
(1988) 08 P&H CK 0061
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 863 of 1982

Nikka Singh and Others

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 04-08-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Northern India Canal and Drainage Act, 1873 — Section 3
Northern India Canal and Drainage Rules, 1873 — Rule 21

Citation : AIR 1989 P&H 100 : (1989) 1 ILR (P&H) 181

Hon'ble Judges : Veeraswami Ramaswami, C.J;G.R. Majithia, J

Bench : Division Bench

Advocate : H.S. Toor, for the Appellant; D.N. Rampal, for the Respondent

Judgement

G.R. Majithia, J.—Civil Writ Petitions No. 2481 of 1979, 2482/79, Nos. 494, 863, 977, 1461/82 and No. 939 of 1985 are being disposed of by a common judgment as a common question of law arises for determination in all these cases.

2. We have referred to the facts as given in CWP No. 863 of 1982 in order to appreciate the point arising for determination.

3. The petitioners have alleged that a chao (rainy drain) named Manauliwala Tangari/Dhangauri Chao runs through various revenue estates from times immemorial. Natural flow of rain water from Shivalik range drains out from this Chao. Respondent 1, the State of Punjab, constructed a bandh at Dhikansu in early 1970 to save Rajpura town in Patiala District from devastation on account of flood water. The water flowing from the Chao is not utilized by the farmers. It has not been canalised. Respondent 1 issued a notification u/s 5 of the Northern India Canal & Drainage Act, 1873 (hereinafter called the Act) on 17th May. 1973. Pursuant thereto, demand notices have been issued to the rightholders for utilisation of the said water. The recovery of water charges (abiana) for utilisation of the rain water is alleged to be without any legal sanction. The notification issued u/s 5 of the Act does not specify the requirement of the statute and is bad

at law.

4. A joint written statement has been filed on behalf of the State of Punjab and the Executive Engineer (Irrigation), Devigarh Division, Bhakra Nangal Project, Patiala, and it is asserted that the water is lifted by the writ petitioners from Tengori Chao. It is a tributary of Dhikansu Bandh and falls within the definition of "canal" u/s 3(3) of the Act. Provision of Part II has been applied to work vide notification No. 5063/CAS/1873 and 55/73 dt 17th May, 1973 issued by the State Government u/s 5 of the Act. The Chao is being maintained and controlled by the Punjab Government.

5. The petitioners are receiving irrigation from the Tangori Chao. The water charges are being recovered for the use of water under the provisions of the Act. Proper notices were issued by the Canal Patwari before measuring the irrigated area and levying the water charges. The Tangori Chao is being maintained for irrigation purposes in order to safeguard the interests of the landowners, including those of the petitioners.

6. The action of the respondents is being impugned in all the writ petitions primarily on the ground that overflow of rain water from the Bandh which enters the field of the petitioners cannot be made the basis for charging tax as the Bandh or the channel in question is not a "canal" within the meaning of Section 3 of the Act. The plea set up by the respondents in the return is that the work in question falls within the meaning of CL (d) of Section 3 of the Act, and, therefore, the demand made by the respondents is in accordance with law. Sub-section (d) of Section 3 defines the term "canal" and reads as under : --

" "Canal" includes--

- (a) all canals, channels and reservoirs constructed, maintained or controlled by the State Government for the supply or storage of water;
- (b) all works, embankments, structures, supply and escape channels connected with such canals, channels or reservoirs;
- (c) all watercourses, as defined in the second clause of this section;
- (d) all parts of a river, stream, lake or natural collection of water or natural drainage channel, to which the State Government has applied the provisions of Part II of this Act;
- (e) a field drain for the purposes of Section 70 of this Act.

Clause (d) of Section 3(1) of the Act envisages that if natural collection of water is sought to be drained out from the work in hand, the said work will be held to be a canal if the State Government had applied the provisions of Part II of the Act to the said work. The State Government has treated the work as a canal under Clause (d) of Section 3(1) of the Act by applying provisions of Part II of the Act. In instant case a bandh was constructed over a rainy drain and Notification dated May 17, 1973 was issued to this effect and it came into force

on or after Nov. 1, 1973. The present work, i.e., Dhikansu Bandh is mentioned at serial No. 209 of the said notification. Once the provisions of Part II of the Act have been applied to the natural collection of water or to the natural drainage channel, the work falls within the definition of Clause (d) of Section 3(1) of the Act and is a "canal" for the purposes of the Act for irrigation purposes.

7. The notification issued u/s 5 of the Act on May 17, 1973, fulfilled all the conditions mentioned in the Act and comes into effect on Nov., 1, 1973, i.e., much after three months of the issuance of the notification and declaration to which work it has to apply.

