

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.12.2016

PRONOUNCED ON : 20.12.2016

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.503 of 2011

and

M.P.No.1 of 2011

Rajammal (deceased)

- 1.R.Subramani
- 2.R.Mahalingam
- 3.S.Andiappan
- 4.S.Mariappan
5. S.Karumalai
- 6.S.Paramasivam
- 7.S.Muthu

..Appellants/ Appellants/
Plaintiffs 2 to 8

Vs.

- 1.The District Collector,
Salem District,
Salem - 636 001.
2. The Deputy Chief Engineer (Construction),
Southern Railway,
Salem - 636 005.

..Respondents/ Respondents/
Defendants

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and Decree dated 30.04.2010 made in A.S.No.15 of 2009 passed by the Principal Subordinate Judge, Salem, confirming the judgment and decree passed by the II Addl. District Munsif Court, Salem, dated 22.09.2008 passed in O.S.No.1300 of 2005.

For Appellants : Mr.V.Bhiman
for Sampath Kumar Associates

For Respondent : Mr.Jayaramaraj
No.1 Govt Advocate

For Respondent : Mr.V.G.Suresh Kumar
No.2

JUDGMENT

Challenge in this second appeal is made by the plaintiffs against the judgment and decree dated 30.04.2010 made in A.S.No.15 of 2009 on the file of the Principal Subordinate Court, Salem, confirming the judgment and decree dated 22.09.2008 passed in O.S.No.1300 of 2005 on the file of the II Additional District Munsif Court, Salem.

2. The suit has been laid by the plaintiffs for declaration and mandatory injunction.

3. The relief of declaration is sought for by the plaintiffs the right of way to take their men, cattle, cart and other vehicles from the suit "C" schedule properties to the public road through the suit "D" schedule properties and the relief of Mandatory injunction is sought for a direction to the second defendant to restore or lay the road on the suit "D" schedule properties within a time specified by the Court, in default permitting the plaintiffs to execute the decree and lay the road and recover the cost from the second defendant.

4. That the plaintiffs were entitled to "A" Schedule properties, which could be seen from the documents marked as Exs.A1 and 2, is not in dispute. For the formation of Salem-Karur broad gauge railway line, some portions of the properties belonging to the plaintiffs were acquired by the first defendant and entrusted to the railways. With reference to the same, we could seek assistance from the proceedings marked as Exs.A3 and 4. Excluding the portion of the properties belonging to the plaintiffs, acquired as above mentioned, the properties remaining with the plaintiffs are shown as "C" Schedule properties. As regards the above case of the parties, there is no dispute.

5. According to the plaintiffs, for reaching the "C" schedule properties and also, for having access to public road, they had been using the "D" Schedule properties as a pathway and by the formation of the broad gauge railway line, the defendants are attempting to close the pathway and in such view of the matter, according to the plaintiffs, they sent a representation to the defendants under notice dated 25.03.2000 and in response to the same, the second defendant has sent a reply, wherein, it has been agreed that the village road from Survey No.1 of P.Nattamangalam Village would be diverted through adjacent road or road under bridge which crosses the new Railway track and necessary action is being taken in this regard and the villagers can reach the National Highways through the diverted road. Further, according to the plaintiffs, contrary to the above said undertaking, the defendants have obliterated the pathway over the "D" schedule properties and hence, the plaintiffs are

constrained to lay the suit for appropriate reliefs against the defendants.

6. As against the portion of the properties of the plaintiffs acquired by the defendants for the formation of the above said Railway line, it could be seen that the plaintiffs were given enhanced compensation on account of the loss of irrigation facilities, severance of properties and loss of pathway etc., and the same could be evidenced from the copy of the award marked as Ex.B1. It is also found that inasmuch the properties acquired for the formation of Railway line were found to be insufficient, further portions of the properties belonging to the plaintiffs were again acquired for the said purpose and it could be seen that the "D" schedule properties were acquired for the completion of the Railway line. The proceedings, with reference to the same, could be evidenced from the documents marked as Exs.A9 and 10.

