

(2007) 09 MAD CK 0207

In the Madras High Court

Case No : Second Appeal (MD) No"s. 453 and 513 of 2007 and M.P. No"s. 1 and 1 of 2007

The Executive Engineer, Wind Farm Project, Tamilnadu
Electricity Board and Tamilnadu Electricity Board

APPELLANT

Vs

S. Jegatheesan, M/s. Suzlon Developers (p) Ltd., and M/s.
Sarjan Realities (p) Ltd.

RESPONDENT

Date of Decision : 27-09-2007

Acts Referred:

Electricity Act, 1910 — Section 12, 12(2), 13, 14, 15
Electricity Act, 2003 — Section 12, 164, 185, 42, 53

Citation : (2007) 09 MAD CK 0207

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : R. Murali, for the Appellant; P. jeyapal, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Arumugaperumal Adityan, J.—S.A.No.453 of 2007:-

The defendants 4 and 5 in O.S.No.384 of 2004 who had lost their defence before the Courts below are the appellants herein. The Plaintiff had filed the suit in O.S.No.384 of 2004 before the Court of Principal District Munsif, Valliyoor for mandatory injunction against the defendants/the appellants herein, the Electricity Board represented by its Executive Engineer and the Superintendent Engineer and for a direction to remove the Electricity poles installed in his land in S.No.2/2A measuring 6.52.08 hectares and also in S.No.2/2C measuring 0.09.08 hectares at Kudankulam village. According to the plaintiff, the defendants 4 and 5 /the appellants herein without the knowledge of the plaintiff had erected the electricity poles in his land i.e., in the above said Survey Number Property at Kudangulam which was objected to by the plaintiff through his notice dated 23.04.2004 and 28.04.2004 to the defendants 1, 2 and 3 respectively. Since the plaintiff is a practicing advocate at Tirunelveli which is about 60 kms away from

the place of occurrence, he came to know about the installation of the electrical post in Survey Number property at Kudankulam only in the month of April 2004. On enquiry, he came to know that the electrical poles were installed in the month of February 2004 itself. Since the representations made by the Plaintiff to the defendants proved futile, he had approached the Court.

The defendants 1 to 3 in the joint written statement in O.S.No.384 of 2004 would contend that the third defendant after purchasing the land, had handed over the same to the first and the second defendants. The first defendant purchased the property in which the Wind Mill was erected by the third defendant under a valid sale deed. The first defendant got no objection certificate for installation of wind mill and electric generation on application to the defendants 4 and 5. The defendants 4 and 5 after perusing the records making a spot inspection and have accorded sanction and accordingly, the electric poles were erected and electric wires are drawn as per the Departmental norms. The electric poles and the stay wires were erected by the defendants 4 and 5 and they are in exclusive possession and control. The defendants 1 to 3 are unnecessary parties to the suit and they have no control over the defendants 4 and 5.

2. The defendants 4 and 5 have filed a joint written statement contending that the electric poles were erected during the month of February 2004 but the suit was filed belatedly. The plaintiff was allowed to erect the poles at the first instance and it is shown from the plaintiff's act of approach to the defendants 1 to 3 several times even after the completion of erection of poles. The plaintiff has filed the suit with a huge delay after the misunderstanding developed in due course between them. The erection of poles and wires are the part and parcel of the sanctioned project of the Tamilnadu Electricity Board as per Section 42 of Electric Supply Act r/w 12 of the Indian Electricity Act. As per the act the Department need not obtain previous permission from the owner of the land in erecting the electric poles. The defendant's act is approved by the Madras High Court's decision reported in 2001 LW 556 and The Superintending Engineer, TNEB Basin Bridge, Power House, Chennai-12 and three others Vs. Thangaprakasam, The action of the Boards is in their interest of public to have undisturbed power supply, and hence the Board cannot be prevented by injunction. There is no cause of action. Hence, the suit is liable to be dismissed.

3. The sixth defendant in his written statement would contend that as per the partition deed, the plaintiff is the owner of the plaint schedule property.

