

on both the occasions the appeals were refiled after the period of one week allowed for removing the objection. There is considerable merit in this argument. On the memoranda of appeals it is not mentioned as to on what dates the appeals were returned for correction to the appellants or their counsel, and this being the position, there is no occasion for holding that the appeals were refiled after more than a week of their being returned for removing the defects.

(12) For the reasons stated above, I find no merit in the preliminary objection raised on behalf of the respondents. The result is that the appeals are allowed and the case is remanded under Order 41, rule 25 instead of rule 23-A with the direction that the trial Court will allow the parties opportunity to lead evidence on issue No. 2 and after deciding this issue return the evidence together with the finding to the appellate Court for decision of the appeals. The report should be submitted within three months. The parties are directed through their counsel to appear in the trial Court on 11th October, 1971.

B. S. G.

CIVIL MISCELLANEOUS

Before D. K. Mahajan and H. R. Sodhi, JJ.

JAGAR SINGH,—*Petitioner.*

versus

SUPERINTENDING CANAL OFFICER AND OTHERS.—*Respondents.*

Civil Writ No. 1350 of 1971

September 15, 1971.

Northern India Canal and Drainage Act (VIII of 1873)—Section 30-FF—Types of water-courses contemplated by the section—Stated—Digging of an unauthorised water-course over another person's land without his permission—Such person dismantling the watercourse—Section 30-FF—Whether attracted.

Jagar Singh v. Superintending Canal Officer, etc. (Mahajan, J.)

Held, that Section 30-FF of the Northern India Canal and Drainage Act, 1873 contemplates three types of water-courses : (a) those sanctioned by law; (b) those sanctioned by agreement between the parties; and (c) which have been prescribed by way of easement. It is only when the water is stopped in the case of water-courses of these three types that Section 30-FF of the Act will come into play. Where an unauthorised water-course is dug on another man's land without his permission which is subsequently dismantled by that person, such a water-course will not fall within the ambit of Section 30-FF even though used for a couple of years. No law contemplates the continuance of an illegal act or gives validity to an illegal act because it has been repeatedly performed. The illegality cannot be perpetuated by resort to Section 30-FF of the Act. (Para 6).

Petition under Articles 226 and 227 of the Constitution of India praying that a writ of certiorari, or any other appropriate writ, order or direction be issued quashing the impugned order dated 29th March, 1971 (Annexure 'C').

P. S. Jain and V. M. Jain Advocates, for the petitioners.

Ashok Bhan, Advocate, for respondents 1 and 2.

S. K. Pipat. Advocate, for respondent 3.

JUDGMENT

Judgment of this Court was delivered by :—

MAHAJAN, J.—(1) This is a petition under Articles 226 and 227 of the Constitution of India praying that the order of the Superintending Canal Officer passed in appeal under section 30-FF (4) of the Northern India Canal and Drainage Act (Act No. 8 of 1873) (hereinafter referred to as the Act) be quashed.

(2) This was admitted to a larger Bench, because it seems that the admitting Bench entertained some doubts as to the correctness of the decision of a learned Single Judge of this Court in *Umed Singh v. State of Haryana* (1).

(3) The facts are simple and do not admit of any controversy. The sanctioned watercourse, so far as the petitioner is concerned, admittedly was 'ABCD'. The petitioner, however, started taking his water from point 'A' in a watercourse denoted by letters 'ABCD' on the plan filed with the return of the Superintending Canal Officer dated 25th April, 1971. For a couple of years before the present petition was filed, the petitioner was taking water from point 'A' in the

(1) 1970 P.L.J. 503.

watercourse 'ABCD'. The owners of land from points A to B dismantled the watercourse. This led to an application by the petitioner under section 30FF of the Act to the Divisional Canal Officer. The Divisional Canal Officer sent for the report from the Zileedar through the Sub-Divisional Officer. The Zileedar reported that the watercourse between points A and B had been dismantled with the result that the petitioner's crops were suffering and he recommended that it be restored with police help. This recommendation was accepted by the Sub-Divisional Officer who endorsed it and forwarded the papers to the Divisional Canal Officer. The Divisional Canal Officer, thereafter, ordered restoration of the watercourse 'ABCD' with police help. This decision was appealed against by the respondent, the owner of the land adjoining watercourse 'AB'. The Superintending Canal Officer allowed the appeal with the following observations:—

"The Divisional Canal Officer had ordered restoration of watercourse 'AB'. The *warabandi* of this outlet was sanctioned under section 68 during the year 20th December, 1966. The map attached with the sanctioned *warabandi* has been seen and it has been found that watercourse 'AB' did not exist at the time of farming the *warabandi*."

