

(2014) 08 MAD CK 0025

In the Madras High Court

Case No : Writ Petition (MD) No. 661 of 2014 and M.P. (MD) Nos. 1 & 2 of 2014

P. Arimutharasu

APPELLANT

Vs

The Superintending Engineer (Wind Farm Project) Tamil Nadu
Electricity Board Tirunelveli

RESPONDENT

Date of Decision : 26-08-2014

Acts Referred:

Citation : (2015) 1 CWC 566

Hon'ble Judges : Mr. T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : Mr. S. Subbiah, Advocate, for the Petitioner; Mr. G. Kasinathadurai, Advocate, for the Respondent Nos. 1 to 3; Mr. G.R. Swaminathan, Advocate, for the Respondent No. 4; No appearance, for the Respondent No. 5

Final Decision : Disposed Off

Judgement

Mr. T.S. Sivagnanam, J.—The petitioner in this writ petition seeks for issuance of a writ of certiorarified mandamus to quash the order, dated 13.08.2013, passed by the second respondent and to forbear the respondents 1 to 3 herein from putting up any poles or pillars or drawing over head lines in any form over the lands, comprised in Survey No.892, measuring an extent of 0.39.5 Hectares (98 Cents); Survey No.893/2, measuring an extent of 43 Cents out of 1.23.5 Hectares; Survey No.894/2, measuring an extent of 0.35.5 Hectares (88 Cents) and Survey No.895/10, measuring an extent of 21 Cents out of 58 Cents, of Koodankulam Village, Radhapuram Taluk, Tirunelveli District, without the consent of the petitioner.

2. With the consent of both the parties, this writ petition is taken up for final disposal.

3. The petitioner submits that he is the absolute owner of the said lands having been allotted the same under a deed of partition deed, dated 22.04.1996, entered into between his family members and ever since the date of partition, he

has been in possession and enjoyment of the said property.

4. The grievance of the petitioner is that his possession of the said property is being interfered by the respondents 1 to 3 Electricity Board under the guise of drawing electric lines for the benefit of private entrepreneurs, who have erected wind mills around the petitioner's property. It is submitted that the private wind energy generators have no vested right to draw electric lines across the petitioner's property without his consent either it may be overhead lines or underground cables and the provisions of the Electricity Act and the Electricity Supply Code, 2004 etc., do not authorize the same. It is further submitted despite the legal position being thus, taking advantage of the petitioner's absence as he is working in Chennai, electric lines have been drawn across the petitioner's property for the benefit of private wind energy generators. Therefore, the petitioner filed suits in O.S.No.187 of 2011 and O.S.No.70 of 2012, on the file of the District Munsif Court, Valliyoor, for mandatory injunction to remove those lines and the suits are said to be pending. Whiles, another attempt has been made by the private respondents to draw electric lines across the petitioner's property. Hence, the petitioner filed another suit in O.S.No.308 of 2013, on the file of the District Munsif Court, Valliyoor, for permanent injunction restraining the private respondents from erecting electric poles or commissioning any wind mill by drawing the lines through his property. In the said suit, an interlocutory application for temporary injunction was filed in I.A.No.1932 of 2013 and an order of status quo was granted by the Trial Court till 13.12.2013, which was extended periodically and the said suit and the interlocutory application are pending.

5. It is further submitted that in spite of pendency of the said suit along with the interim order of status quo, once again electric lines are sought to be drawn to benefit the private respondents. Therefore, the petitioner sought for information from the respondent Board under Right to Information Act and the second respondent by the impugned communication, dated 13.08.2013, sought to justify their action stating that they are entitled to exercise the power under the provisions of the Telegraph Act and there is no need for obtaining permission from the Special Tahsildar/competent authority as they are carrying out line work under Section 164 of the Act. Therefore, the petitioner submits that in spite of having caused extensive damage to his property and though three suits are filed and the same are pending before the District Munsif Court, Valliyoor, once again the respondent Board proposed to draw electric lines across the petitioner's property to benefit the private respondents. Therefore, it is contended that the petitioner should not be driven to file civil suit one after another whenever the respondent Board was directed to provide connections to private wind energy generators, at the cost of the private individuals, contrary to Article 300(A) of the Constitution of India.

