



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.08.2018

PRONOUNCED ON: 20.08.2018

CORAM

THE HON'BLE MR.JUSTICE P.RAJAMANICKAM

S.A.No.1353 of 2001

and

CMP.No.14402 of 2001

1. The State of Tamil Nadu by
the District Collector,
Nilgiris.
2. The District Forest Officer,
Nilgiris South Division,
Udhagamandalam. ... Appellants/Defendants

Vs

M/s.Mahavir Plantation Ltd by one of its
Director Mr.Lalu T. Bhansali
"Mahavir House", Milne Road,
Lingdon Island, Cochin 682 003. ... Respondents/Plaintiff

PRAYER:Second Appeal filed under Section 100 of C.P.C, to set aside the judgment and decree of the District Judge, Udhagamandalam, made in A.S.No.30 of 1998 dated 29.02.2000, confirming the decree and Judgment of the Court of the Sub-Judge, Udhagamandalam made in O.S.No.600 of 1995 dated 16.04.1998.

For Appellants :Mr.S.V.Vijay Prasanth
Additional Government Pleader (Forest)

For Respondent :Mr.M.Mohammed Hasan
for M/s.B.Rama Moorthy

JUDGMENT

This Second Appeal has been filed by the defendants against the judgment and decree passed by the District Judge, Udhagamandalam, in AS.No.30 of 1998 dated 29.02.2000 modifying the judgment and decree passed by the Sub-Judge, Udhagamandalam, in O.S.No.600 of 1995 dated 16.04.1998.



2. The respondent herein has filed a suit in O.S.No.600 of 1995 on the file of the Sub-Judge, Udhagamandalam, for declaration that the demand and collection of fees for the renewal of the four permits issued to the plaintiff pursuant to the two G.Os viz., G.O.Ms.No.781, Forests and Fisheries dated 21.07.1986 and G.O.Ms.No.272, Environment and Forests Department dated 15.04.1991 at the enhanced rate of 10% and 12½% of the market value of the forest lands classifying the same as industrial/ commercial purpose is illegal; consequently for a permanent injunction restraining the Government from collecting the enhanced rate pursuant to the said two GOs from the plaintiff and for the refund of the total sum of Rs.78,045/- demanded and collected illegally from the plaintiff and which had been paid by the plaintiff under protest with interest @ 18% p.a., and for costs of the suit.

3. The learned Sub-Judge, Udhagamandalam, by the judgment and decree dated 16.04.1998 has decreed the suit and directed the defendants to refund the suit amount after deducting 1% permit fees with interest @ 12% p.a., and also directed the defendant to pay costs of the suit to the plaintiff. Aggrieved by the same, the defendants have preferred an appeal in A.S.No.30 of 1998 on the file of the District Judge, Udhagamandalam. The learned District Judge has partly allowed the appeal and modified the judgment and decree directing the defendants instead of refunding the aforesaid amount, adjust the said amount with the amount to be paid by the plaintiffs in future. In respect of other reliefs, the judgment and decree of the trial court are confirmed. He also directed the parties to bear their respective costs. Feeling aggrieved, the defendants have filed the present second appeal. For the sake of convenience, the parties are referred to as described before the trial court.

4. The averments made in the plaint are, in brief, as follows:

The plaintiff is the owner of the tea plantation known as Prospect Estate at Naduvattam, Ootacamund Taluk, Nilgiris. There are a few pockets of lands belonging to the Forest Department interspersed there in. Between the years 1912 and 1957, the Forest Department had issued to the Superintendent / Manager of Prospect Estate four permits for four strips of forest land in Naduvattam Revenue village and within the Prospect Estate to be used as roads under the proviso to Section 21 of the Tamilnadu Forest Act, 1882. The said permits are annual permits and to be renewed by the 1st of April each year by the second defendant on payment of permits fees specified therein. The plaintiff is the successor in interest of Prospect Estate and it is the present owner of the property. Up to 1986-1987 only a sum of Rs.408/- was collected from the plaintiff by the Forest