7. Now, according to the plaintiffs, claiming right of pathway over the "D" schedule properties, they have laid the present suit. The defendants have contended that the plaintiffs are not entitled to claim any right of pathway over the properties acquired for the formation of Railway line and it is also contended that the Railways, after the acquisition of the properties concerned, had formed a road in the "D" schedule properties to carry the railway materials for the purpose of completing the project and in such view of the matter, the plaintiffs cannot claim a right of way on the road, so formed, which is temporary in nature and it is further stated that once the properties had been acquired, the same vests with the Government, free from all encumbrances and therefore, the plaintiffs cannot claim any manner of right, particularly, right of pathway over the acquired properties i.e. "D" schedule properties and hence, the plaintiffs' case should fail.

8. The plaintiffs mainly based their case upon the alleged undertaking given by the 2nd defendant under the reply notice dated 29.03.2000, which has been marked as Ex.A7. The notice sent by the plaintiffs dated 25.03.2000 has been marked as Ex.A6. According to the plaintiffs, Ex.A6 notice is Section 80 notice sent to the defendants prior to the institution of the suit. The suit has been laid in the year 2005. Ex.A6 notice is found to be dated 25.03.2000. Therefore, it could be seen that after the issuance of the alleged section 80 C.P.C notice Ex.A6, 5 years later, the suit has come to be laid by the plaintiffs. Ex.A6 notice has been sent to the State of Tamil Nadu, represented by the District Collector, Salem and Union of India, represented by the Deputy Chief Engineer, (Construction). Ex.A6 notice is responded under Ex.A7 by the Union of India. However, the suit has been filed by the plaintiffs not against the Union of India, but against the Deputy Chief Engineer,

(Construction), Southern Railway, Salem. It has not been explained by the plaintiffs as to why Union of India or the General Manager of concerned Railways has not been shown as the defendants.

9. It is mainly argued by the plaintiffs' counsel that under Ex.A7, the second defendant has given an undertaking that the road will be diverted for the plaintiffs access to the National Highways and contrary to the undertaking, presently, the railways have obliterated the pathway over the "D" Schedule properties and hence, the suit by the plaintiffs. However, a reading of the contents found in Ex.A7 do not go to show that the defendants have accepted the right of the pathway of the plaintiffs over the "D" Schedule properties, as such and undertook to create any pathway for the plaintiffs for having access to their suit properties or from their properties to the National Highways. All that is said under Ex.A7 is only that the road would be diverted for having access to the National Highways and the same does not connote that the defendants have admitted the right of the pathway over the "D" schedule properties and that they have undertaken to create a new pathway for the plaintiffs to reach the National High ways, that to over the "D" schedule properties.

10. As found earlier, the suit "D" schedule properties had been acquired specifically for the formation of the Railway line. In such view of the matter, in the absence of any evidence on the part of the plaintiffs to hold that the plaintiffs had been using the "D" schedule properties as a pathway for reaching the National Highways, it cannot be held that the plaintiffs are entitled to seek the declaration of pathway over the "D" schedule properties and also, the relief of mandatory injunction sought for.

11. As rightly argued by the defendants counsel, the plaintiffs have to establish at the foremost that they have a right of pathway or easementary right over the "D" Schedule properties. As such, with reference to the above case of the plaintiffs, there is no material produced. However, the plaintiffs' counsel contended that the commissioner report would go to show that the plaintiffs have been using the "D" schedule properties as a pathway for reaching the National Highways. The commissioner report cannot be the basis for upholding the plaintiffs' right over the "D" schedule properties. Now, according to the defendants, once the property had been acquired by the railways as per the Land Acquisition Act, 1894, the properties are taken by the defendants free of all encumbrances and therefore, the plaintiffs cannot claim any right of pathway over the acquired properties.