6. Mr.S.Subbiah, learned counsel for the respondents 1 to 3, submitted that the respondents 1 to 3 have not framed any scheme under the provisions of the

Electricity Act and when there is no scheme framed under the said Act for transmission of overhead lines through towers, the respondent Board has no power to take electricity connection through the petitioner's property in deprivation of his rights. Further, it is submitted that in the absence of a scheme under Section 42 of the said Act, the respondents 1 to 3 cannot take shelter under Section 164 of the Act. It is further submitted that in the absence of any order passed by the appropriate Government, the question of invoking power under Section 164 of the Telegraph Act does not arise and electric lines cannot be drawn through the petitioner's property.

7. It is further submitted that in the absence of any scheme, the provisions of the Telegraph Act, 1885 will not be made applicable to the subject matter and therefore, the action of the respondent Board is wholly without jurisdiction. Further, it is submitted that the impugned communication is the outcome of non-application of mind, wherein reference has been made to Section 85(2)(a) of the Act, which has no application to the subject matter.

8. The learned counsel referred to the proceedings of the respondent Board in B.P.(FB) No.135, dated 08.11.2004 and by referring to the contents of the said proceedings, it is submitted that it is not an order by appropriate Government as required by the statute. By referring to the communication of the Chief Engineer/NCES, Chennai, addressed to the fourth respondent, it is submitted that the permission for establishing substation and transmission line work granted to the fourth respondent was to be carried out by themselves at their cost and for which purpose if they have drawn the lines across the petitioner's property, it is noway connected with any scheme and therefore unless and until the petitioner grants his consent, the question of drawing overhead lines across the petitioner's property does not arise.

9. The learned counsel has drawn the attention of this Court to the averments made in the plaints filed in the suits, which are pending and the photographs of the property to show that several lines are passing across the petitioner's property and this has affected the petitioner's easmentary right to enjoy his property, which includes the right of enjoyment vertically also. In this regard, reliance was placed on the decisions of this Court in the cases of Lakshmanan and others v. G. Ayyasamy, reported in 2011-2-L.W.24 and Suvabai and others v. Bhaskara Reddiar, reported in 2012-2-L.W.281.

10. Mr.G.Kasinathadurai, learned counsel for the respondent Electricity Board, submitted that the prayer sought for by the petitioner in this writ petition has become infructuous as the work has already been completed and the new line has been energized on 11.05.2012 at 18.33 hours and this writ petition has been filed only during 2014 and the suits were also filed much after the lines were drawn and therefore this writ petition is liable to be dismissed. By referring to the proceedings of the Board, dated 08.11.2004 and the report accompanying the said proceedings, it is submitted that the lines have been drawn pursuant to the scheme framed by the respondent Board and the scheme has been notified in the

Government Gazette, dated 27.04.2005, in which the concerned village has been notified as Serial No.15 and the same has also been published in the "Daily Thanthi" Tamil newspaper, dated 09.04.2005. In terms of the said notification, if any person has objection, he ought to have agitated the same before the respondent Board within the time prescribed and the petitioner having not agitated the same in the manner provided, now he cannot seek for such a prayer as sought for in this writ petition.

11. Further, the learned counsel made elaborate reference to the proceedings of the Chief Engineer (Transmission), Chennai, dated 25.04.2011 and 28.05.2011 and the proceedings of the Assistant Executive Engineer, Transmission Line Construction, Tamil Nadu Electricity Board, Vallioor, dated 30.06.2013 and submitted that the energisation of the lines having been completed on 11.05.2012, as per the report of the Assistant Engineer, the prayer sought for in this writ petition has become infructuous. Further, the learned counsel referred to the written statement filed by the respondent Board in O.S.No.70 of 2012 and submitted that the identical stand was taken in the suit filed by the petitioner. Therefore, it is contended that the prayer sought for is liable to be rejected.

