

ORDER SHEET

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C. P. No. D - 1661 of 2016

Date of hearing	Order with signature of Judge
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1. For orders on CMA 6112-18.
2. For orders on report dt. 9.9.2018.
3. For hg of main case.
4. For hg of CMA 18204-14.
5. For hg of CMA 19050-15.

28.06.2018

Mr. Aftab Ahmed Shar Advocate for petitioners.

Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh along with Muhammad Younis Domki, XEN, Irrigation, Division, Khairpur.

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Salahuddin Panhwar, J. - At the outset, learned counsel for petitioners contends that this court had decided identical petition No. D- 1043 of 2018 re: Khadim Hussain Aradin v. P.O. Sindh and others, hence he would be satisfied if this petition is decided within spirit of paragraph-19 of the said judgment.

2. On the other hand, learned Assistant A.G extends his no objection and seeks disposal in the same terms, as stated above.

3. Precisely relevant facts, as set out in the petition, are that since 2010 the petitioners are facing non-availability /shortage of irrigation water in the entire kharif season in Faiz Ganj canal tail of Khairpur circle, Sangi Minor tail, Gul Minor tail, Nau Abad minor tail, Moria minor tail, Khush minor tail, Khanwahan minor tail, Budka minor tail, Dali minor tail of Rohri canal circle; due to stealing of water by breaking of water courses, putting illegal pipes, tampering and running illegal outlets from canals, cutting of canal and stopping / blocking of main canal / minor/ distributaries by upper riparians, the irrigation water, available at the head, does not reach at the tail ends of canals / minors/ distributaries thereby deprive the petitioners of their legal share of irrigation water; and this is being done by beneficiary khatedars in connivance with the officials / subordinate of respondent No.2. It is further averred in the petition that

petitioners continuously requested the officials of respondent No.2 as well as peaceful protested, as such officials/subordinates of respondent No.2 visited the aforesaid canals / minors / distributaries alongwith petitioners'' representatives and noted the broken / tampered watercourses, illegal lifting of water through motor pumps / tractors / numerous illegal pipes and outlets running from canals, taking water by cutting of canal bank and stopping / blocking of main canals / minors / distributaries. It is also stated in the petition that after visiting the site the officials of respondent No.2 assured the respondents that will remove all illegalities from the aforesaid canals / minors / distributaries and ensure that irrigation water will reach the tail ends and that they will take coercive action against the culprits who are involved in this heinous crime. On 2.5.2014, Assistant Executive Engineer, Irrigation Sub-Division Faiz Gaj at Pacca Chang addressed letter to the SHO, P.S, Faiz Ganj that khatedars are illegally drawing water by lift machines depriving tail and khatedars due to which irrigation water is not reaching lower riparians, therefore, they are complaining. In the said letter AEN asked the SHO to provide police force to accompany irrigation staff on patrolling in order to seize illegal lift machines and take legal action against the culprits for the supremacy of law, but no action was taken till date. Despite assurance, officials / subordinates of respondent No.2 miserably failed to remove any illegalities from the aforesaid canals / minors / distributaries and the irrigation water could not reach at the tail ends and no coercive action so far has been taken against the culprits who are involved in this heinous act; that petitioners after running from pillar to post of the officials of respondent No.2 for redressing their grievance, but after getting no response from the said officials/subordinates. Petitioners filed complaint to the respondents No.1&2 on 30.5.2014, which also bore no fruit; that on 2.6.2014, Assistant Executive Engineer, Irrigation Sub-Division, Faiz Ganj at Pacca Chang addressed letters to SHO, P.S, Faiz Ganj that khatedars are illegally drawing water by lift machines depriving tail end khatedars due to which FIR be lodged against the persons nominated in the letters, but it also went in vain; that it is pertinent to mention here that 115 number of watercourses / outlets approved / sanctioned in Faiz ganj canal as per outlet register, whereas, much higher number of illegal water course / outlets are existing in the said canal under the supervision / protection of the officers/subordinates of respondent No.2; that in view of above,

petitioners and hundreds of people protested peacefully against respondent No.2 for giving false hopes and not taking any legal action against the criminals neither providing irrigation water to the tail end khatedars of the aforesaid canal / minors/ distributaries, but rather protecting, helping and safeguarding those criminals in theft of irrigation water, the news of peaceful protest was reported in the print and electronic media.

