Mr. Justice Ayyangar, speaking for the Court, "has no esoteric or mystic significance in criminal law or procedure. It merely means, become aware of and when used with reference to a Court or Judge, to take notice of judicially. Taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence. Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken, obviously the statutory requirement must be fulfilled". In my opinion, the discharge by a Magistrate under sub-section (3) of section 173 is separate and distinguishable from that under sub-section (6) of section 207-A. Where a police report discloses that there is no case against an accused person the Magistrate has merely to affirm the order of release and discharge the accused. It is only when an inquiry is being held on a police report against the accused person under Chapter XVIII that a Magistrate may be said to take cognizance and to reach a conclusion about the discharge of the accused person after an examination of recorded evidence and the documents submitted under section 173 of the Code of Criminal Procedure.

In my opinion, there is no merit in this revision petition which fails and is dismissed.

R. N. M.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

LACHHMAN AND OTHERS,—*Petitioners*

versus

THE EXECUTIVE ENGINEER, SIRSA, AND OTHERS,—*Respondents.*

Civil Writ No. 2329 of 1963.

April 27, 1967.

Northern India Canal and Drainage Act (VIII of 1873)—Ss. 33, 35 and 69—Northern India Canal and Drainage Rules (1873)—Rule 32—Inquiry for fixing the liability of a person under—Nature of—Such inquiry—Whether mandatory and must be held by the Divisional Canal Officer himself—Matters on which findings to be re corded as a result of inquiry stated.

Held, that before making an imposition under section 33 of the Northern India Canal and Drainage Act, and fixing the liability of any person for meeting the liability created under that provision, an inquiry must be held into the matter. The Divisional Canal Officer is authorised to hold such inquiry and to pass appropriate orders under sections 33 and 35 of the Act. The provisions of section 69 of the Act make it abundantly clear that every inquiry to be held under sections 33 and 35 of the Act is deemed to be a judicial proceedng and must conform to judicial norms. It is not necessary that every bit of the inquiry must be held by the Divisional Canal Officer himself. It is open to him to hold the entire inquiry himself or to have some evidence collected through his subordinates. All the same, it is the authority who is to give his decision who must bring his own independent mind to bear on the issues to be decided by him and to record his own findings thereon based on the evidence on record before him of which the persons likely to be affected by the orders sought to be passed by the officer have notice.

Held, that in order to fix the liability of each individual person sought to be made liable under section 33 of the Act it is necessary for the authorities under the Act to record a finding to the effect—

(a) that water supplied through a watercourse had been used in an anauthorised manner by the act or neglect of such person; or

(b) if it is not possible to identify the person on account of whose act or neglect the unauthorised supply of water had been made, to find out the person on whose land such water had flowed, if such land had dervied benefit therefrom. In the absence of a finding as to the person who is himself responsible for the unauthorised supply of water, a person over whose land water has flowed, would not be liable if the flow of such water has not resulted in any benefit to him; or

(c) if neither the person covered by category (a) nor any person covered by category (b) referred to above can be identified, the particulars of the persons chargeable in respect of the water supplied through the watecourse in question who are liable to pay the amount of the special charges.

Petition under Article 226 of the Constitution of India praying that a writ of certiorari, mandamus *or any other appropriate writ, order or direction be issued quashing the orders, dated nil and 29th October,* 1963, *passed by Respondents Nos.* 1 *and* 2, *respectively, and prohibiting all the respondents from recovering from the petitioners the impugned Special Charges amounting to Rs.* 2,255.16 *N.Ps.*

NARINDER SINGHA ADVOATE, for the Petitioners.

ANAND SARUP, ADVOCATE-GENERAL (HARYANA) WITH J. C. VERMA, ADVOCATE, for the Respondents.

ORDER

NARULA, J.—Identical questions relating to the interpretation and application of sections 33, 35 and 69 of the Northern India Canal and Drainage Act (VIII of 1873) and Rule 32 framed thereunder have been raised in these four connected writ petitions (Civil Writs Nos. 2327, 2328, 2329 and 2338 of 1963).

