Case Note: The right of the State to levy and collect water charges from ex-proprietors and occupancy tenants for appropriation of water from an artificial tank which had been taken over by the state by virtue of land reform. The court held that the state had to continue to provide the water free of charge because the rights of the ex-proprietors and the occupancy tenants with regard to the land and the tank had not changed and the were entitled to get water without charge as they had been before the state took it over.

AIR1978SC1635, (1978)4SCC170, [1979]1SCR163.

IN THE SUPREME COURT OF INDIA

Decided On: 16.08.1978

The State of Maharashtra and Ors.
v.
Atma Ram Sadashiv Dongarwar and Ors.

Hon'ble Judges:
A.P. Sen, D.A. Desai and Jaswant Singh, JJ.

JUDGMENT

Jaswant Singh, J.

1. This appeal by certificate granted under Article 133(1)(c) of the Constitution by the High Court of Judicature at Bombay (Nagpur Bench) which is directed against its judgment and order dated July 5, 1967 in Special Civil Application No. 893 of 1965 raises an important question of law as to the right of the State to levy and collect water charges from the respondents under the Central Provinces Irrigation Act, 1931 (Act No. III of 1931) for appropriation for irrigation purposes of water from Navegaon Bandh Tank in Tehsil Sakoli, District Bhandara.

2. The facts giving rise to this appeal are :

As already indicated, there is in village Navegaon, Tehsil Sakoli, District Bhandara, which formed part of the erstwhile State of Madhya Pradesh, a very large reservoir of water called Navegaon Bandh Tank which is said to have been constructed some 300 years ago by one Kawdu Patel. The tank which is over an area of land admeasuring nearly 3200 acres has, since the time of its construction, been the main source of supply of water to the rice and sugarcane growing areas of five villages viz, Mouza Navegaon, Deolgaon, Mungli, Yerandi and Kholi comprising about 2688 acres of land which is held partly by the quondam Malguzars including respondents 1 to 8 and partly by the tenants including respondents 9 to 20. The said tank came to vest in the State under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, 1950

(Act No. 1 of 1951). In May, 1965, the State Government called upon the respondents who are ex-proprietors and occupancy tenants to execute agreements in writing undertaking to pay Rs. 7/- per acre for rice and Rs. 45/- per acre for sugarcane irrigation as charges for the use of water from the Navegaon Bandh Tank. The respondents thereupon brought the aforesaid writ petition challenging the levy by the State of the said charges as well as its demand for execution of the aforesaid agreements and seeking the issue of twin writs viz. (1) of prohibition forbidding the appellants from insisting on the respondents to execute agreements in the State's favour for payment of water charges for irrigating their lands and (2) of Mandamus directing the appellants to allow free irrigation of their fields from Navegaon Bandh Tank. The case of the respondents was that the right of taking water for irrigation purposes free of charge from the said lank had been enjoyed by the holders of land from generation to generation for the last 300 years with the only obligation of keeping the lank in proper repairs; that the tank was the property of the descendants of the said Kawdu Patel who were recognised as Malguzars of all the aforesaid live villages; that the right of the aforesaid holders of land of appropriating water of the tank was recognised and recorded in the Wajib-ul-Arz whereunder an obligation was cast on the Malguzars to allow the tenants to irrigate free of charge their lands for rice (dhan) and sugarcane cultivation; that the Malguzars as well as the tenants had thus been using the water of the tank for irrigating their fields and raising crops as of right without any payment either to the State or to any one also; that in the year, 1950, the Madhya Pradesh Legislature passed an Act called "the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals and Alienated Lands) Act, 1950 (Act No. 1 of 1951)" (hereinafter referred to as 'the Abolition of Proprietary Rights Act' with a view to eliminate the intermediaries (variously called as Malguzars, Zamindars and Jagirdars) between the State and the tillers of the soil and to acquire from a specified date for the purpose of the State free of all encumbrances the rights of proprietors in estates, mahals, alienated villages and alienated lands comprised in a notified area in Madhya Pradesh; that in the Notification issued under Section 3 of the Abolition of Proprietary Rights Act, the area vesting in the State was shown as the whole area of the aforesaid villages and the Mahals or Estates comprised therein; that thus the State was substituted in place of Malguzars with the same rights and liabilities; that the only consequence of vesting according to Section 4 of the Abolition of Proprietary Rights Act was to do away with the encumbrances of mortgages, if any, on proprietary lands and to fasten the same on the amount of compensation payable by the State to the proprietors; that the said vesting which took place as a result of the abolition of Proprietary Rights Act and the Notification issued thereunder did not affect, curtail or extinguish the aforesaid rights of free irrigation of the holders of land in the aforesaid five villages i.e., of the Malguzars who were cultivating their home farm lands or of other persons who were in occupation of lands as occupancy tenants at the time of the coming into force of the Abolition of Proprietary Rights Act and on the contrary, Sections 45, 46 and 47 of the Abolition of Proprietary Rights Act preserved those rights; that the right to free irrigation was recognised and recorded at various settlements and in the Wajib-ul-Arz of 1919; that notwithstanding the enactment and enforcement of the Abolition of Proprietary Rights Act, the State continued upto 1964 to recognise the respondents' right of taking water free of charge for irrigation purposes from the aforesaid tank which had been enjoyed by the respondents and their ancestors for the last 300 years and never made any demand on