4. Respondents filed comments contending therein that irregularities have been removed, tampered modules over watercourses have been rectified as per their design and dimension and also unauthorized lifting of water from canals have been stopped by the Executive Engineer and petitioners are cultivating their lands beyond prescribed limits.

5. At this juncture, it would be conducive to refer paragraph-19 of above referred judgment, which reads as under:

“19. Since, the Article 190 of the Constitution is quite clear that:-

“Article 190. Action in aid of Supreme Court— All Executive and Judicial Authorities, throughout Pakistan, shall act in aid of the Supreme Court”.

*Hence, not only this Court but even District Judiciary is expected to act in aid so as to ensure complete satisfaction of directions of honourable Apex Court. Since, it prima facie stood proved that despite a categorical undertaking by Chief Engineer Irrigation that no violation of Act shall go un-noticed but the things remained otherwise therefore, same opens a room of involvement of all judicial authorities to play their roles not only to get compliance of observation of honourable Apex Court but also to protect fundamental rights, as was insisted in referred case. Thus, under these circumstances, judicial propriety demands that Chief Secretary, with consultation of Secretary Irrigation, shall constitute five members committee comprising on three Irrigation Officers (retire/serving), not below the rank of superintendent engineer and two irrigation experts working in private sector who shall visit Nara Canal, examine the sanctioned private lift machines approved by Chief Minister and Secretary Irrigation as well use thereof as per specification or otherwise, and submit report whether such approval is against the interest of **tail-end** khatedars and whether same is justified or otherwise?. The committee shall also point out any violation / breach of the Act as well negligence of irrigation officials of concerned point. The committee would also ensure getting such violation / tampering with module etc repaired (restored at its sanctioned design) by seeking assistance of local police and irrigation officials. Committee shall examine the period of huge increase in command area; approval of lift machines up-to*

Mundh Jamrao and legality thereof. Chief Secretary shall issue such notification in above terms within seven days with compliance report through A.R of this Court and Committee shall complete this assignment within two months such report shall be submitted for action with the secretary irrigation chief secretary within two months, as well as shall be filed before this Court.

- i) *On such proposal, Chief Secretary and Secretary Irrigation shall take action within one month. Needless to mention that due notice shall be provided to all the concerned parties. Every officer/ authority would be bound to co-operate with committee.*
- ii) *Secretary Irrigation and Managing Director Sindh Irrigation and Drainage Authority (SIDA) shall ensure immediate removal of 256 unauthorized lift machines on Nara Canal as well as lift machines on government Channels up-to Mundh Jamrao and lodgment of criminal cases against all beneficiaries. Removal of all illegal and unauthorized machines be ensured regardless of their placement / use at private area or government channel even on wheels; IGP Sindh shall direct all SSPs to provide complete force to finalize this task. This exercise shall be completed within ten days.*
- iii) *Secretary Irrigation and Managing Director Sindh Irrigation and Drainage Authority (SIDA) shall conduct open kachehris at the **tail-end** area of Mithrao, Jamrao and Thar Canal on every six weeks in the months of March to October. Needless to mention that they shall ensure presence of the Judicial Magistrates / Civil Judges, of the respective areas in their open kachehris. Judicial Magistrates / Civil Judges would be competent to supervise and ensure that every common citizen has access in that open kachehris.*
- iv) *Learned District & Sessions Judges, Sukkur, Khairpur, Sanghar, Umerkot and Mirpurkhas shall depute Magistrates who shall make surprise visits as per their convenience without disturbing their judicial works and ensure that no one is getting water illegally in their respective areas and all illegal lift machines, modules, pipes, are removed within their respective areas as well shall point out any violation of the **Act** couple with negligence of concerned official / officials. The learned District & Sessions Judges would refer the matter to quarter concerned for appropriate actions. The quarter concerned however shall deal with such reference as per law and rules but would report disposal of such reference to concerned District & Sessions Judge, within reasonable time, else District judges would be competent to call respective authority for compliance.*
- v) *SSPs, Sukkur, Khairpur, Sanghar, Umerkot and Mirpurkhas shall ensure that at least DSP and other police escort shall be available with the Magistrates and with the Engineers in respect of removal of illegal lift machines, pipes, modules, etc from the Nara Canal and it all branches, including minors. Any negligence or failure in attending the complaint of irrigation official in this regard shall expose the concerned police official to legal action which is not limited but includes contempt proceedings.*