12. Further, the learned counsel referred to the averments made in the counter affidavit and submitted that besides the objection raised by the petitioner, no other land owners raised any objection with regard to the transmission lines and the petitioner having failed to raise any objection at the time when the notification was published or after the paper publication was effected, now the petitioner cannot raise any objection after energizing and commissioning of transmission line. In support of his contention, he has placed reliance upon the decision of the Honourable Supreme Court in the case of Daulat Singh Surana v. First Land Acquisition Collector, reported in (2007) 1 SCC 641 and the decisions of this Court in the cases of E. Venkatesan v. Chairman, T.N.Electricity Board, Madras, reported in AIR 1997 Madras 64, R. Kannan v. Power Grid Corpn. (India) Ltd., reported in (2008) 4 MLJ 892 and T. Narayanan v. Dist. Executive Magistrate-cum-Dist. Collector, reported in (2008) 4MLJ 1024.

13. Mr.G.R.Swaminathan, learned counsel for the private respondent (fourth respondent), while reiterating the stand taken by the respondent Board, submitted that the prayer sought for in this writ petition is not maintainable as the petitioner has challenged the communication issued under Right to Information Act and if at all the petitioner is aggrieved by the information given by respondent Board, he ought to have preferred appeal. Further, he would submit that the consequential prayer sought for to issue a direction to the respondent Board not to draw electric lines across the petitioner's property has become infructuous, since the lines have already been drawn and the same have been energized. Therefore, it is submitted that the writ petition is liable to be dismissed as having become infructuous.

14. Heard the learned counsel for the parties and perused the materials placed on record.

15. The first issue, which has to be considered, is as to whether the electricity supply lines have been drawn across the petitioner's property pursuant to a scheme announced by the Board. It is the contention of the respondent Board that no tower has been erected in the petitioner's land and only six overhead wires in the height of 50 feet above the ground level were strung and it will not affect any agricultural activities. It is the further case of the respondent Board that as per the Technical Branch, Chief Engineer/Planning Proceedings, in Permanent B.P.(FB) No.135, the proposal of establishment of 230-110KV ratio with 2X100 MVA auto transformer at Sankaneri 230/33KV wind farm SS in Tirunelveli Electricity Distribution Circle, survey for transmission and administrative approval were sanctioned on 04.11.2004 and this was published in Tamil Nadu Government Gazette No.16, dated 27.04.2005 and also published in Daily Thanthi on 09.04.2005 with clear instruction to the public that if anybody is having objection in laying transmission line along with passage of the route mentioned, may approach the Superintending Engineer/GCC/Madurai and explain their objection within two months from the date of publication of the notification.

16. It is further submitted that the project of transmission line is a sanctioned scheme to the value of Rs.1386.95 lakhs vide Permanent B.P.(FB) No.135, as per the Chief Engineer Proceedings, dated 04.11.2004. Further, it is submitted that the route of transmission line was inspected by the officials and the same was approved and there was no alternative place was found feasible. Further, it is contended that in terms of Section 13 of the Telegraphic Act, 1885 read with Section 51 of the Indian Electricity Act, 2003, no notice is required to be issued to the owner of the lands before erecting towers nor consent is required. Further, it has been stated that the work has been completed and new lines have been energized on 11.05.2012 at 18.33 hours.

17. On perusal of B.P.(FB) No.135, dated 08.11.2004, it is seen that it pertains to a wind farm substation for Tirunelveli Region for introduction of 230/110KV ratio with 2 X 100 MVA auto transformer at Sankaneri and the said administrative approval was accorded and the expenditure was approved at the estimated cost of Rs.1386.95 lakhs. From the report, which is accompanies the estimate, it is seen that prior to the said proposal, the power generated by the wind energy generators (WEGs) is evacuated through 110 kV feeders, most of them are terminated at 110 kV bus of SR Pudur-230/110 kV SS with a transformation capacity of 2X100 MVA. Further, the report states that the auto transformers at SR Pudur are loaded to their limits and any more addition of wind energy generators on 110 kV feeders in this region will lead to overloading of SR Pudur 230/110 kV autotransformers and that the substations at Maharajapuram and Chidambarapuram are proposed to be established and hence to evacuate the wind power effectively the strengthening of grid has to be done. Further, the report states that a new 230/33 kV substation at Sankaneri is commissioned to evacuate about 100 MW of wind power to be generated by M/s.Suzlon and this would help in reduction of overloading of autotransformers at SR Pudur substation. The said decision was taken by the Board on 08.11.2004 and the

same was published in the Tamil Nadu Government Gazette.