In other words, the basis adopted by the Superintending Canal Officer seems to be that as the watercourse 'ABCD' is not authorised, its restoration could not be granted under section 30-FF. In order to safeguard the crops of the petitioner, he permitted the use of the watercourse 'ABCD' till 15th April, 1971. The petitioner being dissatisfied with the order of the Superintending Canal Officer has moved this Court under Articles 226 and 227 of the Constitution.

(4) The contention of the learned counsel for the petitioner is based on the decision of A. D. Koshal, J., in *Umed Singh's case*. In this case after setting out the provisions of section 30-A it was observed:—

"The words used in clause (a) cover a wide range and must be interpreted to mean that all sorts of watercourses, sanctioned or unsanctioned, are contemplated by them."

On the basis of this decision, the learned counsel for the petitioner contends that the decision of the Superintending Canal Officer is

erroneous in law and he had no jurisdiction to interfere with the decision of the Divisional Canal Officer on the ground that the watercourse 'AB' was not an authorised watercourse.

(5) After hearing the learned counsel, we are unable to agree with this contention. With utmost respect to the learned Single Judges, who have taken the view that an un-authorised watercourse is covered by section 30-A or section 30-FF, we are unable to agree. Before we deal with this question, it will be proper to refer to section 3(2) of the Act which defines 'watercourse' in the following terms:—

“ '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 works belonging to any such channel.”

Section 3(1) defines 'canal' as including "all watercourses as defined in the second clause of this section". It will also be proper to set out the relevant portions of sections 30-A, 30FF and section 70 of the Act. They are reproduced below:—

“30-A. (1) Notwithstanding anything contained to the contrary in this Act and subject to the rules prescribed by the State Government in this behalf, the Divisional Canal Officer may, on his own motion or on the application of a shareholder, prepare a draft scheme to provide for all or any of the matters, namely:—

- (a) the construction, alteration, extension and alignment of any watercourse or re-alignment of any existing watercourse;
- (b) reallocation of areas served by one watercourse to another;
- (c) the lining of any watercourse;
- (cc) the occupation of land for the deposit of soil from watercourse clearances;

- (d) any other matter which is necessary for the proper maintenance and distribution of supply of water from a watercourse. . . .

30-FF. (1) If a person demolishes, alters, enlarges or obstructs a watercourse or causes any damage thereto, any person affected thereby may apply to the Divisional Canal Officer for directing the restoration of the watercourse to its original condition.

(2) On receiving an application under sub-section (1), the Divisional Canal Officer may, after making such enquiry as he may deem fit, require, by a notice in writing served on the person found to be responsible for so demolishing, altering, enlarging, obstructing or causing damage, to restore at his own cost, the watercourse to its original condition within such period as may be specified in the notice.

(3) If such person fails to the satisfaction of the Divisional Canal Officer to restore the watercourse to its original condition within the period specified in the notice served on him under sub-section (2) the Divisional Canal Officer may cause the watercourse to be restored to its original condition and recover the cost incurred in respect of such restoration from the defaulting person.,

70. Whoever, without proper authority and voluntarily, does any of the acts following, that is to say—

(1) damages, alters, enlarges or obstructs any canal or drainage work;

(2) interferes with, increases or diminishes the supply of water in, or the flow of water from, through, over or under, any canal or drainage work;

Penalty.—shall be liable, on conviction before a Magistrate of such class as the State Government directs in this behalf, to a fine not exceeding one hundred rupees, or to imprisonment not exceeding one month or to both.”

(6) It is in the wake of these statutory provisions that the question has to be examined, namely, whether the provisions of section 30-FF embrace an unauthorised watercourse? So far as the Act is concerned, it deals with both authorised and unauthorised watercourses. We are using the expression 'authorised watercourse' to mean a watercourse made available under the provisions of the Act all others being unauthorised. But there is a world of difference between a watercourse which is being used as a matter of right either under some statute or by agreement or by prescription. But it cannot include a watercourse which has no lawful existence. It may even include a watercourse which passes on another person's lands but the other person does not object to its being used as a watercourse, but, in our opinion, a watercourse which has been used on another man's land without his permission will not fall within the ambit of the Act. If the decision of Koshal, J., conveys that the Act only deals with watercourses which are authorised by it or which are unauthorised by the Act but otherwise authorised, as set out above, no exception can be taken to it. But if the decision goes further and embraces watercourses of a type to which I have already made a reference, namely, a watercourse on another man's land without his permission, surely the decision cannot be supported. We say so with utmost respect to the learned Judge. No law contemplates the continuance of an illegal act or gives validity to an illegal act because it has been repeatedly performed. The view we have taken of the matter finds support from the decision of the Lahore High Court in *Hukman v. Emperor* (2). This decision has held the field and reference need only be made to *Moola Singh v. Surendra Singh* (3), wherein a large number of decisions taking the same view have been collated. It is true that the Lahore decision dealt with the provisions of section 70, but broadly speaking, the ambit of that section and section 30-FF is *pari materia*. For instance, section 70(1) talks of alteration, enlargement or obstruction whereas section 30-FF(1) also talks of alteration, enlargement and obstruction. Section 70 fell for interpretation as early as 1921 in the Lahore High Court and it was ruled that it only contemplates three types of watercourses, that is,—

