
(2011) 11 MAD CK 0338

In the Madras High Court

Case No : Writ Petition (MD) No. 8844 of 2011 and M.P. (MD) No's. 1 to 3 of 2011

R. Santhana Raj and T. Karthika

APPELLANT

Vs

The Chief Engineer, Non-Conventional Energy Source, Anna Salai, Chennai and Others

RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Electricity Act, 2003 — Section 121, 164, 185, 185(1), 185(2)
General Clauses Act, 1897 — Section 6
Penal Code, 1860 (IPC) — Section 188, 225
Telegraph Act, 1885 — Section 10, 11, 16, 16(1), 16(4)
Works of Licensees Rules, 2006 — Rule 3(1), 3(2), 3(4)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 21 Rule 98
Constitution of India, 1950 — Article 300A
Customs Act, 1962 — Section 133
Electricity (Supply) Act, 1948 — Section 42, 42(1), 69(1), 83
Electricity Act, 1910 — Section 12, 12(1), 12(2), 13, 14

Citation : (2011) 11 MAD CK 0338

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : S. Meenakshisundaram, for the Appellant; G. Kasinathadurai for TNEB, for the Respondent

Final Decision : Dismissed

Judgement

Honorable Mr. Justice V. Ramasubramanian

1. The petitioners have come up with the above writ petition, seeking a Mandamus, to forbear the respondents from erecting any high tension electric towers in their property in Survey No. 195/1D and 195.14, Veerasigamani Village, Sankarankovil Taluk, Tirunelveli District, in violation of the provisions of the Indian Electricity Act.

2. I have heard Mr. S. Meenakshisundaram, learned counsel for the petitioners and Mr. G. Kasinathadurai, learned Standing Counsel for the respondents.

3. There is no dispute about the fact that the petitioners are the owners of the punja land of an extent of 7 acres and 30 cents with a well and electricity service connection located in Survey No. 194 and 195/14, Veerasigamani Village, Sankarankovil Taluk, Tirunelveli District. They also own another extent of punja land in Survey No. 195/14.

4. According to the petitioners, they have planted 200 cashew nut trees, 68 palmirah trees and 600 gooseberry trees. The petitioners claim to have obtained a loan from the Indian Bank and they have also decided to float a Trust for establishing a school for poor children.

5. The grievance of the petitioners is that the respondents decided to establish a Storage Wind Farm Sub Station at Sarkaraikulam and that for the said purpose, they made preparations to erect 6 high tension wire linking towers. Some of those towers were proposed to be located in the middle of the property owned by the petitioners. The petitioners oppose the erection of the towers on the ground that their consent was not obtained as required by Section 12(2) of the Indian Electricity Act, 1910 and that on the Northern side and Eastern side of their property, there are roads in which towers could be conveniently located.

6. On 11.8.2011, R. Sudhakar, J., before whom the writ petition came up, passed an order, appointing an Advocate of this Court as a Commissioner to inspect the property and to file a report as to whether any concrete structures are being put up in the property for the purpose of erecting electric poles. The learned Judge also granted an interim injunction restraining the respondents from erecting any towers for high tension electrical wires in their property. Accordingly, the Advocate Commissioner inspected the property and filed a report. In the meantime, the respondents in the writ petition have come up with a petition to vacate the interim order of injunction.

7. However, since the issues raised in the writ petition lie in a narrow campus, I took up the writ petition itself for final disposal with the consent of the learned counsel on both sides.

8. As pointed out earlier, the objections of the petitioners to the erection of the towers in their property are two fold viz., (i) that the consent of the petitioners as required by Section 12(2) of the Indian Electricity Act, 1910, was not obtained; and (ii) that there is alternative land available in the form of public roads, through which the high tension wires can be carried.

9. Section 12(1) of the Indian Electricity Act, 1910 empowered the licensee (Board), among other things, to lay down and place electric supply lines and other works in any place within the area of supply. But sub-section (2) of Section 12 made it clear that nothing contained in sub-section(1), shall be deemed to authorize or empower a Licensee, without the consent of the owner or occupier concerned, to lay down or place any electric supply line or other work in, through or against any building.

10. Based upon Section 12 (2), it was held by a learned Judge of this Court in *Bharat Heavy Electrical Ltd vs. Tamil Nadu Electricity Board* 2007 (2) MLJ 111 that the erection of poles in the property of the person, without obtaining his consent u/s 12(2) of the said Act, was illegal. In an another decision in *Superintending Engineer, TNEB vs. M. Sengu Vijay* 2011 (3) MLJ 625, a Division Bench of this Court also held that u/s 12(2) of the Indian Electricity Act, 1910, the Board was bound to get consent from the owner of the property. The Bench held that the mere silence or inaction on the part of the land owner, cannot be taken to be implied consent. Therefore, on the basis of those two decisions, Mr. S. Meenakshisundaram, learned counsel for the petitioners contended that the erection of poles by the respondents, in the lands of the petitioners, without first obtaining their consent, was illegal.

