

CIVIL MISCELLANEOUS

Before R. S. Narula and S. S. Sandhawalia, JJ.

KUNDAN LAL,—*Petitioner*

versus

THE DIVISIONAL CANAL OFFICER AND OTHERS,—*Respondents*

Civil Writ No. 466 of 1966

August 26, 1968

Northern India Canal and Drainage Act (VIII of 1873)—S. 20—Scope of—Section 30-A—Order for reductions, shifting, closing or opening of an existing outlet—Such order—Whether authorised under section 30-A (1)(a) and (d) or section 20—State government in exercise of its executive powers—Whether can pass such an order—S. 30 B(3)—Scheme approved by Divisional canal officer in a modified form—Whether revisable—Constitution of India (1950)—Article 226—Plea not taken in a writ petition but taken in rejoinder—Whether can be ruled out of consideration.

Held, that an existing outlet cannot be closed or shifted in exercise of the jurisdiction conferred on the canal authorities by section 20 of the Northern India Canal and Drainage Act. Section 20 does not authorise either the opening or closing or reduction in size of an existing outlet. The only claim which can be considered under that section is for the supply of water which has to be conveyed through some existing watercourse. The section does not at all refer to the making of a new watercourse or the construction, closing or shifting of an outlet.

(Paras 9 and 12)

Held, that sub-section (2) of section 30-A of the Act requires that every scheme prepared under sub-section (1) shall, amongst other matters, set out the site of the outlet along with the possible realignment of the existing watercourse. It is, therefore, clear that a scheme can provide for realignment of an existing watercourse and in such a scheme the site of the outlet has to be specified. This would necessarily include the site of the outlet, or outlets on the existing watercourse as well as the site of the outlet or outlets on the watercourse at the proposed site of realignment. Hence the opening, closing or shifting or effecting reduction in size of an outlet is clearly envisaged in and authorised by clauses (a) and (d) of sub-section (1) of section 30-A of the Act and not under section 20.

(Para 12)

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Held, that the State Legislature has the power to make law in respect of water supply, irrigation and canals under item 17 of List II of Seventh Schedule of the Constitution read with Articles 245 and 246 of the Constitution. That being so the executive power of the State extends to the matter of water supplies, irrigation and canals and can be exercised in the manner provided by the Constitution in the entire field relating to those subjects which is not covered by either a Parliamentary legislation or an enactment made by the State Legislature. Inasmuch as matters of reduction in size, closing and shifting of an outlet on a canal have not been dealt with by any provision of the Act, the State can then reduce the size of an outlet or close it or shift it in exercise of its executive powers under Article 162, there being admittedly no parliamentary legislation covering that field. (*Obitra dicta*)

(Para 13)

Held, that though no application for revision against the rejection of a Scheme *in toto* would lie under sub-section (3) of section 30-B of the Act, a party aggrieved by an order approving a scheme subject to any modification has a right to move the appropriate canal authority under that provision.

(Para 25)

Held, that a plea not raised in a writ petition but specifically taken up in the affidavit-in-rejoinder of which the respondent has full notice cannot be ruled out of consideration on the ground that the plea was not raised for the first time in the writ petition itself.

(Para 24)

Petition under Articles 226 and 227 of the Constitution of India, praying that a writ in the nature of certiorari, mandamus or any other appropriate writ, order or direction be issued quashing the impugned order, dated 28th July, 1965 of the Divisional Canal Officer, Sirsa, Respondent No. 1.

H. S. GUJRAL AND M. M. PUNCHHI, ADVOCATES, for the Petitioner.

ANAND SARUP, ADVOCATE-GENERAL, HARYANA WITH J. C. VERMA, ADVOCATE, for Respondents Nos. 1 and 2.

M. S. RATTA, ADVOCATE, for Respondent 3.

JUDGMENT

The following Judgment of the Court was delivered by:—

NARULLA, J.—We propose to dispose of these three separate writ petitions by this common judgment as the principal point on account

of which they have been put up for hearing together is the same, namely :—

Whether the authorities under the Northern India Canal and Drainage Act No. VIII of 1873, as subsequently amended from time to time (hereinafter referred to as the Act) have any jurisdiction at all to close or shift an outlet once sanctioned and opened on a canal.

(2) For disposal of these cases it is necessary to notice the facts of one case in a little detail and a mere brief factual outline of the other cases. As the main arguments have been addressed in C.W. No. 466 of 1966—*Kundan Lal v. Divisional Canal Officer and 9 others*, the relevant facts leading to the filing of that petition may first be surveyed. Kundan Lal petitioner owns about 150 acres of agricultural land in village Panihari, tehsil Sirsa, district Hissar, which is being admittedly irrigated by the watercourse known as Sukhchain distributary of Bhakra main (hereinafter referred to as watercourse in question). In the past, the lands of the petitioner as well as of Seth Nand Lal and 7 others—respondent Nos. 3 to 10 in this petition—were being fed with canal water from the outlet fitted at the site R.D. 116,375-R on the watercourse in question. "R.D." connotes reduced distance from the head of the watercourse or distributary as the case may be. The letter 'R' at the end of the figure representing the distance denotes that the outlet is constructed on the right side. As some of the lands of the petitioner were on a higher level, upstream the outlet, a temporary shoot used to be allowed to the petitioner as a temporary measure at the point R.D. 112,000-R. during *kharif* season in the years prior to 1965 for irrigation under the Grow More Food Scheme. Though the parties are not agreed on the question whether action was taken on the application of respondents Nos. 3 to 10 or *suo motu*, the fact remains that a scheme was prepared under section 30-A of the Act for shifting the said outlet from its then existing site to a point at R.D. 116,750-R. The matter was investigated by the Zilladar concerned. Notices of the scheme were issued to all the concerned parties including the petitioner in accordance with the relevant rules. The Sub-Divisional Canal Officer, Sirsa, heard the parties concerned on April 24, 1965, inspected the site on May 10, 1965 and gave another hearing to the parties on May 23, 1965. The petitioner objected to the proposed shifting of the outlet further downstream on the ground that it would make irrigation of a part