Department towards the renewal of the said four permits. Thereafter, no such fees was collected or even demanded from the plaintiff till 1990. By G.O.Ms.No.781, Forests and Fisheries dated 21.07.1986, the Government of Tamilnadu refixed the rate of "lease rents or permits fees" varying between 1% of the market value of the lands for "welfare purposes" to 10% of the market value of the lands for "industrial/commercial purposes". In pursuance of the said G.O, the second defendant had been demanding and collecting the refixed "lease rents/permit fees" from the plaintiff at 10% of the market value of the forest land categorising the four strips of forest lands mentioned in the permits as for "industrial/commercial" purposes. The demand included the arrears from 1986-1987 to 1990. These amounts were paid by the plaintiff under protest.

b) Again by G.O.No.272, Environment and Forest Department dated 15.04.1991, the rates were further revised and for the forest land classified under "commercial/industrial purposes" 12½ % of the market value of the lands were fixed as lease rents. This enhanced permit fee was also paid by the plaintiff under protest for the renewal of the permits. Those permits were issued only for public cause viz., to be used as public roads at all times which is a welfare scheme of the Government. Those roads are not in exclusive use of the plaintiff alone, but they are opened to the public. Therefore the demand and collection made by the second defendant at the enhanced rate is illegal and unauthorised. From 30.03.1990, the plaintiff had paid a sum of Rs.78,045/-, under protest. Since the aforesaid amount had been collected unauthorisedly, the plaintiff had sent a notice on 23.03.1993 under Section 80 of CPC calling upon the defendants to repay the said amount. The first defendant had received the said notice on 26.03.1993 and the second defendant had received the same on 24.03.1993. There has been no response from the defendants so far. Hence the plaintiffs are constrained to file the above suit for the aforesaid reliefs.

5. The averments made in the written statement filed by the second defendant and adopted by the first defendant are, in brief, as follows:

The defendants admitted that by the G.O.Ms.No.781, Forest and Fisheries dated 27.08.1976, the Government of Tamil Nadu refixed the rate for lease rents or permits fees. The Government of Tamil Nadu had hiked the rate based on the land used and impact on the forest land. Therefore, the hike is justified made on scientific basis. It is also correct to say that the Tamil Nadu Government had classified the market value under various heads such as "Welfare Purposes", "Ordinary" and "Industrial/Commercial Purposes". The roads in question used by the plaintiff are purely for Industrial/Commercial purposes. The Prospect Estate is a Tea Estate and the roads in question are used only by the workers of the plaintiff Company and Estate.



Hence, the fee was raised as per the aforesaid Government Order. Subsequently another G.O.Ms.No.272, Environment and Forests dated 15.04.1991 was issued. As per the said G.O., the lease rent has been increased. The plaintiff had paid the rent without raising any objection and therefore, plaintiff is estopped from claiming for refund of the amount. The plaintiff cannot challenge the validity of the G.Os before the civil court. The suit is barred by limitation. The plaintiff's contention that it sent a notice u/s.80 of the CPC is irrelevant as the same did not disclose any cause of action requiring the defendants to reply. The suit is wholly misconceived as a result of misunderstanding of law or facts. Therefore, the defendants have prayed to dismiss the above suit.

6. Based on the aforesaid pleadings, the learned Sub-Judge has framed necessary issues and tried the suit. During trial, on the side of the plaintiff, one witness was examined as PW1. Plaintiff has marked Exs.A1 to A7 as exhibits. On the side of the defendants, neither oral nor documentary evidence has been adduced.

7. The learned Sub-Judge, after considering the materials placed before him found that the plaintiff is using the concerned roads for the welfare of the public and not for industrial/commercial purpose alone and hence, the second defendant is not entitled to demand rent for a tariff applicable to the industrial/commercial purposes. He further found that the suit is not barred by limitation. Accordingly, he decreed the suit as stated above. Aggrieved by the same, the defendants have filed an appeal in A.S.No.30 of 1998 on the file of the District Judge, Udhagamandalam. The learned District Judge has allowed the appeal partly and modified the judgment and decree directing the defendants, instead of refunding the amount which was excessively collected, to adjust the said amount with the fees to be paid by the plaintiff in future. Feeling aggrieved, the defendants have preferred the present second appeal.

