

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.10.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.24448 of 2018

W.M.P.Nos.28485 of 2018

P.Kasiviswanathan

... Petitioner

vs.

1.The Union of India,

Represented by General Manager,
Southern Railway, Park Town,
Chennai - 600 003.

2.The Divisional Railway Manager,
Salem Division, Salem - 636005.

3.The District Collector,
Salem, Salem District.

4.The Tahsildar,
Omalur Taluk,
Salem District.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, directing the respondents to construct the under bridge/limited use subway at the place where the existing level crossing No.3, is located at Puthunallagoundampatti village, Omalur Taluk by considering the petitioner's representation dated 20.02.2018.

For Petitioner : No Appearance

For R1 and R2 : Mr.P.T.Ramkumar

Standing Counsel for Railway

For R3 and R4 : Mr.E.Manoharan

Additional Government Pleader.

ORDER

(Order of the Court was made by S.MANIKUMAR, J)

Instant writ petition has been filed for a Mandamus, directing the respondents, to construct a under bridge/limited use subway, at the place, where the existing level crossing

No.3, is located at Pudhunallagoundampatti village, Omalur Taluk, by considering the representation, dated 20.02.2018.

2. It is the case of the petitioner that, there are 1000 families living in Pudhunallagoundampatti village, Omalur Taluk, Salem District and they are doing agricultural work. People of the said Village, are transporting their agricultural produce to the market and other places, through a tar road, which runs to National Highways - 7, opposite to Government College of Engineering, through the villages Pudhunallagoundampatti and Aanai Goundampatti.

3. Apart from transporting agricultural produce and other goods, children of the said village, go to Schools and Colleges, by using the abovesaid road. In the road stated above, a manned level crossing, was constructed long ago at Pudhunallagoundampatti. The said level crossing, was named by the Railway Department as LC - 3. The abovesaid villagers were using the said road, through LC.No.3 (level crossing gate) for the last 6 decades. Now, the first and second respondents, are trying to close the manned level crossing, wherever located in Salem District. Accordingly, the 2nd respondent, has closed L.C.No.1, located at Manguppai, L.C.No.2 Located at Swaminaicken patti and L.C.No.4, located at Kottagoundampatti village, by constructing bridge/limited use subways. The said bridges have been constructed, in the same place, where there were existing manned level crossings. However, the respondents have proposed to construct, a bridge/limited use of subway 300 Mts., away from the existing manned level crossing No.3, at Pudhunallagoundampatti Village. In the event of constructing of bridge 300 Mts., away from existing level crossing No.3, the abovesaid villagers, would be put into great hardship, and safety of women students, would be affected. Moreover, the public have to walk 600 Mts. distance to reach the road.

4. Grievance of the petitioner is that the underground bridge is not constructed in the same place, where the level crossing was located and in some other place, it would cause inconvenience to the villagers, school and college going students and the location proposed is at the instance of some influential people. Safety of the women students is also apprehended. Distance between the existing level crossing and the proposed location of the bridge is about 600 mts.

5. Further, the proposed area for constructing a bridge, is located in a place lower than the existing level crossing and therefore, during the rainy season, people of abovesaid villages, cannot use the road, through the proposed under bridge. Apart from that, there is a 300 mts., stretch of road, adjoining to Railway track, which belongs to Railway Department.

Thus while undertaking the maintenance work by the Railway Department, 600 mts. stretch would be blocked by the construction material. Hence, the proposed location is arbitrary and against the principle of natural justice.

6. Though the respondents have constructed a bridge in the existing level crossing, in the neighbouring village, they proposed to construct 300 mts. away from existing level crossing, to give undue advantage for few individuals. In other words, the respondents have proposed to construct the bridge in a different place, at the instance of vested interest people. Few individuals are residing close to the proposed location for bridge and they belong to some political party, and only at their instance the respondents are acting arbitrarily.

7. Contending inter alia, that the action of the respondents, is arbitrary, people of the abovesaid village, have made a representation, dated 20.02.2018, to the Tahsildar, Omalur Taluk, Salem District/4th respondent herein, with a copy marked to the District Collector, Salem District/third respondent herein, requesting them, to construct the under bridge, in the place where the existing level crossing is located. The Tahsildar, Omalur Taluk, Salem District/4th respondent herein, his proceeding in L.Dis:4905/2018/C3, dated 27.02.2018, has forwarded the same, to the Divisional Railway Manager, Salem Division, Salem/2nd respondent herein, for taking necessary action, in this regard. However, the 2nd respondent, has not taken any action.