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of his land lying upstream very difficult. In his decision, dated nil (copy at *Annexure 'A'*), the Sub-Divisional Officer held:—

“Under the above circumstances and from the site inspection is decided that the shifting is recommended from R.D. 116,375/R to R.D. 116,750/R in the interest of irrigation and also majority is willing in this change. The shifting may be confirmed.”

(3) The petitioner filed an appeal against the decision of the Sub-Divisional Officer. At the hearing of the appeal before the Divisional Canal Officer, Sirsa, Sirsa Division, on July 28, 1965. the petitioner repeated his objection to the effect that it was difficult for him to take water upstream in the reverse direction to a higher level and that if the outlet was shifted to the new proposed site, he would not be able to irrigate a part of his land. The petitioner suggested that the outlet may rather be shifted upsteraam to a point on the common boundary of villages Musahibwala and Pinhari. By his order of July 28, 1965 (*Annexure 'B'* to the writ petition) the Divisional Canal accepted the recommendation of the Sub-Divisional Officer and while confirming the scheme held:—

“The site proposed by the S.D.O. is at a high contour. The area of Shri Kundan Lal lies in depression and can be commanded from R.D. 116,750/R except a few acres just along the Disty. This area is less than 10 per cent of the total holdings of Shri Kundan Lal, while the premissible supply is for 62 per cent. The decision of S.D.O. is, therefore, confirmed.”

(4) After obtaining copies of the two orders (*Annexures 'A'* and *'B'*), the petitioner moved this court on March 10, 1966, under articles 226 and 227 of the Constitution for quashing both the said orders. At the time of its motion hearing on March 11, 1966, this case was admitted to a Division, Bench by Dua, J., and myself as the solitary question which was sought to be stressed by the petitioner related to the jurisdiction of the Canal authorities under the Act to shift an existing outlet and this question was being raised in a large number of writ petitions.

(5) The petition has been contested on behalf of the State as well as by respondent No. 3. Respondent No. 1, the Divisional Canal

Officer, has filed his return and the respondent No. 3 has submitted his separate written statement. With the leave of the Court granted in C.M. 4567 of 1966, the petitioner filed a further rejoinder in reply to the written statement of the Divisional Canal Officer. Though various disputed questions of fact have been raised in the replication, they are not material for deciding the solitary question in controversy raised in this particular case.

(6) In order to appreciate the submissions of Mr. Harbans Singh Gujral, learned counsel for the petitioner, who addressed us on the common question referred to above, it appears to be necessary to take notice of the provisions of section 20 and section 30-A (1) and (2) of the Act:—

“Whenever application is made to a Divisional Canal Officer for a supply of water from a canal, and it appears to him expedient that such supply should be given, and that it should be conveyed through some existing watercourse, he shall give notice to the persons responsible for the maintenance of such watercourse 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 Canal Officer shall determine whether and on what condition the said supply shall be conveyed through such watercourse.

When such officer determines that a supply of canal water may be conveyed through any watercourse as aforesaid, his decision shall when confirmed or modified by the Superintending Canal Officer be binding on the applicant and also on the persons responsible for the maintenance of the said watercourse. Such applicant shall not be entitled to use such watercourse until he has paid the expense of any alteration of such watercourse necessary in order to his being supplied through it, and also such share of the first cost of such watercourse as the Divisional or Superintending Canal Officer may determine. Such applicant shall also be liable for his share of the maintenance of such watercourse so long as he uses it.

30-A(1) Notwithstanding anything contained to the contrary in this Act and subject to the rules described by the State Government in this behalf, the Divisional Canal Officer

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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.
- (2) Every scheme prepared under sub-section (1) shall, amongst other matters set out the estimated cost thereof, the alignment of the proposed watercourse or realignment of the existing watercourse, as the case may be, the site of the outlet, the particulars of the shareholders to be benefited and other persons, who may be affected thereby, and a sketch plan of the area proposed to be covered by the scheme."

(7) Mr. Gujral submitted that the canal authorities do have the jurisdiction to construct or provide any number of additional or new outlets on any canal as the exigencies of irrigation may require. Once, however, an outlet has been provided either in accordance with a scheme or on the basis of any other order or even without any sanction, the same cannot, according to Mr. Gujral, be closed, reduced in size or shifted from its existing site by the authorities under the Act as there is no specific provision in the Act authorising such action being taken. Counsel argued that there are only two possible provisions under which such action may be justified and on a close analysis of the circumscribed limits of the jurisdiction conferred by those two provisions, viz., section 20 and section 30-A, it would appear that no authority is conferred by any of those sections to close or shift an outlet.