8. This court at the time of admitting the second appeal has formulated the following substantial questions of law:

"1. Whether the courts below are right in not holding that the plaintiff is estopped from challenging the demand made by the defendants without challenging the G.O.Ms.No.781, Forests & Fisheries Department, dated 21.07.1986 and G.O.Ms.No.272, Environment & Forests Department, dated 15.04.1991?

2. Whether the courts below are right in decreeing the suit without setting aside the specific Government Orders in G.O.Ms.No.781, Forests



& Fisheries Department, dated 21.07.1986 and G.O.Ms.No.272, Environment & Forests Department, dated 15.04.1991?

WEB COPY

3. Whether the courts below are right in not holding that the Civil Courts have no jurisdiction and the suit is barred under Section 9 C.P.C as the issue involved is about the Constitutional validity of the Government Orders?".

9. Q.Nos.1 to 3:

Learned Additional Government Pleader (Forest) has submitted that the courts below failed to consider that the respondent/plaintiff without challenging the Government Orders cannot question the demand made by the defendants. He further submitted that the courts below failed to consider that the suit is barred by limitation. He further submitted that the courts below failed to consider that the plaintiff has failed to prove that it has paid the amount with protest. He further submitted that the courts below failed to consider that the plaintiff is estopped from claiming the amount from the defendants. He further submitted that the courts below erred in drawing adverse inference against the appellants/defendants just because no reply was issued to the notice issued u/s.80 CPC., and therefore, he prayed to allow the second appeal and set aside the judgments and decrees passed by the courts below and dismiss the suit.

10. Per contra, learned counsel for the respondent has submitted that the plaintiff has proved its case through oral and documentary evidence, but the defendants did not adduce any evidence to disprove the plaintiff's case. He further submitted that the plaintiff has not challenged the G.Os. On the contrary, it has questioned only the demand made by the defendants and hence it is not necessary to challenge the validity of the G.Os. He further submitted that PW1 has categorically deposed that the plaintiff has paid the amount under protest and to contradict the said evidence, the defendants have not adduced any evidence. He further submitted that the defendants have collected first instalment on 30.03.1990 and the plaintiff has issued notice u/s.80 C.P.C on 23.03.1993 and as per Section 15 (2) of the Limitation Act, the two months period which is covered u/s.80 C.P.C has to be excluded. After excluding the said period, the suit was filed on 07.06.1993 i.e., on the re-opening date after summer vacation and hence, the suit is not barred by limitation. He further submitted that admittedly the defendants after receipt of Section 80 C.P.C notice, have not sent any reply and hence the courts below have drawn adverse inference against the defendants



and in the said concurrent findings, this court cannot interfere and therefore, he prayed to dismiss the above second appeal.

11. The undisputed facts are as follows:

The plaintiff is the owner of tea plantation known as Prospect Estate at Naduvattam, Ootacamund Taluk, Nilgiris. There are a few pockets of lands belonging to the Forest Department interspersed therein. Between 1912 and 1957, the Forest Department had issued to the aforesaid Estate four permits for four stripes of forest land in Naduvattam revenue village under the proviso to Section 21 of the Tamilnadu Forest Act, 1882. The said permits are annual permits to be renewed every year by the second defendant on payment of permit fees specified therein. By G.O.Ms.No.781, Forests and Fisheries dated 21.07.1986, the Government of Tamilnadu refixed the rate of lease rents or permit fees varying between 1% of the market value of the lands for "welfare purposes", to 10% of the market value of the lands for "industrial/commercial purposes". For this purpose, the forest lands for which permits were issued were categorised into five different heads which includes welfare purposes and industrial/commercial purposes. Under this Government Order, the second defendant had been demanding and collecting the refixed lease rents/permit fees from the plaintiff at 10% of the market value of the forest land categorising the four types of forest land mentioned in the permits as for "industrial/commercial purposes". The demands included the arrears from 1986-1987 to 1990. Again by G.O.Ms.No.272, Environment & Forests Department dated 15.04.1991, the rates were further revised and for the forest lands classified under Commercial/industrial purposes 12½% of the market value of the lands were fixed as lease rents. The plaintiff has paid the enhanced permit fees on different dates from 30.03.1990 to 08.04.1992 and the total amount paid was to Rs.78,045/-.

