
(2002) 04 P&H CK 0049

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 2963 of 1998

Pritam Singh and Another

APPELLANT

Vs

Executive Engineer, Punjab State Tubewell Corporation Ltd.,
Abohar and Others

RESPONDENT

Date of Decision : 22-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 9
Northern India Canal and Drainage Act, 1873 — Section 30A

Citation : (2002) 3 RCR(Civil) 43

Hon'ble Judges : M.L. Singhal, J

Bench : Single Bench

Advocate : P.K. Goklaney, for the Appellant; Rajive Bhalla, for the Respondent

Judgement

M.L. Singhal, J.

1. Pritam Singh and Balwinder Singh filed suit for permanent injunction against Executive Engineer, Punjab State Tubewell Corporation Limited, Abohar and others restraining them from metaling their private water course which they have constructed on their own for irrigating their land. Along with the plaint, they made an application under Order 39 Rules 1 and 2 read with Section 151 CPC for the grant of temporary injunction restraining them from metaling the said water course. It was alleged in the plaint that they constructed one kucha water course on the watt in their fields for irrigating their fields and they irrigate their fields through this water course. Thus there is khal constructed by them for facilitating the irrigation of their land. This is not a water course sanctioned by the canal authorities. Defendants are going to brickline this water course. If they brickline this water course, that act would be unlawful, They do not have any right to brickline this water course.

2. Defendants contested this prayer. It was urged that after hearing by the concerned authorities, they decided to metal this water course. Parties were heard u/s 30 of the Northern India Canal and Drainage Act, 1873 on 18.6.1997

when it was ordered that this khal shall be metaled and if any body had any objection to the metaling of this khal, he could go in appeal before the Superintending Canal Officer, Punjab State Tubewell Corporation Limited within 30 days. It was also urged that the dispute was not cognizable by the civil court and the plaint was liable to be rejected.

3. Vide order dated 28.4.98, Additional Civil Judge (Senior Division), Guiderbaha rejected the plaint under Order 7 Rule 11(d) CPC in view of his finding that matter was not cognizable by the civil court. In consequence, order directing the maintenance of status quo was vacated.

4. Plaintiffs went in appeal which was dismissed by Additional District Judge, Muktsar vide order dated 6.10.1998. Still not satisfied, plaintiffs have come up in further appeal to this court.

5. It was submitted by the learned counsel for the appellants that the scheme to metal the disputed khal was sanctioned by the competent authority but behind their back and as such the civil court has jurisdiction to determine "whether the defendants have right to metal the khal which is the private khal of the plaintiffs constructed by them on their own for irrigating their land. It was submitted that private khal is not the property of the Govt. but it is the personal property of the relevant right holders and as such a private khal cannot be touched by the canal authorities. It was submitted that if a private khal is to be bricklined, the land owner has to be paid compensation for the land underneath that khal, how the defendants are proposing to brickline this water course when then they have not acquired the land underneath, and as such the proposed action of the respondents defendants would be unjust and illegal and therefore, civil court has jurisdiction. It was submitted that on this khal, there is no warabandi which suggests that this khal is their private khal. If the defendants are proposing to brickline private khal without acquiring the land underneath, that action would be unjust and illegal. Civil Court can step in to prevent the commission of illegality. It was submitted that a few persons who are not shareholders, filed application to the canal authorities to prepare scheme for bricklining the water course. Canal authorities without issuing any notice to the appellants, allowed the applications and the order that this khal be bricklined was passed behind their back. It was submitted that civil court had jurisdiction to undo an order which was passed behind the back of a party which is injurious to his interest. It was submitted that there are 3 types of water course namely (a) sanctioned by law; (b) sanctioned by agreement between the parties; (c) which have been prescribed by way of easement.

6. In *Jagar Singh v. Superintending Canal Officer, Hissar Bhakra Canal Circle, Hissar and Ors.*,¹ (1972) 74 P.L.R. 315, Hon"ble Division Bench of this Court held that so far as Northern India Canal and Drainage Act, 1873 is concerned, it deals with both authorised and unauthorised water course. The expression "authorised water course" means a water course made available under the provisions of the Act all other being unauthorised. But there is a world of difference between a

watercourse which is being used as matter of right either under some statute or by agreement or by prescription. But it cannot include a water course which has no lawful existence. It may even include a water course which passes on another persons lands but the other persons does not object to its being used as a water course, but a water course which has been used on another man's land without his permission will not fall within the ambit of this Act. It was held that no law contemplates the continuance of illegal act or gives validity to an illegal act because it has been repeatedly performed.