(8) So far as section 20 is concerned, it does not appear to present any difficulty. The opening part of the section provides for four things, i.e. :—

- (1) An application has to be made to a Divisional Canal Officer for supply of water from a canal;
- (2) it must appear to the Divisional Canal Officer to whom the application is made that it is expedient :
 - (a) that such supply should be given, and
 - (b) that the water to be supplied should be conveyed through some existing watercourse;
- (3) The Divisional Canal Officer shall give notice to the persons responsible for the maintenance of the watercourse in question to show cause why water should not be supplied as desired by the applicant or as thought expedient by the Divisional Canal Officer;
- (4) After service of such notice the Divisional Canal Officer has to make an inquiry into the claim of the applicant and the objections raised against it if any; and then to
- (5) determine whether and on what conditions the said supply shall be conveyed through such watercourse, i.e., through the existing watercourse.

(9) The above analysis of the opening part of section 20 would show that the only claim of an applicant which can be considered under that section is for the supply of water which has to be conveyed through some existing watercourse. The section does not at all refer to the making of a new watercourse or the construction, closing or shifting of an outlet. In *Manjit Singh and others v. the Superintending Engineering Upper Bari Doab Circle, Amritsar and others* (1), it was held by Shamsher Bahadur J., that section 20 is intended to apply to applicants who desire their fields to be served through an existing watercourse, but does not vest authority in the Divisional Canal Officer or indeed any other authority appointed under the Act to shut an existing outlet and shift it to another position on the canal. The learned Judge further observed that such a course is perhaps possible with the assent of the right-holders whose fields are irrigated through the existing outlet. In *Kishan Singh and others v. The State of Punjab* (2), it was held by Mahajan J., that there is no provision in

(1) 1964 P.L.R. 495.

(2) 1965 Cur. L.J. 39.

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the Act which permits the reduction of the size of an existing outlet though action to that effect can possibly be taken under section 30-A of the Act for which action there is a regular procedure prescribed in sections 30-B to 30-D. Though objection had also been taken originally in the writ petition of Kishan Singh and others to the decision to shift the existing outlet, the said matter ceased to be an issue at the time of the hearing of the case as in the return filed by the State it was categorically stated that the outlet was not being shifted and only its size was being reduced. Shamsheer Bahadur J., had another occasion to deal with the same matter in *Jit Singh and others v. The State and others* (3). An outlet had been constructed from the inception of Sadewa distributary. After six years the Divisional Canal Officer acting under section 20 ordered the shifting of the outlet to another place "in the interest of irrigation". It was held following the learned Judge's own previous judgment in *Manjit Singh's case* that section 20 of the Act does not invest power in the Divisional Canal Officer or indeed any other authority appointed under the Act to shut an existing outlet and to shift it to another position of the canal. It was made clear by the learned Judge that there was nothing to prevent the Divisional Canal Officer from opening another outlet but section 20 could not be used to close "an existing watercourse and shift it to another place." Whatever may be said about the power to shift an existing watercourse, it is clear that an existing outlet cannot be closed or shifted in exercise of the jurisdiction conferred on the canal authorities by section 20 of the Act. We are in full agreement with the above said judgments of the learned Single Judges on this question. We accordingly hold that section 20 does not authorise either the opening or closing or reduction in size of an existing outlet.

(10) This takes us to section 30-A of the Act. In order to deal with the arguments of the learned counsel on both sides in relation to this provision, it is necessary to quote the statutory definitions of "canal", and "watercourse" as contained in sub-sections (1) and (2) of section 3 of the Act.

(1) Canal. "Canal" includes—

(a) all canals, channels and reservoirs constructed, maintained or controlled by the State Government for the supply or storage of water :

(3) 1965 Cur. L.J. 554.

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- (b) all works, embankments, structures, supply and escape, channels connected with such canals, channels or reservoirs
 - (c) all watercourses, as defined in the 2nd clause of this section.
 - (d) all parts of a river, stream, lake or natural collection of water, or natural drainage channel, to which the State Government has applied the provisions of Part II of this Act;
 - (e) a field drain for the purposes of Section 70 of this Act.
- (2) Watercourse. "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 ;

(11) It would appear from the above quoted definitions of "canal" and "watercourse" contained in the interpretation clause of the Act that whereas all watercourses are canals, every canal is not a watercourse. Whereas a canal may be maintained by private persons or may be maintained at the cost of the State Government a watercourse, as defined in the Act, can only be such a channel conveying water "which is not maintained at the cost of the State Government." "Outlet" is not defined in the Act. It is, however, not in dispute that an outlet is the contrivance constructed on a canal from which water is supplied into a smaller canal. An outlet may be built and maintained at the cost of the State Government or may be constructed and built with the sanction and approval of the canal authorities at the cost of the right-holders whose lands are to be fed by the water-channel at the head of which the outlet is provided. There is nothing in the Act which might indicate that an outlet must like a watercourse be maintained at the cost of private persons. In the absence of such indication it has to be presumed that the learned counsel for the respondents are correct in stating that like any other part of a canal as defined in sub-section (1) of section 3, an outlet may be constructed or maintained by the State Government or by private persons. An outlet would be included in clause (b) of sub-section (1) of section 3 in the expression "all works, structures, supply and escape channels connected with such canals." It is significant to note that the words "maintained or controlled by the State Government" which occur in clause (a) do