account of water charges; that the respondents were entitled to take water from the aforesaid tank for such lands as it had been irrigated as per entries in the Wajib-ul-Arz which is an authentic record of rights of the cultivators of the villages in question; that in November, 1965, the officials of the State Government incharge of the Irrigation Department by reference to Section 26 of the Central Provinces Irrigation Act, 1931, which had no relevance, declined to allow the respondents to take water from the aforesaid tank unless they executed the aforesaid agrements, and that the action of the State Government and its officials was without any legal authority and encroached upon their fundamental rights.

3. In the return filed by them in opposition to the writ petition, the appellants while admitting that the tenants as well as the proprietors could avail of the right of irrigating their paddy lands on condition that they would maintain the Navegaon Bandh Tank in proper repairs and keep the irrigation channels clear from obstruction and sediment inter alia maintained that on and from the 31st of March, 1951 the date specified in the Notification No. 627-XII dated 27th January, 1951 issued under Section 3 of the Abolition of Proprietary Rights Act-all rights, title and interest vesting in the quondam proprietors in the notified area including lands, tanks etc. which were not their private property ceased and stood vested in the State free of all encumbrances; that consequently, the right of the outgoing proprietors and tenants of free use for the aforesaid irrigation purposes of water of Navegaon Bandh Tank (which was held by ex-Malguzars, not as their private property but as proprietors) was extinguished and the State became competent to impose the water charges on persons taking water from Navegaon Bandh Tank more so when on finding that though for many years, the proprietors as well as the tenants had been taking advantage of the irrigation facilities, they had all along been neglecting to keep the said tank and irrigation channels in proper repairs (which was an essential condition for enjoyment of the right of irrigation), it had, for ensuring proper irrigation facilities, to recondition the tank as well as the water channels (which have a water spread of 2688 acres of land) at an expense of about 22.76 lakhs of rupees; that Sections 45, 46 and 47 of the Abolition of the Proprietary Rights Act have no relevance as they had been repealed by Section 238 of the Madhya Pradesh Land Revenue Code read with Schedule III thereto and that such of the respondents as were proprietors had, after the coming into force of the Abolition of Proprietary Rights Act, accepted and withdrawn without any reservation the compensation determined by the Compensation Officer in respect of the proprietary rights over lands and tank's etc. including the Navegaon Bandh Tank which is comprised in the notified area resulting in the vesting of the said Tank in the State free of all encumbrances including the obligation to supply water free of charge to the respondents as well as of all restrictions on Government's right to renovate the tank.