8. The Divisional Railway Manager, Salem Division, Salem/2nd respondent herein, has sent a letter dated 31.05.2018 to the District Collector, Salem District/3rd respondent herein, seeking his consent/approval, in order to eliminate 9 level crossing located in Salem District. In the said letter, the 2nd respondent, has stated that under bridge/limited use subways, for closure of abovesaid manned level crossing, may be provided.

9. In the abovesaid letter of the Divisional Railway Manager, Salem Division, Salem/2nd respondent herein, sent to the District Collector, Salem District/3rd respondent herein, it is specifically mentioned that safety and convenience of road users, shall be safeguarded. Whereas, according to the petitioner the action taken to construct bridge 300 mts., away from the existing level crossing, would not fulfill the consent of 2nd respondent as exhibited in the above said letter.

10. According to the petitioner, the bridge should be constructed in the place where the existing level crossing is located. Though the Divisional Railway Manager, Salem Division, Salem/2nd respondent herein, has received the representations,

dated 24.07.2018 and 27.02.2018, he has not come forward, to consider the same.

11. Being aggrieved, and contending inter alia that action of the respondents is arbitrary and left with no other alternative remedy, instant public litigation filed by the petitioner, for the relief stated supra.

12. Responding to the notice, Mr.P.T.Ramkumar, learned standing counsel for Railway, submitted that at the location where the present level-crossing is existing, there is a curve on the right hand side, and therefore it is not feasible to construct limited use sub-way. If railways have to construct, the location cost will be more, because the track level and road level, are same. Railways have to dig up a hole and construct a sub-way which involves additional cost, whereas 300 meters away from the track, the level is little high, and it will be convenient for railways to execute the work, without an additional cost, and no inconvenience would be caused to the public.

13. Learned counsel for the Railways, has also produced photographs to this Court, which we have perused.

14. Heard the learned counsel for the respondents and perused all the materials available on record.

15. Safety and convenience of the road users, have been stressed. Arbitrariness in the action of Railways in locating the place for construction of the under bridge, is alleged. On the aspect of arbitrariness alleged, this Court deems it to consider few decisions of the Hon'ble Supreme Court.

(i) *Shrilekha Vidyarthi (Kumari) v. State of U.P.*, reported in (1991) 1 SCC 212 : 1991 SCC (L&S) 742, the Hon'ble Supreme Court considered what the Hon'ble Chief Justice Sabya Sachi Mukerji said in *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293], as follows:

"every action of the State or an instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In appropriate cases, as was observed in the last mentioned decision, actions uninformed by reasons may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution."

16. In *Shrilekha Vidyarthi (Kumari)*'s case, the Hon'ble Supreme Court, at Paragraphs 35, 36, 37 & 39, held as follows:

"35. It is now too well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of

Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect, the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

37. Almost a quarter century back, this Court in *S.G. Jaisinghani v. Union of India* [(1967) 2 SCR 703, 718-19 : AIR 1967 SC 1427 : (1967) 65 ITR 34] indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law.

(See Dicey, Law of the Constitution, 10th edn., Introduction, cx). 'Law has reached its finest moments', stated Douglas, J. in *United States v. Wunderlich* [342 US 98 : 96 Law Ed 113 (1951)] , 'when it has freed man from the unlimited discretion of some ruler... Where discretion is absolute, man has always suffered'. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it is classic terms in the Case of John Wilkes [(1770) 4 Burr 2528] , 'means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful'."

39. No doubt, it is for the person alleging arbitrariness who has to prove it. This can be done by showing in the first instance that the impugned State action is uninformed by reason inasmuch as there is no discernible principle on which it is based or it is contrary to the prescribed mode of exercise of the power or is unreasonable. If this is shown, then the burden is shifted to the State to repel the attack by disclosing the material and reasons which led to the action being taken in order to show that it was an informed decision which was reasonable. If after a prima facie case of arbitrariness is made out, the State is unable to show that the decision is an informed action which is reasonable, the State action must perish as arbitrary."

(ii) In *Union of India and Another Vs. International Trading Co. and Another* reported in (2003) 5 SCC 437, the Hon'ble Supreme Court held thus,

"15. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

16. Where a particular mode is prescribed for doing an act and there is not impediment in adopting the procedure, the deviation to act in different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by

reason and it follows that an act uninformed by reason is per se arbitrary.