- (a) sanctioned by law;
- (b) sanctioned by agreement between the parties; and

(2) A.I.R. 1921 Lah. 327.

(3) A.I.R. 1960 All. 656.

(c) which have been prescribed by way of easement.

It was also held that if any person takes water through another man's land, the other man has the 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 watercourses of the three types already mentioned, that section 70 will come into play. Therefore, a watercourse which does not answer the description of the watercourse set out above would surely fall outside the ambit of section 70 and so also section 30-FF. Section 30-FF has been brought on the statute book long after section 70 was judicially interpreted and we must proceed on the basis that the farmers of section 30-FF knew how section 70 had been interpreted and wherever they have used the same language in section 30-FF, that must bear the same interpretation and none other.

(7) The correctness of the above view can further be demonstrated by referring to an instance where an unauthorised watercourse is dug by a party and he draws water from the canal in that watercourse. Surely, it cannot be countenanced that such a watercourse would fall within the ambit of section 30-FF. If that be so, we do not see where to draw the line, for in that even, all illegal watercourses would fall within the ambit of section 30-FF and there would be no way out to curb that illegality because the illegality would have the sanction of law inasmuch as it can be perpetuated by resort to section 30-FF.

(8) Mr. Jain then raised the contention that the watercourse 'AB' has been sanctioned by agreement. No agreement has been produced on the record. Faced with this situation, the learned counsel was driven to the contention that because the watercourse had been in use for a period of two years, we must spell out an agreement therefrom. We are unable to agree with this contention. In the *Lahore case* (2), already referred to, the watercourse was in existence for 13 years and still no agreement was spelt out. A long course of user may result in making the user perfect by prescription, but no agreement can be spelt out from that. Moreover, the owners of the land in which the channel 'AB' exists have denied that they agreed to its user by the petitioner. On the other hand, they maintained that the

S. L. 221, Major Manohar Lal v. The Union of India etc. (Tuli, J.)

petitioner has been using this channel in a clandestine manner. However, we are not concerned with this controversy because, in our opinion, no agreement has been proved on the record which would justify interference by the Divisional Canal Officer under section 30-FF.

(9) Mr. Jain then contended that the water-channel 'ADEF GH' does not effectively carry the water to the lands of the petitioner. He contends that the water properly runs upto the point 'G' but beyond point 'G' it is very difficult for the water to move on the lands of the petitioner. If this is so, the proper remedy of the petitioner is to move the Canal authorities for proper realignment of this channel; in other words, for the alteration or realignment of the channel. This is permitted under section 30-FF. In case such an application is made and the grievance is genuine, we have no doubt that redress will be available to the petitioner, but he cannot claim in the present proceedings that he is entitled to the user of the watercourse marked 'AB'. In our opinion, the decision of the Superintending Canal Officer was correct and no fault can be found therewith.

(10) The difficulty in the way of the petitioner at the moment is that the channel marked 'G to H' is no longer available to him and in order to safeguard his crop, we direct that he may be permitted to use the watercourse 'AB' for a period of six months to enable him to move the Canal authorities to give him redress.

(11) For the reasons recorded above, this petition fails and is dismissed. There will be no order as to costs.

B.S.G.

CIVIL MISCELLANEOUS

Before Bal Raj Tuli, J.

S. L. 221, MAJOR MANOHAR LAL,—Petitioner.

versus

THE UNION OF INDIA ETC.,—Respondents.

Civil Writ No. 2811 of 1970

September 16, 1971.

Army Act (XLVI of 1950)—Sections 108 and 113—Army Rules (1954)—
Rules 40 and 41—Trial by General Court Martial of an Army Officer of the