

RAJASTHAN HIGH COURT

Nand Ram

Vs.

State, (Rajasthan)

Civil Special Appeal No. 897 of 2000
(Rajesh Balia and Harbans Lal, JJ.)

30.10.2001

ORDER

Rajesh Balia and Harbans Lal, JJ.

1. Heard, learned counsel for the parties. These two appeals arise out of common order passed by learned single Judge on 18-7-2000 deciding *Nand Ram v. State of Raj*¹ and S. B. Civil Writ petition No. 920/99. Both the writ petitions were preferred by two independent cultivators of Chak 3 B.H.M., whose total holdings admeasured 53 bighas, challenging the same order dated 6-11-98 passed by the Superintending Engineer, Irrigation by which he did not confirm the order passed by Divisional Irrigation Officer for supply of water to the petitioner-appellant in each case through outlet situated at stone No. 378 through existing water course in Chak No. 2 B.H.M. (A).

2. The land in question is situated in Chak No. 3 B.H.M. The land was getting its water supply through water course existing in chak 3 B.H.M. from the outlet meant for supply therefor, when the petitioner-appellants made applications for getting water supply for irrigation through the existing water course situated in Chak 2. B.H.M. (A). The applications wee considered by the Divisional Irrigation Officer in 1991 and he recommended that petitioner-appellants land situated in Chak 3 B.H.M. may be supplied water through the existing water course in question situated in chak 2. B.H.M. (A). Water supply was commenced immediately in pursuance of the recommendation made by the Divisional Irrigation Officer. The cultivators of Chak No. 2 B.H.M. (A) promptly protested against this change of attaching the lands of chak 3 B.H.M. with Chak 2 B.H.M. (A) for water supply to it from the outlet in question through water course existing in Chak 2 B.H.M. (A).

3. This led, in the first instance, to passing of an order by the Superintending Engineer on 1-10-91 at the behest of chief Engineer to whom grievance was ventilated by the cultivators of Chak 2 B.H.M. (A), for staying the implementation of recommendation of Divisional Irrigation Officer. Said order dated 1-10-91 was challenged by two separate writ petitions No. 5224/91 and 5415/91 one by Magha Ram and another by Nand Ram, who are presently appellants in the two appeals.

4. The writ petition filed by Magha Ram was dismissed on 2-4-97 and another writ petition was also dismissed on 4-4-97 following decision dated 2-4-97. The Court upheld the power of the Superintending Irrigation Officer to modify or revise the order passed by Divisional Irrigation Officer. However, the Court remanded the case to the Superintending Engineer for deciding of issue afresh by giving opportunity to both the sides.

5. It may be noticed that after the order of the Divisional Irrigation Officer was stayed by the Superinending Officer on 1-10-91 which was subjected to challenge in two writ petitions refered to above. In the first instance, the interim order was issued in favour of appellants petitioners by this Court, and was continued until the decision of the said writ petitions in April, 1997. Thereafter it was continued until decision was taken by Superintending Irrigation Officer on remand.

6. The Superintending Irrigation Officer vide his impugned order dated 6-11-98 after noticing the written submissions made before him by the parties in detail, did not agree with the Divisional Irrigation Officer. He found that 53 bighas land in question can be irrigated through the water supply meant for 3 B.H.M. He also found that the order passed by Divisional Irrigation Officer for allowing the lands of the appellants to be irrigated through the water course meant for Chak 2 B.H.M. (A). has been passed without adopting the procedure prescribed in law. The Superintending Irrigation Officer also referred to site inspection which was made by him in the presence of cultivators of both the Chaks and he opined that the water course in question of Chak 2 B.H.M. (A) cannot take more water. The fact that the water course has been constructed Pacca under the scheme of CAD and the manner in which the water supply has been taken by the cultivators of Chak 3 B.H.M. presently by putting sand over the existing water course is likely to damage the 'Pacca Khala', which is not in

the interest of irrigation technically. With these reasonings, he directed that supply of water to the appellant's land be made through the water course existing in Chak 3 B.H.M. as before.

7. Aggrieved with that order, both the appellants namely Magha Ram and Nand Ram filed two separate writ petitions N. 920/99 and 923/99 respectively, which have been dismissed by learned single Judge by a common order dated 18-7-2000 holding that the petitions raise many disputed questions of fact and the Superintending Engineer being technical expert in the matter of water supply, has on proper consideration passed the impugned order. This Court would not substitute its opinion in writ jurisdiction. The Court directed that the supply of water to the petitioners shall continue from the outlet means for water supply in Chak 3 B.H.M. that was available to them prior to passing of the order by the Divisional Irrigation Engineer.