S.A.No.513 of 2007:-

4. The defendants 4 and 5 in O.S.No.406 of 2004 who had lost their defence before the Courts below are the appellants herein. According to the plaintiff, he is the owner of the Survey Number 2/2 along with his son sixth defendant measuring 6.52.08 acres in Survey No.2/2A and 0.09.08 hectares in Survey No.2/2C. The plaintiff is in possession and enjoyment of the plaint schedule property along with his son sixth defendant. A joint patta has been issued in

favour of the plaintiff and his son sixth defendant. The defendants 1 to 3 have installed a Wind Mill over the plaint schedule property. The defendants 4 and 5 have trespassed into the land of the plaintiff and have erected an electric poles in the plaint schedule property without obtaining prior permission from the plaintiff. The plaintiff had issued notice to the defendants 1 and 2 on 23.04.2004 and to the third defendant on 28.04.2004. Since the plaintiff is a practicing advocate at Tirunelveli which is about 60 Kms away from the place of occurrence he came to know about erection of the poles only in the month of April 2004. On enquiry, the plaintiff came to know that the electric poles were installed in the month of February 2004 itself. In spite of several personal request made by the plaintiff to the defendants, they have refused to accede to the request. Hence, the plaintiff filed the suit for permanent injunction and for mandatory injunction.

5. The defendants 1 to 3 have filed the joint written statement contending that the third defendant is the Company which used to purchase land brokers or from the owners of the property. The defendants 1 and 2 are entrusted with the duty of the erection of the Wind Mill when purchased the land and erected the Wind Mill at the request of the customer company. The defendants 1 to 3 had no occasion to trespass into the adjacent land at the time when erecting wind mill and there is no need to trespass into the land. The electric poles and stay wires are erected by the defendants 4 and 5 and they are in exclusive possession and control of the defendants 4 and 5. The defendants 1 to 3 are unnecessary parties to the suit.

6. The defendants 4 and 5 in the joint written statement would contend that after the suit has been filed by the plaintiff he had allowed the defendants to erect the poles and due to subsequent misunderstanding developed between the plaintiff and the defendants 4 and 5, the plaintiff had rushed to the Court without any basis. The erection of poles and wires are the part and parcel of the sanctioned project of the Tamilnadu Electricity Board as per Section 42 of Electric Supply Act r/w 12 of the Indian Electricity Act. As per the act, the Department need not obtain previous permission from the owner of the land in erecting the electric poles. The defendant's act is approved by the Madras High Court decision reported in 2001 LW 556 and The Superintending Engineer, TNEB Basin Bridge, Power House, Chennai-12 and three others Vs. Thangaprakasam, . The action of the Boards is in their interest of public to have undisturbed power supply, and hence the Board cannot be prevented by injunction. There is no cause of action. Hence, the suit is liable to be dismissed.

7. The sixth defendant in his written statement would contend that as per the partition deed, the plaintiff is the owner of the plaint schedule property.

8. After framing the issues, the learned trial Judge had conducted a joint trial in respect of O.S.No.384 of 2004 and O.S.No.406 of 2004 and delivered a common judgment. On the side of the plaintiff, P.W.1 was examined and Exs.A1 to 11 were marked. On the side of the defendants, D.Ws.1 and 2 were examined and Exs.B1 to B3 were marked. A Commissioner was appointed for the purpose of

noting the physical features of the property. The learned Commissioner had visited the suit property and filed Exs.C1 and C3 reports and Exs.C2 and C4 plans.

9. After going through the evidence-both oral and documentary, the learned trial Judge had decreed both the suits against the defendants 4 and 5 who are the appellants herein and dismissed the suit against the other defendants.

10. Aggrieved by the findings of the learned trial Judge, the defendants 4 and 5 had preferred A.S.Nos.261 of 2006 and A.S.No.260 of 2004 against the judgment and decree of the learned trial Judge in O.S.Nos.384 of 2004 and 406 of 2004. After giving due deliberations to the submissions made by the learned counsel appearing for the appellants as well as the respondents and after scanning the evidence let in before the trial Court, the learned First Appellate Judge had dismissed both the appeals which necessitated the defendants 4 and 5 in O.S. No.384 of 2004 and 406 of 2004 to prefer these second appeals.

11. Heard Mr. K. Murali the learned counsel appearing for the appellants and Mr. P. Jeyapal the learned counsel appearing for the respondents and considered their respective submissions.