11. In support of his second contention that alternative location could be considered, Mr. S. Meenakshisundaram, learned counsel for the petitioners placed reliance upon a decision in *The Superintending Engineer, The Executive Engineer, The Asst. Exe. Engineer/C and I, and The Asst. Exe. Engineer (O and M), Tamil Nadu Electricity Board Vs. Vadivelu and Bavayee*, , where another learned Judge of this Court found fault with the discriminatory treatment meted out to the owner of the property. This was on a factual finding that the Electricity Board chose to erect poles in the poramboke land adjoining other private lands, but did not extend the same concession to the party before the Court. Therefore, the contention of the learned counsel for the petitioners is that when there is a public land available adjoining the lands of the petitioners, the respondents could have erected the poles on such public land sparing the lands of the petitioners.

12. However, it is contended by Mr. G. Kasinathadurai, learned Standing Counsel for the Electricity Board that the petitioners cannot place reliance upon Section 12(2) of the Indian Electricity Act, 1910, since the 1910 Act was repealed by Section 185 of the Electricity Act, 2003. According to the learned Standing Counsel, 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.

13. In support of his above contentions, the learned Standing Counsel for the respondents relied upon the following decisions:

(i) *R. Kannan rep. by his Power Agent, K. Sivasubramanian Vs. Power Grid Corporation (India) Limited*, .

(ii) *T. Narayanan Vs. The District Executive Magistrate-cum-District Collector and Power Grid Corporation of India Limited*, .

(iii) *Daulat Singh Surana vs. First Land Acquisition Collector* 2007 (1) SCC 641.

(iv) *E. Mariy Marthal vs. Superintending Engineer, TNEB* W.P.(MD) No. 1247 of 2010 dated 18.3.2010.

(v) *Tony Abraham vs. Superintending Engineer, TNEB* W.A.(MD) No. 521 of 2011 dated 5.9.2011.

14. Before considering the decisions relied upon by both counsel, it is necessary to look into the fundamental question as to whether the benefit of Section 12(2) of the Electricity Act, 1910, is available as on date.

15. The Indian Electricity Act, 1910, is a pre-independence enactment which dealt with the supply and use of electrical energy and the rights and obligations of the licensees. After independence, the Electricity (Supply) Act, 1948, was enacted on the broad lines of the Electricity (Supply) Act, 1926 of the United Kingdom, that enabled provincial Governments to set up suitable organizations to work out "grid system" within the provinces. Therefore, the 1948 Act dealt with the statutory powers and functions of Central Electricity Authority, State Electricity Boards and Generating Companies. Thus both enactments viz., 1910 Act and 1948 Act, were intended to operate in different fields. The latter did not repeal the former except that Section 83 of the 1948 Act, merely stated that nothing contained in the 1948 Act, shall be deemed to apply to a licensee on whom a notice u/s 5 or 7 of the 1910 Act, had been served prior to the coming into force of the 1948 Act.

16. Though the 1948 Act did not repeal the 1910 Act, Section 42(1) of the 1948 Act declared that notwithstanding anything contained in Sections 12 to 16 and 18 and 19 of the Indian Electricity Act, 1910, but without prejudice to the requirements of Section 17 of the 1910 Act, the Board shall have all the powers of the Telegraph Authority under Part III of the Indian Telegraph Act, 1885, for the purpose of placing of any wires, poles, wall-brackets, stays, apparatus and appliances for the transmission and distribution of electricity, if a provision in such behalf is made in a sanctioned scheme. The proviso to Section 42(1) of the 1948 Act, made it clear that where a sanctioned scheme does not make such provision, all the provisions of Sections 12 to 19 of the 1910 Act shall apply to the works of the Board.

17. Thus, the 1948 Act caused a small dent into the provisions of Sections 12 to 16 and 18 and 19 of the 1910 Act, without repealing the 1910 Act in entirety. This is due to the fact that the professed objects and reasons of the 1948 Act were different from those of the 1910 Act. Consequently, after the enactment of the 1948 Act, Section 12(2) of the 1910 Act lost its significance in cases where a provision was made in a sanctioned scheme.

18. However, in the year 2003, the Electricity Act, 2003, was enacted. The preamble indicated that it is an Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to the development of electricity industry, promoting competition therein, protecting the interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and matters connected therewith. All the provisions of the Act, except Section 121 came into force with effect from

10.6.2003.

19. Section 185 of the 2003 Act, contained the provision for repeal and saving. It reads as follows:

185. Repeal and saving.--(1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal,-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) the provisions contained in Sections 12 to 18 of the Indian Electricity Act, 1910 and rules made hereunder shall have effect until the rules under Sections 67 to 69 of this Act are made;

(c) the Indian Electricity Rules, 1956 made u/s 37 of the Indian Electricity Act, 1910 as it stood before such repeal shall continue to be in force till the regulations u/s 53 of this Act are made;

(d) all rules made under sub-section (1) of Section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

20. A reading of sub-section (1) shows that the provisions of the Indian Electricity Act, 1910 stands repealed, by the 2003 Act, save as otherwise

provided in the Act. Sub-section (2) of Section 185 contains a non obstante clause. It saves, de hors the repeal, certain things, one of which, is found in clause (b) of sub-section (2) of Section 185. Under this Section 185 (2) (b), the provisions of Sections 12 to 18 of the Indian Electricity Act, 1910 and the Rules made hereunder are allowed to have effect, de hors the repeal, until the Rules under Sections 67 to 69 of the 2003 Act are made.