8. Learned counsel for the appellants endeavour to challenge the findings recorded by the Superintending Irrigation Engineer as if in appeal by referring to the earlier opinions and the materials suggesting that the order passed by the Superintending Irrigation Officer is not in the interest of irrigation and is contrary to the material on record. He also contended that the Superintending Engineer has no jurisdiction to make the order under challenge without their being any proper appeal filed by the aggrieved parties. He also contended that since the appellant is availing the water supply through the water course in question from the irrigation work through Chak 2 B.H.M. (A) without any problem for 10 years, it should not be disturbed at this stage as it would not be in the interest of anyone.

9. On the other hand, it is contended by the learned counsel for the respondents that the Superintending Irrigation Officer is the only authority, who has to make the final order in the matter of supply of water for irrigation through any existing water course for irrigation, when an application in this regard is made by anyone, the Divisional Irrigation Officer is only a recommending authority. After he makes such recommendation after following procedure by giving notice of at least 14 days to all the persons responsible for construction and maintenance of the existing water course through which water supply is sought by the applicants. Learned counsel for the respondents submitted that as for the findings of the learned Superintending Engineer, procedure laid in statute has not been adopted before the land of the appellants

admeasuring 53 bighas, which is part of Chak 3 B.H.M. was ordered to secure water supply through the existing water course in Chak 2. B.H.M. (A) from the outlet meant for supply of water to Chak 2 B.H.M. (A). For that reason, the order passed by Executive Engineer could not have been sustained. It was also urged that merely because for period since Oct. 91 the appellants are having water supply through the water course in question situated in Chak 2. B.H.M. (A) as per orders of Divisional Irrigation Officer only because of the interim order, passed by this Court and this cannot be of any avail to the petitioners-appellants; who undisputedly are not the cultivators of chak 2 B.H.M. (A) but are cultivators of Chak 3 B.H.M.

10. Having considered the rival contentions we are of the opinion that this special appeal must fail.

11. It is not in dispute before us that prior to the order of Divisional Irrigation Officer, the petitioners were securing the water supply through the water course existing in chak 3. B.H.M. from outlet means for said Chak. They had moved applications for securing water supply of water for irrigating their fields from out let situated at Stone No. 378 through the existing water course in Chak No. 2 B.H.M. (A). In that event, the provisions of Section 20 is relevant, which provides the procedure for considering such applications for water supply through existing water course. Section 20 of the Raj. Irrigation and Drainage Act, 1954 reads as under:-

"20. Supply of water through intervening water course,-

(1) Whenever application is made to a Divisional Irrigation Officer for a supply of water from an irrigation work and it appears to him expedient that such supply should be given and that it should be conveyed through the existing water course, he shall give notice to the person responsible for the construction and maintenance of such water course to show cause, on a day not less than fourteen days from the date of such notice, why the said supply should not be so conveyed and, after making enquiry on such day, the Divisional Irrigation Officer shall determine whether, and on what condition, the said supply shall be conveyed through such water course.

(2) When such Officer determines that a supply of water from any irrigation work may be conveyed through any water course as aforesaid, his decision shall, when confirmed or modified by the superintending irrigation officer, be binding on the applicant and also on the persons responsible for the

maintenance of the said water course.

(3) Such applicant shall not be entitled to use such water course until he has paid the expense of any alternation of such water course necessary in order to his being supplied through it, and also such share of the first cost of such water course, as the divisional or superintending irrigation officer may determine.

(4) Such applicant shall also be liable for his share of the cost of maintenance of such water course so long as he uses it."

12. In this connection, it would be convenient also to refer the definitions of irrigation work", 'water course' and 'outlet'. The Section 3 (1) (ii)(iv) and (v) of Raj. Irrigation and Drainage Act, 1954, which reads as under :-

"3. Interpretation :- (1) In this Act, unless the context otherwise requires;-

(ii) Irrigation works" means a work or system of works, natural or artificial, not being a minor irrigation work as defined in Section 2 of the Rajasthan Minor Irrigation Works Acts, 1953, and includes-

(a) any canal, channel, pipe or reservoir constructed, maintained or controlled by the State Government for the supply or storage of water,

(b) any work, embankment, structure or supply and escape-channel connected with such canal, channel, pipe or reservoir,

(c) any water course.