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not occur in the above-quoted clause (b) of sub-section (1) of section 3. It, therefore, appears to be fair to conclude that an outlet like any other work, structure, or supply and escape channel may either be constructed and maintained by the State Government or by private persons. It is in the light of these facts emerging from the statutory definitions contained in the Act that section 30-A has to be interpreted. In an unreported judgment of Khanna, J., *Munshi Ram and others v. The Superintending Engineer and others* (4), (at page 16 of the short notes) the brief facts were like this. The lands of the writ-petitioners and of the contesting respondents were irrigated through outlet at R.D. 5210-L at Mali Minor of Sunder Sub-Branch of the Western Jamuna Canal, Hissar. The contesting respondents made an application to the Divisional Canal Officer for splitting up the outlet so as to provide them with a new outlet for irrigating their fields. The application was resisted by the writ petitioners. By his impugned order the Divisional Canal Officer sanctioned the splitting up of the existing outlet by providing a new outlet for the contesting respondents. The decision of the Divisional Canal Officer was affirmed by the Superintending Canal Officer. The canal authorities had purported to pass the impugned orders under section 20 of the Act. Counsel appearing before Khanna, J., agreed that the order could not be covered under section 20. Khanna, J., however, held that mere wrong mention of the section would not result in quashing of the order if it could be justified under any other provision of the law. It was held that as the impugned order in that case was in fact for the construction of a new watercourse for the purpose of ensuring equitable distribution of supply of water, it would be covered by clauses (a) and (d) of sub-section (1) of section 30-A reproduced above. An outlet was, therefore, treated by Khanna, J., as a part of a watercourse, the construction or alteration of which is authorised by clause (a) and the passing of any other order, which is necessary for the proper maintenance and distribution of supply of water from the watercourse, is covered by clause (d) of sub-section (1) of section 30-A. The precise question which has been mooted before us as the common question arising in all these three cases arose before me in Single Bench in *Piyare Lal and others v.*

(4) C.W. 1538 of 1964 decided on 30th October, 1964=1965 P.L.R.(S.N.) 32 at page 16.

The State of Punjab (5). After referring to the judgment of Shamsher Bahadur, J., in *Manjit Singh and others* and of Mahajan, J., in *Kishan Singh and others*, I held in that case that clause (d) of sub-section (1) of section 30-A is wide enough to cover "any other matter" not specified in clauses (a), (b) and (c) of that sub-section which might be considered to be necessary for the proper maintenance and distribution of supply of water. It was, therefore, held in *Piyara Lal's case* that the closure or the opening or the shifting of an existing outlet would certainly be a matter connected with the proper maintenance and distribution of supply of water in appropriate cases. While so holding I also treated, like Khanna, J., an outlet as a part of a watercourse. The situation in which an outlet exists shows that it is necessarily a part of one or other or even of both the canals at the junction of which it is constructed. It is a part and parcel of the canal from which water has to flow through the outlet into the smaller channel of which also it can be said to form an integral portion. The same question arose before Grover, J., in *Mohan Singh and others v. The Divisional Canal Officer and others* (6). Grover, J., (now adorning the Bench of the Supreme Court) held that section 30-A of the Act has to be read as a whole and sub-clause (d) of sub-section (1) when read with sub-section (2) would indicate that the site of the outlet has to be covered by the scheme which is to be prepared under sub-section (1) and, therefore, it would be futile to argue that the site of the outlet cannot be changed in any scheme framed under that section. The learned Judge observed that a scheme relating to irrigation through a watercourse is bound in the very nature of things to include the outlet from which the watercourse is to receive water and it is difficult to concede that the Legislature should have made no provision in that behalf. The learned Judge referred to my judgment in *Piyara Lal's case* and approved of the law laid down therein regarding the scope of section 30-A(1)(d) of the Act. No judgment taking the contrary view has been cited before us.

(12) The preamble of the Act shows that it was enacted to amend the law relating to irrigation, navigation and drainage in northern India as it was considered expedient to do so to enable

(5) 1966 Cur. L.J. 3.

(6) I.L.R. (1967) 2 Punj. & Hry. 488=1967 P.L.R. 204.

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the Government to use and control for public purposes the water of all rivers and streams flowing in natural channels and of all lakes and other natural collections of still water. It cannot possibly be denied that it would be practically impossible to achieve the objects of the Act if the authorities under the statute are not entitled to close, shift or open outlets in the canals including watercourses. Still we would be bound to so hold if the plain language of any provision in the Act were to say so. It is, however, conceded by both sides that there is no express or implied prohibition against the closing or shifting of an outlet in the Act. What is contended on behalf of the petitioner is that no express provision authorising the closing or shifting of an outlet being there in the Act, and the jurisdiction of the authorities under the Act being circumscribed by the provisions therein, no Divisional Canal Officer can exercise the jurisdiction to close or shift an outlet because it is not vested in him. The argument appears to be misconceived. It is a settled principle of law that while construing any provision in an enactment, every possible attempt should be made to adopt a harmonious construction and to avoid absurdities and anomalies. For achieving this result Court may go to the length of even changing the structure of a sentence in a particular section of an Act. If sub-section (1) of section 30-A was construed in the manner canvassed by the petitioners, it would have to be held that the canal authorities can completely shift a watercourse from its previous position so as to obliterate and close it, and to open a new watercourse right from the embankment of the canal in question by opening a new outlet, but the previous outlet must be left intact though it will be absolutely useless for practical purposes as no watercourse would be in existence which the previous outlet can feed. Similarly, the interpretation proposed by the petitioners would lead to incapacitating the canal authorities from closing an outlet which may be constructed by an admitted mistake by the subordinate authorities on account of some misunderstanding or mis-construction of the order for the opening of a new outlet at a different place. Similarly, it is conceded that by operation of clause (b) of sub-section (1) of section 30-A, the authorities under the Act have the jurisdiction to reallocate the entire area which was served by an existing watercourse to a new watercourse, thus leaving no land at all to be served by the previous watercourse. According to the petitioners the whole of the previous watercourse may in such circumstances be closed but the outlet must be left