21. Section 67 (1) of the 2003 Act, empowers the licensee to carry out, within his area of supply or transmission, several works such as (i) opening and breaking up the soil of any street (ii) opening and breaking up of any sewer, drain or tunnel (iii) altering the position of any line or pipe (iv) laying down and placing electric lines and other works (v) repairing, altering or removing the same and (vi) doing all other acts necessary for the transmission or supply of electricity.

22. Sub-Section (2) of Section 67 empowers the appropriate Government to frame rules specifying several matters listed in clauses (a) to (q). Sub-Section (3) obliges the licensee to grant compensation for any damage, detriment or inconvenience caused while exercising any of the powers conferred by this Section. Sub-Section (4) provides for the reference of any dispute arising under that Section, to the appropriate Commission and Sub-Section (5) empowers the appropriate Commission to impose a penalty, in addition to any compensation.

23. Just as Section 67 (1) empowers the licensee to carry out certain items of work at the ground level, Section 68(1) empowers the installation of overhead lines, with the prior approval of the appropriate Government. The distinction between Section 67 (1) and Section 68 (1) is (i) that the former deals with the works to be carried out on or under the earth, but the latter deals with the work to be carried out above the ground level in the form of overhead lines and (ii) that the former does not speak about prior approval of anyone, while the latter mandates the prior approval of the appropriate Government.

24. Interestingly, the matters in respect of which the appropriate Government may frame rules, as specified in Section 67 (2) include

(a) the cases and circumstances in which the consent in writing of the appropriate Government, local authority, owner or occupier, as the case may be, shall be required for carrying out works;

(b) the authority which may grant permission in the circumstances where the owner or occupier objects to the carrying out of works;

(c) the nature and period of notice to be given by the licensee before carrying out works;

(d) the procedure and manner of consideration of objections and suggestions received in accordance with the notice referred to in clause (c);

(e) the determination and payment of compensation or rent to the persons

affected by works under this Section; and

(g) the right of the owner or occupier to carry out certain works under this Section and the payment of expenses therefore.

25. Section 69 of the 2003 Act, provides for notice to Telegraph Authority under certain circumstances. Since we are not concerned here, with the contingencies arising u/s 69, I shall not advert to the same.

26. In exercise of the powers conferred by Section 67(2) of the 2003 Act, the Central Government had already issued a set of Rules known as the Works of Licensees Rules, 2006. They came into effect from 18.4.2006. Therefore, the contingencies stipulated in Section 185(2)(b) of the 2003 Act, for the repeal of Sections 12 to 18 of the Indian Electricity Act, 1910, had arisen, with effect from the date of issue of these rules, viz., 18-4-2006.

27. But in view of the fact that Section 185(2)(b) makes the provisions of Sections 12 to 18 of the Indian Electricity Act, 1910, continue to have effect till Rules under Sections 67 to 69 of the 2003 Act are made, it is contended by Mr. S. Meenakshisundaram, learned counsel for the petitioner that Section 12 (2) of the 1910 Act would continue to have effect until Rules are framed under Sections 67 to 69 of the 2003 Act. Since the Central Government had issued Rules only u/s 67(2) and had not so far issued any rules in terms of Sections 68 and 69, it is his contention that Section 12(2) of the 1910 Act, continue to have force.

28. But a reading of Sections 67 to 69 of the 2003 Act, shows that it is only u/s 67(2) that a rule making power is conferred upon the appropriate Government. Section 68 dealing with overhead lines and Section 69 dealing with notice to Telegraph Authority, do not confer any rule making power upon the Government. Therefore, a reference to Sections 68 and 69 in Section 185 (2) (b) of the 2003 Act, is redundant. Consequently, Section 185(2)(b) can be construed only to mean that Sections 12 to 18 of the 1910 Act, would continue to have effect until the appropriate Government issued rules in terms of Section 67 (2). Since the Central Government had already issued a set of rules known as the Works of Licensees Rules, 2006 with effect from 18.4.2006, in exercise of the power conferred by Section 67 (2), Section 12 (2) of the 1910 Act stands repealed with effect from 18.4.2006.

29. The fact that Section 12(2) of the 1910 Act, cannot be pressed into service, can be seen from another perspective also. A comparison of Section 12(1) of the 1910 Act with Section 67(1) of the 2003 Act, would show that they are almost in pari material. Clause (a), (b), (c), (d) and (e) of Section 12(1) of the 1910 Act, are exactly the same as Clauses (a),(b),(d),(e) and (f) respectively of Section 67(1) of the 2003 Act. Clause (c) of Section 67(1) is a new addition, as it does not find a place in Section 12(1) of the 1910 Act.