(d) any part of a river, stream, lake or natural collection of water or natural drainage channel to which the State Government applies the provisions of Part II of this Act;

(iii) xxx xxx xxx

(iv) water course" means any channel, (not constructed and maintained) at the cost of (State Government) which is supplied with water from a canal, Channel, pipe or reservoir and includes any subsidiary work belonging to such channel);

(v) outlet" means an opening constructed in a canal through which water passes into a water course or directly on to any land."

13. The aforesaid provisions envisages the scheme of the consideration of application where a water supply is sought by the person from existing water course.

14. Section 20 obligates the Divisional Irrigation Officer to give notice of any such application or applications to the persons responsible for construction and maintenance

of such water course through which water supply is sought, to show cause against grant of such applications. Such notice has to be of a period of not less than 14 days from the date of service of notice. This inhere in inviting of their objections and affording hearing to the affected parties. Thus principle of natural justice have been ingrained in procedure required to be followed in dealing with such applications. After issuance of such notice, the Divisional Irrigation Officer is further required to make enquiry on such day, as may be fixed by him for the purpose. The Divisional Irrigation Officer is then to determine whether, and on what condition, if the said supply is to be conveyed through such water course and subject to conditions, if any laid by him.

15. Sub-section (2) makes it very clear that the finality of such an order rest with the Superintending Irrigation Officer. It envisages that where Divisional Irrigation Officer determines that a supply of water from any irrigation work may be conveyed through any existing water course as aforesaid, his decision becomes final as only confirmed or modified by the Superintending Irrigation Officer and the order of Superintending Irrigation Officer binds all persons responsible for constructions maintenance of the existing water course.

16. Thus, the contention of the learned counsel for the appellants that the Superintending Irrigation Officer had no jurisdiction to examine the order of the Divisional Irrigation Officer, unless an appeal is filed before him in a proper form as provided of the Act, he has no authority to modify, confirm or resulting the order passed by Divisional Irrigation Officer cannot be sustained.

17. In this connection, the definition of the irrigation work, water course and outlet leaves no room of doubt that a water course is as much a part of 'established system of irrigation' for channelising water. Any irrigation work meant for supply of water for irrigation which is not constructed and maintained by State, or in other words, channelisation of water which is not state owned but is a private property has been assigned expression 'WATER COURSE'. In such water courses water is supplied through the connection opening from a channel or canal or other irrigation works called 'outlet'. Obviously where an existing water course which is constructed and maintained at the cost of cultivators, who get water supply through it results in creation of private rights. Any additional water supply through such existing water course to additional users do puts extra pressure on the said existing water course and likely to affect adversely the rights of cultivators sharing cost of maintenance and

construction of that water course, apart from affecting system of water supply needing a change in established system of irrigation. That necessitates adoption of a fair and just procedure before taking any decision to the effect that any additional user may be supplied water through the existing water course. This requirement is statutorily recognised in procedure required to be followed under Section 20 of the Act. Even otherwise where individual rights are likely to be affected adversely, adherence to a fair procedure in accordance with principles of natural justice is fundamental requirement of rule of equality before law which is antithesis to arbitrariness in any sphere of state activity, as envisaged under Article 14 of the Constitution. Following such a requirement cannot but be held mandatory.

18. It is nobody's case that before making the order of providing water supply to the petitioners, through the existing water course Divisional Irrigation Officer has followed the procedure in question situated in Chak 2 B.H.M. (A). The findings reached by Superintending Irrigation Officer in this regard is also to same effect. Moreover the Superintending Irrigation Officer has found as a fact that change recommended by Divisional Irrigation Officer shall not be in the interest of better irrigation.

19. Therefore, as a matter of law without going into the questions of disputed facts no fault can be found with the reasons adopted by Superintending Irrigation Officer in setting aside the order passed by Divisional Irrigation Officer.

20. In these circumstances, we are in agreement with the learned single Judge that no interference is called for by this Court to disturb the order passed by Superintending Irrigation Officer.

21. The appeals therefore fail and are hereby dismissed. No costs.

Appeals dismissed.

Cases Referred.

1. S. B. Civil Writ Petition No. 923/99