intact. It appears to be proper that such anomalies and absurdities should be avoided if possible while construing sub-section (1) of section 30-A. I think "the construction—of any watercourse" in clause (a) of sub-section (1) of section 30-A includes the construction of a new outlet from which the watercourse has to be fed. If that is so the "alteration of any watercourse" in the same clause would possibly envisage the shifting of the watercourse including its outlet to a new position. Moreover, it is conceded, and rightly too, that the word "watercourse" in clause (d) of section 30-A (1) includes a new watercourse proposed in the scheme prepared under that section. That being so, it would necessarily include a new outlet. Similarly, there is no repugnancy in construing the watercourse in clause (d) to include an existing watercourse. Here again the watercourse would include the outlet from which it is fed as well as the outlets on the watercourse itself from which further channels or distributaries shoot off. It is not possible to contradict the fact that in order to ensure proper distribution of supply of water from a new watercourse, it may become necessary to close an old watercourse or an existing outlet or to reduce its size or to shift the same. What is, therefore, said by the petitioners to be not allowed by the Act appears to be clearly envisaged by clause (d) of sub-section (1) of section 30-A. It has become particularly clear when sub-section (2) of the section is read with clause (d) of sub-section (1). Sub-section (2) requires that every scheme prepared under sub-section (1) shall, amongst other matters, set out the site of the outlet alongwith the possible realignment of the existing watercourse. It is, therefore, clear that a scheme can provide for realignment of an existing watercourse and in such a scheme the site of the outlet has to be specified. This would necessarily include the site of the outlet, or outlets on the existing watercourse as well as the site of the outlet or outlets on the watercourse at the proposed site of realignment. To ask the question whether this means authorising the closing or shifting of an existing outlet or not is to answer the question. We are, therefore, in full agreement with the judgment of Grover, J., in *Mohan Singh's case* that the opening, closing or shifting or effecting reduction in size of an outlet is clearly envisaged in and authorised by clauses (a) and (d) of sub-section (1) of section 30-A of the Act and we hold accordingly.

(13) In the view we have taken of the main contention raised by the petitioners, it is really not necessary to deal with two other contentions of the learned Advocate-General, Haryana, but in

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fairness to him we must take notice thereof. His first argument was that even if the contention of the petitioners is deemed to be correct, the action of the Government in closing or shifting an outlet cannot be assailed because admittedly there being no prohibition in the Act for such an action being taken, the Government would be entitled to adopt such a course in exercise of its executive powers under Article 162 of the Constitution. Article 162 provides that the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. The proviso to the Article directs that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof. The distribution of legislative powers is prescribed by Articles 245 and 246 of the Constitution. The State Legislature is entitled to make laws for the whole or any part of the State in respect of any of the matters enumerated in List II of the Seventh Schedule (referred to as the "State List") as well as in respect of the matters enumerated in the "Concurrent List", i.e., List III in the Seventh Schedule of the Constitution subject to certain reservations mentioned in Article 246. In List II, item 17 authorises the State Legislature to make laws in respect of "water that is to say water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I". Entry 56 of List I (Union List) relates to regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest. There is, therefore, no doubt that the State Legislature has the powers to make law in respect of water supply, irrigation and canals under item 17 of List II of Seventh Schedule of the Constitution read with Articles 245 and 246 of the Constitution. That being so, it is equally plain that the executive power of the State extends to the matter of water supplies, irrigation and canals and can be exercised in the manner provided by the Constitution in the entire field relating to those subjects which is not covered by either a parliamentary legislation or an enactment made by the State Legislature. It is on this basis that the learned Advocate-General for the State of Haryana submitted that if the Court finds that the matter of reduction in size, closing and shifting of an outlet on a canal is a subject which is not dealt

with by any provision of the Act, the State can then reduce the size of an outlet or close it or shift it in exercise of its executive powers under Article 162, there being admittedly no parliamentary legislation covering that field. In view of our finding to the effect that the Act clearly and unambiguously provides for the closing, shifting or reduction in size of an outlet on a canal, it is unnecessary to deal with this contention of the learned Advocate-General any further. I am, however, of the opinion that If I had found that there is really no provision in the Act authorising shifting or closing of an outlet, I would have held that there is logic in the argument of Mr. Anand Sarup and that the State can shift or close an outlet in exercise of its executive power. Even in that eventuality it may not have been possible to save the impugned order in the present case as the executive power of the State under Article 162 of the Constitution has to be exercised in accordance with the provisions of Article 166 of the Constitution inasmuch as orders passed in exercise of executive power should be expressed to be taken in the name of the Governor and have to be authenticated in such a manner as may be specified in the relevant rules made by the Governor. The executive power of the State is by virtue of Article 154 of the Constitution vested in the Governor and can be exercised either by himself directly or through officers subordinate to him in accordance with the procedure laid down in Article 166. The impugned orders do not *prima facie* appear to have been passed in exercise of the executive power of the State and inasmuch as they had not satisfied the requirements of Article 154 and Article 166 of the Constitution, they would not have been sustained by me if I had found against the State on the first main point raised by Mr. Gujral.

