

State Government could not be said to have taken a decision without any just cause or basis. At any rate, I am not sitting as a Court of appeal against the order of the State Government so as to interfere in its discretion when the action taken by it is not shown to be contrary to law, *mala fide* or without jurisdiction.

(13) For the foregoing reasons, there is no merit in the writ petition which stands dismissed with no order as to costs.

B.S.G.

CIVIL MISCELLANEOUS.

Before A. D. Koshal, J.

PIRTHI AND OTHERS,—*Petitioners*

versus

THE SUPERINTENDING CANAL OFFICER AND
ANOTHER,—*Respondents.*

Civil Writ No. 744 of 1970.

May 29, 1970.

Northern India Canal and Drainage Act (VII of 1873)—Sections 30-A, 30-B and 30-FF—The word ‘may’ in section 30-FF(3)—Whether means ‘shall’—Notice issued under section 30-FF(2)—Such notice not complied with—Divisional Canal Officer—Whether bound to restore the watercourse to its original condition—Approval of scheme envisaged by section 30-A without following the prescribed procedure—Whether without jurisdiction.

Held, that ordinarily the word ‘may’ does not connote a duty but signifies the conferment of an option, but sometimes by the word ‘may’ the legislature really issues a mandate and enjoins upon the authority concerned a duty to be compulsorily performed. In each particular case it will be a question depending upon the context in which the word is used as to whether it casts a duty upon or gives an option to the authority concerned. In the context in which the word ‘may’ occurs in sub-section (3) of Section 30-FF of the Northern India Canal and Drainage Act, 1873, it means ‘shall’ or ‘must’. An option is given under sub-section (1) of Section 30-FF of the Act to any person affected by the demolition, alternation, enlargement or obstruction of a watercourse to apply to the Divisional Canal Officer for directing the restoration of the watercourse and under sub-section (2) to the Divisional Canal Officer to issue a notice of the requisite type in proper cases. Once the notice is

Pirithi, etc. v. The Superintending Canal Officer, etc. (Koshal, J.)

issued under section 30-FF(2) to a person who fails to comply with the same, the Divisional Canal Officer is not at liberty either to restore the watercourse or to decline to do so. He is bound to restore the watercourse to its original condition. The whole purpose of sub-section (3), which is obviously enacted in the interest of the person affected by the demolition etc., would be defeated, if any other interpretation is put upon the word 'may' in section 30FF(3). (Paras 4 and 6)

Held, that before a Divisional Canal Officer can exercise the right to approve a scheme envisaged in section 30-A of the Act, he has got to go through the procedure specified in that and the following section with regard to its contents, publication and also to the inviting, hearing and consideration of objections, etc. Compliance with that procedure is a *sine qua non* for the approval of the scheme and unless that procedure is observed the Divisional Canal Officer has no jurisdiction to make a direction with regard to the matters covered by clauses (a) to (d) of sub-section (1) of section 30-A which include the alteration and re-alignment of any existing watercourse. (Para 8)

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 order of respondent No. 1, dated 9th of January, 1970 and further directing respondent No. 1 and the Divisional Canal Officer, Rohtak to exercise the jurisdiction vested in them under section 30-FF of the Canal and Drainage Act in accordance with law and to have the old running dismantled watercourse restored.

ANAND SARUP, ADVOCATE WITH R. S. MITTAL, ADVOCATE, for the Petitioners.

ASHOK BHAN, ADVOCATE, FOR ADVOCATE-GENERAL (HARYANA) for respondent No. 1, P. S. JAIN, ADVOCATE, for Respondent No. 2.

JUDGMENT.

A. D. KOSHAL, J.—In this petition under Articles 226 and 227 of the Constitution of India 40 land-owners of village Nidhana, Tahsil Gohana, District Rohtak, have attacked an order, dated the 9th of January, 1970 (annexure 'C') passed by the Superintending Canal Officer, Western Jamuna Canal, West Circle, Rohtak (respondent No. 1), upholding one, dated the 21st of October, 1969 (Annexure 'B') passed by the Divisional Canal Officer concerned refusing to restore a watercourse demolished by respondent No. 2.

