

HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD

C.P No. D-401 of 2009

[Mohammad Afzal & another v. Province of Sindh & others]

BEFORE:

MR. JUSTICE MUHAMMAD IQBAL KALHORO

MR. JUSTICE ADNAN-UL-KARIM MEMON

Petitioners : Through Mr. Abdul Hameed Bajwa advocate

Official respondents : Mr. Ayaz Ali Rajper Asstt: A.G Sindh

Private respondents : None present though served

Date of hearing: 06.10.2022

Date of order : 06.10.2022

ORDER

Through this petition, the petitioners have sought declaration for alignment of water course 1 ER sub-modules (i) & (ii) existing at the site for more than 30 years upheld by Respondent No.2 in his order dated 20-07-2007 in compliance of order dated 25-07-2006 passed by this Honorable Court in C.P No.S-124-2006 be not disturbed or changed on political influence of Respondents 4 & 5 and other their associates and further declare that the order dated 19-02-2007 issued by Respondent No.2 is illegal void ab-initio and is not binding upon the petitioners.

2. It is averred by the petitioners in the memo of petition that they are agriculturists and their lands are settled on watercourse 1-ER Guni Canal Division Grari Disty within the jurisdiction of respondent No.1 and the said water course is functioning since last more than 30 years and its one part is passing from Chak No.44 and comes in between Survey Nos. 1211 & 1212, 1148, 1149 and 1191 and it has two portions viz. sub module (i) & (ii); that since long respondent No.4 and his associates had been interested to get alignment of water course changed according to their own will and wish and since 2003 various FIRs were lodged by both parties against each other and also filed civil suits; however, the said civil suits were either dismissed for non-prosecution or withdrawn. It is also averred that in the year 2006 respondent No.2 filed Cr. Misc. Appl. No. 65 of 2006 before Sessions Judge Badin falsely alleging that the petitioners and their associates had dismantled the watercourse and sought registration of FIR, which was disposed of through an order dated 21-04-2006 and in the meanwhile one Khatedar namely Mohammad Akram filed CP. No S- 124 of 2006 before this Court, which was disposed of on 25-07-2006 and respondent No.2 was directed to set the watercourse in a manner beneficial to all the parties and in compliance of said directions respondent No.2 after hearing the

parties vide order dated 20.07.2007 maintained the same alignment of water course which was already existing from Block No.1149 and portion of Block Nos.1148, 1191; however the order issued by respondent No.2 was not implemented but respondents 1 to 3 under the political influence of respondents 4 & 5 are trying to forcibly disturb the existing peach of water course 1-ER.

3. Abdul Hameed Bajwa learned counsel for the petitioners argued that in terms of the order dated 25-07-2006 passed by this Court the matter was referred to respondent No.2 who decided the same through order dated 20-07-2007 and no khatedar challenged the decision at any legal forum and now the private respondents are using the political influence through illegal and coercive manner to change the alignment, existing since more than 40 years; that if alleged compromise as claimed by respondents 4 & 5 is implemented the land of petitioners would become barren, as technically there will be no alternative; that the petitioners cannot be forced to accept the compromise if any held on his back. He prayed for allowing this petition with direction to official respondent not to disturb the alignment of watercourse that existed for a long.

4. Despite service, no one is present on behalf of private respondents; however, we have perused their para-wise comments, available on record, where it is alleged that the petitioners and their collusive elements kept an evil eye over Chak No.44, as such they forcibly excavated watercourse from above Chak; that the ill-motive of petitioners and their allies is to occupy the land of Chak No.44, which was/is declared as Chak comprising block No. 1148, 1149, 1191 and 1190, hence from the border of the block they forcibly excavated the watercourse and separated thereby block No.1190 & 1191 to create a working canal by cut across the Chak thereby tried to usurp the land; that when there is no water sanctioned for village i.e Chak 44, then what is the wisdom to pass the watercourse from the mid of Chak bisecting four blocks as stated above. They through their comments finally prayed for dismissal of the petition.

5. Learned AAG also opposed the petition and prayed for its dismissal.

6. We have heard learned counsel for the parties present in court and perused the record with their assistance.

7. In our view Article 9 of the Constitution provides the right to life, if a person is deprived of the fundamental right, he can always approach this court by invoking Constitutional jurisdiction with a rider that such right is not hampered by any law. A right to irrigate agricultural land is subject to irrigation law and rules, this right however if infringed could be examined by this court; we therefore, hold that the instant petition is maintainable.

8. Further we have noticed that Section 16 of Sindh Irrigation Act requires any person with the permission of duly-empowered Canal Officer may construct a watercourse on the land after obtaining consent of owners of the land. Under section 17 of the Act, the land may even be acquired to enable a person to construct the watercourse to irrigate his land and it may also cause to be constructed by the Canal Officer; but all expenses have to be borne by the person applying for construction of the watercourse. Any person desirous of obtaining the benefit of such watercourse may also apply for joint ownership thereof and upon paying his share in construction can be benefited. Section 21 of the Act, however, deals with the rights and obligations of owners of watercourses and apart from requiring them to maintain them, confers upon such owners a right to have a supply of water on such terms as prescribed in the relevant Rules.

9. A bare reading of above provisions shows that though receiving water in terms of Section 21 is the right of petitioners, it is subject to water sharing policy as discussed in the preceding paragraphs. Such right, however, would not be translated to mean depriving the other khatedars at the tail end of their due share in the water. The water sharing policy has to be made on equitable distribution of water for the benefit of all khatedars including those at tail end of water source.

10. This petition has been filed against the purported harassment on the part of private respondents; however, we direct the irrigation department to ensure the right of each party to their water share under Irrigation Act and water share policy.

11. In view of the above facts and circumstances of the case, we direct the competent authority i.e. Respondent-department that the issue of supply of water to the lands of Petitioners and respondents shall be made as per their share and if there is any dispute the same shall be taken care of afresh, after appropriate proceedings, in case the parties approach them. The said exercise shall be undertaken within two weeks positively.

WUDGE

JUDGE