

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 22.11.2018

CORAM

THE HONOURABLE MR. JUSTICE M. SATHYANARAYANAN

AND

THE HONOURABLE MR. JUSTICE P.RAJAMANICKAM

WA.Nos.2532 & 2533 of 2018 and
CMP.Nos.20450 & 25453/18 in W.A.NO.2533/2018
and

CMP.NOS.20452, 20456 & 20460 of 2018 in WA.NO.2532/2018

M/S. Bharat Petroleum Corporation Ltd.
No.1, Ranganathan Gardens, 11th Main Road,
Anna nagar, Chennai-600 040,
Rep by its Territory Manager (Retail)
Debashis naik ...Appellant in both W.As

Vs

1.The Estate Officer,
Additional Divisional Railway Manager,
Southern Railway, Madras Division, Chennai 3.

2.Office of the Divisional Railway Manager
SR. DEN/CO-ORDN/MAS Southern
Railway, Madras Division, Chennai 3

3.Office of the sr. Divisional
Finance Manager, Southern Railway,
Madras Division, Chennai 3.

....Respondents in both W.As

COMMON PRAYER:- Writ Appeal filed under clause 15 of the
Letter Patents praying this Court to aside the Common order
dated 20-09-2018 in W.P.Nos.6683 & 6682/2016 respectively and
pass such further or other order as this Honble Court may deem
fit and proper in the circumstances of the case by the allowing
the present writ appeal.

WP.NO.6682/2016:

Petition filed under Article 226 of the Constitution of
India praying to call for the records pertaining to the

proceedings initiated under the Public Premises (Eviction of Unauthorized Occupants) Act 1971 by the 1st respondent vide Notice dt 25.11.2015 bearing reference M/W/234/Eviction/East/BPCL and quash the said proceedings as illegal and forbear the respondents its men agents and representatives from levying or enforcing way leave charges in respect of the lands licensed to the petitioner admeasuring around 20 688 sq.mts. forming the pipeline corridor situated between the petitioners Installation Facility at Tondiarpet and the Refinery of Chennai Petroleum Corporation Limited at Mannali near Thiruvottiyur Railway Station at Chennai.

WP.NO.6683/2016:

Petition filed under Article 226 of the Constitution of India praying to Call for the records of the respondents relating to the demand towards way leave charges raised on the petitioner vide letter dt 8.12.2014 issued by the 2nd respondent and confirmed vide letters dt 11.12.2014 2.6.2015 27.7.2015 30.12.2015 issued by the 2nd respondent and 1.2.2016 issued by the 3rd respondent and quash the same as illegal and direct the respondents to adjust the amount of Rs.10,39,58,729/- paid by the petitioner under cover of its letter dt 27.1.2016 against the license fees payable in the future by the petitioner in respect of the lands licensed to the petitioner admeasuring around 20 688 sq.mts. forming the pipeline corridor situated between the petitioners Installation Facility at Tondiarpet and the Refinery of Chennai Petroleum Corporation Limited at Mannali near Thiruvottiyur Railway Station at Chennai.

For Appellant in both W.A.s : Mr.Krishna Srinivasan
for S.Ramasubramaniam and Associates

For Respondents in both W.A.s : Mr.P.T.Ramkumar

COMMON JUDGMENT

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.,]

The writ petitioner viz., M/s.Bharat Petroleum Corporation Ltd.,(in short 'BPCL') Chennai-600 040, represented by its Territory Manager (Retail) is the appellant. The writ petitioner made a challenge to the Form-A notice dated 25.11.2015 issued by the 1st respondent herein Under Section 4(2)(i) and (ii) (b) of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 [Central Act 40/1971]. As per the impugned notice, the writ petitioner / appellant was asked to show cause on or before 10.12.2015, as to why such an order eviction should not be made for the reason that the appellant / writ petitioner did not

remit Way Leave Charges for laying pipe line between Korukkupet - Tondiarpet stations for 24,154,43 sq.mts for which raised bill for 2004-2014 and advance Way Leave Charges for 2014-2024 amounting to a sum of Rs.94,94,93,400/-, vide communication dated 11.12.2014 as the land legally belongs to Railway.

