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JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.7699 of 2013.

(Shahzadi Umerzadi Tiwana versus. Province of Punjab and others)

J U D G M E N T

Date of hearing	22.11.2017
Petitioner by	Malik Noor Muhammad Awan, Advocate
Respondents No.1 and 2 by	Mr. Muhammad Hammad Khan Rai, Assistant Advocate-General Punjab
Respondents No.3 to 8 by	Rana Muzaffar Hussain, Advocate

IBAD-UR-REHMAN LODHI J.:- With the consent of learned counsel for the parties, the hearing of this petition is being treated as *pacca* one.

2. The petitioner is representative of fourth generation of *Tiwana* Family. Between 1860 and 1871, great grandfather of petitioner Malik Sahib Khan Tiwana had constructed some inundation canals subject matter of the dispute, known as Malik Sahibkhanwala, also known as great Kalra canal, Piranwala canal, Chaharmiwala canal and Tootanwala canal in the district of Shahpur. With the exception of Tootanwala canal, the other three canals were mentioned in Schedule-II of The Punjab Minor Canals Act (Act III of 1905). By means of notification dated 19.04.1952 issued under Section 48 of The Punjab Minor Canals Act, 1905, two private canals known as Malik Sahibkhanwala and Piranwala were acquired by the Government of Punjab. In the same year, a new canal called Shahpur Branch was constructed by Government of Punjab, which cut across the Chaharmiwala and Tootanwala channels and thus stopped the flow of water to latter two canals from the river. Malik Khizar Hayat Khan Tiwana predecessor-in-interest of the present petitioner moved the Collector seeking compensation with regard to

three canals namely Sahibkhanwala, Piranwala and Chaharmiwala. The Collector, Shahpur District made his award on 18.12.1954, whereby he determined the entitlement of the petitioner to receive the following amounts:-

Sahibkhanwala Canal	Rs.2,01,18,035/-
Piranwala Canal	Rs.37,37,470/-
Chaharmiwala Canal	Rs.11,28,432/-

In 1952, the Provincial Legislature amended the Canal and Drainage Act by promulgation of Canal and Drainage Amendment Act (Act XIV of 1952), The Punjab Minor Canals Amendment Act (Act XVII of 1952) and the Punjab Minor Canals Amendment (Ordinance I of 1952). The effect of these amendments was that no compensation was payable by the Government either for acquisition of the canals or for stoppage of water to the other canals. Furthermore, against the award made by the Collector, the only remedy provided was to file an appeal.

Such amendments were challenged by Malik Khizar Hayat Khan Tiwana predecessor-in-interest of present petitioner by filing a suit before the learned Senior Civil Judge, Sargodha, however, it was transferred to the High Court on account of involvement of important Constitutional question in it. The Civil Original Case No.09 of 1954 was decreed by this Court vide judgment and decree dated 22.07.1954 (reported in **PLD 1955 Lahore 88**).

The province was not satisfied with such decree granted by the High Court and thus, it was appealed against through Constitutional Civil Appeal No.01 of 1954 before the Hon'ble Federal Court. The Hon'ble Federal Court accepted the referred appeal on 14.03.1956 and set aside the judgment and decree passed by the High Court. This judgment is reported as "THE PUNJAB PROVINCE versus Malik KHIZAR HAYAT KHAN TIWANA" (**PLD 1956 Federal Court 200**).

The conclusion arrived at by the Hon'ble Federal Court for ready reference and in order to understand the proposition is reproduced herein below:-

“The true position, however, is that both these sections are valid. Section 4 is valid for the reason that it seeks to make unconstitutional legislation constitutional, and this is essentially a constitutional matter. Where a law is invalid on the ground that it is in excess of the powers of the legislature passing it, its validation by a constituent authority must ex-hypothesis be deemed to be constitutional legislation, and any objection to the manner in which such validation is affected is an objection to the form of that legislation and not to the power of the validating authority. In the present case, the laws in question could be validated by the Constituent Assembly by so amending sections 88 and 299 of the Constitution Act as to bring the objected legislation retrospectively within the competency of the Provincial Legislature or by the Assembly's itself enacting that legislation retrospectively. The Assembly having done both, no objection can consequently be taken to the manner in which it has chosen to proceed. It is true that having retrospectively amended sections 88 and 299 the subject-matter of section 4 and partly of section 5 of the Validation of Laws Act fell within the Provincial List, but this does not mean that for that reason it went out of the legislative authority of the Constituent Assembly. A constituent authority, like the Constituent Assembly, with no limitations on its powers may at any time encroach upon the sphere of a legislature which is subject to its constituent authority, and all such encroachments, whether they take the form of validation of the laws of, or the making of laws for that legislature are in substance provisions as to the constitution of the State and properly fall within subsection (1) of section 8 of the Indian Independence Act. Similarly, section