12. However, countering the above contention of the defendants, the plaintiffs' counsel placed reliance upon the decision reported in 2005 SAR (Civil) 190 (H.P.State Electricity Board and Ors. V. Shiv K.Sharma and Ors). It is contended that in view of the above mentioned decision, when the plaintiffs are claiming pathway over the "D" schedule properties as an easement of necessity, the same does not get extinguished by reason of acquisition and particularly, when the nature of easementary right is not capable of being evaluated in terms of compensation and arising out of necessity. However, countering the above arguments, it is contended by the defendants' counsel that in the absence of any establishment of the plaintiffs case that they had pre-existing right over the "D" schedule properties as a right of pathway for reaching the National Highways, the above decision is inapplicable to the facts and circumstances of the present case.

13. Further, it could be seen that as per the report of the advocate commissioner, the plaintiffs have got alternative way for reaching their lands and in such view of the matter, the contention that the plaintiffs have only the "D" schedule properties as a pathway for having access to their properties and also, for reaching the National High ways cannot be countenanced. Therefore, as rightly argued by the defendants' counsel, when the plaintiffs have not established that they have a right of pathway or easementary right over the "D" schedule properties for reaching National Highways and when it is found that the plaintiffs are having other access to reach their properties and the National Highways, the contention that Section 16 of the Land Acquisition Act, 1894, would not come into operation in respect of the acquisition of the "D" schedule properties by the defendants cannot be countenanced.

14. The main argument projected by the plaintiffs' counsel is that the defendants are prevented by way of promissory estoppel from resisting the plaintiffs' claim over the right of pathway in the "D" schedule properties as per Ex.A7 and therefore, on that principles, the Court should uphold the plaintiffs' case. At the foremost, the plaintiffs have not instituted the suit against the Union of India or the General Manager of concerned railways. On the other hand, the suit has come to be laid only against the Deputy Chief Engineer, (Construction), Southern Railway, Salem and the District Collector, Salem. However, before instituting the suit, the plaintiffs have not issued the statutory notice under Section 80 C.P.C to the present defendants. The so-called statutory notice under Section 80 CPC said to have been issued by the plaintiffs under Ex.A6, has been issued only to the State of Tamil Nadu and the Union of India. But both the State of Tamil Nadu and the Union of India are not the defendants in the present suit.

15. On the other hand, it is only the District Collector, Salem and the Deputy Chief Engineer, (Construction), Southern Railways are arrayed as defendants. To the notice under Ex.A6, the reply has been sent on behalf of the Union of India, which has been marked as Ex.A7 and that is stated to be an undertaking given by the Union of India. But, it has not been explained by the plaintiffs as to why it has not arrayed the Union of India or at least the General Manager of concerned railway as a party. Therefore, it could be seen that the plaintiffs though would claim to have issued the statutory notice under Section 80 CPC against the State of Tamil Nadu and Union of India, had chosen to lay the suit only against the District Collector, Salem and the Deputy Chief Engineer (Construction), Southern railway and not against the State of Tamil Nadu and Union of India. The plaintiffs have failed to establish as to against whom they are seeking the relief based upon the plea of promissory estoppel now projected in the case. The plea of promissory estoppel raised by the plaintiffs is based upon Ex.A7. Ex.A7 is issued on behalf of the Union of India, The Union of India is not shown as a party to the present suit. In such view of the matter, the contention raised that the Union of India is estopped from resisting the plaintiffs' case, on the plea of promissory estoppel, in view of Ex.A7, as such, cannot be accepted, particularly, when the plaintiffs have not arrayed the Union of India as a party defendant. Further, as adverted to earlier, under Ex.A7, the Union of India has not admitted the right of pathway of the plaintiffs over the "D" schedule property and also, not agreed to lay any new road or adjacent road over the acquired land for the plaintiffs access to the National Highways. What has been stated in Ex.A7 is only the formation of necessary access would be considered for the villagers to reach the National Highways. Therefore, it could not be stated that Union of India has agreed that they would lay a pathway over the acquired land for enabling the plaintiffs to have access to the National Highways. If that be the case, as rightly argued by the defendants' counsel, the purpose of acquisition of further portions of the properties of the plaintiffs i.e. "D" schedule properties would be rendered otiose. The railway administration cannot be expected to lay a road for the plaintiffs access to the National Highways in the absence of establishment of the plaintiffs right over such a road over the "D" schedule properties. Further, as found earlier, the plaintiffs having other access to reach their properties and National Highways, as seen from the commissioner's report, therefore, the plea of promissory estoppel projected by the plaintiffs cannot be accepted both factually as well as legally.