17. As Professor Wade points out (in Administrative Law by H.W.R. Wade 6th Edition) there is ample room within the legal boundaries for radical differences of opinion in which neither side is unreasonable. The reasonableness in administrative law must, therefore, distinguish between proper course and improper abuse of power. Nor is the test Court's own standard of reasonableness as it might conceive it in a given situation. The point to note is that the thing is not unreasonable in the legal sense merely because the Court thinks it to be unwise."

18. On the facts and circumstances of this case, it could be deduced that the under bridge is proposed to be constructed, 300 feet, from the existing level crossing, and we are at loss to understand, as to how the safety would be affected. Though the petitioner has contended that the bridge should be constructed at the place where the level crossing was earlier located, we are of the view that it is for the Railways to decide where the construction of the bridge has to be located, unless it is substantiated by the petitioner that the decision taken is smacked with arbitrariness.

19. Petitioner has alleged inconvenience. Convenience of users, is different from arbitrariness. Feasibility to construct the bridge at the place suggested by the petitioner is another aspect. On the principles of law, as to how, arbitrariness has to be tested, Railways, has come out with a concrete statement, that it is not feasible to construct an underbridge, at the place suggested, for the reasons stated, and the said decision cannot be said to be arbitrary. On the facts and circumstances of the case, we accept the reasons. Location at the place suggested, is stated to be not only expensive and not feasible by Railways. On the facts placed, we are of the view that the petitioner, has failed to prove that there is arbitrariness, in choosing the place, for the proposed construction of the bridge. The allegation that the proposed construction is at the instance of influential people is also not substantiated.

20. In view of the above, writ petition is dismissed. No Costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

dm

To

1.The Union of India,
Represented by General Manager,
Southern Railway, Park Town,
Chennai - 600 003.

2.The Divisional Railway Manager,
Salem Division, Salem - 636005.

3.The District Collector,
Salem, Salem District.

4.The Tahsildar,
Omair Taluk,
Salem District.

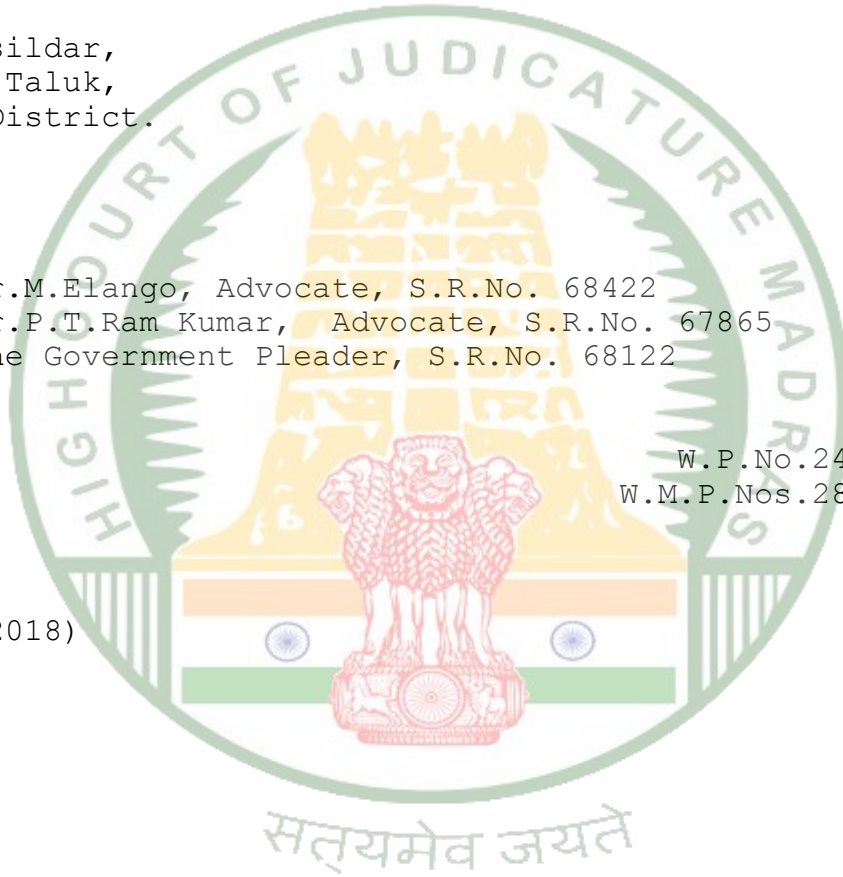
+1cc to Mr.M.Elango, Advocate, S.R.No. 68422

+1cc to Mr.P.T.Ram Kumar, Advocate, S.R.No. 67865

+1cc to the Government Pleader, S.R.No. 68122

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GN(14/11/2018)



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