12. According to the plaintiff, it has not used the aforesaid four types of forest land for any commercial purpose and hence, the amount fixed by the second defendant under the category of Industrial/Commercial purposes is against the aforesaid Government Orders. Its further case is that it has paid the permit fees at enhanced rate only under protest and hence it is entitled to get back the said amount and hence, it has issued notice u/s.80 CPC on 26.03.1993 and as per Section 15 (2) of the Limitation Act, the period of two months which is covered u/s.80 CPC has to be excluded and after excluding the said period, the suit was filed after re-opening date of summer vacation on 07.06.1993 and hence the suit is not barred by limitation.

13. According to the plaintiff, after issuance of



G.O.Ms.No.781 dated 21.07.1986, the second defendant has passed an order dated 30.03.1990 fixing the permit fees at 10% of the market value with effect from 21.07.1986 and hence, the plaintiff has paid the permit fees of Rs.33,044/- on 30.03.1990 and the other payments have been made subsequently. Its further case is that the said amount was paid under protest. So, the burden is upon the plaintiff to prove that it has paid the amount under protest. The plaintiff has not produced any documentary evidence to show that it has paid the aforesaid amount under protest. The courts below drawn an adverse inference on the ground that the defendants have purposely withheld the documents with regard to the payments made by the plaintiff.

14. In this context, it would be relevant to refer the decision in Union Of India vs Ibrahim Uddin & Anr (Civil Appeal No.1374 of 2008 dated 17.07.2002) wherein the Hon'ble Supreme Court in paragraph No.16 has observed as follows:

"16. Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side. The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

15. From the aforesaid decision, it is clear that the court



cannot loose sight of the fact that the burden of proof is on the party which makes the factual averments. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc., as is required under XI CPC. Conduct and diligence of the other party is also paramount important. It is also clear that presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. In the instant case, admittedly the plaintiff during the pendency of the suit did not submit any interrogatory statement or an application for making inspection or for production of the document as provided under Order XI CPC. In such a factual situation, in view of the law referred to above, it is not permissible for the courts below to draw any adverse inference against the defendants.

16. The courts below also drawn adverse inference against the defendants for not sending reply to the Section 80 CPC notice.

17. At this juncture, it would be relevant to refer to the decision in Manepalli Udaya Bhaskara Rao vs Kanuboyina Dharmaraju, 2004 (1) ALD 269, 2004 (4) ALT 600, II (2004) BC 323, wherein a Division Bench of the Hon'ble Andhra Pradesh High court in paragraph Nos.9 to 11 has observed as follows:

"9. Silence or non-issuance of reply notice cannot be termed to be admission under Section 17 of Evidence Act since Section 17 contemplates of a statement in oral, documentary or electronic form. There is no provision in Evidence Act including Section 114 under which admission can be presumed." In AIR 1955 NUC (Mad.) 3939, it was held as under:

"The law in the Republic of India will not oblige the man who receives an absurd and vexatious notice to reply to it, and will not conclude from the mere fact of non-reply an admission of the truth of the allegation that he had by instructing his advocate to put questions to a witness defaming the sender of the notice."

In it was held at para 7 as under:

"It was pointed out that the plaintiff given notice to the defendant claiming rent at the rate of Rs. 4/- per ton per month and there was no protest on behalf of the defendant and, therefore, it must be taken that there was an implied agreement between the parties that rent would be paid at that rate i.e., at the rate of Rs. 2,400/- p.m. We do not think there is any warrant for this submission.



