

MOHAMED SAHIBU AND OTHERS

v.

ARIYARATNE AND OTHERS

COURT OF APPEAL.

SENEVIRATNE, J. (PRESIDENT) AND B. E. DE SILVA, J.

C.A. 611/82.

OCTOBER 2, 1984.

Writ of Mandamus – Irrigation Ordinance – Rules 1, 7 and 8 made under Irrigation Ordinance – Duty of Government Agent – Irrigation (Amendment) Act No. 48 of 1968 (section 23 (1) (a)) – Agrarian Services Act No. 58 of 1979 (section 55 (2) (b)) – Maintenance of minor irrigation works and tanks.

The petitioners and many others were owners and cultivators of fields served by four village tanks. In 1976 a number of persons damaged the tank bunds drained out the water and started unauthorised cultivations. Under the rules made under the Irrigation Ordinance the tanks were state property but the duty to maintain the tanks was cast on the proprietors and cultivators of the lands fed by these tanks. The Government Agent (1st respondent) had undertaken to have the squatters evicted and irrigation facilities restored to the petitioners but not taken action. The petitioners alleged that in terms of the Irrigation Ordinance and regulations and practice for more than a century the 1st respondent had a public duty to ensure that the said four tanks were maintained and made available to the petitioners and others for their cultivation. On this basis petitioners moved for a Writ of Mandamus on the Government Agent and other officials.

Held –

There is no duty cast on the Government Agent now to maintain minor irrigation works known as village tanks in view of the Irrigation (Amendment) Act No. 48 of 1968. By Section 23 (1) (a) of this Act the duty is now cast on the Cultivation Committee.

At Land Kachcheries held, permits had been issued to a number of those who were now cultivating the fields fed by these tanks. The petitioners had not made any applications for allotments at these Land Kachcheries. The petitioners were therefore guilty of laches.

Further there was no practical way of complying with the Writ of Mandamus if issued as the present occupiers held permits.

In these circumstances Mandamus will not issue.

APPLICATION for Writ of Mandamus.

K. Shanmugalingam for petitioners.

K. Siriparan, S.C. for 1st respondent.

December 14, 1984.

SENEVIRATNE, J. (President)

The petitioners in this Application have stated that they and many others are the owners and cultivators of several acres of irrigable paddy lands fed by the village tanks called :- (1) Pirvaikulam, (2) Thamaraiikulam, (3) Karungoditivu Kulam, (4) Sakkarathar Kulam situated in Akkaraipattu Central A.G.A.'s Division. These village tanks were governed by the Irrigation Ordinance and the rules made thereunder, and published in Gazette No. 7707 of May 3rd 1929 (P 2) Under the said rules these tanks were state property but the duty to maintain the said tanks is cast on the proprietors and cultivators of the lands fed by these tanks - Rules 1, 7 and 8 of (P 2).

The petitioners allege that in 1976 a number of unauthorised persons damaged the tank bunds, drained out the water and started cultivating the Tank Bed without any authority. The petitioners made representations to the respondents particularly the 1st respondent. The respondents undertook to expel the squatters from the Tank Bed and restore the irrigation facilities to the petitioners. The petitioners have filed copies of correspondence from 1980 onwards.

The petitioners state that in spite of the undertaking given by the 1st respondent and other public officers and more recently by the Agricultural Development Authority, the squatters and encroachers on the tank bed have not been evicted and irrigation facilities from the said tanks have not been provided to the petitioners. The petitioners have filed a letter dated 19.6.80 (P 6) from the Assistant Commissioner of Agrarian Services, Amparai to the Agricultural Development Authority, Pottuvil which states that tenders have been called to repair the tanks in question (subject matter of this Application) but repairs cannot be done due to illegal encroachers and if they are evicted repairs can be done. By letter dated 21.9.81 (P 7) the D.L.O., Amparai has requested the A.G.A., Akkaraipattu to take action to evict the encroachers to enable the restoration of these tanks. By letter dated 14.7.81 (P 8), the D.L.O., Amparai for G.A. Amparai has written to the A.G.A., Akkaraipattu calling for a report regarding the restoration of these tanks.

The petitioners rest their Application on the rules framed under the Irrigation Ordinance and published in Gazette No. 7707 of May 3rd, 1929 pertaining to Irrigation Districts inter alia Akkaraipattu. The following rules framed are of importance :-

Rule 1 - "The tank is the property of Government ; but so long as the tract of fields attached to it is occupied, it shall for agricultural purposes be considered to be the joint property of the proprietors of the fields in proportion to the share held by them".

Rule 3 - "No person other than a proprietor or lessee of the lands under the tank shall be entitled to the use of water from the tank for agricultural purposes".

Rule 7 - "Tanks, dams, minor channels, water-courses, or other minor works shall be *repaired or improved* by the *proprietors* whenever the Government Agent shall consider it necessary. The work to be performed by each proprietor shall be in proportion to the extent of his land likely to be benefited by the work in question".

As such the petitioners have stated that in terms of the Irrigation Ordinance and regulations and practice for more than a century the 1st respondent has a public duty to ensure that the said four village tanks among others are maintained and available for cultivation of the low-lying paddy lands of the petitioners by providing irrigation facilities from the said tanks. The petitioners move for a Writ of Mandamus as follows :-

(a) Directing the respondents to maintain the Village Tanks, known as Pirvaikulam, Thamaraiikulam, Karungoditivu Kulam and Sakkarathar Kulam situated in the Akkaraipattu A. G. A. 's Division and depicted in the plan marked (P1) as Minor Irrigation Tanks in terms of the Irrigation Ordinance and the rules thereunder to supply water to irrigate the paddy fields of the petitioners and other irrigable paddy lands of the others in the area.

