

ORDER SHEET

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA.

Constitution Petition No.D- 137 of 2022

Petitioners : Muhammad Usman Aheer and others, through Messrs Muhammad Yousif Magsi and Mr. Muhammad Afzal Jagirani, Advocate.

The State: Through Mr. Abdul Hamid Bhurgri, AAG

Date of hearing: 03.08.2022.

Date of order : 03.08.2022.

ORDER

Adnan-ul-Karim Memon, J: - Through this petition, the petitioners have

prayed for the following relief(s):-

"a. To direct respondent No.1 to visit illegal outlets, illegal water courses, artificial cuts, tempered water courses of the Kur Datto Minor, taking rise from Ghaar Wah Rice Canal, personally and to submit such detailed report about action taken.

b. To direct respondents No.1 to 5 to remove all the illegal outlets, illegal water courses and close the artificial cuts and repair the tempered water courses as per their legal sanctioned designs, and ensure the supply of the water to the tail end growers/ petitioners under law.

c. to direct respondents No.1 to 5 to submit such statement that no violation of the Sindh Irrigation Act, shall be committed in future".

2. Muhammad Yousif Magsi, learned counsel for the petitioners argued that to stop water supply to the lands of petitioners is illegal, against the law and equity; that official respondents are bound to supply water to the lands of petitioners under the share list; that the people have right to have access to safe drinking water and to irrigate their lands; that supply of water to the petitioners is either illegally denied or is disturbed by the official respondents arbitrarily and at their whims in the exercise of authority not vested in them and even without providing an opportunity of hearing to the khatedars; that due to mismanagement of irrigation authorities the petitioners' ends are seriously affected. They also raised their voice of concern about their other water-related issues, including illegal outlets, illegal water courses, artificial cuts, tempered water courses of the Koor Dato Minor, taking rise from Ghaar Wah Rice Canal, which is not being addressed by the irrigation authorities. Having explained their grievances, they prayed for allowing the instant petition.

3. Learned AAG has referred to the statement/ report submitted by the Executive Engineer Rice Canal Division, Larkana, and submitted that the Rice Canal System has 99 channels and there is no complaint of shortage without Ghary Distry and Kur-Datto branch both are off taking from up stream of seventh mile cross regulator which is being maintained upto 80% due to rain damages the remaining 20% of shortage will be recovered shortly. However, he assured to supply the irrigation water to the lands of the petitioners as per their share list and the officer present in court has given undertaking to take prompt action against the Khatedars who have illegal outlets, illegal watercourses with artificial cuts/ tampered water courses. Let him do so strictly in accordance with law and submit comprehensive report to this court through Additional Registrar along with copies of panel action against the persons who are involved in such state of affairs as discussed supra.

4. We have heard learned Counsel for the parties and perused the material available on record. Before discussing the issue at hand, it must be kept in mind that Article 9 of the Constitution provides the right to life, and the right to receive water to irrigate agricultural land is indeed a fundamental right, however, such right is subject to irrigation laws and rules.

5. Prima-facie, the basic issue involved in the present proceedings is the distribution of water to the lands of lawful Khatedars of the concerned area under the Sindh Irrigation Act. The official respondents along with others have allegedly attempted to obstruct the water supply to the petitioners' lands and in some of the cases have allegedly closed or blocked the source of water supply to them and/or threatened to close the water source through force, to accommodate khatedars of their choice irrespective of their entitlement and created bottlenecks for their water-related issues involved in the present proceedings. Besides illegal and tempered outlets/watercourses and artificial cuts are still in existence and penal action has been taken by the irrigation department against the concerned person involved in the said illegal exercise. if this is the position of the case let the SSP concerned area co-ordinate with irrigation staff and promptly visit the relevant area and if he finds such things immediately direct the concerned SHO,s to register F.I.R of the incident, this exercise shall be completed forthwith. The officials present are directed to co-operate with SSP for the aforesaid purposes, in case of failure, contempt proceedings shall be initiated against delinquent officials under Article 204 of the Constitution. In such view of the matter, we direct the Secretary, Irrigation that immediately he should take action to protect the interest of genuine Khatedars and ensure supply of water to the lands of tailenders of the subject area.

6. Coming to the other points, involved in the matter, it appears from the record that the issue as raised in the present proceedings has already been set at rest by the Honorable Supreme Court in the case of *Suo-Moto Action Against Giving of Direct*

outlets from Naseer Branch Rohri Canal by Chief Minister Sindh reported as **2014**

SCMR 353. A perusal of said judgment shows that certain outlets were either sanctioned in violation of law or relaxation of the ban, imposed by the Government of Sindh vide letter No.2/687-S.O. (OP)/70-Vol-III, dated 02-01-1999, in favor of influential and interested persons and consequently, the lands of Khatedars situated at the tail end were not getting water according to their share, as before reaching the tail, the entire water was consumed by upper riparian's. The Khatedars raised their voice of concern to protect their rights. The Honorable Supreme Court took Suo-Moto's notice in the above-cited case. An excerpt whereof is reproduced below:

"In such view of the matter, we direct the Secretary, Irrigation that immediately he should take action to protect their interest. Here we deem it appropriate to reproduce the operative part of the report of the learned District and Sessions Judge Badin dated 27-11-2013:- "It is further submitted that frames of the outlets were tampered and some were having repaired freshly. The type of the frames as sanctioned was 2" x 2" inches but after tampering; the same was found up to 1 to 2 feet width. It is further submitted that on 25- 11-2013 most of the outlets were closed and the Irrigation Officers informed that the same has been closed due to rotation; hence, the flow of water was found up to the sanctioned level and reached the tail of Sangi Pharho / Regulator. It is further submitted that the outlet of Kamal Khan Chang crossed Pir Sakhi Minor. It is further submitted that again on 26-11- 2013 the undersigned conducted the surprise visit of the site without accompanying the Irrigation Officers and found that most of the outlets were opened, hence, there was no pressure of the flow of the water at the tail and it was not flowing at the sanctioned level at the tail of Sangi Phraho. It is further submitted that if all the outlets remain opened, then the flow of the water will not reach the tail of Naseer Branch. In this situation, the Zamindars of the tail of Naseer Canal Branch cannot get the Irrigation water for cultivating their lands."

7. As regards the issue involved in the present proceedings, this Court vide judgment dated 18.4.2019 passed in C.P. No. 1375-D of 2017 directed the competent authority of the Irrigation Department to ensure the supply of water to the khatedars under the share list. The aforesaid judgment was 4 assailed before the Honorable Supreme Court in Civil Petition No. 410-K of 2019 which was disposed of in the following terms:

"Learned counsel for the petitioners has impugned the judgment dated 18.4.2019, whereby the issue as to the supply of water to the petitioners' land, which, according to the learned counsel, is being curtailed. Learned Additional Advocate General along with Secretary Irrigation Department, Government of Sindh have filed their comments, duly signed by Secretary Irrigation and Managing Director, SIDA, Hyderabad, which read as under:- "As permanent relief relocation of head regular of Bilori Minor has been provided in ADP 2019-20, at Sr.No.1113 which is in process and will facilitate the restoration of the original source of irrigation water supply to the petitioner and others in due course of time". Learned Bench of the High Court, already seized of the matter, in terms of para No.23 of the impugned judgment has directed for compliance report before the Assistant Registrar of High Court. Since High Court itself is regulating and supervising the issue as urged in the petition, we are not inclined to interfere in the matter which is purely between the two departments and as stated by the learned Additional Advocate General same will be resolved on the permanent basis no sooner the scheme allocated to ADB is executed for which funds are allocated it is expected that such scheme is materialized. The High Court will ensure that its orders are complied with in letter and spirit. The authority shall ensure to supply water from either of the available sources of supply in accordance with the share list. In this view of the matter, we are not inclined to interfere in the impugned judgment. Petition disposed of."

8. The above orders passed by the Honorable Supreme Court resolve the issue, which is also the subject matter of these petitions. Learned counsel for the petitioners

took us through various provisions of the Sindh Irrigation Act and demonstrated that sanctioned watercourses were personal properties of individual landowners, who were required to construct and maintain them from their resources in terms of the Sindh Irrigation Act. Be that as it may, no authority has been conferred upon the khatedars to utilize water more than their sanctioned share as per the prescribed share list and the Irrigation Department is bound to ensure this.

9. This court vide common order dated 10.12.2019 passed in C.P. No.D721 of 2010 (Umer Din Mehar v. Province of Sindh and others) has resolved the controversy, which is also the subject matter of this petition in the following terms:

“14. In view of the main grievance of the petitioners discussed above, we hold that Irrigation Department shall ensure the supply of water to every khatedars per his share prescribed in the share list; and shall take action forthwith according to law against such khatedars who have violated or violate the law by tampering with the sanctioned modules and/or by changing the watercourse and/or by obstructing the water supply of other khatedars.

15. The Irrigation Act provides a complete mechanism for equitable distribution of water amongst khatedars and remedies for redressal of their other water-related grievances, which exercise cannot be undertaken by this Court under Article 199 of the Constitution and it is for the official respondents to take prompt action to redress the genuine grievances of the khatedars.

16. In all these petitions allegations have been made by the petitioners against the Irrigation Department regarding unfair distribution or stoppage of water supply at the instance of influential persons or private parties, illegal change / cancellation of the watercourse, or refusal to change the watercourse. According to the petitioners, they were constrained to file these petitions as the Government functionaries had failed to discharge their functions according to law. However, it may be observed that in all the cases/situations discussed above, an aggrieved person has to first avail of the remedy provided to him by law before the competent authority of the Irrigation Department and he must exhaust such remedy before approaching this Court instead of bypassing the appellate forum. The office is, therefore, directed to entertain only such petitions in the future wherein all remedies, including remedies provided under the Irrigation Act and/or litigation before any forum, have been fully exhausted by the person before approaching this Court.

17. In view of the above discussion, the competent authority of the respondent department is directed to ensure a regular supply of water to the lands of the petitioners and khatedars/ land owners in the Province of Sindh according to the Irrigation Act, and grievances / complaints, if any, placed before them by the aggrieved khatedars shall be addressed/decided promptly within a period not exceeding thirty (30) days from the date of complaints strictly in accordance with law after providing the opportunity of hearing to all concerned. Issue notice to the Chief Secretary Sindh and the Secretary Irrigation Department, Government of Sindh, to ensure compliance with the above directions in letter and spirit.

18. All these petitions and applications pending therein stand disposed of in the above terms with no order as to costs.”

10. This petition along with pending applications stands disposed of in the terms of a common order dated 10.12.2019 as discussed in the preceding paragraph.

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