18. From a perusal of the Government Gazette, it is seen that the notification pertains to Sanganeri 230 kV substation from Koodankulam 110 kV substation and line has to be drawn for a distance of 7 Kms, at the cost of Rs.65.590 Lakhs. Therefore, B.P.(FB) No.135, dated 08.11.2004 or the notification published in the Tamil Nadu Gazette on 27.04.2005 do not relate to the drawl of the line from the private respondent's wind mill, but this is the proposal for establishment of new substation at Sankaneri so as to reduce overload in SR Pudur substation. The proposal was made as there was a private company engaged in wind generator namely by M/s. Suzlon and that was cited as a reason to establish a new substation at Sankaneri to reduce the overloading of the auto transformer at SR Pudur substation. Therefore, the reliance placed by the respondent Board on the Board proceedings and the gazette notification justifying the action of the private respondents is thoroughly misconceived.

19. At this stage, it is pertinent to point out that the Chief Engineer/NCES, by proceedings, dated 03.11.2010, has issued a communication to the fourth respondent, wherein in the subject column, the establishment of new substation has been referred to. Based on the request made by the fourth respondent and as per B.P.(Ch) No.433, dated 22.09.2010, the fourth respondent was permitted to take up the establishment work of new 110/33 KV SS with erection of 2 x 55 MVA, 110/33 KV power transformer at Koodankulam village under Section 10(1) of EA 2003 by meeting all the expenditures by themselves for evacuating the wind energy generated from their clients WEGs to TNEB grid. The conditions imposed in the said order makes it clear that all issues have to be handled by the fourth respondent. Therefore, the establishment of the new substation at Sankaneri could be construed as a scheme but the issue in this writ petition is as to whether the line drawn from the fourth respondent's wind energy generator to be connected to TNEB grid would form part of the scheme. If such interpretation is accepted then the requirement is to notify the scheme by mentioning lands owned by the petitioner across which the lines are to pass through. In the absence of the petitioner's name having been found in the notification, the petitioner cannot be blamed to state that he ought to have filed objection after the notification was published in the Gazette.

20. As noticed above, the Gazette notification itself is only for the proposal of establishment of the substation and it does not speak about the manner in which the lines to be drawn. That apart, the petitioner has already been put to prejudice since already two other lines are passing through his lands and he filed two suits and the same are said to be pending before the Civil Court. While so, the respondent Board ought not to have permitted the private respondents to march over the petitioner's land ignoring his objection as well as the fact that this issue is pending before the Civil Court. Therefore, this Court is of the view that the action of the respondent Board is wholly arbitrary and unreasonable.

21. The decision in the case of R. Kannan (cited supra) is for the proposition that

by virtue of Section 164 of the Electricity Act, 2003, the appropriate Government for placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for proper co-ordination of work confer upon any public Officer etc., subject to such conditions as the appropriate Government may specify any powers which the telegraph authority possesses under that Act with respect to placing of telegraph lines and posts.

22. It has to be pointed out that in the instant case, there is no notification by the appropriate Government and the notification is issued by the respondent Board and such notification does not prescribe the route through which the line is to be drawn and it is left to the respondent Board by the fourth respondent to draw the lines for the purpose of establishment of the project and in such circumstances, the petitioner ought to have been heard in the matter especially when he has already approached Civil Court on account of two other lines passing across his lands.

23. The decision in the case of T. Narayanan (cited supra) is to the effect that public interest is always superior to the interest of an individual and when the Corporation exercises powers under Section 164 of the Electricity Act, 2003 read with Section 10 of the Indian Telegraph Act, they are not acquiring the land, but they are only making use of the land for the purpose of laying electric lines. The facts of the present case are entirely different, wherein objection was raised, the District Magistrate has passed certain orders and this decision is clearly distinguishable on facts and does not render support to the stand taken by the respondent Board.

24. Hence, for all the above reasons, this Court is of the firm view that the petitioner has been arbitrarily dealt with and the respondent Board, in the absence of the petitioner, drawn the lines across his property, without considering his objection especially when he has already raised objection in respect of two other lines and suits are pending for removal of those two lines. Therefore, least that could have been done by the respondent Board is to issue notice to the petitioner before accepting the proposal of the fourth respondent to pass the lines across the petitioner's land. It would have been reasonable, if this proper procedure is adopted.