- vi) Secretary Irrigation shall ensure website of Irrigation Department on same pattern as Punjab Province is working and survey of underground and surface water and its environmental and other effects for the lands as well for human beings. Such survey and reports shall be published every year and shall be flashed on website. As well as **toll free number** shall be provided in similar fashion as Province of Punjab is doing with regard to complaints, and rescue centers shall be established.
- vii) Chief Secretary Sindh and IGP Sindh shall ensure that Police Department along with Irrigation and agriculture Department shall establish rescue centers who shall hear the complaints. In every District Headquarter and in Taluka Headquarter of **tail-end** areas, there must be a rescue center; concerned Magistrates of respective area, would be competent to make surprise visit and ensure that **tail-end** khatedars are receiving their share of water as well citizens are getting drinking water per sanctioned.
- viii) CEO of SEPCO shall ensure that no one is allowed to use electricity for private unauthorized lift machines over Nara Canal and its channels. All the illegal electric connections, being used for purpose other than its sanction, shall immediately be disconnected, for which request is already made. In case of failure, they will be booked in criminal cases. Executive Engineers of respective areas are hereby directed to point out those places. This exercise shall be completed within one month, with compliance report.
- ix) Even in case of shortage of water, if sanctioned ratio as per available discharge from main source (Indus River) is not received at Mundh Jamrao, Superintending Engineer and Executive Engineer Nara **canal** would be responsible for that shortage and Secretary Irrigation shall take action against them because it is their obligation to ensure reach of due discharge to next canal.
- x) Besides Chief Secretary Sindh, to curb this menace, shall seek assistance of Rangers with the help of Federation and ensure complete monitoring over water distribution system on all canals including Nara Canal and Rohri Canal particularly from the period of March to August, every year.

Since a challenge in petition was made with reference to water rotation programme for which it would suffice to say that since the application of Section 28 of the **Act** is available with the Irrigation authority hence petition seems to have found its answer. Further, it is added that such exercise (water-rotation Programme) may be continued, if circumstances, so demands. However, this shall not be exercised at the cost of rights of other khatedars. A proper publication of water rotation programme shall however be made in advance.

While parting, we feel it proper that the farmers / zamindars also be made aware of Part-V in the **Act** with title '**of the Award of Compensation**' which cannot be expected from lay-men therefore, while holding first open kachehri the holder thereof shall ensure a briefing thereof and a good publication of complete mechanism.

Office shall communicate this order to all concerned for compliance. The petition is disposed of.

6. Since this petition pertains to Rohri Canal and learned counsel for petitioners and learned AAG are agreed that same directions would serve the purpose, however, learned counsel for petitioners has submitted additional aspects which are:

“1. To visit the retaining walls/waterfalls and face heads of the all canals, minors and water courses with technical team comprising upon reputable officers to verify the accuracy and level and level permitted under the law.

2. To demolish/remove self-created retaining walls / waterfalls constructed by powerful landholders and ensure the reconstruction of legal restraining walls/Dikkas, removed by Irrigation Authorities for facilitating the influential landlords.

3. To enquire into the construction of new public or private bridges constructed over the canals and minors for which technical assistance and legal permission was not obtained from Irrigation Department. Their designed may be revisited along with effects thereof over smooth floor water.

