

(1995) 12 MAD CK 0043
In the Madras High Court

L.A. Thengappa Gounder

APPELLANT

Vs

The Revenue Divisional Officer

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Citation : (1996) 1 MLJ 485

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Judgement

Srinivasan, J.—The petitioner herein as the owner of an extent of 1.56 aces in S.E. No. 896/1, which has been assigned R.S. No. 960/1, after re-survey proceeding. After the advent of Lower Bhavani Project (Lower Bhavani Project) canal about 40 years ago, petitioner's land has been included in the ayacut and it has been irrigated from the acquired Lower Bhavani Project canal, which runs to the immediate south of the property. Number of other adjacent lands have also been included in the ayacut. There is no dispute that the lands of respondents 3 and 4 herein, which are situated in R.S. Nos. 957/1, 958/3 and 959/1, are also included in the ayacut and this respondents 3 and 4 are also entitled to have their lands irrigated from the Lower Bhavani Project canal.

2. Respondents 3 and 4 gave a complaint to the Revenue Department in 1978 that the petitioner herein had obliterated the patta kanni vaikal (irrigation channel or Field Boothies), running in R.S. No. 960/1, and refused to allow water to their lands, which are situated in the lower ayacut. A report was called for from the Tahsildar, Erode, who inspected the lands on 11.9.1978 and 29.9.1978. He submitted two reports, according to which, the channel was obliterated by the petitioner and it should be restored. The Revenue Divisional Officer had himself inspected the lands on 29.10.1978. He agreed with the view taken by the Tahsildar and, as a result, issued a notice dated 4.1.1979 to the petitioner u/s 3 of the Tamil Nadu Irrigation Works (Construction of Field Boothies Act)(XXV of 1959), hereinafter referred to as "the Act". The notice demanded the petitioner to dig a field boothies in his land in S. No. 960/1. The notice informed him that in

default, action will be taken u/s 4 of the Act. The petitioner sent his objections to the notice on 14.2.1979. The Revenue Divisional Officer passed an order on 5.9.1979. In that order, reference is made to the inspection by the Tahsildar of all the concerned lands and his findings as well as the inspection by the Revenue Divisional Officer of all the lands included in the ayacut. After referring to the notice u/s 3 of the Act and the objections raised by the petitioner herein, the Revenue Divisional Officer found that there was no truth in the objections raised by the petitioner. The Revenue Divisional Officer also found that there was no other alternative source of irrigation for the lands of respondents 3 and 4 and other adjacent ayacutdars excepting a field boothies through S. No. 960/1, the land of the petitioner herein. On such findings, the Revenue Divisional Officer directed that the land of the petitioner herein R.S. No. 960/1 be excluded from the ayacut of Lower Bhavani Project under the provisions of Section 4 of the Act as a penalty for the petitioner's failure to comply with the notice issued u/s 3 of the Act.

3. Aggrieved by the same, the petitioner filed an appeal to the Collector of the District. The appeal was disposed of by an order dated 22.4.1981. The appellate authority found that the procedure adopted by the Revenue Divisional Officer was erroneous inasmuch as the notice u/s 3 and the notice u/s 6 of the Act were issued together simultaneously. Hence, the Collector cancelled the proceedings and remitted the matter back to the file of the Revenue Divisional Officer for observance of the provisions of the Act and further proceedings. That order of the Collector was challenged by respondents 3 and 4 herein in W.P. No. 7117 of 1981 in this Court. That writ petition was dismissed on 28.11.1986. The court directed the Revenue Divisional Officer to dispose of the matter before him within three months from the date of receipt of the said order.

4. Even when the writ petition was pending the lands were inspected and sketches were prepared in 1984. The inspection notes and the report of the Revenue Divisional Officer were also prepared. After the disposal of the writ petition on 4.8.1987, the Tahsildar inspected the lands and submitted his report. The Tahsildar had also enquired the ayacutdars in that area and recorded their statements. Several ayacutdars had given their statements, which were forwarded to the Revenue Divisional Officer. A report was filed on 18.8.1987 by the Tahsildar. Thereafter, the Revenue Divisional Officer issued a notice u/s 3 of the Act once again on 21.12.1987, calling upon the writ petitioner to dig a field boothie in his land in S. No. 960/1. It is the said notice, which is challenged in this writ petition, by the petitioner. In the affidavit filed in support of the writ petition, the petitioner has raised several grounds to contend that the notice is not a valid one. In the course of opening arguments, learned Counsel for the writ petitioner raised five contentions. In his reply, he added one more contention against the validity of the notice. They are dealt with hereunder seriatim.