30. Thus the Parliament has simply adapted Section 12(1) of the 1910 Act with a slight modification and created Section 67(1) of the 2003 Act. After having

copied sub-section (1) of Section 12 of the 1910 Act, the Parliament left out sub-section (2) of Section 12 and the provisos hereunder, in total. In other words, even after making Section 67 (1) as a provision corresponding to Section 12 (1) of the 1910 Act, the Parliament deliberately did not make a provision corresponding to Section 12 (2) of the 1910 Act. On the contrary, Clause (a) of sub-section (2) of Section 67 merely enables the Appropriate Government to frame rules, specifying "the cases and circumstances in which the consent in writing of the appropriate Government, local authority, owner or occupier, as the case may be, shall be required for carrying out works". Therefore, the conscious omission of what is contained in Section 12(2) of the 1910 Act, in Section 67 of the 2003 Act, is an indication that the statutory requirement of consent of the owner or occupier, is a *causes omissus*, which the Courts are not entitled to supply.

31. Once it is found that Section 12(2) of the 1910 Act stands repealed in terms of Section 185(2)(b) of the 2003 Act, after the issue of the Works of Licensees Rules, 2006 u/s 67 (1) of the 2003 Act, the question that arises next for consideration is about the procedure to be followed under the 2003 Act, whenever the licensees seek to erect electric poles, towers and lines on private lands.

32. As pointed out above, Section 67(1)(d) and (f) authorize a licensee (a person who is granted a license u/s 14 to transmit or distribute or trade in electricity) to lay down and place electric lines, electrical plants and other works and to do all other acts necessary for transmission or supply of electricity. By virtue of Section 67(2)(a) to (d), the appropriate Government is entitled to frame rules specifying (i) the cases and circumstances in which the consent in writing of the owner or occupier is required for carrying out works (ii) the authority to grant permission to carry out works, when the owner or occupier objects (iii) the nature and period of notice to be given by the licensee before carrying out works and (iv) the procedure and manner of consideration of objections and suggestions.

33. Therefore, 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).

34. As we have seen earlier, the Central Government had issued the Works of Licensees Rules, 2006 with effect from 18.4.2006. Rule 3(1) empowers the licensee, with the prior consent of the owner or occupier of any building or land, to carry out works, lay down or place any electric supply line or other works in, through or against any building, or on, over or under any land whereon, wherever or where under any electric supply line or work has not already been lawfully laid down or placed by such licensee. The first proviso to Rule 3 (1) states that in case the owner or occupier raises objections, the licensee shall obtain permission in writing from the District Magistrate or the Commissioner of Police or any other Officer authorized by the State Government in this behalf. The

second proviso to Rule 3(1) provides a remedy to the owner or occupier of the building, on whose lands, any works have been carried out. Under this proviso, if the owner or occupier shows sufficient cause, the District Magistrate or the Commissioner of Police may direct any such works, support, stay or strut to be removed or altered.

35. Thus it is clear from Rule 3 (1) of the 2006 Rules that despite the repeal of Section 12(2) of the 1910 Act, by the 2003 Act, the requirement of prior consent is introduced under the Rules issued in exercise of the power conferred by Section 67(2). As a matter of fact, Section 12 (2) of the 1910 Act spoke only about consent and not about prior consent. But Rule 3 (1) of the Works of Licensees Rules, 2006 speaks of prior consent. The new addition under the 2006 Rules is that the District Magistrate or the Commissioner of Police is empowered to overrule the objections of the owner or occupier and permit the licensee to carry out the works. Another addition is that the owner or occupier also has a remedy, even after the laying down of the poles, overhead lines etc., to move the District Magistrate or Commissioner of Police to remove or alter such poles or lines.

36. But unfortunately, sub rule (4) of Rule 3 makes it clear that nothing contained in this Rule shall affect the powers conferred upon any licensee u/s 164 of the Act. Therefore, the requirement of prior consent of the owner or occupier of the land, prescribed under Rule 3(1)(a) of the Works of Licensees Rules 2006, is subject to the powers, if any conferred upon the licensee u/s 164.

37. u/s 164 of the 2003 Act, the appropriate Government may confer upon any Public Officer, Licensee or any person engaged in the business of supplying electricity, any of the powers possessed by the telegraph authority under the Indian Telegraph Act 1885, for the purpose of placing electric lines or electric plant for the transmission of electricity.

38. Section 10 of the Telegraph Act, 1885 empowers the Telegraph Authority to place and maintain a telegraph line under, over, along or across and posts in or upon any immovable property. Section 11 of the Act empowers the Telegraph Authority to enter upon any property for the purpose of examining, repairing, altering or removing any telegraph line or post. u/s 16 (1), the District Magistrate is empowered to pass an order permitting the telegraph authority to exercise the powers conferred by Section 10, if there is any resistance or obstruction from anyone, for the exercise of the powers by the Telegraph Authority u/s 10. Sub-sections (3) and (4) of Section 16 provides for resolution of disputes with regard to the compensation payable for the damage caused to the property, by the telegraph authority while exercising powers u/s 10.

39. It will be relevant to note that the first proviso to Rule 3(1) and Rule 3(2) of the Works of Licensees Rules 2006, have resemblance to the provisions of Section 16 (1) to (3) of the Telegraph Act, 1885. The first proviso to Rule 3(1) of the Works of Licensees Rules 2006 as well as Section 16 (1) of the Telegraph Act,

1885 resemble each other, in the sense that both speak of removal of obstruction or resistance by the owner or occupier. Similarly, Rule 3(2) of the said Rules and Section 16(3) of the 1885 Act, speak of determination of compensation.