4. To remove the hidden illegal pipes and lift machines by Banana growers or any powerful growers.

5. To ban on private de-slitting by private tail growers as they dug the minors, canals by crane machines and put the mud on inspection paths which practice has made the condition of the inspection paths and design of the canals and minors from worse to worst hence to ensure the cleaning of the inspection paths of canals and minors by removing all the obstacles and make it in same position as these were few decades back. As non-functioning of inspection paths creates hurdles for proper visit and inspection of the canals, minors and heads of the water courses by the Irrigation Authorities and even by law enforcement agencies; because of that sad back the canals, minors became exclusive property of the powerful persons as there is no access for the site inspection of Irrigation system and total system is under the control of Beldars and Darogos of their respective beats, high rank officers are not in position to visit the canals as they cannot use inspection path from head to tail. The lower staff is associated with the powerful Khatedars and facilitate their needs in lieu of their personal gains, whereas the high officers are sitting in the offices by making huge embezzlement of the funds. Major portion of the inspection paths and banks of the canals and minors is occupied by the private powerful persons and

such occupation also accommodates the Zamindars to use lift machines, pipes and theft of the Irrigation water. The prime need of time is to make inspection paths clean and clear from head to tail by the irrigation authorities as soon as possible and not more than six months. Further the old trees of Shisum and other were cut down by the Irrigation Officials and such acts had put worst impact upon the atmosphere and so also the design of the canals and minors. Therefore the authorities may be directed for plantation of trees on both sides of the canals.

6. To inquire about all the outlets which are entered into the record by tampering and giving duplicate and triplicate number of water courses, which were not available in the record or on field ten years ago.

If any new water course or any outlet has been sanctioned then the Irrigation department is bound to redesign the main canal by adding surplus water taken by any fresh outlet or watercourse, unfortunately the outlet/discharge design of the major canals is same, as it was at the time of its construction, whereas the large number of water courses and outlet were sanctioned without re-designing and assessment.

7. To direct the Irrigation authorities and so also Govt. of Sindh to ensure and introduce the uniform policy for crops by growers from head to tail, as the head Khatedars use to cultivate their 100% land which is illegal more-so-over they use to cultivate the crops which need more Irrigation water rather than regular crops, this aspect also made the situation worst for the tail Khatedars, which are not in position to cultivate single crop of wheat or grains, the constitution of Pakistan provides equal treatment to all citizens and this discriminatory situation make tail Khatedar poorer to poorest and head Khtedars weather to wealthiest.

8. Constructing/contracting authorities of the Irrigation department shall be directed to call pre-qualification tenders for remodeling and Paka construction of the canals and minors because the influenced and lower grade contractors made the situation worst by using low grade material and level structure. This process should be monitored strictly in accordance with law.

9. To direct the NAB authorities to probe into funds, released to Irrigation department, and weather the funds have been properly utilized or not if any corruption or embezzlement has taken place, the legal action should be taken against the persons involved.

10. To direct the Sessions Judges/Director Human right Justice to entertain the oral or written complaints regarding the redressal of grievance by any Khatedar. Further Magistrate being empowered under section 133 be directed to ensure for removal of hurdles from inspection paths of canals and minors by using their powers.

7. It needs not be mentioned that directions, contained in case of Khadim Hussain, not only intend to ensure removal of all *illegalities* but also any *violation* of the Act. The *violation* of the Act shall always include any *negligence* or *departure* from a commandment of law, rules and procedure. The irrigation law, *no where*, permits addition or reduction into *command* area of watercourse / minor etc without redesigning thereof hence any departure would be nothing short of a *violation*. An *illegality* or multiplicity thereof and even *duration* of continuity of such an *illegality* would never be an excuse to let it continue. We would also add that *irrigation system*, *no where*, permits one to make disposal of *drainage* into any running / flowing water course, minor etc hence such would also fall within meaning of an *illegality* / *violation*. We would not hesitate in saying that such act by *any* person and *omission* by *any* official of irrigation department shall *equally* expose them to legal actions. Therefore, it is needless to say that *Authorities* and all concerned (*irrigation officials*) shall ensure that no *illegality* (violation) continues even if it is in *practice* / use since considerable time which action, *however*, would be subject to an *explanation* / *hearing*. Needless to add that an *exception* to provide an opportunity of hearing may well be taken in certain cases i.e where such process is likely to result in '*more injustice than justice*' or infringing '*public interest*'. Reference may well be made to the case, reported as 2015 SCMR 338, wherein *binding* principle of law has been made as:-