25. In the case of R. Santhana Raj and another v. The Chief Engineer, Non-Conventional Energy Source, Anna Salai, Chennai and others in W.P.(MD) No.8844 of 2011, dated 08.11.2011, a prayer was made to issue a writ of mandamus to forbear the respondents from erecting any high tension electric towers through the petitioner's property violating the provisions of Indian Electricity Act. The petitioners contended that their consent, as required under Section 12(2) of the Indian Electricity Act, 1910, was not obtained and that there is an alternative land is available in the form of public road, through which high tension line can be carried. The respondent Board contended that the petitioners cannot place reliance upon Section 12(2) of the Indian Electricity Act, since the

1910 Act was repealed by Section 185 of the Electricity Act, 2003 and the only right that the petitioners have is to claim compensation and that the question of consent did not arise after the advent of the 2003 Act. The respondent Board relied on the decisions in the cases of R.Kannan, T. Narayanan and Daulat Singh Surana (cited supra).

26. Mr. V. Ramasubramanian, J., by Order, dated 08.11.2011, while considering the said writ petition, first took note of the fundamental question as to whether the benefit of Section 12(2) of the Electricity Act is available as on date. After referring to the various provisions of the Act, held that it is clear that prima facie the licensee has the power to lay down and place electrical lines and other works in any place within the area of supply or transmission. However, this power can be circumscribed only by the rules framed by the appropriate Government in terms of sub-section (2). Answering the question as to whether prior consent of the owners is necessary before erecting poles, towers or supply lines, on a private land, held that it depends upon the licensee under Section 164 of the Electricity Act, 2003.

27. By referring to B.P.(CH) No.368, Technical Branch, dated 25.08.2010, it was held that the appropriate Government had already conferred powers upon the Electricity Board to exercise the powers of the Telegraph Authority under the Telegraph Act, 1885. This conferment had been made by the Government, in terms of Section 51 of the Electricity Act, 1910, much before the 2003 Act was issued. This conferment made under Section 51 of the 1910 Act should be deemed to be a conferment under the corresponding provision of the 2003 Act, namely Section 164, since it is not inconsistent with any of the provisions of the 2003 Act. It was further held that the electricity board has been conferred with the powers exercisable by the Telegraph Authority in terms of Section 10 of the Telegraph Act, 1885. Therefore, Rule 3(4) of the Works of Licensees Rules, 2006 would come into play in the case on hand. Consequently, the requirement of prior consent of the owner or occupier, prescribed under Rule 3(1)(a) of these Rules will not affect the powers deemed to be conferred upon the respondents under Section 164 of the 2003 Act, by virtue of Section 185(2)(a) of the 2003 Act read with Section 51 of the 1910 Act. In conclusion it was held as follows:

"58.

(ii) Primarily, Rule 3(1)(a) the Works of Licensees Rules, 2006 requires the licensee to obtain the prior consent of the owner or occupier of any building or land on which it is proposed to carry out certain works.

(iii) If the owner or occupier refuses to give consent and raises objections, the licensee may obtain permission in writing from the District Magistrate or the Commissioner of Police, in terms of the first proviso under Rule 3(1).

(iv) But in cases where powers are conferred upon the licensee under Section 164 of the Electricity Act, 2003, the provisions of Rule 3(1) to (3) of the Works of Licensees Rules, 2006 will not apply, In other words, where the appropriate

Government had conferred upon the licensee, the powers of a Telegraph Authority under the Telegraph Act, 1885, the licensee need not take recourse to the procedure prescribed by Rules 3(1) to (3) of the Works of Licensees Rules, 2006. But the licensee shall take recourse to the provisions of the Telegraph Act, 1885.

(vii) Though Section 10 of the Telegraph Act, 1885, does not make it incumbent upon the licensee to obtain permission of the owner or occupier, it does not also reduce his ownership or right of possession into something farcical. The right of the owner or occupier to resist or obstruct any act undertaken under Section 10, is recognised indirectly in Section 16(1), which requires the licensee to obtain an order of the District Magistrate, in such circumstances. A careful reading of Section 16(1) would show two things viz., (a) that the District Magistrate exercises his power under this Section, in his discretion and (b) that what the District Magistrate does under Section 16(1) is akin to the removal of obstruction as ordered by an Executing Court in terms of Order XXI, Rules 97 and 98 of the Code. Any resistance on the part of the owner or occupier after an order is passed by the District Magistrate becomes a punishable offence under Section 188 of the Indian Penal Code, by virtue of Section 16(2) of the Telegraph Act, 1885.