16. The plaintiffs' counsel contended that the defendants are liable to make and maintain their works after suitably accommodating the owners and occupiers of the lands adjoining to the railways and in this connection, he placed reliance under

Section 16 of The Railways Act, 1989. However, the courts below have rightly found that as per the proviso appended to section 16 of The Railways Act, 1989, the defendants, particularly, railway administration shall not be required to make any accommodation works in such a manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners or occupiers of the land have been paid compensation in consideration of their not requiring the said works to be made.

17. In so far as this case is concerned, as rightly found by the courts below, the plaintiffs have been suitably awarded for the lands acquired in addition to the value of the properties acquired as also for the loss of other amenities/benefits and this could be seen from the document marked as Ex.B1. From Ex.B1, it could be seen that the plaintiffs have been given additional compensation on account of the loss of irrigation facilities, severance of lands obstruction of pathway road etc., Therefore, when the acquisition of additional properties of the plaintiffs for the formation of the railway line has been made, the contention of the plaintiffs that despite the same, the railway administration should earmark a separate portion out of the said acquired properties for the purpose of forming a pathway to enable the plaintiffs to have access to their properties and the National Highway as such cannot be accepted in any manner. If such a view is taken, as rightly argued the defendants, the acquisition object would be defeated and furthermore, when the plaintiffs have not established any pre existing right of pathway over the acquired properties i.e. "D" schedule properties, the plaintiffs cannot be allowed to contend that the railway administration should provide the pathway right over the "D" schedule properties under Section 16 of the Railways Act, 1989.

18. The counsel for the defendants also contended that the suit laid by the plaintiffs has to fail for want of the statutory notice under Section 80 CPC. As found earlier, Ex.A6 notice stated to be the statutory notice under Section 80 CPC has not been sent to the present defendants. It had been sent only to the State of Tamil Nadu and the Union of India, but the State of Tamil Nadu and the Union of India are not shown as defendants. However, the plaintiffs have issued another notice to the second defendant dated 22.01.2005, which has been marked as Exs.A8. In that notice also, it is stated that the same should be treated as Section 80 CPC notice. Therefore, it could be seen that inasmuch as the plaintiffs have decided that the notice under Ex.A6 sent to the the State of Tamil Nadu and the Union of India could not be construed as a statutory notice issued under Section 80 CPC, have chosen to issue another notice under Ex.A8 to the second defendant alone. The second statutory notice issued under Ex.A8 has not been sent to the District

Collector, Salem or to the State of Tamil Nadu or to the Union of India. The suit has come to be laid on 22.12.2005. However, when the State of Tamil Nadu and Union of India or the General manager of the concerned railway have not been shown as the defendants and the properties had been acquired only by the State of Tamil Nadu and Union of India for the railways administration, it could be seen that so-called statutory notice marked as Ex.A8 would not serve the purpose and it cannot be construed as the statutory notice as contemplated under Section 80 CPC. A perusal of Section 80 CPC would go to show that no suits shall be instituted against the Government or against a Public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office of. (a) In the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that government; (b) In the case of a suit against the Central Government where it relates to railway, the General Manager of that railway; (c) In the case of a suit against any other Government, a Secretary to that Government or the Collector of that District. However, in the light of the position that Ex.A8 notice has not been sent to the State of Tamil Nadu represented by the Collector of District and the General Manager of concerned Railways and on the other hand, it has been sent only to the second defendant, it could be seen that the plaintiffs' suit should fail for want of appropriate statutory notice as contemplated under Section 80 CPC.