4. On a consideration of material existing on the record, the High Court allowed the writ petition holding that the right to appropriate water free of charge was a customary right which was preserved and was not destroyed either by the Abolition of Proprietary Rights Act or by the Madhya Pradesh Land Revenue Code and that the State was not competent to levy any water charges under the Central Provinces Irrigation Act, 1931.

5. At the hearing of the appeal, the learned Counsel for the appellants has urged that the relevant provisions of the Abolition of Proprietary Rights Act have been wrongly construed by the High Court; that under Section 4 of the Abolition of Proprietary Rights Act, all the rights, title and interest of the erstwhile proprietors in the lands and tanks comprised in the notified area vested in the State on and from the date specified in the Notification issued under Section 3 of the Act viz. from 31st March, 1951 with the result that the respondents could not claim the right of free irrigation after such vesting; that the original right of free irrigation from the tank was not saved by any provision of the Abolition of Proprietary Rights Act; that even assuming without admitting that the respondents' right of free irrigation continued after 1950, it was finally destroyed by the Madhya Pradesh Land Revenue Code which came into force in 1953 and neither Section 7 of the Madhya Pradesh General Clauses Act nor Section 225 of the Madhya Pradesh Land Revenue Code saved the same; that the State was empowered under the provisions of the C.P. Irrigation Act, 1931 to recover charges for the supply of water for irrigation from the Navegaon Bandh Tank which had come to vest in it with effect from 31st March, 1951, and that in any event, respondents 1 to 8 who were the original owners (ex-proprietors) could not claim the right of free irrigation. On the other hand, it is contended on behalf of the respondents that the right of irrigation from the tank in question evidenced by entries in the wajib-ul-arz is preserved and protected by Sections 45 to 47 of the Abolition of Proprietary Rights Act; that the protection far from being taken away subsequently as alleged by the appellants was preserved by the M.P. Land Revenue Code; that repeal by Schedule III to the MP. Land Revenue Code of Sections 45 to 47 of the Abolition of Proprietary Rights Act did not affect any vested right which accrued under the repealed provisions of the Abolition of the Proprietary Rights Act and accordingly the respondents' right of appropriating the water of Navegaon Bandh Tank free of charge for irrigating their fields was not in any way affected by the aforesaid provisions of the M.P. Land Revenue Code; that the C.P. Irrigation Act, 1931 has no application to the instant case and that the case of respondent's 1 to 8 as regards free irrigation stands on the same footing as that of respondents 9 to 20.

6. For a proper appreciation and determination of the points involved in the case, it is necessary to have a clear idea of the scheme of the Abolition of Proprietary Rights Act which as already stated was enacted to provide for the acquisition of the rights of proprietors in estates. Mahals, alienated villages and alienated lands in Madhya Pradesh and to make provision for other matters connected therewith. Sub-section (1) of Section 3 of the Abolition of Proprietary Rights Act lays down that on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate, mahal, alienated village or alienated land, as the case may be, in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor, shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all circumstances. This provision, as evident from its opening words has been expressly made subject to savings as provided in the Act. The consequences ensuing from the beginning of the date specified in the notification which is made by the State Government under Section 3(1) are set out in Section 4(1) of the Abolition of Proprietary Rights Act which again is subject to exceptions provided in the