12. Point:-

According to the learned counsel appearing for the appellants, the Electricity Department is competent to erect electric poles in a private land for the benefit of the public in order to provide electricity as per Section 42 of Electricity Supply Act, 1948, which reads as follows:-

41. Powers to Board for placing wires, poles, etc:- Notwithstanding anything contained in Sections 12 to 6 and 18 and 19 of the Indian Electricity Act,1910(9 of 1910), but without prejudice to the requirements of Section 17 of that Act where provision in such behalf is made in a sanctioned scheme, the Board shall have, for the placing of any wires, poles, wall-brackets, stays, apparatus and appliances for the transmission and distribution of electricity, or for the transmission of telegraphic or telegraphic communications necessary for the proper co-ordination of the works of the Board, all the powers which the telegraph authority possesses under Part III of the Indian Telegraph Act,1885(13 of 1885) with regard to a telegraph established or maintained by the Government or to be so established or maintained:

Provided that where a sanctioned scheme does not make such provision as aforesaid, all the provision of Sections 12 to 19 of the first-mentioned Act shall apply to the works of the Board

2) A Generating Company may, for the placing of wires, poles, wall-brackets, stays, apparatus and appliances for the transmission of electricity, or for the transmission of telegraphic or telephonic communications necessary for the proper co-ordination of the works of the Generating Company, exercise all or any of the powers which the Board may exercise under sub-section (1) subject to the

conditions referred to therein."

13. For contra, the learned counsel for the respondents would contend that the appellants have not obtained prior permission from the respondent who is the land owner in whose land the appellants have erected poles, which is violation of Section 12(2) of the Indian Electricity Act 1910 which reads as follows:-

"(2) Nothing contained in sub-section (1) shall be deemed to authorise or empower a licensee, without the consent of the local authority or of the (owner or occupier) concerned, as the case may be, to lay down or place any electric supply-line, or other work in, through or against any building or on, over or under any land not dedicated to public use whereon, where over or where under any electric supply or work has not already been lawfully laid down or placed by such licensee:

Provided that any support of an (overhead line) or any stay or strut required for the sole purpose of securing in position any support of an (overhead line) may be fixed on any building or land or, having been so fixed, may be altered, notwithstanding the objection of the owner or occupier of such building or land, if the District Magistrate or, in a Presidency town ***, the Commissioner of Police by order in writing so directs:

Provided, also, that if at any lime the owner or occupier of any building or land on which any such support, stay or strut has been fixed shows sufficient case, the District Magistrate or, in a Presidency own ***, the Commissioner of Police may order in writing direct any such support, slay or strut to be removed or altered."

14. It has been contended on behalf of the learned counsel appearing for the appellants that the Indian Electricity Act has been amended and as per Section 164 of the Central Act 36 of 2003 which came into force from 10th June 2003, there is no necessity for the Electricity Department to get prior permission from the land owner for the purpose of telephonic or telegraphic communication. Section 164 of the Electricity Act Central 2003 will say that

"164. Exercise of powers or Telegraph Authority in certain cases:- The Appropriate Government may, by order in writing, for the placing of electric lines or electrical plant for the transmission of electricity or for the purpose of telephonic or telegraphic communications necessary for the proper co-ordination of works, confer upon any public officer, licensee or any other person engaged in the business of supplying electricity under this Act, subject to such conditions and restrictions, if any, as the Appropriate Government may think fit to impose and to the provision of the Indian Telegraph Acl,1885 (13 of 1885), any of the powers which the telegraph authority possesses under the Act with respect to the placing of telegraph lines and posts for the purposes of a telegraph established or maintained, by the Government or to be so established or maintained."

But the learned counsel for the respondents Mr. P. Jeyapal would contend that as

per Section 185 of the Electricity Act, Section 12 to 18 of the Indian Electricity Act 1910 and the rules made there under will stand unaltered because there is no rules u/s 67 to 69 of the Electricity Act 2003 has been formulated. As per the repeal clause u/s 185 which provides

"185. Repeal and saving:- (1) Save as otherwise provided in this Act, the Indian Electricity Act, 1910 (9 of 1910), the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commission Act, 1998 (14 of 199) 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 licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provision 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 (9 of 1910) and rules made thereunder shall have effect until the rules under sections 67 to 69 of this Act are made;

Relying on the above said provision, the learned counsel would contend that Until rules have been made u/s 67 to 69 of the Electricity Act, 2003, the provisions contained in Sections 12 to 18 of the Indian Electricity Act, 1910 and the rules made thereunder shall be in force. Similarly, the Indian Electricity Rules, 1956 shall continue to be in force till the regulations have been made by the Central Electricity Authority u/s 53 of the Electricity Act, 2003. All rules made u/s 69(1) of the Electricity Act, 1948 shall continue to be in force until such rules are rescinded or modified"

15. So as per Section 12 of the Indian Electricity Act 12(2) of Act, 1910, it is mandatory on the part of the appellants to get prior permission from the owner of the land before erecting the electric poles in his land for the purpose of providing electric supply to the public which has not been done so in this case. A vain attempt was made by the learned counsel appearing for the appellant that it is open to the respondent to move the District Magistrate as per the proviso to Section 12(2) of the Indian Electricity Act, 1910 to get compensation for the act done by the appellants. But, there is no embargo or impediment for the plaintiff/ the respondent to approach the Civil Court for getting Civil remedy of mandatory injunction to remove the same. The choice is open to the respondent either to approach the Civil Court for appropriate civil remedy or to approach the District Magistrate to get compensation. It is not open to the appellants the electricity Department to direct the respondent to approach the District Magistrate for getting compensation when there is civil remedy is available to him through the Court by way of injunction.