5 is a provision as to constitution because it (1) bars objections to legislation on the ground of ultra vires, and (2) ousts the jurisdiction of all Courts, including the Federal Court whose jurisdiction in certain matters is guaranteed by the Constitution Act. I have, therefore, no doubt in my mind that both under subsection (1) of section 8 of the Indian Independence Act and section 5 of the Validation of Laws Act, we cannot entertain any objection to the validity of the laws which have deprived the respondent of the right of compensation to which he was entitled under the unamended laws and which was recognized by the decree of the High Court. In such matters the Courts are not to question the motives of policy of the legislature or to refuse to give effect to legislation merely because it appears to be harsh or unreasonable or vindictive. Their plain duty is to ascertain the intention of the legislature and to carry it out irrespective of the consequences that may ensue to a particular party. I, therefore, hold that the Validation of Laws Act, 1956, has the effect of rendering the decree of the High Court ineffective and that it is the duty of this Court not only to so declare but also to vacate the decree. I would, therefore, accept the appeal of the Government, reverse the decree of the High Court, and dismiss the respondent's suit. I would, however, allow to the respondent his costs throughout because after a strenuous battle he won in the High Court and he is defeated here, not because the judgment of the High Court was wrong on the date that it was delivered, but because the Legislature without waiting for this Court's decision on the merits of the appeal came to the rescue of the Punjab Government and deprived the respondent of the benefit of a decree."

On the other side, some references under Section 18(3) of The Land Acquisition Act, 1894 were pending before the learned District Judge, Sargodha. The learned District Judge, Sargodha vide judgment dated 11.07.1957 in such references has held that with regard to

Chaharmiwala Canal, the Collector had no authority to award compensation for stoppage of water in view of the amended law, whereas with regard to three other canals, it was observed that an appeal was available with the Commissioner, Rawalpindi Division, who was competent to deal with the matter.

Such findings of the learned District Judge were challenged by Malik Khizar Hayat Khan Tiwana before this Court by means of Writ Petition No.1282 of 1957, which finally was taken up and decided by this Court on 13.10.2000, when the same was dismissed.

In order to understand the prayer made in the present writ petition, it would be in the fitness of thing that the prayer made by late predecessor-in-interest of present petitioner Malik Khizar Hayat Khan Tiwana made in the referred writ petition be reproduced as under:-

“It is therefore respectfully prayed that this Hon’ble Court in the exercise of its jurisdiction under Article 170 may be pleased to quash the order of the learned District Judge, and direct that the compensation already assessed be paid to the petitioner, in respect of all the three canals.”

It is an admitted fact that such findings arrived at by this Court on 13.10.2000 were never further challenged.

3. The present petitioner with the claim that late Malik Khizar Hayat Khan Tiwana was her great grandfather, by impugning order dated 16.12.2012 passed by a Committee constituted for such specific purpose in the Government of Punjab conveyed through letter dated 22.02.2013 having the prior approval of the competent authority, whereby in view of the decision of the Hon’ble Federal Court arrived at in Constitutional Civil Appeal No.01 of 1954 on 14.03.1956 and the judgment passed by this Court in Writ Petition No.1282 of 1957 on 13.10.2000, again attempted to reopen the past and closed transaction.

Learned counsel for the petitioner instead of putting a challenge straightway to the impugned order has now made basis of his arguments an interim order dated 03.07.2014 passed by this Court in the present writ petition.

In order to better appreciate the contentions of learned counsel for the petitioner, referred interim order has been gone through with care, wherein although not only the earlier decision of the Federal Court, but also of this Court passed in Writ Petition No.1282 of 1957 were referred, however, in view of some concession seemingly extended by the departmental representative appearing for Irrigation Department, the matter was again referred to the Collector, Sargodha for determining afresh the entitlement of the present petitioner of having compensation as against the acquisition of canals or stoppage of water from the river by means of award dated 18.12.1954.

The status of the concession extended by the departmental representative, as shown to have been extended in favour of the petitioner on 03.07.2014 reflected in the interim order passed by this Court on the said date in the present writ petition, will be dealt with later on, however, on the reference made by this Court, District Collector, Sargodha, who was designated to proceed under the direction of this Court with reference to claim of the petitioner has finally decided the matter placed before him on 30.10.2014 and held the petitioner not entitled to any compensation as is being claimed by her.

Although a decree was passed in favour of Malik Khizar Hayat Khan Tiwana by this Court in Civil Original No.09 of 1954, but on account of amendments in the relevant Law, the Hon'ble Federal Court proceeded to set aside the said decree and held not entitled Malik Khizar Hayat Khan Tiwana to have any compensation in the light of award dated 18.12.1954. In view of legal position, when the judgment of the High Court is set aside by the Hon'ble Federal Court, the entire superstructure built thereon is bound to fall on the ground and the parties

are restored to the same position as if no judgment and decree had been passed by the High Court. In this regard, reference can be made to case titled "AASIA JABEEN and 3 others versus LIAQAT ALI and others" (2016 SCMR 1773).