5. The first contention is that the impugned notice does not disclose the materials on which the notice is based. According to learned Counsel it is a non

speaking order, Secondly it is submitted that there are no materials, as a matter of fact, to satisfy the requirements of Section 3 of the Act. Learned Counsel submits that under that section the Collector must be satisfied that it is necessary or expedient that the owner should construct or dig field boothie. According to him there is no material in this case to give such a satisfaction to the Collector. Thirdly, it is contended that, according to the counter-affidavit of the 1st respondent filed this writ petition, there was a channel previously in existence and, therefore, the impugned notice is based only on such a circumstance. It is contended that there was no channel previously and the notice is, therefore unsustainable as it relied upon a nonexistent factor. In this connection, it is submitted that there was a civil proceeding between the petitioners on the one hand and respondents 3 and 4 on the other, which came up to this Court in S.A. Nos. 1630 and 1631 of 1990. As a matter of fact, the second appeals were dismissed by us yesterday, We upheld the concurrent findings of the courts below. It is contended by learned Counsel for the petitioner that the finding in the suit is that there was no channel previously in existence and the respondents 3 and 4 herein had not made out any right to take water through the land of the petitioner herein. The fourth contention is the only remedy of respondents 3 and 4, if at all, is to approach the Government u/s 6 of the Act for acquiring the lands for the purpose of constructing or digging field boothie. The next contention is that the impugned notice places reliance only on the report of the Tahsildar and the said report has no value as the Commissioner appointed in the civil proceedings by the civil court has inspected the lands and found that there was no channel in existence. According to learned Counsel, in the face of the report of the Commissioner no reliance should have been placed on the report of the Tahsildar. The last contention which was urged in the course of the reply is that the petitioner was not given any opportunity to cross-examine the ayacutdars and the statements recorded by the Tahsildar from them were not furnished to the petitioner. It is submitted that the rule of audi alteram partem has been violated in this case.

6. Per contra, it is contended by the learned-Government Pleader, as well as learned Counsel for respondents 3 and 4, that the impugned notice was issued only after detailed enquiry held by the officials concerned and that the matter was pending before the Revenue Department from 1979 onwards. It is also argued that parties being recognised ayacutdars entitled to have irrigated from the Lower Bhavani Project canal are entitled to have a channel through the land in S. No. 960/1 particularly in view of the fact that there is an acquired channel near that land from which the petitioner is getting his lands irrigated. It is further contended by them that there was a field boothie which was obliterated by the petitioner herein as is evident from the various statements of the ayacutdars which were recorded in the course of enquiry and that the petitioner cannot feign ignorance of the same. It is also pointed out by them that the existence of continuation channel in R.S. No. 960/1 would itself prove that there was a field boothie as alleged by respondents 3 and 4. It is argued on behalf of the

respondents that the proceedings in the civil court do not prevent the revenue officials from holding an enquiry under the provisions of the Act and passing appropriate orders, which are found to be expedient and necessary. It is submitted that there is no other source of irrigation for the lands of respondents 3 and 4 and the level of the lands in question is such that water can flow only from the petitioner's land to those of respondents 3 and 4. It is therefore submitted that the writ petition is without any merit and it has to be dismissed.

7. Before considering the validity of the contentions raised on both sides, it is necessary to refer to the provisions of the Act, including the preamble thereof. The preamble of the Act reads, "whereas it is expedient to provide for the construction or digging of field boothies by the Government and by owners of lands entitled to irrigation under certain irrigation works in the State of Tamil Nadu". The crucial words in the poramboke are "entitled to irrigation under certain irrigation works". There is no dispute in this case that Lower Bhavani Project canal, an irrigation work in the State of Tamil Nadu and that the lands of the petitioner as well as lands of respondents 3 and 4 are entitled to irrigation therefrom.

8. Section 2(c) of the Act defines field boothies as small channels which run from outlets in the Government channels and which convey and distribute water to individual fields. Section 2(o) defines irrigation work as any of the projects or canals specified in the Schedule to the Act and any other project or canal which may be declared by the Government by notification to be an irrigation work. Item No.4 in the Schedule to the Act refers to Lower Bhavani Project. Thus, there can be no dispute that Lower Bhavani Project canal is an irrigation work within the meaning of the Act and the ayacut lands are entitled to irrigation under the said irrigation work.