40. A combined reading of Section 67 (2) (a) to (d) of the 2003 Act together with (I) Rule 3 (1) and 3 (4) of the Works of Licensees Rules 2006 (II) Section 164 of the 2003 Act and (III) Sections 10 and 16 of the Telegraph Act, 1885, would lead us to the following conclusions:

(i) In normal circumstances, the licensee would require the prior consent of the owner or occupier of any land, by virtue of Rule 3(1)(a) of the Works of Licensees Rules 2006, read with Section 67 (2)(a) to (d) of the Electricity Act 2003.

(ii) But if the appropriate Government has, in terms of Section 164 of the 2003 Act, by order in writing, conferred upon any Public Officer or licensee, the powers of a telegraph Authority under the Indian Telegraph Act, 1885, for placing of electric lines or electric plant, then the requirement of prior consent under Rule 3(1)(a) need not be complied with. This is in view of Rule 3(4) of the Works of Licensees Rules 2006.

(iii) In other words, if the appropriate Government had passed an order empowering the licensee to exercise any of the powers conferred by the Telegraph Act, 1885, then the licensee can invoke Sections 10 and 11 of the Telegraph Act, 1885 and simply enter upon any private land and carry out necessary works, without the prior consent of the owner. But if the appropriate Government had not passed any order in terms of Section 164 of the Electricity Act, 2003 conferring such a power upon the licensee, to exercise any power under the Telegraph Act, then the licensee has to obtain prior consent of the owner or occupier, as per Rule 3(1)(a) of the Works of Licensees Rules 2006 to carry out the works.

41. Therefore, the answer to the question as to whether the prior consent of the owner is necessary before erecting poles, towers or supply lines, on a private land, depends upon whether the appropriate Government had conferred powers upon the licensee, u/s 164 of the Electricity Act, 2003 or not.

42. To find an answer to the above question, we may have to go back once again to the Electricity Act, 1910. Section 51 of the 1910 Act stipulated that notwithstanding anything contained in Sections 12 to 16 and 18 and 19, the appropriate Government may by order in writing, confer upon any Public Officer, Central/State Transmission Utility, Licensee, Transmission Licensee or any person engaged in the business of transmission, any of the powers of the Telegraph Authority under the Telegraph Act, 1885. As a matter of fact, Section 51 of the 1910 Act is in pari material with Section 164 of the 2003 Act, with only a slight modification. While Section 51 of the 1910 Act refers to Central Government in the case of Inter State Transmission and the State Governments in the case of Intra State Transmission, Section 164 of the 2003 Act refers only to "Appropriate

Government". Additionally, Section 51 of the 1910 Act, speaks of electric supply lines, appliances and apparatus for transmission of energy. But Section 164 of the 2003 Act speaks of electric lines or electrical plant for the transmission of electricity. Except this, the provisions of both are almost identical.

43. It is seen from para 4 of the Board proceedings of the Tamil Nadu Electricity Board in Permanent B.P.(CH) No. 368, Technical Branch, dated 25.8.2010, 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 u/s 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. This is in view of Section 185(2)(a) of the Electricity Act, 2003. u/s 185 (2)(a) of the 2003 Act, any notification, declaration or authorization made under the repealed enactments would be deemed to have been done under the corresponding provision of the 2003 Act, if it is not inconsistent with the 2003 Act. Since the power of the appropriate Government u/s 51 of the 1910 Act, to empower a licensee to exercise the powers of the Telegraph Authority, is retained in tact, u/s 164 of the 2003 Act, there is no inconsistency. Therefore, the only condition prescribed in Section 185(2)(a), namely that the act done in terms of the previous enactment should not be inconsistent with the provisions of the new Act, is also satisfied. Hence, the power conferred upon the TNEB by the State Government u/s 51 of the 1910 Act, is deemed to be the power conferred under the corresponding provision of the new Act viz., Section 164.

44. Thus it is clear that the respondents have 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 u/s 164 of the 2003 Act, by virtue of Section 185(2)(a) of the 2003 Act read with Section 51 of the 1910 Act.

45. Though the statutory provisions themselves are very clear and they do not give any scope for any interpretation by any Court, let me also consider, for the sake of completion of narration, the decisions relied upon by the learned counsel on both sides.

46. In the first decision relied upon by the learned counsel {BHEL vs. TNEB}, R. Banumathi, J., was concerned with a case where the writ petitioner-BHEL objected to the grant of electricity service connection to a Church on the ground that the land on which the Church had been constructed, belonged to BHEL. While it was the contention of BHEL that their consent was necessary in view of Section 12(2) of the 1910 Act, it was the contention of the Board and the Church

that the requirement of consent had been dispensed with, by Section 42 (1) of the 1948 Act. But the learned Judge held that Section 42 of the 1948 Act can be invoked only in cases where there is a sanctioned scheme and that it cannot be invoked for erection of poles for extending supply for domestic or commercial use. Following the decision of the Orissa High Court in *The Orissa State Electricity Board and Another Vs. Pyari Mohan Patnaik and Others*, and the decision of T. Meenakumari, J., in *S. Kannappan (died) and Others Vs. The Commr., Tiruvottriyur Municipality and Others*, , the learned Judge held in *BHEL vs. TNEB* that the requirement of Section 12(2) of the 1910 Act cannot be circumvented through Section 42 of the 1948 Act.