2. In the affidavit filed in support of the writ petition, the appellant / writ petitioner would aver among other things that license was granted by the 2nd respondent, vide License Agreement dated 21.03.2000, which came into being between them and the 2nd respondent in and by which the appellant / writ petitioner shall use the railway lands admeasuring to an extend of around 20,688 sq.mts for laying of pipelines running between the petitioner's Oil installation at Tondiarpet located near Tondiarpet Railway Station to the Refinery of Chennai Petroleum Corporation Ltd (CPCL) at Mannali near Thiruvottriyur Railway Station at Chennai as shown in the plan attached to the said license Agreement dated 21.03.2000. It is also the claim of the appellant / writ petitioner that though license was granted, the said agreement was initially valid for a period of one year and thereafter, shall be renewed every year by duly signing a Rider Agreement. By continuing to occupy the land, the 2nd respondent on license basis, it is substantiated by the periodic payment of license fees by them which has been accepted by the 2nd respondent, despite the fact that there is no formal execution of a rider agreement every year as contemplated in the license agreement dated 21.03.2000 and as such, the 2nd respondent had acquiesced that the appellant / writ petitioner is a licensee.

3. The main grievance expressed by the writ petitioner / appellant from the materials appears to be that though the above said agreement, is having nomenclature of a license, subsequently, the Railways, vide communication dated 27.11.2001 has sought to change the same as "way leave facility / easement rights" and formulated a pipeline and also sought for remittance of the revised license money with retrospective effect. The primordial point urged for consideration in the writ petition was that in the light of the fact that original Agreement was termed only as License and not as Way Leave facilities, and despite lapse of one year, the appellant / writ petitioner continues to be the Licensee and paid an amount which has also been accepted by the 2nd respondent and the amount of license fee cannot be varied / enhanced with retrospective effect. It is also urged on behalf of the appellant / writ petitioner that the provisions of the Public Premises (Eviction of Unauthorised Occupants Act, 1971) (in short herein after referred as 'the Unauthorised Occupants Act') cannot be invoked at all and therefore, made a challenge to the said notice.

4. The writ petition was entertained and a conditional interim order was granted and subsequently, vide order dated 01.09.2016, this Court has extended the interim order till 04.10.2016, subject to the condition that the writ petitioner / appellant herein without prejudice to the rights and contention, shall pay a further sum of Rs.15,00,000/- to the credit of Senior Divisional Finance Manager, Chennai Division, Southern Railway, Park Town, Chennai-600 003 on or before 04.10.2016, with a default clause and it is brought to the knowledge of this Court that the said conditional order has also been complied with.

5. The Divisional Engineer (East) has sworn to the counter affidavit filed on behalf of the respondents 1 to 3 in the writ petition and took a stand that as per para 7 of the Railway circular dated 29.08.1995, on commercial licensing, the land value shall be escalated by 10% annually on 1st of April of every year for calculating the license fee which has to be complied with. Accepting the said terms and conditions, the writ petitioner / appellant has already remitted an amount of Rs.2,33,13,162/- through Cheque dated 08.05.2000. It is also the stand of the respondents that the appellant / writ petitioner committed breach of agreement by not executing any rider agreement after the expiry of the year 2000 and as of now, they are unauthorizedly using the Railway land without any valid agreement and that apart, also failed in giving increase loading of Oil Tanker Wagons as projected by them at the time of signing the agreement. It is also submitted by them that while policy note dated 27.01.2001, the Railway Board had issued guidelines in the matter of granting Way Leave Facilities / Easement rights on Railway land and the said circular issued in super session of all the instructions and accordingly, Way Leave Charges has been drawn to a tune of Rs.94,94,93,400/- for the period from 2004-2014 and in advance for a block period between 2014-2024 while claiming / renewing the way leave charges for the next 10 years.

