

(2008) 10 KL CK 0037

In the High Court Of Kerala

Case No : Writ Petition (C) No. 26169 of 2007

Essar Telecom Infracture (P) Ltd.

APPELLANT

Vs

The Circle Inspector of Police and Others

RESPONDENT

Date of Decision : 21-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2A, Order 9 Rule 9
Constitution of India, 1950 — Article 21, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 149, 150, 151, 155, 156
Kerala Municipality Building Rules, 1999 — Rule 158, 158(2)
Kerala Police Act, 1960 — Section 29
Penal Code, 1860 (IPC) — Section 341, 447

Citation : (2008) 4 ILR (Ker) 561 : (2008) 3 KLJ 672 : (2008) 4 KLT 713

Hon'ble Judges : M.C. Hari Rani, J;K. Balakrishnan Nair, J

Bench : Division Bench

Advocate : Santhosh Mathew, Sathish Ninan and Arun Thomas, for the Appellant; M. Sasindran, P.V. Surendranath, P. Parameswaran Nair, ASG and Benjamin Paul, GP, for the Respondent

Final Decision : Dismissed

Judgement

K. Balakrishnan Nair, J.—The petitioners in these writ petitions are companies providing mobile telephone service or companies providing infrastructure to such companies. W.P.(C) No. 18568/2008 is treated as the main Writ Petition for referring to the facts and exhibits.

W.P.(C) No. 18568/2008

2. The petitioner herein is proposing to set up 300 telecommunication towers at various places throughout the State of Kerala for enhancing the network coverage for various mobile telephone operators. It has obtained the necessary building permits from the local authorities concerned and also obtained consent of the Pollution Control Board for operation of diesel generator sets. Ext.P1 is the permit issued to the petitioner by the Taliparamba Municipality for erecting a telecommunication tower at Kolmotta. When steps were taken by the petitioner

for construction of the tower, based on Ext.P1 permit, certain residents of the locality under the leadership of the 3rd respondent, obstructed the construction. So, the petitioner's representative filed Ext.P3 petition before the police, seeking necessary police protection for constructing the telecommunication tower, without any obstruction from the near-by residents and the persons in the locality. The relevant portion of the said representation reads as follows:

1. Essar Telecom Infrastructure (P) Ltd., is part of ESSAR Group and has stated operations in September 2005, The Head Office of the Company is at Essar House, Mahalakshmi, Mumbai. We had set up 400 Mobile State of Kerala for enhancing the net work coverage for various Mobile Operators after having obtained the requisite no objection certificate from the local authorities concerned.

2. For improving the coverage in the Kolmotta in Kannur District, we submitted an application for putting up a telecommunication tower in Taliparamba Municipality and the same has been approved, issuing the building permit which is attached with the petition and referred as No. 2.

3. When steps were taken by the Company for constructing the Tower, certain residents of the locality including Mr. Lashman, Chaithram, Parassinakkadavu P.O., Kolmotta, Kannur and some others alleging that the putting up of the tower will cause health hazard to the residents of the locality, obstructed the same. The allegation that the construction of the telecommunication tower will cause health hazards to the residents of the locality is absolutely baseless. A Division Bench of Kerala High Court has decided in the case Reliance Infocom Ltd. Vs. Chemanchery Grama Panchayat, , that the mobile tower is not causing hazardous effects to human bodies.

4. When people are causing problem in tower site we have approached the DGP of Kerala for police protection, he has pleased to give a direction to police officials to provide police protection, if statutory compliances are fulfilled. The order copy is attached and referred as No. 1.

5. In these circurnstances, your good self may be pleased to provide effective and adequate police protection for constructing the telecommunication tower without any obstruction from the nearby residents and persons in the locality.

(Emphasis supplied)

Ext.P3(2) is the receipt issued by the Sub Inspector Of Police, Taliparamba on submission of Ext.P3 before the said officer. Alleging that the police did not extend any help, this Writ petition is filed, seeking the following relief:

issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding first and second respondents to provide effective and adequate police protection to the petitioner's workers for constructing the telecommunication tower without any obstruction from respondent Nos. 3 to 6 and their henchmen.