Act. One of such consequences is that all rights, title and interest vesting in the proprietor or any person having interest in such proprietary right through the proprietor in such area including land (cultivable or barren), grass land, scrub jungle, forest, trees, fisheries, wells, tanks, ponds, water-channels, ferries, pathways, village sites, hats, bazars and melas; and in all subsoil, including rights, if any, in mines and minerals, whether being worked or not cease and vest in the State for purposes of the State free of all encumbrances and the mortgage debt or charge on any proprietary right becomes a charge on the amount of compensation payable for such proprietary right to the proprietor under the provisions of the Act. Now as observed by this Court in Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh [1953] S.C.R. 476 that last part of Clause (a) of Section 4(1) of the Abolition of Proprietary Rights Act indicates that mortgage debts and charges on the proprietary right are what are meant by the term encumbrances. Sub-section (2) of Section 4 of the Abolition of Proprietary Rights Act which is in the nature of a non obstante provision says that notwithstanding anything contained in Sub-section (1), the proprietor shall continue to retain the possession of his home-stead, home-farm land ((2) For the purposes of the present case "home-farm land" as defined in Section 2(g) means-(i) land recorded as sir and khudkasht in the name of a proprietor in the annual papers for the year 1948-49. and (ii) land acquired by a proprietor by surrender from tenants after the year 1948-49 till the date of vesting) and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting.

7. Section 38(1) of the Abolition of Proprietary Rights Act which confers the rights of malik-makbuza on proprietors provides thus :-

38. (1) Every proprietor who is divested of his proprietary rights in an estate or mahal shall, with effect from the date of vesting, be a malik-makbuza of the home-farm land in his possession.

8. Section 39(1) of the Abolition of Proprietary Rights Act lays down that where the proprietary rights held by a protected thekadar or other thekadar or a protected headman or by any other under-tenure vest in the State under Section 3, the Deputy Commissioner may reserve to such proprietor the rights of an occupancy tenant in the whole or part of the home farm land and shall determine the rent thereon Sub-section (2) of Section 39 of the Abolition of Proprietary Rights Act provides that any person becoming an occupancy tenant under Sub-section (1) shall be a tenant of the State.

9. Section 40 of the Abolition of Proprietary Rights Act which confers rights of a lessee on the proprietor in certain lands provides that any land not included in home-farm but brought under cultivation by the proprietor after the agricultural year 1948-49 shall continue in the possession of such proprietor and shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed.

10. Section 41 of the Abolition of Proprietary Rights Act lays down that except in such areas as the State Government may, by notification, exclude from the operation of this section, every absolute occupancy tenant who, at any time before the date of vesting or

within six months therefrom, or such further period as the State Government may from time to time notify pays to the State Government an amount equal to three times the annual rent for the time being payable by him for his holding and every occupancy tenant who likewise pays to the State Government an amount equal to four times such rent, shall, on and from the date of vesting or the date of such payment, whichever is later, be declared in the prescribed manner to be malik-makbuza of the land comprised in his holding.

11. Section 45, 46 and 47 of the Abolition of Proprietary Rights Act which are material for the purpose of this case may be conveniently reproduced at this stage. These sections run thus :

45. (1) Subject to the provisions of Section 41, any person who immediately before the date of vesting was in possession of any holding as an absolute occupancy tenant or an occupancy tenant shall, on and from the date of vesting, be deemed to be a tenant of the State and shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting.

(2) Any person holding land as village service land shall be deemed to be holding it from the State and shall be governed by the provisions contained in Sections 42 to 48 of the Central Provinces Tenancy Act, 1920.

(3) Any person holding land other than sir land from the proprietor on favourable terms for service rendered by him shall from the date of vesting be declared to be an occupancy tenant of the State and the Deputy Commissioner shall fix the rent to be paid by him.

(4) The rent payable to the State by such a tenant shall for the purpose of its recovery be rent within the meaning of Clause (a) of Section 225 of the Central Provinces Land Revenue Act, 1917.

46. Every person deemed or declared to be a malik-makbuza under Section 38 or Section 41 and every other malik-makbuza in a mahal shall be entitled to any right which a tenant has under the village wajib-ul-arz and any reference to a tenant in the wajib-ul-arz shall be deemed to include a reference to every such malik-makbuza.

47. (1) The Deputy Commissioner shall, in regard to lands vesting in the State or remaining with the proprietor under this Act, ascertain in the prescribed manner the custom in respect of-

(a) the rights of persons resident in the estate or village or holding lands comprised in the mahal;

(b) the rights to irrigation, right of way and other easements;

(c) the rights to trees and to produce;

(d) any other rights and customs which the State Government may direct to be recorded.