47. But in *BHEL vs. TNEB*, this Court did not consider, unfortunately, either Section 185 (2)(b) or Sections 67 to 69 of the 2003 Act or even the Works of Licensees Rules 2006, issued in exercise of the powers conferred by Section 67(2) of the 2003 Act. Apart from the fact that the repeal and savings provision contained in the 2003 Act, was not considered by the learned Judge in *BHEL vs. TNEB*, the said decision in any case, cannot be pressed into service, by the petitioner herein. This is in view of the fact that the said case arose much before the enactment of 2003 Act. Therefore, the reliance placed by Mr. S. Meenakshisundaram, learned counsel for the petitioner, on the said decision, is of no avail.

48. In the next decision viz., *Superintending Engineer vs. M. Sengu Vijay*, the question that arose for consideration before the Division Bench was entirely different. In that case, a property in which electrical poles and lines had been erected long time ago, was developed into a layout of house sites by the subsequent purchaser. For the approval of the layout, the Director of Town and Country Planning imposed a condition that the poles and lines had to be shifted along the road, formed by the promoter in the layout. When the promoter of the layout made a request to the Electricity Board, the Board demanded a sum of Rs. 6 lakhs towards expenses for shifting. Therefore, the promoter of the layout filed a writ petition seeking a Mandamus directing the Board to remove the electric poles and service lines. The writ petition was allowed and the Board preferred an appeal. The only question that arose before the Division Bench, as seen from para 6 of the judgment, is as to whether the Board was right in insisting the first respondent to pay the expenses for shifting the electric poles and lines. While answering the said question, the Division Bench relied upon Section 12 (2) of the 1910 Act.

49. In view of the fact that the question that arose for consideration in that decision of the Division Bench was different and also in view of the fact that the express provisions of the 2003 enactment were not taken into account, the said decision of the Division Bench will also not go to the rescue of the petitioner. Moreover, it was found on facts by the Division Bench in that decision, that neither the consent of the owners was obtained nor any compensation was paid to the owners. Apart from this fact, it was recorded in para 7 of the judgment

that the poles had been erected 22 years ago, when the 2003 Act had not come into existence. Therefore, the petitioner cannot take refuge in the said decision.

50. In *R. Kannan rep. by his Power Agent, K. Sivasubramanian Vs. Power Grid Corporation (India) Limited*, relied upon by the Standing Counsel for the Board, this Court was dealing with a case where the District Magistrate gave opportunity of hearing to the land owner and the licensee and passed an order overruling the objections of the land owner and permitting the licensee to carry on the work, in terms of Section 16 (1) and (2) of the Telegraph Act, 1885. In the case on hand, the objections or resistance of the writ petition, had not been taken up with the District Magistrate, in terms of Section 16(1) of the Telegraph Act, 1885. Therefore, the said decision is of no avail to the respondents. Similarly, the decision in *T. Narayanan Vs. The District Executive Magistrate-cum-District Collector and Power Grid Corporation of India Limited*, , also arose out of an order passed by the District Magistrate in terms of Section 16(1) of the Telegraph Act, 1885.

51. The decision of the Supreme Court in *Daulat Singh Surana* {2007 (1) SCC 641}, arose out of the proceedings under the Land Acquisition Act, 1894. Therefore, the principles enunciated therein cannot be applied to a case arising under the Electricity Act, 2003 read with Telegraph Act, 1885, where no acquisition of land takes place. In cases arising under the Land Acquisition Act, 1894, the Constitutional (not fundamental) right to property, guaranteed under Article 300-A, is sought to be infringed by procedure established by law. But in cases arising under the Electricity Act and Telegraph Act, a right to enter into somebody else's property is conferred by statute, upon licensees, for a limited purpose. Therefore, the question in this case is whether consent is necessary or not.

52. The unreported decision in *E. Mary Marthal vs. The Superintending Engineer* dated 18.3.2010 in W.P.(MD) No. 1247 of 2010, relied upon by the learned Standing Counsel, is actually in favor of the petitioner. It is held by R.S. Ramanathan, J., in the said decision that where there is obstruction or resistance, by the land owner, the respondents should obtain permission from the District Magistrate for carrying out the works.

53. In the unreported decision of the Division Bench in *Tony Abraham vs. The Superintending Engineer* dated 5.9.2011 in W.A.(MD) No. 521 of 2011, the Division Bench quoted with approval, the following principles enunciated in another decision in W.P.No. 18967 of 2009 *Dr. M. Ponnuswamy vs. The Chairman:-*

(1) No notice is necessary to the land owners for laying high tension wire in their land.

(2) The permission of the land owners for laying high tension wire over and above the land of the petitioners is not necessary and Section 10 and Section 16 of the Telegraphic Act do not contemplate so.

(3) Such permission is required only in respect of the land owned by the local authorities.

(4) A mere objection by the land owner does not require authorities to seek permission from the District Magistrate concerned.

(5) Only if there is an obstruction or resistance by land owners such permission is necessary.

