
(2011) 10 KL CK 0007

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22050 of 2011

Delhi Telecom India (P) Ltd

APPELLANT

Vs

S.I. of Police

RESPONDENT

Date of Decision : 24-10-2011

Acts Referred:

Kerala Panchayat Raj Act, 1994 — Section 233, 233(1)
Telegraph Act, 1885 — Section 2(1AA), 3(1AA), 4

Citation : (2012) 1 CivCC 208 : (2012) 1 RCR(Civil) 497 : (2012) 1 RCR(Civil) 497

Hon'ble Judges : Pius C. Kuriakose, J;C.K. Abdul Rehin, J

Bench : Division Bench

Advocate : S. Krishnaprasad, for the Appellant; P.V. Kunhikrishnan, M.P. Mohammed Aslam, Advocates and Dhanesh Mathew Maniooran, Government Pleader, for the Respondent

Judgement

C.K. Abdul Rehim, J.—The petitioner company is seeking police protection for its staff and employees for carrying out construction and other works of a Base Transceiver Station and its ancillary unit tower, in survey No. 11/4 in Kakkodi Village, in Kozhikode District, from the threat and hindrance alleged to have been caused by respondents 4 to 6 and their men. Averments are to the effect that, by virtue of Ext. P-1 agreement entered into with M/s. Indus Towers Ltd., which is a registered infrastructure provider, the petitioner had undertaken construction of the Telecommunication Tower in question, for which M/s. Indus Towers Ltd. had obtained Ext. P-2 Building Permit from Kakkodi Grama Panchayat, the 3rd respondent herein. But when the petitioner company started the works relating to construction of the Telecommunication Tower on 7.7.2011, the respondents 4 to 6 along with some other persons threatened the workers and created physical obstructions. Even though the petitioner submitted Ext. P-3 complaint before the 1st respondent, no effective steps were taken to remove such obstructions and to afford protection to the activities of the petitioner. Hence this Writ Petition is filed. According to the petitioner, M/s. Indus Towers Ltd. is a registered

infrastructure provider entitled to establish and maintain Towers for the purpose of granting them same on lease/rent/sale to licensee of Telecom services, who are licenced under S.4 of the Indian Telegraph Act 1885. Ext. P-5 is the certificate of registration issued to the infrastructure provider. It is submitted that the name M/s. Indus Infratel Ltd., shown in Ext. P-5 has been changed to M/s. Indus Towers Limited, as evidenced from Ext. P-6. It is further contended that the obstruction is caused on the basis of apprehension that establishment of the Tower will cause health hazard to the neighboring residents. It is contended that a Division Bench of this Court in the decision in Essar Telecom Infrastructure (P) Ltd. Vs. State of Kerala, held that merely on the basis of allegations of apprehended radiation in deviation from the international standards prescribed, operation of mobile towers could not be restrained, and this court cannot be prevented or held to decline jurisdiction to grant police protection if the petitioner is otherwise entitled for such establishment. Referring to another decision reported in Essar Telecom Infrastructure Pvt. Ltd v. CI, Of Police (2010 (2) KLT 762 (F.B.) = 2010 (2) KHC 445 (F.B.)) it is contended that in case of forceful obstruction by a group of people whose identity cannot be available, no efficacious relief can be obtained against the obstructers from the civil court and in such cases police protection is the only efficacious remedy. Hence the petitioner is seeking a writ of mandamus for a direction to afford adequate and effective police protection.

2. In the counter affidavit of respondents 4 to 6 it is contended that the petitioner had not obtained the requisite permits and licences for erecting the Tower in question. It is contended that the Tower which is proposed to be erected is a "telegraph" as defined under S.2(1-AA) of the Indian Telegraph Act 1885. It is pointed out that S.4 of the said Act confers exclusive privilege in establishing, maintaining and working of telegraphs on the Central Government and it confers power on the Central Government to grant licences for such establishment, maintenance and working, to any person within any part of India. According to respondents, since the petitioner is not issued with any licence as contemplated under S.4, they are not entitled to establish, maintain and work any telegraph including a Telecommunication Tower. Since the petitioner has not obtained any requisite permit as above, this court may not order police protection is the contention. On facts it is stated that, on the basis of apprehended health hazard which will be caused by establishment of the Telecommunication Tower, a mass petition has been submitted to the 3rd respondent as per Ext. R-4(1). The respondents also points out Ext. R-4(2) circular issued by the Government of Kerala instructing the local authorities to convene meetings and discussions on objections if any raised with respect to erection of mobile towers and to find out solution by finding alternative sites for establishing such towers. It is contended that the 3rd respondent have taken a decision to request the petitioner to relocate the tower as per Ext. R-4(3), but without complying with such directions, this Writ Petition is filed. Yet another contention raised by the petitioner is that the Building Permit was granted by the 3rd respondent

Panchayat without approval of site plan and that no installation permission was obtained from the 3rd respondent Panchayat under S.233(1)(b) of the Kerala Panchayat Raj Act required for establishment of any machinery.