(14) The second hurdle which was suggested to stand in the way of the petitioners even in case of their success on the main point was that in view of the provisions of section 32(f) of the Act, the petitioners have no right to use canal water, more so, from any particular outlet and in the absence of a legal right having been infringed, the petitioners have no cause of action under Article 226 of the Constitution. Sub-section (f) of section 32 of the Act provides that no right to the use of the water of a canal shall be, or be deemed to have been acquired under the Indian Limitation Act, 1871, Part IV, "nor shall the State Government be bound to supply any person with water, except in accordance with the terms of a contract in writing." The argument was that the claim of the petitioners not being based on the terms of a written contract, the State Government is not

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bound to supply them with water at all much less from the outlet of the choice of the petitioners. As already stated, it is unnecessary to deal with this argument in view of our finding on the main question being against the petitioners. No other point having been argued in *Kundan Lal's* case C.W. 466 of 1966 must fail.

(15) In C.W. 1733 of 1967—*Kanhi Ram and others v. Superintending Engineer and another*—the main point urged by the petitioners fails for the reasons already stated, though it was sought to be argued on behalf of the respondents that the said point does not really directly arise in this case. What happened in *Kanhi Ram's* case was this. The 20 writ petitioners in the case are residents of village Nathusari Kalan, tehsil Sirsa, district Hissar. The village was irrigated from outlet No. R.D. 38000/L at Kutian distributary. Villages Hanzira, Rampura Dhillan and Gigorani were also irrigated from the same outlet. Some residents of the village Gigorani made an application in 1964 for shifting of the above-said outlet to a point at R.D. 38900/L. This was done under the order of the Superintending Canal Officer, Hissar, dated October 30, 1964 (Annexure 'A' and 'A/1'). Kanhi Ram and others, writ petitioners, felt aggrieved by the said order and preferred an appeal against the same. By order dated May 17, 1967, (Annexure 'B') the Superintending Canal Officer, Bhakra Canals, Hissar, dismissed the appeal of the petitioners on two grounds, viz:—

- (i) The outlet was previously at R.D. 38000/L and was shifted to R.D. 38900/L in 1964 and irrigation was also improved after shifting; and
- (ii) according to the ruling of the High Court in C.W. 1486 of 1963, the outlet cannot be shifted unless all the shareholders agree.

(16) It is against the above said order rejecting the appeal of the petitioners that C.W. 1733 of 1967 was filed. In effect what has been impugned is the shifting of the outlet to its present site at R.D. 38900/L in pursuance of the order, dated October 30, 1964 (Annexure 'A'). It was on this account that the learned Advocate-General submitted that the petitioners were guilty of laches. In addition to the main question already dealt with, it was contended by the learned counsel for the petitioners that the procedure prescribed by sections 30-A to 30-F of the Act had not been followed for shifting the outlet and that the shifting has been done in exercise of the purported powers vested under section 20 of the Act, under

which provision the shifting could not be effected. In reply to those allegations in the writ petition, it has been said in the affidavit of Shri S. P. Malhotra, Superintending Canal Officer, Hissar, that the shifting has been done on the application of the shareholders of the watercourse for its proper working and that no representation or petition was received from the petitioners at the time of the passing of the order in October, 1964. It was only on March 24, 1966, (vide paragraph 4 of the return) that the petitioners applied for re-shifting of the outlet to its original position. It was this application of the petitioners for re-shifting which was rejected by the Divisional Canal Officer, on January 20, 1967, against which order the petitioners' appeal was rejected on May 17, 1967. In paragraph 5 of the State's return, it has been unequivocally stated that the shifting had been done in October, 1964 "after dealing with the case under section 30-A to F" of the Act. In reply to the allegations made in paragraph 5 of the writ petition, the Superintending Canal Officer has deposed in his return as below:—

"The previous shifting of the outlet from R.D. 3800-L Kutiana Distributary to 38900-L was done during October, 1964 when no objection or appeal was received from any of the shareholders, as such the appeal of the petitioners on 29th September, 1966 (after a period of two years) was time-barred. However, the case was again investigated and rejected by the Divisional Canal Officer on 20th January, 1967 after observing all formalities under Section 30-A to F of the Canal and Drainage Act, 1873."