So far as the concession extended by the representative of Irrigation Department on 03.07.2014 before this Court, while agreeing that the matter can again be referred to the Collector for evaluating the entitlement of the petitioner for compensation as against the acquisition of referred canals is concerned, it is a settled position of law that the consent of the parties cannot confer the jurisdiction.

In case titled "SHAHUL HAMID versus TAHIR ALI" (1980 SCMR 469), the Hon'ble Supreme Court of Pakistan has held as under:-

"8. All this discussion will show that neither a Court can issue any order nor a party can agree that with regard to any particular operative judgment a plea of res judicata will not be raised in any future litigation. Such order or agreement as discussed above would be a nullity and inoperative."

In case titled "SULTAN ALI versus KHUSHI MUHAMMAD" (PLD 1983 Supreme Court 243), the Hon'ble Supreme Court of Pakistan has held that total absence of jurisdiction can never be waived by the parties nor can an illegality in an order be cured by the consent of the parties.

In another case titled "ADMINISTRATOR, THAL DEVELOPMENT through EACO Bhakkar and others versus ALI MUHAMMAD" (2012 SCMR 730), the Hon'ble Supreme Court of Pakistan has observed in the following manner:-

"8. The two Courts below were, therefore, not justified in bypassing the issue of maintainability of the suit merely on the concession of

appellants' counsel, who refrained to argue this legal point. Needless to mention here that it is the bounden duty of every Court/Tribunal to examine the issue of bar of its jurisdiction at the earliest opportunity and decide it in accordance with law, instead of escaping to decide such important aspect of the case on the mere concession of one or the other party. Moreso, when consent of the parties can neither confer nor can take away the jurisdiction of a Court/Tribunal, unless so conferred or barred by law."

In case titled "MEMBER, BOARD OF REVENUE, PUNJAB (SETTLEMENT AND REHABILITATION WING)/CHIEF SETTLEMENT COMMISSION, PUNJAB, LAHORE versus MUHAMMAD MUSTAFA and 74 others" (1993 SCMR 732), the Apex Court provides a verdict that where the direction given by the High Court is manifestly against the law, it cannot be allowed to remain.

By getting a reference from this Court to the Collector on the basis of concession extended by the departmental representative, as is manifest from interim order passed by this Court on 03.07.2014, the petitioner in fact attempted to get a compensation, which earlier on number of occasions has been refused by the authorities having competent jurisdiction including the Apex Court at the relevant time i.e. Federal Court and in view of law laid down by the Hon'ble Supreme Court of Pakistan in case titled "Haji MUHAMMAD BOOTA and others versus MEMBER (REVENUE), BOARD OF REVENUE, PUNJAB and others" (PLD 2003 Supreme Court 979), it is settled position of law that what is not permitted to be done directly cannot be achieved through circumvention of law by indirect means.

4. Learned counsel for the petitioner in the last limb of his arguments has referred Article 24 of The Constitution of Islamic Republic of Pakistan, 1973 with the contention that no one can be

deprived of his property without due process of law and without payment of compensation thereto.

Even this was the plea *inter alia* raised in Writ Petition No.1282 of 1957, which was duly answered by this Court in judgment announced on 13.10.2000 in the following manner:-

“4. *One of the contentions raised in this petition is that by the time, the matter was decided by the learned District Judge, the Constitution of Islamic Republic of Pakistan, 1956 had been promulgated and under the provisions contained therein, no property could be acquired without providing compensation.*

5. *That may so, but what is to be seen is that the acquisition in this case was complete as far back as 1952, much before coming into force of the Constitution. Consequently, the constitutional provisions have no application to the present case. If any authority is needed, reference may be made to Keshavan Madhava Menon v. The State of Bombay (AIR (38) 1951 S.C. 128), Habeeb Muhammad v. The State of Hyderabad (AIR 1953 S.C. 287) and Dilbar Husain v. Ch. Khurshid Ahmad (PLD 1956 (W.P.) Lahore 865).”*

As such, the point lastly raised by learned counsel for the petitioner is not available to the petitioner in view of above unchallenged findings of this Court.

5. For what has been discussed above, it is the considered view of this Court that the relief, which has been prayed for by the petitioner in the present writ petition, is in fact a closed and past transaction and the entitlement, which is being claimed by the petitioner, has already been

refused to her forefathers on the same issue. As such, the present Constitutional petition is not competent and the same is **dismissed**.

6. Before parting with the decision of this writ petition, it is appropriate to recognize the able assistance provided by Mr. Muhammad Hammad Khan Rai, learned Assistant Advocate-General Punjab in this matter in arriving at a just decision.

Judge

Announced in open Court on 15.12.2017.

Judge

Approved for reporting.

Haider Shah