

(2011) 12 P&H CK 0128

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 18 of 1989

Ishar Singh and Others

APPELLANT

Vs

The State of Haryana and Others

RESPONDENT

Date of Decision : 20-12-2011

Acts Referred:

Haryana Canal and Drainage Act, 1974 — Section 30(5), 66
Northern India Canal and Drainage Act, 1873 — Section 5
Punjab General Clauses Act, 1898 — Section 22

Citation : (2012) 4 RCR(Civil) 144

Hon'ble Judges : Tejinder Singh Dhindsa, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tejinder Singh Dhindsa, J.—This is a second appeal by the plaintiffs-appellants, who were unsuccessful in both the courts below.

2. The plaintiffs-appellants, who are residents of village Urlana, Tehsil Gulha, Distt. Kurukshetra filed a suit for permanent injunction against the State Govt. from charging Abiana/Water Charge from them. It was pleaded that the village of the plaintiffs-appellants was towards the southern side of river Ghagar, which was flowing from the eastern side to western side. It was also averred that Ghagar river does not flow continuously and it was only during the rainy season that there was a continuous flow of water therein. The case set up, accordingly was that the Ghagar river would not fall within the expression "Canal" under the Haryana Canal and Drainage Act, 1974 (herein after referred to as the 1974 Act) or the rules made thereunder. No notification had been issued under the 1974 Act or the rules declaring Ghagar river to be a canal. It was further pleaded that the State Govt. had not spent any money so as to control the flow of water in Ghagar river and consequently the charging of Abiana/Water Charge was illegal. Written statement was filed by the State and reliance was placed upon a notification dated 28.6.1897 issued u/s 5 of the Northern India Canal & Drainage

Act, 1873. It was denied that Ghagar river was unregulated and that the Govt. had not taken any steps to regulate the flow. On the basis of the notification dated 28.6.1897 the State Govt. justified the levy of Abiana/Water Charge. On the pleadings of the parties the following issues were framed:

1. Whether the demand of impugned amount of abiana dhalbush is illegal, void and not binding upon the plaintiffs, as alleged?
2. Whether the suit in the present form is not maintainable?OPD
3. Whether the verification of the plaint is not in accordance with the rules, if so, to what effect? OPD
4. If Issue No.1 is not proved then whether the defendants validly and illegally claim abiana for the plaintiffs, as alleged?OPD
5. Relief.

3. The Trial Court dismissed the suit of the plaintiffs-appellants and the Lower Appellate Court dismissed the appeal thereby confirming the order dated 30.1.1988 passed by the Sub Judge Ist Class, Kaithal.

4. I have heard learned counsel for the parties and perused the record. It has been argued on behalf of learned counsel for the plaintiffs-appellants that both the courts have grossly erred in law. As per learned counsel for the plaintiffs-appellants the following substantial questions of law arise for determination before this Court.

(i) As to whether the findings of the courts below suffer from perversity based upon misreading of evidence?

(ii) As to whether the Abiana/Water Charge could have been levied by the State Govt. without any statutory sanction?

(iii) The Northern India Canal & Drainage Act, 1873 having since been repealed, could the State Govt. levy Abiana/Water Charge on the basis of a notification issued under an Act which stood repealed?

5. Both the courts below have returned a finding by placing heavy reliance on the notification dated 28.6.1897 issued u/s 5 of the 1873 Act to hold that the Ghagar river had been included in the expression "Canal". Consequently, it has been held that the State Govt. was vested with the power to charge Abiana/Water Charge upon the plaintiffs-appellants having used water from Ghagar river for irrigation purposes. The notification dated 28.6.1897 is Ex. D-1 and I have perused the same. In terms thereof the water of Ghagar river was to be used by the Govt. for the purposes of Ghagar canal. Accordingly, it cannot be construed that the Ghagar River has been included in the term "Canal" under the provisions of either the 1873 Act or the 1974 Act so as to vest power and jurisdiction with the State Govt. for charging of Abiana/Water Charge. The findings of both the courts below in terms of upholding the action of State Govt. to charge Abiana/Water

Charge from the plaintiffs-appellants on the basis of notification dated 28.6.1897 is clearly perverse. The notification has been misread.

6. Even otherwise the notification dated 28.6.1897, which was issued u/s 5 of the 1873 Act will have no binding force on account of the fact that the 1873 Act stood repealed in so far as its application to the State of Haryana is concerned by the Haryana Canal & Drainage Act, 1974. The repealing clause is contained in Section 66 of the 1974 Act and the same reads as under:

66. Repeal and Savings:-(1) The Northern India Canal and Drainage Act, 1873 shall, in its application to the State of Haryana repealed.

(2) Save as provided in sub-section (2) of Section 30 of this act, such repeal shall not effect:

(a) any application, appeal or revision pending before the commencement of this Act or filed thereafter against any order passed before the commencement of this act;

(b) any right of appeal or revision, if any, in respect of an order passed under clause (a) above; and such application, appeal or revision shall be continued and disposed of by the competent authority under the provisions of the repealed Act as if this Act had not come into force.

7. The repealing clause is without any exception whatsoever and does not contain any condition of consistency or inconsistency. It altogether repeal the old Act of 1873 in so far as its application in the State of Haryana is concerned. By virtue of such repeal the notification dated 28.6.1897 would cease to operate upon repeal of the old Act and could have no binding effect on the plaintiffs-appellants so as to suffer the imposition of Abiana/Water Charge.

8. The lower appellate court has also referred to the Punjab General Clauses Act so as to still find force and operation as regards the notification dated 28.6.1897 (Ex.D-1). Even such view by the lower appellate court is holding erroneous. Section 22 of the Punjab General Clauses Act, 1898 which deals with continuation of orders etc. issued under enactment, repeal and re-enactment clearly stipulates that where any Punjab Act is repealed and re-enacted with or without notification, then only it is otherwise expressly provided any order, scheme, rule, form or bye-law issued under the repealed act so far as it is not inconsistent with the provisions of re-enacted continuing in force and be deemed to have been RSA No. 18 of 1989 -5-issued under the provisions so re-enacted. Clearly the Punjab General Clauses Act, 1898 would also not come to the rescue of the State Govt. to impose Abiana/Water Charge on the basis of a notification issued under the repealed act. Section 22 of the Punjab General Clauses Act, 1898 envisages a situation, where any Punjab Act is repealed and thereafter re-enacted. However, in the facts of the present case, it was the Central Act that sought repealed in so far as its application to the State of Haryana by virtue of Section 66 of the Haryana Canal & Drainage Act, 1974. The notification dated

28.6.1897 (Ex.D-1) cannot as such vest any power with the State Govt. to charge Abiana/Water Charge.

9. No notification has been brought to my notice, whereby Ghagar River has been declared to be a canal under the Haryana Canal & Drainage Act, 1974 and the rules made thereunder. Imposition of Abiana/Water Charge upon the plaintiffs-appellants as such is without any authority in law.

10. The substantial questions of law as such are determined in favour of the plaintiffs-appellants.

11. Consequently, the present appeal is accepted. The judgements and decree of both the courts below i.e. judgement and decree dated 30.1.1988 passed by Sub Judge Ist Class, Kaithal and the judgement dated 24.10.1988 passed by the Additional District Judge, Kaithal are hereby set aside. The suit of the plaintiffs-appellants is hereby decreed with costs throughout.