3. The 1st and 2nd respondents respectively are the Circle Inspector and Sub Inspector of Police, Taliparamba. The respondents 3 to 6 have filed a counter affidavit, resisting the prayers in the writ petition. According to them, the functioning of the telecommunication tower is a health hazard. They rely on Ext.R6(a) communication tower is a health hazard. They rely on Ext.R6(a) communication dated 31.1.2006 issued by the District Medical Officer, Kannur to the Special Grade Secretary, Kalliasseri Grama Panchayat, advising against the installation of a telecommunication tower in that Panchayat. The D.M.O., Kannur has stated that the tower would cause health hazard, in view of the radiation emanating from it. The diesel generator set used for supplying power to the tower also will cause sound and air pollution. The said respondents have produced Ext.R6(b) materials collected from the internet, which would tend to show that radiation from the mobile phone towers will cause cancer and other health problems. So, the said respondents pray for not issuing any direction to the police, as prayed for by the writ petitioner.

4. As directed by this Court, the 8th respondent, Telecommunication Engineering "Centre, Department of Telecommunications, Government; of India has produced Ext.R8(a) guidelines issued by the International Commission on Non-Ionizing Radiation Protection. Those guidelines have been adopted by several other countries. Now, India has also adopted those guidelines and the mobile phone operators have a conduct audit and provide certificates for meeting the standards for registration of the antenna (mobile tower) used by them, in terms of the said guidelines.

5. We heard the learned Counsel on both sides. Whether the electromagnetic fields upto 300 GHz will have any adverse effect on the health of persons exposed to it, is a disputed question. Many environmentalist assert, they have adverse impact, whereas the mobile phone service providers, whose operations generate EMF upto 300 GHz make assertions to the contrary. Following the precautionary principle, many countries have introduced restrictions regarding the level of radiation from such towers. In India Ext.R8(a) guidelines are being enforced, governing installation of mobile phone towers. Mr. Santhosh Mathew, learned Counsel for the petitioner mainly relied on the decision of this Court in support of his submissions, in *Reliance Infocom Ltd. Vs. Chemanchery Grama Panchayat*, wherein this Court quashed the order of the Chemanchery Grama Panchayat, cancelling the building permit for erecting a mobile phone tower and also ordered the police to grant necessary protection for the construction of the tower. In view of the said decision, this Court may grant police protection to the petitioner to construct the tower, it is submitted. According to the learned Counsel, the decision of the Government of India to enforce Ext.R8(a) guidelines has not brought about any qualitative change in the situation. He also submits that the companies providing mobile phone service will undertake to abide by the aforementioned guidelines. The learned Counsel relief on Sub-sections (b) and (c) of Section 29 of the Kerala Police Act and submitted that the police have a duty to prevent commission of cognizable offences and also to preserve peace. He

referred to Rule 158 of the Kerala Municipality Building Rules and submitted that if the tower constructed is dangerous to health, the remedy of the persons in the neighbourhood is to move the Secretary of the Municipality concerned. The said officer can take action under Sub-rule (2) of Rule 158, it is pointed out.

6. We also heard M/s. V.G. Arun and P. Sathisan, learned Counsel appearing for the petitioners in the connected writ petitions. They supported the submissions of the learned Counsel for the petitioner in W.P.(C) No. 18568/2008. They further pointed out that the petitioners in those writ petitions are providing service on the strength of the licences issued by the Central Government under the provisions of the Indian Telegraph Act. In the light of the provisions contained therein, they have a right to the provisions of Telecom Regulatory Authority Act, 1997 and pointed out that the remedy of the aggrieved persons against the establishment of the tower is to move the Telecom Regulatory Authority constituted under the said Act.

7. The learned Counsel for the contesting party respondents submitted that in view of the disputed questions involved, this Court may not order any protection to the petitioners. The local people are protesting against the commencement of an activity in their neighbourhood, which is going to be a perpetual health hazard, affecting their right to life. They are not committing any cognizable offence. If the rights of the petitioner are infringed by them, it has to move the civil court for reliefs, it is contended.