7. An authorised water course is not covered by Section 30-A or 3-FF of the Act. What is water course is defined in Section 3(2) of the Act in the following term:-

"Watercourse" means any channel which is supplied with water from .a canal, but which is not maintained at the cost of the State Government, and all subsidiary work belonging to any such channel."

Section 3(1) of the Act defines "canal" as including all water courses as defined in the second clause of this section.

8. In *Hukman v. Emperor* AIR 1921 Lah. 327 also it was ruled that Section 70 of the Act contemplates 3 types of water courses i.e. sanctioned by law; (b) sanctioned by agreement between the parties; and (c) which have been prescribed by way of easement. If any person takes water through any other man's land, the other man has right to stop the flow of water through his land thereby committing no offence within the meaning of Section 70. It is only when water is stopped in the case of water course of the 3 types already mentioned that Section 70 will come into play. Therefore, a water course which does not answer the description of water course set out above would surely fall outside the ambit of Section 70 and so also Section 30-FF. It was submitted that the canal authorities do not have jurisdiction to touch a private Khal. It was submitted that since the khal in question is not khal of the type which are contemplated by the provisions of Section 30-FF and 70 of the Act, canal authorities have no jurisdiction to touch this khal and brickline it. If they propose to brick line this khal without hearing them, their grievance is cognizable by the civil court.

9. In *Chatru and Ors. v. Surta and Anor.*,³ (1982)84 P.L.R. 137, it was held that the Civil Court will have jurisdiction where there is no proper order passed by the canal authorities u/s 30 (3-FF) of the Act against which appeal could be filed before the canal authorities. In *Kheta Ram v. The State of Haryana* 4 1974 P.L.J 294 it was held that as the Divisional Canal Officer has not complied with the statutory provisions while passing the order, therefore, the jurisdiction of this court is not excluded. In case the Divisional Canal Officer wants to proceed under the aforesaid section, he can do so in accordance with the provisions of Section 30-FF. When there is no proper order passed by the Divisional Canal Officer under Sub-section(3) of Section 30-FF of the Act against which appeal could be filed, civil court will have jurisdiction.

10. In *Ram Sarup v. Harpal and Ors.* 1974 (5) P.L.R. 258. It was held that Civil court will have jurisdiction to prevent a threatened wrongful demolition of khal, such a civil suit is not barred by Section 30-G of the Act. There is nothing in Section 30A to Section 30-FF of the Act which may suggest that a party has any remedy under the Act where he is trying to prevent a threatened wrong. Canal authorities can remedy a wrong that is already done. It is not necessary that party should always wait until the damage had been done. As no effective remedy appears to have been provided in the Act for the prevention of a threatened wrong there was no bar to the plaintiff coming to the court to enforce a preventive remedy, Section 30-FF does not provide for the prevention of a threatened injury. It only provides for a remedy where the injury had already been caused. Civil suit to prevent a threatened wrongful demolition of khal is not barred by Section 30-G of the Act."

11. It was submitted that the Divisional Canal Officer was bound to hear them if he has passed order proposing to brickline their private khal, they can knock the door of the civil court for preventing the invasion of their right. It was held in *Suraj Mal and Ors. v. The Superintending Canal Officer, Western Jamna Canal, West Circle, Rohtak and Ors.* ILR 1982 691 that Division Canal Officer is duty bound to serve right holders and serve them before passing any order detrimental to their interest.

12. Learned counsel for the respondent, on the other hand, submitted that the plaintiffs ought to have gone to the Superintending Canal Officer and avail the remedy of appeal. They could not have straightaway come to the civil Court when equally efficacious remedy was available to them under the Act. It was submitted that they should have exhausted all the channels provided in the Act before coming to the civil Court. Why should they have gone to the Superintending Canal Officer for attacking an order of the Division Canal Officer which they say is of no effect so far as their rights are concerned as the same was passed behind their back. It was submitted by the learned counsel for the respondents that before framing the scheme, right holders were heard.

13. In my opinion, the civil Court should not have been denied the jurisdiction to hear the grievance of the plaintiffs when their grievance is that without hearing them, the canal authorities have proposed to brickline this khal which is purely their "personal khal" constructed by them for bitter irrigation of their land. So, this regular second appeal is allowed and the judgments and decrees of the courts below are set aside and it is held that civil court has jurisdiction. Case is remanded to the learned trial court. Now the learned trial Court will decide the plaintiffs prayer afresh whether they should or should not be allowed temporary injunction pending the disposal of the suit. If Ranjit Singh that he is a necessary/ proper party to the suit, i.e. without him, no effective adjudication is possible, he may make this prayer before the learned trial Court and this prayer shall be decided on its merits.