(17) The writ petition appears to have been admitted because of the main point taken in it. This is obvious from the order of the Motion Bench dated August 25, 1967 saying : "Mr. P. C. Jain says a similar point has been raised in C.W. 466 of 1966 (*Kundan Lal v. Divisional Canal Officer.*) Admitted." The above-quoted order of the Motion Bench shows that the writ petition would not have been admitted in August, 1967, but for the common point referred to above. Learned counsel for the petitioners could, in addition argue only this that at the time of passing the previous order in 1964, the prescribed procedure had not been followed. Not only is this plea highly belated but the plea does not, in our opinion, permit of being urged in this case as the respondents maintain that the procedure required by those provisions of the Act was duly followed. This writ petition must also, therefore, fail.

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(18) This takes us to the case of *Surat Singh and others v. State of Haryana and others* C.W. 971 of 1967. Ten writ petitioners in this case reside and own lands in village Durjan Pur, tehsil Narwana, district Jind. It is stated by the petitioners (paragraph 2 of the writ petition) and admitted by the State in its return that the entire land of all the petitioners in village Durjan Pur was being irrigated for about 15 years prior to the filing of the writ petition from outlet No 28500-L of Surbra distributary. The lands of Durjan Pur form a tri-junction with the lands of village Hasan Garh and village Latani. There is a common boundary between the lands of Latani and Durjan Pur. The lands in villages Hasan Garh and Latani used to be served by one common outlet at point R.D. 29500-R. This is stated in paragraph 5 of the writ petition and has been admitted in the corresponding paragraph of the affidavit of the Superintending Canal Officer, Bhakra Canal Circle, Hissar. There was considerable tension between the residents of the two villages (Hasan Garh on the one hand and Latani on the other) in connection with the irrigation of their respective lands from outlet R.D. 29500-R. The residents of village Hasan Garh (with whom and with whose interests we are not concerned in this writ petition) applied to the canal authorities for the transfer of the Latani lands to some other outlet. Their application came up before the Divisional Canal Officer, Fatehabad Division, Hissar. The said officer by his order dated April 8, 1966 (Annexure 'A') held that there would be genuine apprehension of breach of peace if the areas of village Latani (99 acres of culturable commanded area) remain included in the same outlet. The order of the Divisional Canal Officer states that the shareholders of outlet No. R.D. 22760/L belonged to village Durjan Pur and to village Latani and that major portion of the area fed by the said outlet (592 acres of the culturable commanded area) belonged to village Durjan Pur. The Divisional Canal Officer agreed with the contention of residents of Durjan Pur that they were justified in not agreeing at any cost to include 99 acres of village Latani in the same outlet. He, therefore, directed that the said area of village Latani may be included in the outlet at R.D. 29500-R through a siphon as the villagers did not want to have a separate outlet for that area though they also did not agree to the siphon being constructed. It was then directed :

"The only practical solution, therefore, is to include this area on outlet R.D. 29500-R through a siphon. Outlet R.D. 29500-R. Contain to (to continue for the) land of village Latani."

(19) The residents of village Latani did not agree to the order of the Divisional Canal Officer Respondent No. 5 who is a resident of that village filed an application for revision of the order, dated April 8, 1966 (Annexure 'A') to the Superintending Canal Officer. The last mentioned officer by his order, dated June 21, 1966 (Annexure 'B') held that irrigation through a siphon could be resorted to only in exceptional cases and inasmuch as the *chak* of village Durjan Pur had a culturable commanded area of 675 acres only which was not a very big *chak* the area of village Latani on the left side of the distributary should be irrigated from the outlet R.D. 28760-L. The result of the said appellate order was that outlet R.D. 28760-L was to feed the lands of the petitioners as well as certain lands of the residents of village Latani including those of respondent No. 5. Up to this stage no question of shifting of any outlet arose in this case and all that was being decided was whether it was or was not necessary to shift certain areas of culturable land from one outlet to another. What, however, happened subsequently was that on the revision petition filed by the villagers of Durjan Pur, the Superintending Canal Officer held by his subsequent order dated April 14, 1967 (Annexure 'C') that he was satisfied that the outlet should be located at the boundary of villages Durjan Pur and Latani at R.D. 28760-L and that "if there is any little variation" his orders were that "the outlet should be fixed at the village boundary so that the *chak* of village Durjan Pur and the area of Latani lying on the left side is irrigated from this source." Though the Superintending Canal Officer rejected the application of the villagers of Durjan Pur in the last sentence of his order (Annexure 'C'), he gave the direction, quoted-above, for the shifting of the outlet, if necessary, so that it may not necessarily remain where it actually was but would be ensured to exist at the point R.D. 28760-L. The residents of village Durjan Pur were satisfied with the order (Annexure 'A') but were dissatisfied with both the orders of the Superintending Canal Officer and, therefore, filed this writ petition to quash the same (Annexures 'B' and 'C'). The first point mentioned in the writ petition as well as urged before us was that the canal authorities could not direct the shifting of the existing outlet. We have already held in the main case that there is no force in this contention.

(20) Nor is there any force in the additional point urged in this case by Mr. Surinder Sarup, Advocate to the effect that the second order of the Superintending Canal Officer (Annexure 'C') was without jurisdiction as he had no power of reviewing his earlier order. In

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fact the Superintending Canal Officer merely rejected the application of the petitioners for review of his earlier order (Annexure 'B'). The direction of shifting the outlet if necessary, was in the nature a step for execution of his earlier order for keeping the residents of village Durjan Pur as well as the contesting respondent (respondent No. 5) and other concerned residents of village Latani on the same outlet at point R.D. 28760-L. His giving the additional direction of shifting the outlet in question if it was not at the place already directed by him in his order (Annexure 'B') does not in our opinion amount to reviewing his earlier order.