WEB COPY

Merely because the plaintiff had claimed storage charges at the rate of Rs. 4/-per ton per month and there was silence on the part of defendant, it cannot be deemed that there was acquiescence on the part of the defendant and there was an implied undertaking on his part to pay godown rent at that rate."

10. Even the Queen Bench of England in 1891 (2) Q.B. 534 between Wiedemann v. Walpole held at 537 as under:

"The question for us is whether, according to law, the fact of the defendant not answering the letters could be taken as any evidence of corroborating required by the statute."

At page 538 it was held as under:

"A man might day by day write such letter, which, if they are not answered would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them to take no notice of them. Unless it is made out to be ordinary practice of mankind to answer. I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written has made a promise of marriage is no evidence whatever of any admission and that he did make the promise and therefore no evidence in corroboration of the promises."

Then again at page 539 it was held as under:

"It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission by him that he had been guilty of it."

11. From the above discussion, it makes clear that the admission has to be spelled out only from the positive acts on the part of the party, but cannot be culled out or cannot be based on any presumptions. The exchange of notices would only at the most constitute a demand and refusal in writing, but the absence thereof would not either way constitute an admission. Even failure to issue a notice cannot be said to be an absence of demand nor the failure to reply to such notice would amount to an admission of the claim made in the notice. Such omission would not amount to a tacit consent in



respect of the demanded liability.”

18. From the aforesaid decisions, it is clear that the silence or non - issuance of the reply notice cannot be termed to be admission under Section 17 of the Evidence Act. Further it is clear that the exchange of notice would only at the most constitute demand and refusal in writing, but, the absence thereof would not either way constitute an admission.

19. It may also be relevant to refer to the decision in Salem Advocate Bar Association, Tamil nadu Vs. Union of India AIR 2005 SC 3353, wherein a three Judges Bench of the Hon'ble Supreme Court has observed in paragraph Nos.40 and 41 as follows:

“40. Section 80 Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the



WEB COPY

State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.

41. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him."

20. In the aforesaid decision, the Hon'ble Supreme Court has observed the object of issuing notice under Section 80 CPC. Further it insisted that the Government or Department or other statutory bodies are bound to send reply to the Section 80 CPC notice. It also observed that the replies shall be sent after due application of mind and if the court finds that either notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the court shall ordinarily award heavy costs against the Government and directed it to take appropriate action against the concerned officer which includes recovery of cost from him. The said directions are perspective in nature. But even in the said decision, the Hon'ble Supreme Court has not held that merely because reply was not sent to the notice u/s.80 CPC, adverse inference can be drawn against the Government. Therefore, merely because the Government Officials have not sent reply to the Section 80 CPC notice, no adverse inference can be drawn against the Government and it cannot be presumed that it has admitted the plaintiff's case.

21. In the absence of any evidence from the plaintiff's side that it has paid the suit amount only under protest, it has to be presumed that it has paid the amount voluntarily. It has paid the amount from the year 1990. Only in the year 1993, suddenly the plaintiff has stopped the payment and raised a question that



the second defendant is not entitled to claim permit fees at enhanced rate. So the principle of estoppel will apply. Therefore the plaintiff is not entitled to ask for refund of the amount. But the courts below have wrongly applied the principles of law and fixed the burden on the defendants and drawn adverse inference against the defendants. Therefore, the findings of the courts below are liable to be set aside. Accordingly, these substantial questions of law are answered.

22. In the result, the second appeal is allowed. Consequently, connected miscellaneous petition is closed. The judgments and decrees passed by the courts below are set aside. The suit filed by the respondent/plaintiff is dismissed. No costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The District Judge,
Udhagamandalam
2. The Sub-Judge,
Udhagamandalam

Copy to

The Section Officer,
V.R.Section,
High Court, Madras. (2copies)

+1cc to M/s.B.Ramamoorthy, Advocate Sr.57523
+1cc to the Special Government Pleader sr.56537

S.A.No.1353 of 2001
and
CMP.No.14402 of 2001

rgn[co]
srg 22/08/2019