8. In, all the writ petitions, the recovery of abiana/water charges pertains to the period after Nov. 1, 1973, i.e., after the provisions of Part II of the Act were made applicable to the work. The action of the State Government is perfectly legal and justified.

9. The second question which arises is whether the levy of water charges and the penalty is legal, and so, its recovery. In order to determine this question, a brief reference is necessary to Sections 33, 34 and 35 of the Act which are reproduced under : --

""33. If water supplied through a Canal be used in an unauthorised manner, and if the person by whose act or neglect such use has occurred cannot be identified.

The person on whose land such water has flowed, if such land has derived benefit therefrom. Nor if such person cannot be identified, or if such land has not derived benefit therefrom, all the persons chargeable in respect of the water supplied through such Canal

shall be liable or jointly liable, as the case may be, to the charges made for such use."

"34. If water supplied through a Canal be suffered to run to waste, the persons through whose act or neglect such water was suffered to run to waste cannot be discovered all the persons chargeable in respect of the water supplied through such canal shall be jointly liable for the charges made in respect of the water so wasted."

"35. All charges for the unauthorised use or waste of water may be recovered in addition to any penalties incurred on account of such use or waste.

(2) All questions, including questions pending for disposal on the commencement of the Northern India Canal and Drainage (Punjab) Amendment Act, 1965, u/s 33 or Section 34 shall be decided by the Collector,

(3) An appeal shall lie to the Commissioner against the decision of the Collector under Sub-section (2) within a period of thirty days from the date of decision.

(4) The Financial Commissioner may suo motu at any time or on an application made in this behalf by an aggrieved person within a period of thirty days from

the date of the order, revise an order passed in appeal under Sub-section (3),"

10. Section 33 deals with the liability of persons on whose land canal water has flowed and has been used unauthorisedly. Section 34 imposes liability on all persons who are driving water where it is not possible to locate persons responsible for waste of water. A combined reading of these Sections 33 34 35 shows that if water or a watercourse is used in) an unauthorised manner or is allowed to run to waste, all persons who derive water supplies from the course can be made jointly liable for the charges for the water so wasted, and the penalties can also be imposed upon them on account of the wastage of water. From the language of Section 34 it is clear that the matter has not been left to the subjective satisfaction of the Divisional Canal Officer who is the authority empowered to take action under the two provisions. He is required to conduct an enquiry. The enquiry can be made from any course which appears to the authority appropriate. It is not obligatory to confine the enquiry to the persons who are ultimately going to be affected. But the principles of natural justice require that the result of the enquiry must be disclosed to the persons who are going to be saddled with the liability and they should be allowed an opportunity to rebut the result of the enquiry and to adduce such evidence as they may like, to support their case. The functions assigned to the authorities named in Sections 34 and 35 are of a quasi-judicial nature and the order that it passes is an order of assessment of water charges and penalty. Such an order cannot be passed upon any evidence of any fact without first pointing out the same to the assessee and giving him reasonable opportunity of meeting the case which is ultimately made against him.

11. In *Dhakeswari Cotton Mills Ltd. Vs. Commissioner of Income Tax, West Bengal*, , the Supreme Court set aside an assessment order under the Income Tax Act, 1922, where the fundamental principles of natural justice were violated. In our opinion, the same principle would govern an order contemplated by Section 35 of the Act.

12. In the present case we are not satisfied that any opportunity was afforded to the petitioners of being heard before making the assessment. Even if the authorities have to sustain their action u/s 36 of the Act, read with Rule 21 of the Northern India Canal & Drainage Rules, 1878 (for short, the Rules), they must associate the petitioners in the said enquiry. The enquiries which are alleged to have been conducted were not made known to them. The facts of the present case are not suggestive of the fact that the authorities concerned had followed the procedure indicated above, namely, to have given notice to the persons who are ultimately saddled with the liability and to have afforded them an opportunity of showing cause against the imposition of water charges and penalty.

13. All matters decided by the Collector u/s 34 are appealable u/s 35(2) of the Act. This presupposes that the question mentioned in Section 34 has to be decided after affording a reasonable opportunity of hearing to the aggrieved party, and a proper order has to be passed which will be the subject-matter of

the appeal before the Commissioner, and revision before the Financial Commissioner, as envisaged by Sections 35 (3) and (4), respectively.

14. Resultantly, we quash the assessment of abiana water charges and direct the respondent-authorities to proceed in accordance with the provisions of Sections 34 and 35 of the Act, keeping in view the observations made by us above. The right of the State of recover abiana/water charges is, however, upheld. But the procedure adopted while effecting the recoveries is held to be violative of the principles of natural justice being in breach of the mandatory provisions of Section 34, and it is struck down. The authorities will proceed as indicated earlier. The writ petitions are disposed of accordingly. No costs.