(2) The facts giving rise to the petition may be stated thus. The lands of the petitioners were served by a watercourse, part of

which is designated by letters AD in plan annexure 'A' (that part is hereinafter referred to as watercourse AD). Sometime between the 28th of August, 1969, and the 3rd of September, 1969, respondent No. 2 demolished watercourse AD and instead dug out another designated by letters ABCD in the said plan (hereinafter referred to as watercourse ABCD). It being the case of the petitioners that watercourse ABCD was situated at a higher level than that of watercourse AD and that irrigation water from the canal could not reach it effectively, they made an application to the Divisional Canal Officer, Rohtak Division, Rohtak, on the 3rd of September, 1969, under sub-section (1) of section 30-FF of the Northern India Canal and Drainage Act, 1873 (hereinafter referred to as the Act), for restoration of the dismantled watercourse AD. On a reference made to them, the Ziladar and the Sub-Divisional Officer concerned reported to the Divisional Canal Officer that respondent No. 2 had dismantled an existing watercourse AD which he had replaced by watercourse ABCD, and which could not serve the petitioners as a proper means of irrigation for their lands. Both the subordinate officers recommended that watercourse AD be restored. The Divisional Canal Officer then served respondent No. 2 with a notice under sub-section (2) of section 30-FF directing him to restore watercourse AD as it already existed. Respondent No. 2 did not comply with the notice and, on the other hand, made an application to the Divisional Canal Officer praying that an alternative watercourse along the boundary line of his fields be allowed to be constructed. On this application the Divisional Canal Officer found that watercourse AD was harmful to the interests of respondent No. 2 and that watercourse ABCD which ran along the boundary line of the fields owned by respondent No. 2 was "most suitable and the irrigation of the shareholders of this watercourse cannot be said to have suffered in any way". In these circumstances he considered it unnecessary to get the dismantled watercourse restored and accordingly passed order annexure 'B', which the petitioner sought to have revised by respondent No. 1 under the provisions of sub-section (3) of section 30-B of the Act as it purported to sanction a scheme for the alteration or realignment of an existing watercourse without recourse to the provisions of sections 30-A and 30-B of the Act. Respondent No. 1, however, rejected the petitioners' revision petition and upheld the decision of the Divisional Canal Officer solely on the ground that the site inspection made by the latter clearly indicated that "the alternative watercourse should serve the interest of the petitioners as satisfactorily as from the old water-

Pirithi, etc. v. The Superintending Canal Officer, etc. (Koshal, J.)

course." It is his order (annexure 'C') passed in this behalf which is attacked being illegal and without jurisdiction on the following grounds :—

- (i) After having issued a notice to respondent No. 2 in terms of sub-section (2) of section 30-FF of the Act, the Divisional Canal Officer was legally bound to restore the watercourse to its original condition if the notice was not complied with.
- (ii) By approving the action of respondent No. 2 in providing watercourse ABCD and by reason thereof refusing to have watercourse AD restored, the Divisional Canal Officer really and in effect approved a scheme envisaged by section 30-A of the Act without, however, going through the procedure described in that and the following section. The order of the Divisional Canal Officer was, therefore, without jurisdiction and so was the impugned order.

(3) I find that there is substance in both the above grounds. In order to appreciate ground (i), it is necessary to make a reference to the provisions of section 30-FF, which runs thus :—

Section 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."

"(4) Any person aggrieved by the order of the Divisional Canal Officer, may prefer an appeal within thirty days of the passing of such order, to the Superintending Canal Officer, whose decision on such appeal shall be final."

"(5) Any sum which remains unpaid within a period to be specified for this purpose by the Divisional Canal Officer may be recovered by the Collector from the defaulting person as if it were an arrear of land revenue."