9. Section 3 of the Act provides for, if the collector is satisfied that it is necessary or expedient that any owner should construct or dig field boothies in his land in the ayacut of an irrigation work, he shall by notice require the owner to construct or dig field boothies in that land within such time as may be specified in the notice and in such manner as may be prescribed. The language of Section 3 shows that there is no necessity whatever for a channel to exist previously for the Collector should take action u/s 3. If the Collector finds that under the irrigation work, it is necessary or expedient to construct a field boothie as defined in Section 2(c) in a particular land, it is open to him to call upon the owner by a notice to construct such field boothies. The section used both the expression "necessary" and "expedient", but they are used disjunctively as the expression "or" is in between the two words. In this case, we have already referred to the fact that the lands of respondents 3 and 4 as well as some other lands are within the ayacut of Lower Bhavani Project canal. Thus, they are entitled to get irrigation under the irrigation work, viz. Lower Bhavani Project canal. It follows therefore that the Collector is empowered to call upon any owner of the land situated within the ayacut to construct a field boothie in order that

water may be taken to the lands of respondents 3 and 4. It is not an answer to such a notice to say that there was no channel previously and that no field boothie shall be constructed. If a field boothie is necessary for the purpose of taking water to the lands falling within the ayacut, the Collector can call upon any of the owners of the ayacut lands to construct a field boothie. u/s 2(b) Collector means a Revenue Divisional Officer and includes any person appointed by the Government to exercise any of the functions of a Collector under the Act. Thus, the Revenue Divisional Officer is a Collector within the meaning of the section.

10. Therefore, it follows that Revenue Divisional Officer has jurisdiction to call upon the petitioner herein, who is one of the ayacutdars to construct or dig a field boothie in his land so that water may be taken to the lands of respondents 3 and 4. The only question is whether he is satisfied that it is necessary or expedient to construct or dig a field boothie. The records in this case show that the Revenue Divisional Officer is satisfied that it is necessary to have such a field boothie. He has made a detailed enquiry by inspection through Tahsildar and later inspection by himself and also recorded statements from the ayacutdars in that area. Several land owners have been examined and their statements have been recorded on the same day, in the course of the enquiry by the Tahsildar. There is no point in saying that copies of such statements were not furnished to the petitioner or that he was not given an opportunity to cross-examine those owners. This is not a judicial enquiry by the Tahsildar. It is only a fact finding enquiry and he has made the enquiry on the spot by enquiring the various land owner in that area. It is not pleaded by the petitioner that the petitioner was not aware of the recording of statement of the adjacent land owners.

11. Even assuming that such an enquiry has not been made, the very lie of the land and the situation of the various lands in the ayacut would itself show that there is necessity for construction of a field boothies in the land of the petitioner, viz., R.S. No. 960/1. In fact, the petitioner has admitted that Lower Bhavani Project canal is flowing adjacent to his lands and according to him, on the southern boundary of his land. It is not in dispute that the level of the land is shaping from south to north and water will flow only from southern side to the lands on the northern side. Even the report of the Commissioner relied on by the petitioner himself shows that the lands of the petitioner are situated 2 1/2 feet higher in level than that of respondents 3 and 4. There can be no doubt whatever that water will flow from the petitioner's land to the lands of the respondents 3 and 4 and it is a matter of necessity that a field boothie should be constructed on the land of the petitioner to take water from the Lower Bhavani Project canal to the lands of the respondents 3 and 4.

12. Section 4 of the Act provides for penalty for failure to comply with notice u/s 3. If, on receipt of notice u/s 3, the owner of the lands fails to construct or dig a field boothie the penalty prescribed is to exclude his lands from the ayacut of the irrigation work concerned. Thus such an owner who refuses to comply with the

notice u/s 3 will himself lose the benefit of irrigation from the Lower Bhavani Project canal. u/s 5 an appeal is provided against the order made u/s 4, Section 6 provides for acquisition by the Government for the purpose of construction or digging a field boothie. Section 6 will come into play only if an owner of the land refuses to comply with the notice u/s 3 and action is taken u/s 4 and his land is removed from the ayacut of the irrigation work. If the land of a particular person is removed from the ayacut of the irrigation work, it is necessary that the Government has to provide the other lands with irrigation facilities and that is why Section 6 has been introduced in the Act so as to enable the Government to acquire a land in order that a channel may be formed to take water to the lands of other ayacutdars.

13. Section 8 bars any suit or other legal proceedings against the Government or Government Official for action under this Act. Reliance is placed on this section by learned Counsel for respondents 3 and 4 in support of the contention that the proceedings in the civil suit, which culminated in S.A. Nos. 1630 and 1631 of 1990, will have no bearing on this writ petition or the proceedings before the revenue officials. Though it is unnecessary for us to go to that extent, it is suffice to point out that even in the judgment of the lower appellate court in those proceedings, the right of respondents 3 and 4 herein to approach the revenue officials under the provisions of the Act was left intact. So also, in our judgment delivered yesterday, we have held that the dismissal of the second appeals is without prejudice to the rights of the respondents 3 and 4 herein under the provisions of the Act. Hence the findings, if any, in the civil proceedings will not have any conclusive effect in this matter.

14. Now, we shall turn to the contentions urged by the petitioner's counsel one by one. As regards the first contention that the impugned notice is a non-speaking order, there is no merit in this contention. Section 3 of the Act refers only to the satisfaction of the Collector. The impugned notice in this case expressly refers to the satisfaction of the Collector. It reads that the Collector is satisfied that it is necessary and expedient that a field boothie shall be dug in the land in R.S. No. 960/1. Hence Section 3 does not contemplate a detailed order being passed by the Collector. The section speaks only of a notice by the Collector to the owner concerned.