(21) Mr. Surinder Sarup then submitted that the application of respondent No. 5 and others to the Superintending Canal Officer for setting aside or revising the order of the Divisional Canal Officer, dated April 8, 1966 (Annexure 'A') was not competent and that, therefore, the order Annexure 'B' was wholly without jurisdiction. This submission was based on the language of section 30-B(3) of the Act. Since it is conceded by the learned counsel for respondent No. 5 that the application on which the order in Annexure 'B' was passed had been made by respondent No. 5 and others under that provision, it is necessary to notice sub-section (3) of section 30-B. It reads :

"The Superintending Canal Officer may, *suo motu* at any time or on an application by any person aggrieved by the approved scheme made within a period of thirty days from the date of publication of the particulars of the scheme under section 30-C, revise the scheme approved by the Divisional Canal Officer : Provided"

(22) The argument is that the Divisional Canal Officer had not approved the scheme for shifting the Latani lands from the common outlet but had carved out a new provision for creating a siphon in his order at Annexure 'A' and since the Superintending Canal Officer had not acted *suo motu* and had acted on an application of the Latani villagers, he could have jurisdiction to act under the above-quoted provision only if the order under appeal before him (Annexure 'A') had approved of the scheme. In this case, it is admitted, that the scheme had been varied.

(23) A preliminary objection was raised by Mr. G.P.S. Dhillon learned counsel for respondent No. 5 against this point being permitted to be argued on the ground that the point was not taken in

the writ petition though it has admittedly been mentioned in the replication. Mr. Surinder Sarup repelled this contention by referring to the Judgment of the Supreme Court in *A. St. Arunachalam Pillai v. M/s. Southern Roadways Ltd., and another* (7), wherein it was held :

“In a petition under Art. 226 for a writ of certiorari to quash certain order, the High Court acts rightly in allowing the petitioner to urge a plea which goes to the root of the matter and is based on a Division Bench decision of the High Court arrived at since the filing of the writ petition, although the petitioner had submitted to the jurisdiction of the authority whose jurisdiction was being questioned by the new plea and had not taken the objection in his petition under Article 226.”

(24) The argument was that it was during the pendency of this writ petition that it was laid down by a Division Bench of this Court in *Risal Singh and others v. The State of Haryana and others* (8) and by a learned Single Judge of this Court in *Ram Rikh v. State of Haryana and others* (9), that sub-section (3) of section 30-B of the Act gives the Superintending Canal Officer the power to interfere with the application of any person aggrieved “by the approved scheme” and to “revise the scheme approved by the Divisional Canal Officer.” It was further held in those cases that the jurisdiction of the Superintending Canal Officer is to revise the scheme which has been approved by the Divisional Canal Officer and that no application under section 30-B (3) of the Act lies against the rejection of a scheme *in toto*. It is again submitted on the authority of the judgment of their Lordships of the Supreme Court in *Sri-la Sri Subramania Desika Ghanasambanda Pandarasannidi v. State of Madras and another* (10), that a plea not raised in a writ petition but specifically taken up in the affidavit-in-rejoinder of which the respondent has full notice cannot be ruled out of consideration on the ground that the plea was not raised for the first time in the writ petition itself. In view of the authorities referred to by Mr. Surinder Sarup, we find no force in the preliminary objection of Mr. Dhillon and accordingly reject the same.

(7) A.I.R. 1960 S.C. 1191.

(8) C.W. 537 of 1967 decided on 8th April, 1968.

(9) 1968 Cur. L.J. 356.

(10) A.I.R. 1965 S.C. 1578.

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(25) On the merits of the point, however, we find no force in the contention of Mr. Surinder Sarup. After a scheme is published under sub-section (1) of section 30-B and objections against the same are considered, the Divisional Canal Officer is authorised by sub-section (2) of that section to either "approve the scheme as it was originally prepared or in such modified form as he may consider fit" so that a proposed scheme approved subject to certain modifications would be as good an approved scheme within the meaning of sub-section (3) of section 30-B as a scheme approved without any modification. In the cases on which the learned counsel for the petitioner relied, the scheme had been rejected *in toto*. In the case in hand, the situation is different. The scheme was approved by the Divisional Canal Officer in a modified form. We would hold that though no application against the rejection of a scheme *in toto* would lie under sub-section (3) of section 30-B a party aggrieved by an order approving a scheme subject to any modification has a right to move the appropriate canal authority under that provision. No other point produced in the Court but the learned Sub-Judge held that the question having been argued in this case, the third writ petition must also fail.

(26) For the foregoing reasons we dismiss all these three writ petitions though without making any order for costs in either of them.

R.N.M.

REVISIONAL CIVIL

Before Mehar Singh, C.J. and Bal Raj Tuli, J.

UNION OF INDIA AND ANOTHER,—*Petitioners*

versus

OM PARKASH GUPTA, *Respondent*

Civil Revision No. 426 of 1968

August 26, 1968

Evidence Act (I of 1872)—Ss. 121 to 131—Contents of a privileged document—Whether can be proved by any mode of primary or secondary evidence—S. 129—Expression "no one"—Interpretation of—A client showing a letter of his legal