The facts of Civil Writ 2329 of 1963 (*Lachhman and others* v. *The Executive Engineer, Sirsa Division Sirsa, and others*) may first be stated briefly. I have taken these facts from the appellate order of the Commissioner, Ambala Division, dated October 29, 1963 (Annexure 'B'), to the extent to which they are more definitely and clearly stated therein as compared with the writ petition itself. It appears that on November 15, 1961, it was detected that an unauthorised cut had been made at RD 165OL of Shahidanwali minor, and that an enquiry into the same was made by Shri Bhagwan Dass, the then Overseer. According to the petitioners, it had been found by the Overseer that no Bagli cut had been made, According to the respondents, the report of the Overseer has been lost and is not available. An enquiry was also made by Shri Narinder Singh, Zilledar. According to the finding recorded in this respect by the Executive Engineer, Sirsa Division, in his impugned order (Annexure 'A'), "the original case was lost in the office of the Sub-Divisional Officer. Fatehabad Sub-Division". The Executive Engineer by his said order (dated nil) held that "in view of the detailed report of Sub-Divisional Officer, Fatehabad" the case of Bagli had been established. He found that a recommendation had already been made by two Zilledars for the levy of special charges. On this basis the Executive Engineer was convinced that undue benefit had been derived of the canal water by the reported cut. His order ended with the following passage :—

> "To put a stop to this illegal practice, I hereby order the levy of special charges at six times the crop rate on the sown area and the highest crop rate on the *rauni* area amounting to Rs. 2,255.16, in addition to the normal assessment as per attached *tawan* forms under sections 31 and 33, and rule 32 of the Northern India Canal and Drainage Act VIII of 1873".

The appeal of the petitioners against the abovesaid order was partially allowed by the judgment of the Commissioner of Ambala

Division, dated October 29, 1963 (Annexure 'B'). The claim of the petitioners to the effect that no Bagli cut had at all been made, based on the alleged report of Bhagwan Dass, Overseer, was turned down by the appellate authority on the ground that though the said original record had unfortunately been lost, there was no apparent reason as to why the Department should have made out a false case against the petitioners. Regarding the second ground pressed by the petitioners before the appellate authority about the special charges having been imposed "without ascertaining the quantum of the unauthorised irrigation alleged", the Commissioner held as follows:—

> "It is on the file that due to lapse of time no proper enquiry was made to determine the extent of irrigation made. In view of this, I would partly accept the appeal and reduce the penalty levied to half the amount in addition to the normal assessment."

The abovesaid orders of the Executive Engineer and the Commissioner have been impugned in this case. While admitting the writ petition on December 20, 1963, the recovery of the impugned charges was stayed by the Motion Bench.

In the other three connected cases, the only point, which appears to have been argued before the appellate authority, related to the dispute about the duration of the unauthorised irrigation, and the finding was that it was not possible to determine the duration, but in conformity with the previous practice the entire period, from the date of the last inspection of the cut, was treated to be the period of unauthorised irrigation. In the case of *Sarmukh Singh and others* (Civil Writ 2338 of 1963), it has been held by the Commissioner in his appellate order, dated November 18, 1963 (Annexure 'C'), as follows :—

> "It is an admitted fact that the lands of village Ahlupur do not receive irrigation from this point and it is not commanded from any other source of irrigation. The area between the outlet RD. 51800-L and the distributary does not receive irrigation. The history of the whole case shows that cut is made at this site deliberately to receive unauthorised irrigation."

All these writ petitions have been contested on behalf of the respondents. Mr. Narinder Singh, the learned counsel for the

petitioners in three cases (other than Civil Writ 2338 of 1963) has pressed the following points in support of the claim of his clients:—

(1) The Divisional Canal Officer, that is, the Executive Engineer (respondent No. 1), did not hold any enquiry himself before the imposition of the impugned charges under sections 31 and 33 of the Act read with rule 32 of the Rules framed under the Act, and that, in view of the provisions of section 69 of the Act, the impugned orders are liable to be set aside on that ground.

(2) Once the appellate authority had held that no proper enquiry had been made to determine the extent of the alleged unauthorised irrigation in the case of Lachhman and others (Civil Writ 2329 of 1963), the order of imposition of special charges against the petitioners in that case could not be upheld as no such levy could be made without a proper enquiry as to the extent of such irrigation in respect of each separate landowner.