(4) It is contended by Mr. Anand Sarup, learned counsel for the petitioners, that the word "may" occurring in sub-section (3) of the section means "shall" and that after having gone through the procedure prescribed by sub-section (1) and (2) of the section, the Divisional Canal Officer was duty-bound to restore watercourse AD to its original condition, after respondent No. 2 had failed to restore the same within the period specified in the notice served on him under sub-section (2). The contention, in my opinion, is unexceptionable. It is true that ordinarily the word "may" does not connote a duty but signifies the conferment of an option. Cases, however, are not wanting when by the word "may" the legislature really issues a mandate and enjoins upon the authority concerned a duty to be compulsorily performed. In each particular case it will be a question depending upon the context in which the word is used as to whether it casts a duty upon or gives an option to the authority concerned. In this connection, guidance is available from *Province of Bombay v. Khushaldas S. Advani*, (1) and *State of Uttar Pradesh v. Jogendra Singh*, (2). In *Province of Bombay v. Khushaldas S. Advani* (1) (supra), Das, J., (as he then was) observed:

The authorities show that in construing a power the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation. They are read as compulsory where they are words to effectuate a legal right."

(1) A.I.R. 1950 S.C. 222.

(2) A.I.R. 1963 S.C. 1618.

Pirithi, etc. v. The Superintending Canal Officer, etc. (Koshal, J.)

(5) *State of Uttar Pradesh v. Jogendra Singh* (2) (*supra*) deals with the interpretation of the word "may" in sub-rule (2) of Rule 4 of the U.P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, That sub-rule is to the following effect :—

"The Governor may, in respect of a gazetted government servant on his own request, refer his case to the Tribunal in respect of matters referred to in sub-rule (1)."

(6) In holding that the word "may" in this sub-rule means "shall", their Lordships observed :

"Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in clauses (a) to (d) of sub-rule (1). The question for our decision is whether like the word 'may' in rule 4(1) which confers the discretion on the Governor, the word 'may' in sub-rule (2) confers the discretion on him, or does the word 'may' in sub-rule (2) really mean 'shall' or 'must'. There is no doubt that the word 'may' generally does not mean 'must' or 'shall'. But it is well-settled that the word 'may' is capable of meaning 'must' or 'shall' in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word 'may' which denotes discretion should be construed to mean a command. Sometimes, the legislature uses the word 'may' out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of rule 4(2) would be frustrated if the word 'may' in the said rule receives the same construction as in sub-rule (1). It is because in regard to gazetted government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule-making authority wanted to make a special provision in respect of them as distinguished from other government servants falling

under rule 4(1) and rule 4(2), otherwise rule 4(2) would be wholly redundant. In other words, the plain and unambiguous object of enacting rule 4(2) is to provide an option to the gazetted government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the gazetted government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in accepting the view taken by the High Court that rule 4(2) imposes an obligation on the Governor to grant a request made by the gazetted government servant that his case should be referred to the Tribunal under the Rules. Such a request was admittedly made by the respondent and has not been granted."

The observations made in these two cases apply fully to sub-section (3) of section 30-FF of the Act. An option is given under sub-section (1) to any person affected by the demolition, alteration, enlargement or obstruction of a watercourse to apply to the Divisional Canal Officer for directing the restoration of the watercourse and under sub-section (2) to the Divisional Canal Officer to issue a notice of the requisite type in proper cases. Now if it is held that once the notice is issued to a person who fails to comply with the same, the Divisional Canal Officer is at liberty either to restore the watercourse or to decline to do so, the whole purpose of sub-section (3), which was obviously enacted in the interest of the person affected by the demolition, etc., would be defeated. In the context in which the word "may" occurs in the sub-section, therefore, it must be held to mean "shall" or "must". It follows that the Divisional Canal Officer had no power to decline the restoration of the watercourse to its original condition after respondent No. 2 had failed to do the same in spite of a notice issued to him under sub-section (2).

(7) Ground (ii) is based on the provisions of sections 30-A and 30-B of the Act which may be quoted *in extenso* for facility of reference.

Section 30-A

"(1) Notwithstanding anything contained to the contrary in 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 clearance;
 - (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 estimate 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.”

Section 30-B.