54. But in *T. Narayanan vs. Power Grid Corporation India Ltd* W.P.No. 49172 of 2006 decided on 18.1.2007, Prabha Sridevan, J., held in paragraph-20 that when there are objections to the laying of lines or the erection of transmission towers, the Corporation was bound to get the permission of the District Magistrate. In paragraph 21 of the said decision, the learned Judge held "we have already seen that the objections need not be in a particular form; even a protest can be termed as an objection. The very fact that all these writ petitioners have come to Court seeking Mandamus shows that they are protesting against the project of the Corporation".

55. Though the learned Judge who decided *Dr. M. Ponnuswamy*, referred to the decision of Prabha Sridevan, J., in *T. Narayanan*, the learned Judge nevertheless held that a mere objection does not require the authorities to seek permission from the District Magistrate concerned, in terms of Section 16 of the Telegraph Act. He held that something more than a mere objection was required, to make it a case of obstruction/resistance. In other words, the learned Judge who decided *Dr. M. Ponnuswamy*, actually took a view which was diametrically opposite to the view expressed by Prabha Sridevan, J., in *T. Narayanan*. For taking such a view, the learned Judge drew a distinction in paragraph 6.3 of his decision (in *Dr. M. Ponnuswamy*) between the words "objection" and "obstruction/ resistance" appearing in Section 16(1) of the Telegraph Act, 1885. However, an exercise into semantics was not undertaken by the learned Judge. Therefore, let us now see whether an objection would tantamount to obstruction/resistance.

56. The words "obstruction" and "resistance" are used together, not only in Section 16(1) of the Telegraph Act, 1885, but also in several enactments including Order XXI, Rule 97 of the Code of Civil Procedure, 1908 as well as in Section 225 of the Indian Penal Code, 1860. Even under Order XXI, Rule 97 of the Code, it is left to the decree holder to file an application before the Executing Court, whenever his attempt at obtaining possession of a property is resisted or obstructed by anyone. This is similar to the prescription contained in Section 16 (1) of the Telegraph Act, 1885, which makes only the Telegraph Authority liable to seek an order from the District Magistrate, if there is obstruction or resistance.

57. If understood in the context of the very same expressions used in Order XXI, Rule 97 of the Code, it will be clear that there need not be an actual physical scuffle or a dharna in front of the land, to constitute an obstruction/resistance. While dealing with the meaning of the expression "obstruction" appearing in Section 133 of the Customs Act, 1962, the Supreme Court pointed out in

Collector of Customs and Central Excise, Bhubneshwar, District Puri Vs. Paradip Port Trust and Another, the following:-

On the authority of *Hinchliffe vs. Sheldon* 1955 (1) W.L.R. 1207, it can be said that obstruction is not confined to physical obstruction and it includes anything which makes it more difficult for the police or the public servant to carry out their duties.

In the same decision, the Supreme Court relied upon an earlier decision in *Santosh Kumar Jain Vs. The State Union Of India (Intervener)*, to conclude that even an order of seizure would amount to obstruction. Therefore, obstruction/resistance need not necessarily be a violent or non-violent physical act. It is always construed as a defensive act. As a matter of fact, the first proviso to sub-rule (1) of Rule 3 of the Works of Licensees Rules 2006, makes it incumbent upon the licensee to seek the permission of the District Magistrate, when the owner objects. The expression used in the said provision is only "objection".

58. Therefore, in the light of the foregoing discussion, the following conclusions emerge:

(i) The provision of Section 12(2) of the Electricity Act, 1910, requiring the licensee to obtain consent of the owner or occupier of the land on which it is proposed to carry out certain works, stands repealed, in terms of Section 185 (1) and 185 (2) (b) of the Electricity Act, 2003, with the issue of the Works of Licensees Rules, 2006, in exercise of the power conferred by Section 67 (2) of the 2003 Act.

(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 u/s 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.

(v) Since Section 164 of the 2003 Act, corresponds to Section 51 of the 1910 Act, the power conferred by the Government upon a licensee, in terms of Section 51 of the 1910 Act, is saved by Section 185(2)(a) of the 2003 Act. Therefore, the power conferred upon the Tamil Nadu Electricity Board by the Government of Tamil Nadu u/s 51 of the 1910 Act, could continue to be exercised by the Board, as though those powers were conferred u/s 164 of the 2003 Act.

(vi) Section 10 of the Telegraph Act, 1885, does not contemplate "consent" or "permission" of the owner or occupier of a property, for the purpose of placing and maintaining a supply line, under, over, along or across and posts in or upon any immovable property. The only case where Section 10 contemplates permission is in respect of a property vested in or under the control or management of any local authority.