(3) The impugned orders, having been passed without obtaining the advice of the Advisory Committee referred to in Punjab Government notification No. S.O. 90/P.A. 22/60/S.I./63, dated February 21, 1963, in pursuance of the provisions of the Northern India Canal and Drainage (Punjab Amendment) Act (22 of 1960), cannot be sustained.

(4) The respondents not having recorded any finding about unauthorised irrigation having been made by any of the petitioners from any watercourse, the case does not fall within the mischief of section 33 of the Act, and the impugned imposition under that provision is, therefore, liable to be set aside.

(5) The orders of imposition are liable to be set aside, as they were passed without compliance with the mandatory requirements of rule 33 of the rules framed under the Act, whereunder it is necessary that the persons chargeable with the special rate should be served with an immediate notice on each occasion when such a charge is proposed to be made against them.

Mr. S. S. Dewan, the learned counsel for the petitioners in Civil Writ 2338 of 1963, has adopted all the arguments advanced by Mr. Narinder Singh in the other three cases.

It would be convenient to reproduce at this stage the provisions of sections 3(2), 31, 33, 35 and 69 of the Act and rules 32 and 33 of the Rules framed under the Act:—

[His Lordship read these sections and rules and continued:]

It cannot be disputed that before making an imposition under section 33 of the Act and fixing the liability of any person for meeting the liability created under that provision an enquiry must be held into the matter. The Executive Engineer or the Divisional Canal Officer (notified as a Collector) is admittedly authorised to hold such an enquiry and to pass appropriate orders under sections 33 and 35 of the Act. The provisions of section 69 of the Act make it abundantly clear that every enquiry to be held under sections 33 and 35 of the Act is deemed to be a judicial proceeding. The result of the above-said statutory provisions is that an enquiry to be held into the matter in question must be held in a quasi-judicial manner and must conform to judicial norms. I am not able to agree with the learned counsel for the petitioners that every bit of the enquiry must be held by the Divisional Canal Officer himself. It should be open to him to hold the entire enquiry himself or to have some evidence collected through his subordinates. All the same, it is the authority who is to give his decision who must bring his own independent mind to bear on the issues to be decided by him and to record his own findings thereon based on the evidence on record before him of which the persons likely to be affected by the orders sought to be passed by the officer have notice. In all the cases before me, it appears that no enquiry was made by the Divisional Canal Officer himself, that certain enquiry had been made at one stage or the other by some subordinate officials, that the record of some of those enquiries was not at all available, and that the Executive Engineer merely endorsed the reports and recommendations of the other enquiry officers. It is nobody's case that the contents of the said reports were made known to the petitioners. It is also not clear whether the inspections or enquiries, on the basis of which the impugned orders have been passed in these cases, were conducted in the presence of the petitioners or after notice to them or not. In order to fix the liability of each individual person sought to be made liable under section 33 of the Act, it was necessary for the authorities under the Act to record a finding to the effect—

(a) that water supplied through a watercourse had been used in an unauthorised manner by the act or neglect of such person; or

(b) if it is not possible to identify the person on account of whose act or neglect the unauthorised supply of water had been made, to find out the person on whose land such water had flowed if such land had derived benefit therefrom. In the absence of a finding as to the person who is himself responsible for the unauthorised supply of water, a person over whose land water has flowed, would not be liable if the flow of such water has not resulted in any benefit to him; or

(c) if neither the person covered by category (a) nor any person covered by category (b) referred to above can be identified, the particulars of the persons chargeable in respect of the water supplied through the watercourse in question who are liable to pay the amount of the special charges.

In none of the cases before me has any clear finding been recorded either by the Divisional Canal Officer or by the appellate authority as to the person by whose act or neglect the unauthorised water supply has occurred. Nor has any clear finding been given as to whether the unauthorised water had flowed on the land of each of the petitioners, and that such flow had resulted in any benefit to them. Mere absence of the findings on the abovesaid two questions does not, in my opinion amount to an implied finding to the effect that the identity of the persons referred to therein cannot be established. It is possible that the authorities did not apply their mind at all to definitely identify the persons concerned. In my opinion, it is necessary in an eventuality of that type to record a definite finding about it being not possible to identify the person at fault or the person who has benefited from the supply and then to record a further finding about the persons who are supplied water from the particular watercourse from which the unauthorised supply had taken place and to hold them liable jointly under the last portion of section 33 of the Act. I would, therefore, hold that the imposition in all the cases before me was bad for want of a proper enquiry in accordance with the provisions of section 69 of the Act and for want of a definite finding about the category in which the petitioners fell, out of the three classes of persons mentioned in section 33.

