

(1971) 01 AHC CK 0015

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 576 of 1966

Shietla Din and Others

APPELLANT

Vs

The Executive Engineer and Others

RESPONDENT

Date of Decision : 18-01-1971

Acts Referred:

Constitution of India, 1950 — Article 226

Northern India Canal and Drainage Act, 1873 — Section 34, 35

Citation : AIR 1971 All 343 : (1971) 41 AWR 195

Hon'ble Judges : R.L. Gulati, J

Bench : Single Bench

Advocate : N. Aly Khan, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

R.L. Gulati, J.—This is a petition under Article 226 of the Constitution of India.

2. The petitioners, seven in number, are all residents of village Sarivan-wan, in the district of Pratapgarh. The petitioners' allegation is that in the month of August, 1965, the right bank of Allahabad Branch of Sharda Canal was breached at a point about six furlongs away from village Sariyanwan. The breach is attributed by the petitioners to the negligence of the Canal Department as a result of which crops worth several hundreds were damaged of four villages including the village Sariyanwan by the gushing water which entered into the fields at great pressure. The petitioners state that they met the local M. L. A. and also Assistant Engineer Incharge of the Canal Sub-Division at Tehsil Kunda and sent written representations claiming damages and compensation for the loss caused to their crops. It has further been alleged that in the meantime the Canal authorities reported the matter to the police and in the first information report lodged on 14th August. 1965. by the Assistant Engineer four persons were named, who were suspected to have caused the breach. None of the petitioners was among the four persons named in the first information report.

It has further been alleged that the police made enquiries and submitted a final report on September 12, 1965, which was accepted by the Judicial Magistrate On December 28, 1965. However, while the matter was under investigation at the hands of "the police the canal authorities took action under Sections 34 and 35 of the Northern India Canal and Drainage Act and by a common order dated 12-11-1965 levied varying amounts on several persons by way of charges for the unauthorised use of water and penalties. The amounts demanded from the petitioners are set out in paragraph 7 of the writ petition. The amounts were sought to be realised through the Tehsildar, Tehsil Kunda, the opposite party No. 3.

3. The petitioners allege that the levy of water charges and the penalty is illegal and so is its recovery. From the counter-affidavit of Sri Gur Prasad filed on behalf of respondent Nos. 1 to 4 it appears that the Canal Department attributed the breach not to any negligence on the part of the canal department, but to deliberate act on the part of the villagers who wanted to irrigate their paddy field in an unauthorised manner.

4. Learned counsel for the petitioner has raised two contentions. His first contention is that the impugned order was passed without conducting the enquiry contemplated by Section 34 and without affording an opportunity to the petitioners of being heard. The impugned order, according to the learned counsel, is contrary to the statutory provisions and offends against principles of natural justice. The second contention, raised by the learned counsel is that Sections 34 and 35 of the Northern India Canal and Drainage Act are constitutionally invalid being violative of Articles 19(1)(f) and (g) and 31 of the Constitution of India.

In support of this submission he has placed reliance upon a decision of a Division Bench of the Patna High Court in *Ajablal Mandal and Others Vs. State of Bihar and Another*, . Learned Standing Counsel appearing on behalf of the opposite parties submits that the order was passed after holding an enquiry u/s 34 and that Sections 34 and 35 of the Northern India Canal and Drainage Act are not constitutionally invalid.

5. Before dealing with this contention, it will be appropriate to deal with the two sections which run as under:--

"34. Liability when water runs to waste:-- If water supplied through a water course be suffered to run to waste, and if, after enquiry by the Divisional Canal Officer, the person 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 water course shall be jointly liable for the charges made in respect of the water so wasted."

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

A reading of the two sections shows that if water or a water course 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 penalties can also be imposed upon them, on account of the wastage of water.

6. Now in the instant case, it has been alleged on behalf of the opposite parties in the counter-affidavit filed by Sri Gur Prasad that before the impugned order was passed an enquiry was conducted as contemplated by Section 34 and it was found that the person who was responsible for the breach of the canal could not be located. In these circumstances Sections 34 and 35 clearly became applicable.

7. The next question that arises is as to whether it is open to the authorities concerned to pass an order imposing water charges and penalties without notice to persons affected thereby and without an opportunity of putting forward their case. 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. It is also clear that the authority concerned is not obliged to confine his enquiry to the persons who are ultimately going to be affected. The enquiry can be made from any source which appears to the authority to be appropriate. 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 authority named in Section 34 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 or any fact without first pointing out the same to the assessee and giving him a reasonable opportunity of meeting the case which is ultimately made out against him.

8. 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 this fundamental principle of natural justice was violated. In my opinion the same principle would govern an order contemplated by Sections 34 and 35.

9. Admittedly in the instant case no notice was given to the petitioners nor were they afforded any opportunity of being heard. The enquiries which are alleged to have been conducted were not made known to them. In the circumstances the impugned order must be held to be bad in law. Moreover the facts of the present case are such that it was necessary for the authorities concerned to have followed the procedure indicated above, namely, to have given a notice to the persons, who were ultimately saddled with the liability, and to have afforded them an opportunity of showing cause against the imposition of water charges and penalties.

10. It is not disputed that in the first information report lodged by the Sub-

Divisional Officer, none of the petitioners was named. However, before the investigations were completed, by the police, the impugned order was passed. In these circumstances it was incumbent upon the Divisional Canal Officer to give a show cause notice to the petitioners and other persons who were held liable. In the counter-affidavit it has been alleged that the representations made by the petitioners were being enquired into, but the petitioners did not wait for the result of the enquiry and rushed to this Court and filed the present writ petition, as a result whereof further enquiries were suspended. To my mind this circumstance does not in any way change the legal position. The appropriate procedure should have been to afford an opportunity to the petitioners before the impugned order was passed. Once an order is passed, the Divisional Canal Officer becomes *functus officio* and he cannot vary or modify the same as a result of any enquiry held by him subsequently. The order passed by him is final subject only to an appeal to the Head Revenue Officer of the district.

11. It has further been alleged that the impugned order was appealable and the petitioners should have exhausted the remedy by way of appeal. In my opinion the existence of an alternative remedy is no bar in a case like the present one where the order complained of offends against the principles of natural justice. Such an order is void *ab initio* and can be challenged in a petition under Article 226 of the Constitution.

12. In these circumstances the impugned order cannot be sustained and must be quashed. In view of this finding, it is not necessary to adjudicate upon the alternative contention that Sections 34 and 35 of the Northern India Canal and Drainage Act are *ultra vires*.

13. In the result, this petition must succeed and is allowed. The order dated November 12, 1965, passed by the Executive Engineer, Sharda Canal and Irrigation, Pratapgarh is quashed so far as it affects the petitioners. The respondents are restrained from taking any recovery proceedings against the petitioners in pursuance of the aforesaid order. The petitioners are allowed costs.