19. The defendants' counsel in respect of their case relied upon the decisions (1995) 5 Supreme Court Cases 587 (State of U.P. And Another V. Keshav Prasad Singh), (1997) 9 Supreme Court Cases 544 (State of Punjab and others V. Sadhu Ram) and AIR 2010 Supreme Court 2617 (The District Collector, Srikakulam and Ors V. Bagathi Krishna Rao and Anr) and further, the plaintiffs' counsel also relied upon the decision reported in 1948 MLJ 546 (Governor-General in Council, represented by the General Manager, South Indian Railway V. The Municipal Council, Madura, through its Commissioner). The principles of law outlined in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the present case.

20. In the light of the above discussions, it could be seen that the courts below have rightly, on the basis of the evidence adduced on record, found that the plaintiffs have no right of pathway over the "D" schedule properties and as such not entitled to seek the relief sought for. No exception could be taken to the findings of the courts below for rejecting the plaintiffs' case .

In conclusion, no substantial question of law is found to be involved in this second appeal and accordingly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

sms

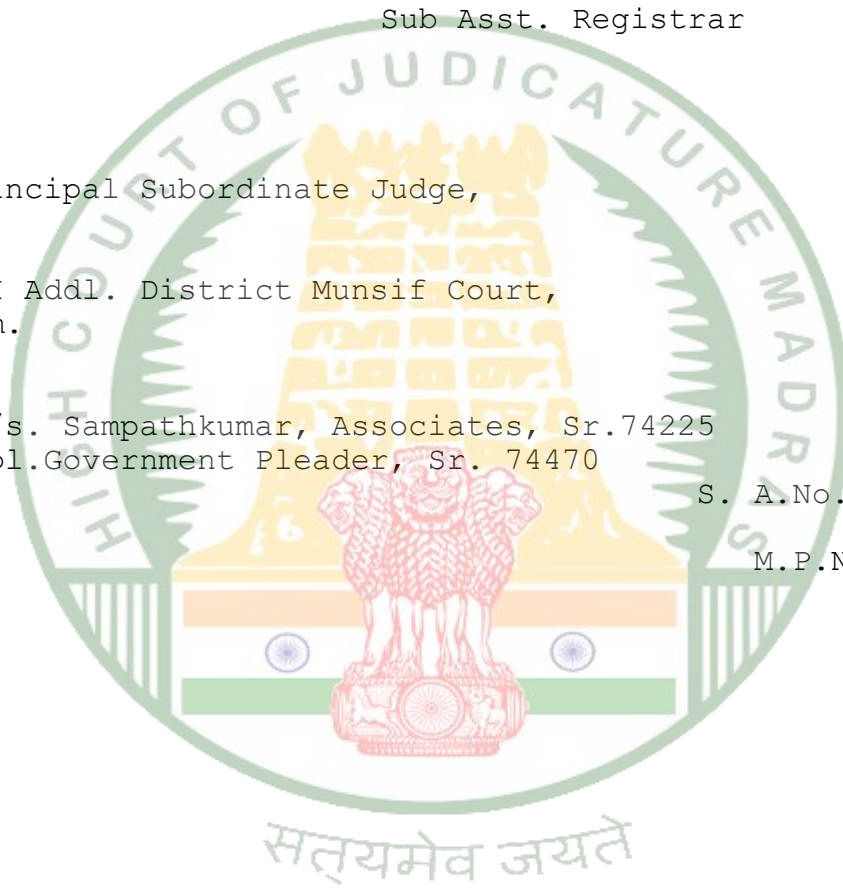
To

1. The Principal Subordinate Judge,
Salem.
2. The II Addl. District Munsif Court,
Salem.

1 cc to M/s. Sampathkumar, Associates, Sr.74225
1 cc to Spl.Government Pleader, Sr. 74470

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and
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