(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 u/s 10, is recognized 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 u/s 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 u/s 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. They have to be understood as defensive acts as pointed out by the Apex Court in Santosh Kumar (cited supra). Actual physical acts of omission and commission at site or on the spot, is not necessary to constitute resistance or obstruction, as held by the Supreme Court in C.C.E. vs. Paradip Port Trust. The method of resistance/obstruction adopted by people, vary from person to person depending upon their status, level of education, mental orientation and social upbringing. Therefore, any kind of objection or protest by the land owner would tantamount to obstruction/ resistance. Such an interpretation is necessary in view of the fact that the Telegraph Act is a colonial Act of pre-Constitutional days, which came to be adapted after the Constitution and which has come to be borrowed by the Electricity Act, 2003 to interfere and infringe upon the rights of owners of private property to their unhindered enjoyment. The Supreme Court pointed out in Dev Sharan and Others Vs. State of U.P. and Others, that even the Land Acquisition Act, 1894, is "a pre-constitutional legislation of colonial vintage and is a drastic law, expropriatory in nature". Therefore, any interpretation to such enactments should conform to the Constitutional goals and rights. Despite the fact that the right to property is no more a fundamental right after the 44th Amendment to the Constitution, it is nevertheless a constitutional right under Article 300-A. In several decisions, the Supreme Court has held that to hold property is not only a Constitutional right but also a human right. {see Lachhman Dass Vs. Jagat Ram and Others, , Vimalben Ajitbhai Patel Vs. Vatslabeen Ashokbhai Patel and Others, , N. Padmamma and Others Vs. S. Ramakrishna Reddy and Others, , Chandigarh Housing Board vs. Major General Devinder Singh 2007 (9) SCC 67.

Therefore, a dignified protest, even in the form of a formal letter, notice or telegram, would amount to obstruction within the meaning of Section 16(1) of the Telegraph Act, 1885. Once such a protest is lodged, the licensee should seek an order from the District Magistrate.

59. With the above principles of law in mind, if we now come back to the facts of the case, it is seen that even as per the counter affidavit filed by the sixth respondent, the survey for the line transmission and erection was conducted in August 2010 and subsequent check survey was conducted on 1.8.2011. According to the respondents, the Chief Engineer, TNEB-Transmission published a notification in the "Daily Thanthi" on 6.7.2011 itself, inviting objections.

60. Though the notice published in the Tamil newspaper "Daily Thanthi" dated 6.7.2011, does not indicate the lands on which it was proposed to erect towers, the petitioner nevertheless sent telegrams to all the respondents on 22.7.2011 itself. These telegrams were issued by the counsel for the petitioner to all the respondents terming the proposed action of the respondents, high handed, illegal and arbitrary. Therefore, it is clear that the petitioner has certainly obstructed the exercise of powers by the respondents u/s 10 of the Telegraph Act, 1885. Hence, the respondents ought to have approached the District Magistrate u/s 16(1) for an order permitting them to exercise the powers u/s 10. Unfortunately, the respondents have failed to do so. Therefore, the petitioner is entitled to the reliefs prayed for.

61. But unfortunately for the petitioner, the erection of poles appears to have already been completed. The petitioner filed the above writ petition on 2.8.2011. It was only on 11.8.2011 that an interim injunction was granted by this Court, even while appointing an Advocate Commissioner simultaneously to inspect the place and file a report. The Commissioner has filed a report enclosing photographs showing that the erection had already been completed. Though the learned counsel for the petitioner contended that the erection was completed in violation of the interim order of injunction, it is not very clear from the report of the Commissioner as to when the erection was completed. In part-II of his report, the Commissioner had stated that at the time of his inspection on 17.8.2011, he not only found that a concrete structure had been put up, but also the whole structure of TLCC Tower had been erected and completed. What remained to be done on the date of inspection by the Commissioner, was only the completion of connection to the main line. The Commissioner has indicated the following features:

That the height of the tower is measuring 23 Meter (approximately 100 feet) and the Length of the bottom portion of the tower on each side is measuring 19.9 feet and there are totally four sides in the bottom. There are foursquare typed concrete basements. On each basements measuring 2 feet and tower been erected up on the four basements.

62. Therefore, it is clear that the entire work has now been completed and the

act of providing connection to the supply alone remains. In such circumstances, it may not be feasible to grant the prayer of the petitioner for a writ of mandamus to forbear the respondents from erecting the towers. I am not for a moment suggesting that the prayer has become infructuous. But the grant of the prayer for mandamus, after the entire exercise has been carried out, would result in serious consequences.

63. Even if I allow the prayer for mandamus, it would be open to the respondents to seek the permission of the District Magistrate to pass an order u/s 16(1) of the Telegraph Act, 1885. If the District Magistrate chooses to exercise his discretion to direct the petitioner to permit the erection of towers, nothing much could be done thereafter, since the power of judicial review over such exercise of discretion may be limited. On the other hand, even if I refuse the prayer for mandamus sought by the petitioner, he would still have two types of remedies against the respondents. They are (i) a remedy u/s 16 (3) for determining the sufficiency of compensation and (ii) a remedy u/s 17 (1) to require the respondents to remove or alter the line or post and a remedy u/s 17(2) to apply to the District Magistrate to direct the removal of the line or post. In other words, the grant of the prayer for mandamus after the respondents have completed the erection of towers would leave the respondents remediless, while the refusal of the prayer for mandamus would not leave the petitioner remediless.

64. Therefore, the writ petition is dismissed. However, the petitioner is granted liberty to apply to the District Magistrate u/s 17(2) of the Telegraph Act, 1885 for the removal of the towers or to seek compensation in terms of Section 16. There will be no order as to costs. Consequently connected miscellaneous petitions are closed.