashed. This order will not debar respondent 1 from preparing and sanctioning another scheme, if considered necessary, in accordance with law. Counsel's fee Rs. 100/-.