6. Attention of the Court was also drawn to Clause 18, wherein it is stated that if there shall be any breach by the licensee, of any of the provision of the agreement, the administration shall be in liberty to determine forthwith the agreement, after giving a notice to the licensee and the licensee discontinue the said installation on the subject matter of the licenses without claim for compensation or any other whatsoever against the administration. It is also stated in the said counter affidavit that on receipt of the impugned notice, the appellant / writ petitioner requested to re-schedule the hearing on various dates by repeatedly sending various communication. During the course of a hearing, the petitioner / appellant agreed to pay way leave charges for the year 2014-2015 and 2015-2016 and further made a payment of Rs.10,39,58,729/-

towards way leave charges. But the railway administration did not agree for such part payment as it is to be collected only in advance for next 10 years as per guidelines issued by Railway Board and prayed for dismissal of the writ petition.

7. The learned Judge, after taking note of the materials placed especially the arguments advanced on behalf of the respective parties, held that the impugned notice is in the nature of show cause notice for which the writ petition is not maintainable and observed that the writ petitioner has to submit his explanation / objections in respect of the show cause notice issued by the competent authority under the provisions of the Unauthorised Occupants Act and also further observed that the dispute now raised in the present writ petition relates to certain contractual obligation and the points urged requires adjudication by producing original documents as well as by adducing evidences before the Estate Officer and therefore found that the writ petition is not maintainable and found that the writ petition need not be entertained at this point of time and granted liberty to the writ petitioner to submit his explanation and redress their greivances before the Estate Officer constituted under the provisions of the said Act and having held that the writ petition is prematured, dismissed the same, vide impugned order dated 20.09.2018 and challenging the legality of the said order, the writ petition has filed this appeal.

8. Mr.Krishna Srinivasan, learned counsel appearing for the appellant / writ petitioner made the following submissions.

(i) Admittedly, the original agreement dated 21.03.2000, is having the nomenclature of license only and though it was initially for a period of one year and that renewal agreement have not been executed, the fact remains that the appellant / writ petitioner continued to occupy the railway land for public purpose and continued to pay the license amount without any demand or default and all of a sudden, under the guise of policy decision of the Railway Board, the nomenclature of the Agreement sought to be revised as grant of Way Leave facilities and that very many manifold increase of license fee is also sought to be made with retrospective effect and the same is impermissible either in terms of the said Agreement or under any other provisions of the Act and therefore, the said demand is also wholly unjust.

(ii) The provisions of the Unauthorised Occupants Act have no application at all to the case on hand for the reason that the license cannot be converted as Way Leave facilities and laying of the pipelines, as done by them, cannot be accorded as Way Leave facility and further pointed out that the impugned notice was issued by the Estate Office,r who is subordinate to the Divisional Manager who raised demand to the increased Way Leave charges with retrospective effect and there cannot be any

fairness on his part to adjudicate the issue even if the appellant / writ petitioner has acceded to the jurisdiction and submits his response.

9. The learned counsel appearing for the appellant has also drawn the attention of this Court to Clause Nos.29 to 30 of the License Agreement and would submit that even assuming that the 1st respondent is having jurisdiction to issue notice under the provisions of the Unauthorised Occupants Act, Clause No.29 ought to have been ordered before doing so and without even adhering to the terms and conditions of the said License Agreement, a new nomenclature sought to be introduced and reasonable retrospective demand of Way Leave facilities have been raised and therefore, would urge that the writ petition is perfectly maintainable and it cannot be termed as premature and prays for interference.

10. Per Contra, Mr.P.T.Ramkumar, learned counsel appearing for the respondent has invited the attention of this Court to the terms of the license and would submit that admittedly, the agreement was for a period of one year and it has not been renewed till, as per the circular issued by the Railway Board, who is competent to do so. The license is only Way Leave Facilities and in the light of the fact that the increase demand as contemplated has not been made and further that the appellant / writ petitioner is also using the said facility for commercial purpose also and despite very many opportunities given to them to pay the increased way and leave charges, they have not complied with and therefore, the provisions of the Unauthorised Occupants Act have been rightly invoked. It is further urged by the learned counsel for respondent that the impugned notice issued by the 1st respondent is only in the nature of show cause notice and whatever defense available to the writ petitioner / appellant, it may be raised and the said official may also adjudicate the same in accordance with law and would further urge that the reasons assigned by the learned Judge cannot be termed as perverse and hence prays for dismissal of this writ appeal with costs.