16. The learned counsel for the appellant relying on 1994 Writ L.R. 445 M. Nithyanandham and 2 others v. The Chairman, Tamilnadu Electricity Board, Madras-2 and others, contended that it is not mandatory on the part of the Electricity Department to erect the poles before giving any notice to the owner of the land which the electric poles are intended to be installed or planted. The writ petitioner in the said ratio had challenged the act of Taminadu Electricity Board in erecting high rise towers, affixing the electricity lines in between the high rise towers and energising the same on the ground that the said act is a act to trespass on the private party of the persons like the Petitioner and it will amount to a clear act of trespass and actionable nuisance besides being highly dangerous to the lives and limbs of persons entering on the property and also prospective buyers of the lands. While dismissing the writ of certiorari mandamus, this Court had held that it is not obligatory on the part of the competent authority to issue prior notice before exercising power under the provision of the Act. It will be proper and certainly desirable that the owner or occupier should be informed before the acts are done on his property. It is conceivable when the parties are so informed the exact location and the alignment of the line can be settled without resistance or obstruction by mutual understanding and discussion.

17. The said judgment was delivered in 1994 i.e., before the Electricity Act 2003 came into force. There was no auction for the learned Judge who had delivered the said judgment to consider Section 12(2) of the Electricity Act 1910 and Section 185 of the Electricity Act 2003 which specifically provided that unless rules u/s 67 to 69 of the Electricity Act 2003 are framed, the provision contained in Section 12 to 18 of the Indian Electricity Act 1910 shall remain in force. So, the above said ratio decedent is not applicable to the present facts of the case.

18. The learned counsel for the appellant placing his reliance on an unreported judgment in S.A.No.1566 of 1993 dated 29.03.2007. A reading of the judgment will go to show that the learned Judge while dealing with the provision u/s 12(2) of the old Act 1910, has observed that the appellant had not raised his little finger against the Act of the Electricity Department in erecting the poles in his land. The learned judge has observed that since he has not made any objection at the time of erection of poles he cannot raise any objection afterwards. But that is not the case herein. Admittedly, the plaintiff/the respondent is a practicing advocate at Tirunelveli whereas the appellants have erected the pole in his land at Kudankulam which is situate 60 Kms away from Tirunelveli. According to the respondent/ the plaintiff he came to know about the erection of pole in his land only in the month of April 2004, at the time when he visited his village during summer holidays of the Court. According to his information, the poles were erected in February 2004 itself. Thereafter, he approached the Court. Further, in S.A.No.1566 of 1993, there was no occasion for the learned Judge to consider the fate of Section 12(2) of the Indian Electricity Act, 1910 after the amending the Act of 2003 and the repeal clause of Section 185 of Electricity Act 2003 and its impact was also not considered in the said judgment. So, I am of the view that the decision in S.A.No.1566 of 1993 differs from the facts on the case on

hand. Hence, I am of the view that there is no substantial question of law involved in these second appeals for admission and there is no material on record to warrant any interference to the findings of the learned First Appellate Judge who had concurred with the findings of the learned trial Judge in coming to the conclusion that the plaintiff is entitled to the relief asked for in the plaint. It is open to the respondent/the plaintiff to consider whether he has to approach the District Magistrate for compensation taking into consideration the fact that the electric poles have been installed in his land only for the public purpose. At this juncture, the learned counsel appearing for the appellants would contend that the relief given to the plaintiff is being one of the mandatory injunction time may be granted, some breathing time i.e., one month is granted to the appellants for removal of the Electrical posts from the plaintiff's land. In fine, both the second appeals are dismissed even before admission confirming the findings of the learned First Appellate Judge in A.S.No.260 of 2006 and A.S.No.264 of 2006 on the file of the Court of the Principal Subordinate Judge, Tirunelveli. No costs. Consequently, connected miscellaneous petitions are closed.