I the case of *Lachhman and others* (Civil Writ 2329 of 1963) I would quash the impugned orders on the further ground that once it had been found by the appellate authority that no proper enquiry

had been made to determine the extent of irrigation, the possibility of such irrigation being nil in the case of the petitioners was not excluded and in the absence of a finding about joint responsibility referred to above, no levy could be made against the petitioners in that case. The quantum of liability maintained by the Commissioner at the appellate stage has been assessed in an entirely arbitrary manner by the rule of thumb for which there is no scope in judicial or quasi-judicial proceedings. The levy being penal in nature, no charge should be imposed or mere nominal amount assessed as a token of liability if it is found to be impossible to determine even approximately as to what amount if any, a person is liable to pay.

In the view I have taken of the fiirst point raised before me, it is not necessary to decide as to what is the effect of not consulting the Advisory Committee on the impugned orders, particularly when it is admitted that the relevant provision came into force from February 21, 1963, when the above-mentioned notification was issued.

It has been held by Capoor, J., in *Amar Singh and others* v. *The Divisional Canal Officer and another* (Civil Writ No. 1772 of 1960), decided on September 12, 1961, that if unauthorised supply is not made through a watercourse, no special charges can be levied under section 33 read with ruls 32. The said judgment was followed only recently in that respect by Mahajan, J., in *Ram Kishan and another* v. *The Divisional Canal Officer and others* (Civil Writ No. 1449 of 1963), decided on March 28, 1967. Shahidanwali minor is admittedly not a 'water-course' within the meaning ascribed to that expression in section 3(2) of the Act. It is, however, contended by Mr. Anand Swaroop, the learned Advocate-General for the State of Harvana, that except in cases where unauthorised cut is made in the canal itself or in a minor at a place where there is no outlet, section 33 of the Act would always be attracted as water is bound to flow in case of a Bagli cut particularly through a watercourse. In my opinion, a finding has to be recorded by the Canal authorities in this respect, as the jurisdiction of the said authorities under section 33 of the Act depends on proof of the unauthorised use of water having taken place through a 'watercourse' as defined in the Act except in cases where this fact is not disputed by the person or persons concerned. On the record of the cases before me, it is not clear whether the unauthorised flow of water took place through a watercourse or not. The learned counsel for the respondents contends that this is so because the petitioners did not join any issue on this point before the departmental auhorities. In the view I have

taken of the first two points referred to above, it is not necessary to deal with this point any further.

Regarding the want of service of notice referred to in rule 33, it has been averred on behalf of the respondents in their respective written statements in these cases that such a notice was given. This is in reply to a definite allegation to the contrary made in the writ petitions. No particulars of the alleged notice have been given in the return. Nor has a copy of the notice been produced. Learned counsel for the respondents contends that the original records are with him and it can be ascertained from them whether a notice was in fact given or not in each case. For the reasons already recorded by me, however, it is not necessary for me to go into this matter in these cases.

In the three cases other than Civil Writ 2329 of 1963, the method of calculating the period of unauthorised supply of water (from the date of last inspection) is rather arbitrary and in the absence of some statutory justification behind it—appears to be opposed to principles or equity and justice. Imposition under section 33 of the Act is penal in nature. Benefit of doubt of liability or its quantum under such provisions of law must at each stage go to the subject. Since the reverse process has been adopted in these three cases, the impugned orders therein have to be set aside for that additional reason.

All these writ petitions are, therefore, allowed without any order as to costs and the impugned orders of imposition and recovery are set aside.

K. S. K.

REVISIONAL CIVIL

Before Prem Chand Pandit, J.

J. C. GUPTA ALIAS JAGDISH LAL GUPTA AND OTHERS,—*Petitioners*

versus

M/S WAZIR CHAND-VIR BHAN,—*Respondents.*

Civil Revision No. 65 of 1967

May 5, 1967

Partnership Act (IX of 1932)—Ss. 4 and 69—Firm carrying on business not in the firm name but in a trade name—Whether entitled to sue for the amount due to the business carried on in the trade name—Firm constituted of four