- “(1) Every scheme shall, as soon as may be after its preparation, be published in such form and manner as may be prescribed by rules made in this behalf for inviting objections and suggestions with respect thereof within twenty-one days of the publication.”
- “(2) After considering such objections and suggestions, if any, the Divisional Canal Officer shall approve the scheme either as it was originally prepared or in such modified form as he may consider fit.”
- “(3) The Superintending Canal Officer may, *suo muto* 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-A, revise the scheme approved by the Divisional Canal Officer;

Provided that such revision shall not be made without affording to the person affected an opportunity of being heard."

(8) Before a Divisional Canal Officer can exercise the right to approve a scheme envisaged in section 30-A, he has got to go through the procedure specified in that and the following section with regard to its contents, publication and also to the inviting, hearing and consideration of objections, etc. Compliance with that procedure is a *sine qua non* for the approval of the scheme and unless that procedure is observed the Divisional Canal Officer has no jurisdiction to make a direction with regard to the matters covered by clauses (a) to (d) of sub-section (1) of section 30-A which include the alteration and realignment of any existing watercourse. It is not disputed before me that the Divisional Canal Officer approved the action of respondent No. 2 in providing watercourse ABCD without following any part of that procedure. He must, therefore, be held that he really approved a scheme envisaged in clause (a) of sub-section (1) of section 30-A of the Act in disregard of the procedure prescribed in that and the following section.

(9) In view of my discussion on grounds (i) and (ii), I conclude that order annexure 'B' of the Divisional Canal Officer was without jurisdiction on two counts and is liable to be quashed along with that passed by the Superintending Canal Officer (annexure 'C') which upheld the same.

(10) Learned counsel for respondent No. 2 has contended that the point involving want of jurisdiction on the part of the Divisional Canal Officer and the Superintending Canal Officer was never raised before either of them and that it cannot, therefore, be taken at the hearing of this petition, which invokes a special jurisdiction of the High Court. The contention is without force as orders annexures 'B' and 'C' suffer from an inherent lack of jurisdiction on the part of the officers who respectively passed them and the defect is patent on the record. In such a situation it was held in *Davindar Singh and another v. The Deputy Secretary-cum-Settlement Commissioner, Rural Rehabilitation Department, Jullundur* (3) that

Market Committee, Jalalabad v. Punjab State, etc. (Koshal, J.)

the failure of the party concerned to raise objections on the point of jurisdiction before an inferior Tribunal would not debar him from getting relief on that score in a writ petition.

(11) In the result, the petition succeeds, orders annexures 'B' and 'C' are quashed as being without jurisdiction and the Divisional Canal Officer is directed to restore watercourse AD in compliance with the provisions of sub-section (3) of section 30-FF of the Act. It will, of course, be open to the Divisional Canal Officer to prepare and sanction a scheme for the alteration or realignment, etc., of the existing watercourse either on its own motion or on the application of respondent No. 2 after following the procedure laid down in sections 30-A and 30-B of the Act. In the circumstances of the case, I would leave the parties to bear their own costs.

N. K. S.

CIVIL MISCELLANEOUS

Before A. D. Koshal, J.

MARKET COMMITTEE, JALALABAD,—*Petitioner*

versus

PUNJAB STATE AND OTHERS,—*Respondents.*

Civil Writ No. 668 of 1970

May 29, 1970

Punjab Agricultural Produce Markets Act (XXIII of 1961)—Sections 3, 20 and 33—General power of superintendence of Agricultural Marketing Board under section 3(9)—Whether circumscribed by section 33—Marketing Committee suspending its employee—Marketing Board—Whether has power to direct reinstatement of such employee.

Held, that although sub-section (9) of Section 3 of Punjab Agricultural Produce Markets Act, 1961, while giving power of superintendence and control to the Agricultural Marketing Board uses only the words "over the committees" and not "over the committees and their officers", yet the other provisions of the Act and the Rules made thereunder leave no room for doubt that the Board, subject to the control of the State Government, is constituted as the supreme authority controlling the affairs of the committee in all spheres of action. The general power of superintendence and control conferred on the Board by section 3(9) is not whittled down or circumscribed by the provisions of section 33 except in matters specifically