11. The learned counsel appearing for the appellant, in support of his response, has placed reliance upon the judgment rendered by a Division Bench of this Court in M.Sankara Subramanian Vs. The Director General of Police, Law and Order, Office of the Director General of Police, Chennai-4 and Others [2016 Writ L.R.631] and would urge that as per the proposition laid down in the said judgment, the writ petition against a show cause notice is not maintainable.

12. This Court paid it's best attention to the rival submissions and also perused the materials placed before it.

13. The sole question arises for consideration is "Whether the Writ Petition is maintainable against a show cause notice and the grounds urged in the Writ Appeal can be adjudicated by this Court in exercise of it's jurisdiction under Article 226 of the Constitution of India?"

14. Though arguments have been advanced by the respective learned counsels appearing for the parties by inviting the attention of this Court to the terms of the Agreement came into being between the Southern Railways and the appellant dated 21.03.2000 as well as the subsequent circular / policy notice issued by the Railway Board / Administration, this Court is not prepared to go in to the said aspects for the reasons that this Court/ in exercise of it's jurisdiction under Clause 15 of the Letters Patent and the Learned Judge in exercise of jurisdiction under Article 226 of the Constitution of India, cannot interpret the terms of the contract for the reasons that it requires necessary averments, and also adjudication, by appreciation of facts.

15. The primordial submission made by the learned counsel appearing for the appellant is that the license agreement dated 21.03.2000 is purely a nomenclature of Way and Leave facility granted to the BPCL and in the absence of renewal and even as per the terms of the agreement, the license fee is liable for periodical increase and in the absence of renewal and also default on their part to pay the increased said charges, they are deemed to be Unauthorised Occupants.

16. Attention of this Court was also invited to Section 2(g) of the said Act which defines Unauthorised Occupation and the same reads as follows:

"Unauthorised Occupation", in relation to any public premises means the occupation by any person of the public premises without by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises, has expired or has been determined for any reason whatsoever.

17. A Division Bench of Gujarat High Court in Gail (India) Limited Vs. Gujarat State Petroleum Corporation Limited [2014 [1] SCC 329] had entertained the writ petition filed by the Gujarat State Petroleum Corporation Limited under Article 226 of the Constitution of India in the matter of fixation of price of the gas supplied by the appellant Gail (India) Limited and whether a mandamus could be issued requiring the appellant therein to engage itself with the respondent to arrive at the price of gas effective from 01.01.2014. The Apex Court, while holding that the remedy of arbitration available to the respondent under Para 15.5 of the GSA was an effective alternative remedy and the High Court should not have

entertained the petition filed under Article 226 of the Constitution of India also dealt with the issue relating to scope of judicial review of complex economic decision by referring to the decision of the Apex Court reported in Arun Kumar Agrawal v. Union of India [2013 (7) SCC 1] and it is relevant to extract Paragraph No.41 of the same:

"41. We notice that ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."

18. The primordial submission made by the learned counsel for the appellant/writ Petitioner is that the first respondent lacks jurisdiction to issue the impugned notice under the provisions of the Unauthorised Occupants Act, and in the light of the fact that the said official totally lacks jurisdiction and further on account of unreasonable stands of the respondents, the petitioner/appellant is constrained to approach this Court by filing the Writ Petition.

19. In the considered opinion of this Court, whether the Agreement dated 21.03.2000 can be construed as a License Agreement or can be termed as granting of way leave facility for easement rights?; cannot be interpreted by this Court under Article 226 of the Constitution of India as it involves complex issues relating to facts and adjudication and also interpretation of the contract. It is also the submission of the learned counsel appearing for the respondent that once, in terms of the definition of 2 (g) of the Unauthorised Occupants Act, it can be considered that the Writ Petitioner/appellant can be considered as a person in unauthorised occupants for the reasons that the alleged license Agreement was initially for a period of one year and that too expired and despite the demands for making

the enhanced payment raised, they have failed to pay. In the considered opinion of this Court, the said issue cannot be adjudicated by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The decision relied on by the learned counsel for the respondent reported in 2016 Writ L.R. 631, has dealt with the issue, relating to show cause notice, issued under the provisions of the Tamil Nadu Public Premises(Eviction of Unauthorised Occupants) Act, 1975 which is in pari materia with the Central Act 40 of 1971 and it is stated in the said decision that the writ petition against a show cause notice is not maintainable.