The 1st respondent Government Agent in his objections dated 27th October, 1982 has taken two vital objections among others :

(1) that no duty was cast on him now to maintain minor irrigation works known as village tanks in view of the Irrigation (Amendment) Act, No. 48 of 1968 ;

- (2) that the encroachments in Akkaraipattu have been regularised by granting permits. The 1st respondent has stated that by the provisions of section 23 (1) (a) of the Irrigation (Amendment) Act, No. 48 of 1968 the duty has been cast on the Cultivation Committee of the area (under the Paddy Lands Act, No. 1 of 1958) "to attend to all matters connected with the irrigation and cultivation of land and the preservation of rights and maintenance of irrigation works connected therewith."

I must add that section 23 (1) (b) is also relevant - "to prevent, as far as practicable, any act or omission which is contrary to the rules or regulations in force under this Ordinance or to established customs relating to irrigation or cultivation"

The regulations in the Gazette of 30th April 1929 (P2) relied on by the petitioners are rules made by the proprietors under Section 11 of Irrigation Ordinance No. 45 of 1917 as amended by Irrigation Ordinance No. 17 of 1927. The Irrigation Ordinance that prevails now is "An Ordinance to amend and consolidate the law relating to Irrigation - No. 32 of 1946", and Act, No. 1 of 1951; Vol. XII C.L.E. as amended by Irrigation (Amendment) Act, No. 48 of 1968. However Section 119 of the Irrigation Ordinance No. 32 of 1946 has kept alive "every rule, made under any previous Irrigation Ordinance by the proprietors within any Irrigation District" so far as it is not inconsistent with the provisions of this Ordinance". (The emphasis is mine) The law pertaining to the maintenance of minor irrigation works - village tanks has since been changed by several subsequent enactments. The 1st respondent's main defence is based on the Irrigation (Amendment) Act, No. 48 of 1968 Section 23 (1) (a) which is as follows: -

- "A Cultivation Committee shall within the area of its jurisdiction -
- (a) attend to all matters connected with the irrigation and cultivation of land and the preservation of rights and the maintenance of irrigation works therewith".

The Paddy Lands Act, No. 1 of 1958 has been later replaced by the Agricultural Lands Law No. 42 of 1973. The latter Act has been repealed and replaced by the Agrarian Services Act, No. 58 of 1979 - date of operation 25th September 1979. This present Act - Part VI-section 55 (1) (2) has provided that the Cultivation Officers "subject to the general control and direction" of the Commissioner of Agrarian Services" and section 55 (2) (b) "attend to all matters

relating to minor irrigation works and the maintenance of minor irrigation works". The Irrigation (Amendment) Act No. 48 of 1968 came into force on December 14, 1968, that is before any repeal of the Paddy Lands Act, No. 1 of 1958 by the subsequent Acts of 1973 and 1979. As such this Amendment by its provision section 49 keeps the rules framed under the Irrigation Ordinance prior to this Amendment of 1968 as "effective rules made by the Cultivation Committee of that irrigable area". As shown earlier section 119 of the Irrigation Ordinance kept alive the rules framed under any previous Ordinance such as the Rules of 30 April 1929 (P2) - "so far as it is not inconsistent with the provisions of this Ordinance". It is quite clear that these rules (P2) are inconsistent with the provisions of section 23 of the (Amendment) Act, No. 48 of 1968. The subsequent law referred to above has now made the rules (P2) further obsolete and inoperative and also in terms of section 119 Irrigation Ordinance" inconsistent with the provisions". Due to these reasons the petitioners cannot assert that the 1st respondent Government Agent, Amparai is in duty bound to maintain the village tanks in question. The objection of the 1st respondent in this respect is upheld.

The petitioners have stated that there were encroachers cultivating the tank beds in question and that permits have been given to such encroachers by the 1st respondent. The petitioners aver that the 1st respondent should take steps to evict such encroachers from the tank beds, and should cancel or not renew the permits issued to such encroachers and make the tank beds and bunds available for repair and maintenance. The proprietors were ready and willing to do that work in terms of the rules (P2).

The 1st respondent has stated that his predecessor in 1968 made a report (1R2) to the Land Commissioner regarding these encroachments and sought his directions in terms of section 4(1) of the Land Development Ordinance. On the directions of the Land Commissioner, Land Kachcheries were held in terms of section 23 of the Land Development Ordinance, by the A.G.A., Akkaraipattu and permits were legally issued to the selected applicants. The petitioners did not make any claims to the land at that stage. This averment that the petitioners did not make any claims have not been denied and as such in this respect the petitioners are seriously guilty of laches for having slept over their rights. However the 1st petitioner in a later set of papers filed on 11th September 1984 states that these permits have been unlawfully issued to cultivate the tank beds to encroachers

and squatters. Thus, there is a dispute in this application regarding the validity of the permits issued which dispute cannot be decided in this application. When the Court questioned the learned counsel for the petitioners as to how in this situation the 1st respondent can obey the Mandamus applied for if issued, the answer was that the 1st respondent should take steps to evict these permit holders and execute the Mandamus. If this is going to be a consequence of a Writ of Mandamus if issued against the 1st respondent, then the permit holders have to be parties to this application, and have to be heard before any order which affects their proprietary rights is made by this Court.

I hold that this application is not properly constituted as the permit holders who appear to be necessary parties are not parties to this application. Further in this context an issue of a Writ of Mandamus will be a futility as the 1st respondent cannot obey or execute the Mandamus of this Court. Where there is no practical possibility of enforcing obedience to an order to perform a duty a Writ of Mandamus will generally be refused.

For the reasons given above this application is refused. As the petitioners have had rights to irrigate their fields from these tanks and for whatever reason have now lost their rights, no costs are ordered. Application is dismissed without costs.

B. E. DE SILVA, J. – I agree.

Application dismissed.