Art. 10A. Whenever adverse action was being contemplated against a person a notice and / or opportunity of hearing was to be given to such person—Said principle was a fundamental right under Art. 10A in the Constitution. However, both the requirements of a notice and providing an opportunity of a hearing may also be dispensed with in certain type of cases e.g. where such requirement would cause '*more injustice than justice*' or it was not in the '*public interest*'.

8. Worth to add that since continuity of an *illegality / violation* in '**irrigation system**' in *present* situation (*serious scarcity of water*) , if allowed to continue, shall be nothing but '*more injustice*' and serious *threat* to guaranteed rights of *khatedars* as well *general* people begging rather crying nothing but for '*due amount of water*' . Accordingly, all concerned, so highlighted in the case of *Khadim Hussain* supra shall keep this in view and a *prompt* and *immediate* action is expected.

9. Further, the provision of section 133 of the *Code* (Cr.P.C) itself is clear in *duties* of Magistrate which includes '*removal of any unlawful obstruction or nuisance from any way, river or channel*' as well :

"the construction of any building, or the disposal of any substance, as likely to occasion configuration or explosion, should be prevented or stopped."

therefore, any *damage* to inspection-path would be actionable within meaning of Section 133 of the *Code* as such *inspection* path can also be used by *general public* of the area. The exercise of *jurisdiction* under section 133 of the *Code* is not *necessarily* confined to a police report but may well be exercised on *other information* and evidence. The purpose and object of *open katchery* by Irrigation officers and *visits* by judicial officers is meant to provide a mechanism that no *genuine* complaint goes unnoticed. However, we would say that since the remedy is available (*created by law itself*) hence needs no hammering in existence of such clear provision. However, it is *hoped* that Magistrate (s) concern on having any such *information* relating to way, river, channel, water-course and *inspection path* shall show more concern and *action* in ensuring removal as well stopping / preventing of any *illegality*. All these aspects were well within view while passing the observations in case of *Khadim Hussain* supra, however, concern, shown by counsel for present petitioners, made it necessary to make things more *clear* and *brighter*.

10. With above explanations, instant petition is disposed of with directions to the Managing Director, SIDA, Secretary, Irrigation Department, Chief Engineer, Irrigation, Chief Secretary and IGP, Sindh that on Rohri Canal all the directions given in the case of *Khadim Hussain Aradin*, shall be followed for grievance of present petitioners as well District & Sessions Judges having territorial jurisdictions of Rohri Canal,

particularly in the tail-end areas, such as districts Naushehro Feroze, Shaheed Benazirabad (Nawabshah), Hyderabad, Matiari, Tando Muhammad Khan, Badin and Tando Allahyar would be competent to proceed within the spirit of case of *Khadim Hussain Aradin*. and with further directions that all the designs of watercourses, bed levels of canals and minors shall be re-examined and restoration of lawfully sanctioned *design / modules* shall be ensured which *otherwise* is one of the *basic* requirement of Act. Services of highly skilled consultants shall be hired. Chief Secretary and Sindh and Secretary, Irrigation shall issue Notification with regard to committee for examining the veracity of direct outlets of Nara Canal and its linked canals which shall point out any *illegal* and *unlawful* direct outlet to Secretary, Irrigation who shall proceed further according to commandment of law. Needless to mention that due notice shall be given to all the necessary parties of province of Sindh. Chief Secretary and Secretary, Irrigation shall ensure that recommendations of that committee are followed in its letter and spirit.

Let the copy of this order be circulated to all those, addressed in case of *Khadim Hussain* supra, being explanatory.

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Ahmad