20. In the light of the above said reasons, this Court of the considered view that it is open to the appellant / writ petitioner to urge all the defence that are available to them in the form of reply to the impugned notice sent by the first respondent and if they are so advised and if it is available to them under law, they are also at liberty to workout their any other or further remedies in accordance with law.

21. In the result, these Writ Appeals stand dismissed confirming the common order dated 20.09.2018. The writ petitioner/appellant, shall submit their response to the impugned show cause notice dated 25.11.2015 issued by the 1st respondent in the form of representation with reasons, with annexures if any, within a period of four weeks from the date of receipt of a copy of this order and upon receipt of the same, the said authority shall adjudicate / consider the same on merits and in accordance with law and pass orders as expeditiously as possible, within a further period of six weeks from the date of receipt of the response. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

- 1.The Estate Officer,
Additional Divisional Railway Manager,
Southern Railway, Madras Division, Chennai 3.

2.Office of the Divisional Railway Manager
SR. DEN/CO-ORDN/MAS Southern
Railway, Madras Division, Chennai 3

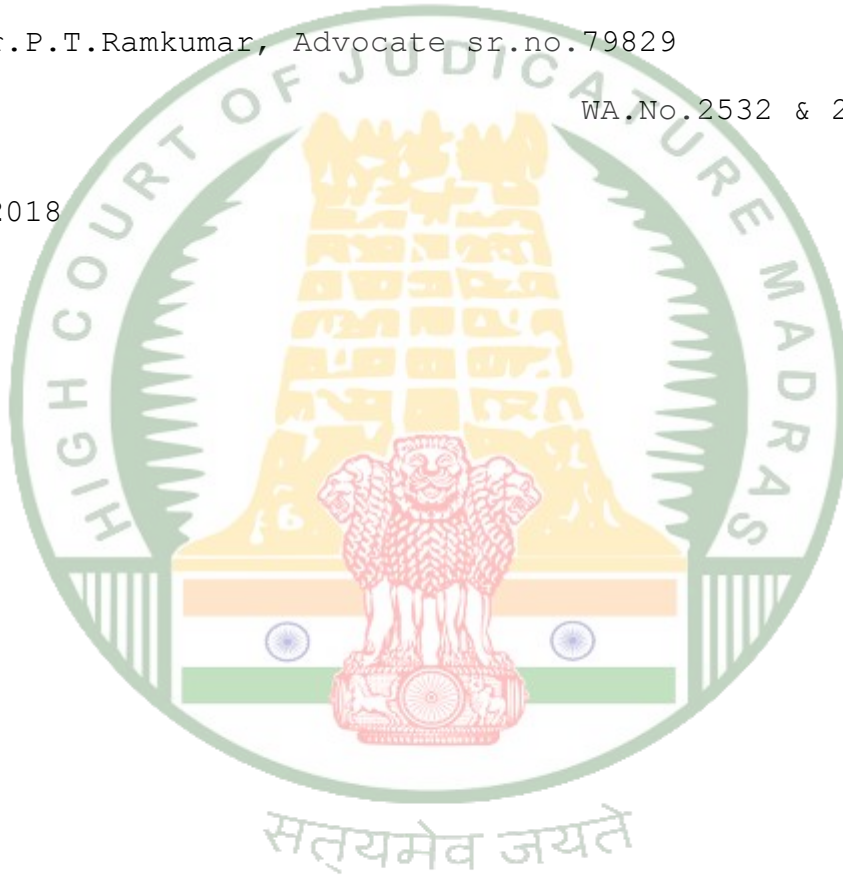
3.Office of the sr. Divisional
Finance Manager, Southern Railway,
Madras Division, Chennai 3.

+2cc to S.Ramasubramaniam & Associates, Advocate sr.no.79761 &
79762

+2cc to Mr.P.T.Ramkumar, Advocate sr.no.79829

WA.No.2532 & 2533 of 2018

spd(co)
nr 14/12/2018



WEB COPY