3. Arguments of Sri. Krishna Prasad S, learned counsel for the petitioner and Sri. M.P.M. Aslam, learned counsel appearing for respondents 4 to 6 were heard, at length. Contention of Sri. Aslam is to the effect that Ext. P-5 registration cannot be considered as a licence contemplated under S.4 of the Telegraph Act, and without there being any such valid licence the petitioner company is not entitled to establish, maintain and work a telegraph. Per contra, Sri. Krishna Prasad contended that the petitioner company, by virtue of Ext. P-1, has undertaken only the work of erecting a tower and all other machinery required for transmission or reception of signals will be established or installed only by the infrastructure provider or the telecom service provider. Erection of a tower is not installation of any machinery and the work is purely in the nature a fabrication works using iron and steel and other construction materials. The Tower as such is not a "telegraph" and for establishing the Tower no licence as contemplated under S.4 is required, is the contention.

4. For the purpose of deciding the controversy, a perusal of the definition of the "telegraph" under S.3(1-AA) will be beneficial. It defines the word "telegraph" as any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, radio waves or hertzian waves, galvanic, electric or magnetic means. The question posed is as to whether the Tower as such is capable of use for transmission or reception of signs or signals. It is common knowledge that only the instrument or appliance fitted to such Tower will be used for transmission or reception of signs and signals. Hence we have no hesitation to hold that the Tower as such is not a "telegraph" coming within the purview of S.3(1-AA). Restriction imposed under S.4 is only with respect to establishments, maintenance and working of a "telegraph". Therefore the petitioner herein being a company which had undertaken the work of erection of a Telecom Tower is not under any obligation to get licence under S.4 of the Telegraph Act unless they establish, maintain or operate a "telegraph".

5. Further question arises as to whether the infrastructure provider, M/s. Indus Towers Ltd. requires any licence under S.4, apart from Ext. P-5 registration for establishing and maintaining or working of a "telegraph" or in other words, for operating the Telecom Tower. Contention raised by Sri. Krishna Prasad is to the effect that, even the registered infrastructure providers are providing such facility only on behalf of licenced telecom service providers. It is the contention that if the establishment of any telegraph is intended for use of a licenced service provider, such establishment or maintenance or working can only be construed as an act for and on behalf of the licenced service provider. Therefore, the contention is that, once the service provider is licenced under S.4 the

infrastructure provider who is only establishing and maintaining any instrument or appliance which will come within the purview of definition "telegraph" on behalf of such service provider does not require a licence under S.4. However on the facts of the case at hand it is evident that the petitioner company is neither a service provider nor a infrastructure provider, but they are only a contracting company constructing Tower on behalf of the infrastructure provider. Therefore we are not proposing to enter upon any finding as to whether the infrastructure provider (M/s. Indus Towers Ltd.) require any licence under S.4. Since the protection sought for is only with respect to construction (erection of the tower), we leave open the controversy for the parties to agitate at appropriate stage.

6. Further contention of respondents 4 to 6 is to the effect that Ext. P-2 Building Permit is unsustainable since the same was granted without site approval as required under the provisions of the Kerala Municipality Building Rules. We notice that the respondents 4 to 6 or anybody else have not taken any steps to challenge Ext. P-2 Building Permit. Nobody has approached the competent appellate authority in this regard. Therefore we are not in a position to evaluate the contention in this regard. Further there is no material placed before us to arrive at any conclusion that the Building Permit was granted without approval of the site. However it will be left open to the respondents to challenge Ext. P-2 Building Permit, before appropriate appellate authority, if permissible under law.

7. Yet another contention raised is to the effect that, installation of any machinery for operation of the tower as well as its energisation, including installation of the Tower will amount to an installation of machinery as contemplated under S.233 of the Kerala Panchayat Raj Act and in such case the place in question will be considered as a workplace which requires installation permit. We notice that in the decision in Essar Telecom Infrastructure 11 case (cited supra) this court had specifically held that a mobile tower would not be a work place within the meaning of S.233 of the Kerala Panchayat Raj Act or S.448 of the Municipality Act. However in the said decision this court had left open the question as to whether the component parts of a mobile tower are machinery as contemplated under S.233(1)(b) of the Panchayat Raj Act. Therefore we do not propose to enter upon the question as to whether the installation permit is required for installation of components and for installation of generator and other equipments.

8. From the discussions as mentioned above we are proposing to dispose of the Writ Petition on the limited question as to whether the respondents 4 to 6 have any manner of right to obstruct construction (erection) of a Telecom Tower undertaken on the basis of Ext. P-1 contract by the petitioner company. We do not find any legally tenable and sustainable ground to hold that the petitioner company is not legally entitled to do such construction. Therefore we dispose of the Writ Petition granting relief to the limited extent.

9. There will be a direction to respondents 1 and 2 to take effective measures to remove obstructions if any caused to the staff and workers engaged by the

petitioner company for construction (erection) of the Telecom Tower at the site in question. We direct to afford police protection for completing such works if there is any continued obstruction. We make it clear that we have not arrived at any conclusion as to whether for installation of components of machinery, any permission is required as contemplated under S.233 (1)(b). We have also not decided as to whether such installation of machinery and operation of the Telecom Tower can be done by the infrastructure provider for and on behalf of a telecom service provider.