(2) The Deputy Commissioner shall record in the wajib-ul-arz, the customs so ascertained and if necessary modify any entries therein.

12. The rules which the Deputy Commissioner is required to follow in ascertaining custom in relation to the rights mentioned in the above noted Section 47 appear to have been made vide Notification No. 70-XXVIII dated 3rd March, 1951. The said rules may also be reproduced here for facility of reference :

1. (1) In the Central Provinces, excluding merged territories, the Deputy Commissioner shall issue a proclamation in Form A appended to these rules asking the villagers to apply by a specified date if they consider inadequate the existing customs recorded in the Village Administration Paper in respect of any heads specified in Rule 2 or desire to have recorded therein any new custom under any head specified in Rule 2.

(2) In the merged territories, the Deputy Commissioner shall issue a proclamation in Form B appended to these rules asking the villagers to state by a specified date what customs in respect of the heads specified in Rule 2 should be recorded in the Village Administration Paper.

2. Customs shall be ascertained under the following heads and due regard shall be had to the conditions entered in the Village Administration Paper, if any, and the objections urged by the residents of the village :-

Heads under which customs can be recorded.

.. ..

(VIII) Irrigation

(IX) Other water rights .. .. ..

13. A plain reading of Section 45 reproduced above would show that the Abolition of Proprietary Rights Act did not affect the tenancy rights of absolute occupancy tenants and occupancy tenants created by the outgoing landlords. On the contrary, it guaranteed the continuity of absolute occupancy tenants and occupancy tenants by clothing them with the status of tenants under the State and conferring on them the same rights as were being enjoyed by them before the date of vesting. The words "in the same rights" occurring in Sub-section (1) of Section 45 are very significant. They leave no room for doubt that the absolute occupancy tenants and occupancy tenants were to continue to enjoy the irrigation and other water rights which were enjoyed by them before the date of vesting.

14. Section 46 puts the Malik-makbuza at par with the tenants in regard to customary rights under the wajib-ul-arz. It ordains that every person deemed or declared to be a

malik-makbuza under Section 38 or Section 41 and every other malik-makbuza in a mahal is entitled to the same customary right as a tenant under the village wajib-ul-arz.

15. Section 47 emphasises the importance of custom in relation to the right to irrigation by making it imperative for the Deputy Commissioner to ascertain in accordance with the aforementioned rules and record in the village wajib-ul-arz the custom in respect of the right to irrigation and certain other rights in regard to the lands vesting in the State or remaining with the proprietor under the Abolition of Proprietary Rights Act.

16. It may be stated here that wajib-ul-arz which was prepared at the time of settlement under the C.P. Land Revenue Act, 1917 contained the following entries :-

Term No. 13(2) of the Wajib-ul-arz of the year 19-20 of mouza Navegaon Bandh P.H. No. 35.

13. Water of tank No. 883/1 is taken for irrigation to Villages Muza Mungli, Deolgaon, Yerandi and Kholi for Veblaf(?) of also and Sadshiv son of Istari of Mouza is entitled for Sugar Cane free of charge.

Term No. 18(2) of the Wajib-ul-arz :

Water of tank No. 883/1 is taken free of rate for paddy irrigation both by the Malguzars and tenants. Details are given in the Walit Parcha. Water of this tank for one day and night is taken by Sitaram Patil for mahal No. 1 and Kanhu son of Sambhu Patil also takes one day and one night for Mahal No. 2. It is free to Malik Mukhiya only for Sugar Cane Irrigation.

17. From the foregoing, it becomes crystal clear that the occupancy tenants and malik-makbuza who were appropriating the water of Navegaon Bandh Tank for raising paddy and sugarcane crops before the date of vesting under the Abolition of Proprietary Rights Act were to continue to enjoy those rights without any let or hindrance even after the date of vesting.