(viii) The words "resisted or obstructed" appearing in Section 16(1) of the Telegraph Act, 1885 have to be given their ordinary meaning..... Therefore, a dignified protest, even in the form of a formal letter, notice or telegram, would amount to obstruction within the meaning of licensee should seek an order from the District Magistrate."

28. In terms of the above decision, a dignified protest would amount to obstruction within the meaning of Section 16(1) of the Telegraph Act, 1885 and once such a protest is lodged, the licensee should seek an order from the District Magistrate. At this juncture, the question would be did the petitioner herein protest the action of the respondent Board.

29. Firstly, though a notification was published in the Gazette and the Daily Thanthi newspaper, the petitioner's name did not find place in the said notification nor the survey numbers of the property and other details were mentioned, all that has been mentioned is regarding the Sankaneri substation, length of line and the estimated cost. Therefore, no reasonable person could state that the petitioner ought to have responded to the notification and submitted his objections. When in fact the petitioner was not aware that the drawl of the lines by the private wind energy generator would affect his lands. Therefore, the contention of the respondents is farfetched. Nevertheless, the petitioner has been agitating the issue when two other lines cross his lands. In fact, suits are pending since 2012 in respect of those lines, which were drawn across the petitioner's property to benefit certain other private parties and in the said suits the respondent Board is also a defendant. Therefore, the question would be as to whether the Board could say that the petitioner did not even

protest in the matter when the lines were drawn for the private respondents, in fact his protest is pending before the Civil Court when lines were drawn across the same property for other private parties. In such circumstances, when the suit was pending, it is deemed that there is a protest registered by the petitioner. A protest in the most dignified forum is by approaching the Civil Court of competent jurisdiction. Therefore, in all fairness, the respondent Board ought to have treated the pendency of the Civil suits as a protest by the petitioner and in spite of the same if the respondent Board or the private respondents were of the opinion that the line ought to be drawn through the petitioner's property, then they ought to have approached the District Magistrate. Presumably, the respondent Board and the private respondents took advantage of the fact that no interim order was granted in the suits, which are said to be pending and the order of status quo granted in the third suit was also subject matter of interpretation. Admittedly, as on date the lines have been drawn across the petitioner's property and they have been connected to the poles and according to the respondent Board they have also energized, though the learned counsel for the petitioner raised certain objections regarding the terminology used by the Board. The facts remain that the lines have already been drawn. Therefore, at this stage, no direction can be issued to the respondent Board not to dismantle the lines and that does not mean that the petitioner is remedyless. The Court is entitled to mold the relief according to the facts and circumstances of the case and according to the situation that may warrant and issue directions in order to render full and complete justice to the parties. Bearing in mind public interest, which is involved in the matter, this Court does not propose to issue a writ of mandamus to the respondent Board to dismantle, but would place on record that the action of the respondent Board and the private respondents is arbitrary, the impugned order is an outcome of the non-application of mind by referring to the provisions of the Act, which have no application to the facts of the case. This shows the manner in which the land owner has been dealt with probably at the behest of the private respondents.

30. Be that as it may, if the petitioner had been notified that a third line is going to be drawn, he would have probably registered a protest since his prayer for dismantling the two lines, which were drawn, is still pending before the Court. Therefore, this Court is of the view that the petitioner should be granted liberty to move the District Magistrate, under Section 17(2) of the Telegraph Act, 1885. It is true that the respondent Board should go before the District Magistrate for removal of the obstruction of the petitioner as the work has already been completed, liberty is granted to the petitioner to apply to the District Magistrate under Section 17(2) of the Telegraph Act, 1885 and if such application is filed within a period of two weeks from the date of receipt of a copy of this order, the District Magistrate shall consider the same after affording an opportunity of personal hearing of the petitioner as well as the respondents and pass final orders on merits and in accordance with law, within a period of three weeks, after the conclusion of the personal hearing.

31. In the result, the writ petition is disposed of with the above observations and directions. Consequently, connected miscellaneous petitions are closed. No costs.