15. The second contention is that no material is placed on record to support the impugned notice. There is absolutely no substance in this contention. We have already referred to the history of the case, beginning from the first notice, which was issued as early as on 4.1.1979, u/s 3 of the Act. After the objections of the petitioner were received by the Revenue Divisional Officer he considered the same and passed orders. The matter went upto the District Revenue Officer and it was remanded for fresh consideration. Thereafter a detailed enquiry had been held by the Revenue Divisional Officer and the petitioner had taken part in the same. It is only after such enquiry, the present notice was issued on 21.12.1987. We have gone through the entire file produced by the Government Pleader and

we find there are ample materials on record to show that the Collector was satisfied that it is necessary and expedient that there should be a field boothies in the land of the petitioner herein, viz., R.S. No. 960/1. In fact, we have adverted to the two crucial circumstances that there is no other source of irrigation in the lands of respondents 3 and 4 and that the level of the lands is such that water can flow only from the petitioner's land to the lands of respondents 3 and 4. We have also referred to the circumstance that the respondents 3 and 4 are entitled in-law to get water from Lower Bhavani Project canal, which, admittedly, runs adjacent to the petitioner's land. The various land and sketches found in the file amply prove that the view taken by the Collector is unassailable.

16. The third contention that the Collector relied only upon the prior existence of a channel in R.S. No. 960/1 is not acceptable. We have already pointed out that there is no necessity for a channel to exist previously. But the records show that there ought to have been a channel previously in the land in question, viz., R.S. No. 960/1. It is not in dispute that Lower Bhavani Project canal came into existence about 40 years ago. It is not as if the lands of the respondents 3 and 4 had no irrigation facility under that project for all these years. Then it is not in dispute that the lands respondents 3 and 4 are also in the ayacut of Lower Bhavani Project canal, it follows that there must have been a field boothie in R.S. No. 960/1 to take water to the lands of respondents 3 and 4. Apart from that, the inspection report shows that the connection channel remains on the land itself prove that channel in dispute was obliterated by the petitioner, some time prior to the inspection. In this connection reliance is placed upon the report of the Commissioner appointed by the civil court. That report does not negative the existence of a channel previously. In fact when the Commissioner visited the land there was no channel to be seen, because by that time some paddy seedlings had been planted. The Commissioner had referred to that fact that paddy seedlings along the area EFJK are sparsely planted and the transplantation should have taken place atleast 10 days prior to his visit. The Commissioner has also referred to a fence which was removed near the point E.F. and the existence of a channel south to north in the field of the defendants. It should be noted that the defendants referred to in the Commissioner's report are respondents 3 and 4 herein. In fact the Commissioner has observed that the channel in the defendant's lands was a continuation, of the channel from the acquired field boothie from the plaintiffs land. Thus, the report of the Commissioner is also against the petitioner herein. Hence, this contention is rejected.

17. The next contention that the only remedy of respondents 3 and 4 is to approach the Government for acquisition of lands is unsustainable. We have already pointed out that the question of acquisition will arise only if the land of the petitioner herein is excluded from the ayacut of the irrigation work. If the petitioner is prepared to have his land excluded from the ayacut of the irrigation work, then the question of acquisition will come in. If the petitioner fails to comply with the notice u/s 30 of the Act the authorities will take action u/s 4 and

exclude his land from the ayacut. In that event the question of acquisition of lands will arise.

18. The next contention that the report of the Tahsildar has alone been relied on by the Revenue Divisional Officer is factually not correct. The Revenue Divisional Officer has himself inspected the lands and he had before him the statements of the owners of the adjacent lands who are also ayacutdars.

19. The last contention urged in the course of the reply that the petitioner should have been given an opportunity to cross-examine the persons who gave statements before the Tahsildar is unsustainable. In this connection, it is relevant to notice the difference in language between Section 3 and Section 4 of the Act. While Section 4 expressly provides for giving a reasonable opportunity to the owner of the land being heard, Section 3 does not contain any such provision. That shows that for issuing notice u/s 3, the Collector has to be satisfied on the basis of available material, situation of the land and the water canal. But when it is a matter falling u/s 4, he has to hold an enquiry and give an opportunity to the owner. In those circumstances, the contention that the rule of audi alteram partem is violated is without substance.

20. In the result, none of the contentions urged by the petitioner are acceptable, and the writ petition has to fail. Accordingly the writ petition is dismissed with costs, to be shared by the learned Government Pleader and learned Counsel for respondents 3 and 4, equally. Counsel fee Rs. 4,000.