18. Let us now proceed to determine whether there was any change in this position as a result of the enactment of the Madhya Pradesh Land Revenue Code, 1954 (hereinafter referred to as 'the Code') which received the assent of the President on the 5th February, 1955 and was adapted and modified at first by the Bombay (Vidarbha Region) Adaptation of Laws (State and Concurrent Subjects) Order, 1956 and later on by the Maharashtra Adaptation of Laws (State and Concurrent Subjects) Order, 1960 because it has been contended by learned Counsel for the appellants during the course of his submissions that with effect from 12th February, 1955 when the aforesaid assent accorded by the President to the Code was published in the Madhya Pradesh Gazette Extraordinary there was an automatic extinction of the aforesaid right of irrigation enjoyed by the occupancy tenants and malik-makbuza in consequence of the repeal of Sections 45 to 47 of the Abolition of Proprietary Rights Act by virtue of Section 238 of the Code, read with Schedule III thereto. The contention is, in our opinion, wholly

untenable as it proceeds on a misconception of the true legal position and overlooks the provisions of Section 239 of the Code which runs thus :

239. All rules, assessments, appointments and transfers made, notifications and proclamations issued, authorities and powers conferred, farms and leases granted, records-of-rights and other records framed or confirmed, rights acquired, liabilities incurred, times and places appointed, and other things done under any of the enactments hereby repealed shall, so far as may be, be deemed to have been respectively made, issued, conferred, granted, framed, revised, confirmed, acquired, incurred, appointed and done under this Code.

19. It is worthy of note that Section 239 of the Code did not destroy the right of free irrigation enjoyed by the respondents. On the contrary, it fully protected and preserved the same. The words "all rights acquired" occurring in the said section of the code are comprehensive enough to take in the irrigation and other rights acquired by the tenants and malik-makbuza under Sections 45 to 47 of the Abolition of Proprietary Rights Act which stood repealed by virtue of Section 238 of the Code. This view is in consonance with the decision of this Court in State of Punjab v. Mohar Singh where it was held that the line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Examining the matter in the light of this principle, we have no doubt in our mind that the right of free irrigation which accrued to the occupancy tenants and malguzars under the aforesaid Sections 45 to 47 of the Abolition of Proprietary Rights Act were not only not destroyed but were also saved by Section 239 of the Code and are, therefore, to continue to be enjoyed by the occupancy tenants and malguzars without being affected, curtailed or whittled down in any manner despite the repeal of Sections 45 to 47 of the Abolition of Proprietary Rights Act by Section 238 of the Code.

20. The last contention advanced by the learned Counsel for the appellants that the Government was competent to recover water charges by virtue of the provisions contained in Section 26 of the Central Provinces Irrigation Act, 1931 is also devoid of substance. The said section, it would be noticed, vests in the Government all rights in the water of any river, natural stream or natural drainage channel, natural lake or other natural collection of water. As in the instant case, it is clear not only from the averments of the respondents but also of the appellants themselves that the tank in question is not a natural lake, Section 26 of the Central Provinces Irrigation Act, 1931 can be of no avail to the appellants and the water rights which could be acquired by custom as indicated in Harrop v. Hirst [1968] L.R. 4 Exch. 43 and were in fact acquired by custom by the respondents in the instant case as shown above and were recognised and preserved both under the Abolition of Proprietary Rights Act and the Code cannot in any manner be interfered with by the appellants.

21. The importance attached to the need for recognition of the right to irrigation may also be gleaned from the following observations made by Chief Justice Callaway in Allen v. Petrick (69 Mont, 373, 377, 379, 380, 22 Pac 451, 452, 453 (1924) :

The appropriator does not own the water.... He has a right of ownership in its use only. The use of water in Mautana is vital to the prosperity of our people. Its use, even by an individual, to irrigate a farm, is so much a contributing factor to the welfare of the State that the people, in adopting the Constitution, declared it to be a public use....

22. For the foregoing reasons, we do not find any merit in this appeal which is dismissed with costs.