8. Police protection jurisdiction is a "special" original jurisdiction, which, it appears, is exercised by the Kerala High Court only. Disputes between the parties are raised before the High Court, as if they are raised in an original suit. This Court adjudicates the rights and based on its findings, issued directions to the police. We find that this Court has no such power under the Constitution or under any other statute. The writ petitions are filed for issuing a writ of mandamus to the police under Article 226 of the Constitution of India, on the ground that the police have failed to discharge their statutory duty. It means, the powers of this Court, while exercising this jurisdiction, are co-terminous with the failure of duty of the police. If this Court finds that the police have failed to perform a duty, it can remedy that. The police have no right, power or authority to decide the dispute regarding the ill-effects of radiation or whether a mobile phone tower will cause radiation, which is injurious to the health of the people residing in the locality. So, in this jurisdiction, this Court also cannot adjudicate that dispute. One of the cases in which this Court exercised the "special" original jurisdiction of adjudicating the civil rights of parties, which was later reversed by the Apex Court, was in W.P.(C) No. 16047 of 2004. It was a case where a Sanyasin claimed that he is the Sthiradhakshan (permanent Chairman) of Vadayampadi Ashramam and the rival group claimed that the bye-laws of the Trust were amended, deleting the provision concerning Sthiradhyakshan. The Sanyasin's suit to continue as Sthiradhyakshan was dismissed by the civil court for default. Undaunted, he approached the High Court for police protection to continue as

Sthiradhyakshan. Another suit filed by a founder member of the, Trust, challenging the validity of the above said amendment was pending before the civil court. This Court under Article 226 adjudicated the above civil dispute and granted police protection. The Apex Court reversed that judgment by the decision in P.R. Murlidharan and Others Vs. Swami Dharmananda Theertha Padar and Others, . In the said decision, it was held as follows:

7. Though the suit filed by the first respondent was dismissed, he filed a writ petition before the Kerala High Court at Ernakulam praying for police protection which was marked as WP(C) No. 16047 of 2004. A Division Bench of the said High Court went into the question as to whether the first respondent was entitled to hold the office of Madathipathi and Sthiradhyakshan for the purpose of issuing an appropriate direction as regards grant of police protection. The High Court opined that the State and the police officials have got a legal obligation to give protection to the life and properties of the appellant upon arriving at a finding of fact that he was entitled to hold the said office. The High Court proceeded to determine the said purported question in the light of Article 21 of the Constitution and opined:

Respondents 5 and 6 have not given adequate and effective police protection in spite of repeated requests which only paved the way for the contesting respondents and others to take law into their hands and act contrary to the terms of the trust deed. Such being the conduct of the respondents, their assertion that Ext.P13 is fabricated by the petitioner cannot be believed. Going by the facts and circumstances of the case, and, on going through the materials placed before us, we are inclined to accept the averment made by the petitioner that he is Sthiradhyakshan an Madathipathi of the Ashramam.

8. It was directed:

We have therefore no hesitation to allow this writ petition giving direction to Respondents 5 and 6 to give adequate and effective police protection to safeguard the interest of the petitioner being the Sthiradhyakshan and Madathipathi of the Vaddyampqdi Ashramam. The petitioner be given effective police protection so as to discharge the function as Sthiradhyakshan and Madathipathi as per Ext.P1 trust deed for his peaceful residence in the Ashramam....

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx 11. the question is a contentious one. Construction of the said trust and the rights and obligations thereunder were in question. The first respondent filed a suit in that behalf. The said suit was dismissed. In terms of Order 9 Rule 9 of the CPC another suit would not be maintainable at his instance. We have noticed hereinbefore that another suit being OS No. 30 of 2002 is pending in the Court of Munsiff. The High Court, despite noticing the said fact, sought to usurp the jurisdiction of the civil court. It, as noticed hereinbefore, determined the contentious issues which were required to be proved in terms, of the provisions of the Evidence Act.

xxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx xxxxxxxxxxxx 14. For the foregoing reasons, the impugned judgment cannot be sustained which is set aside accordingly.

Thus, the Hon'ble Supreme Court has condemned the entertaining of "police protection Original Suits".

9. As pointed out by the learned Counsel for the petitioner, the police have a duty u/s 29(b) of the Kerala Police Act to prevent commission of cognizable offences. They are to collect and communicate to the best of their ability, intelligence concerning the commission of cognizable offences or designate commit such offences. u/s 29(c), they are also duty bound to preserve peace and collect and communicate intelligence affecting or likely to affect public peace. u/s 149 of the Cr.P.C., the police have a duty to prevent commission of cognizable offence. In this case, going by the averments in the representation of the petitioner before the police, we find that what is done by the people of the locality is objecting to the construction of the tower. The same cannot be described as commission of a cognizable offence, warranting interference from the part of the police. But, the objection may turn into situations, which may cause commission of acts amounting to cognizable offences like wrongful restraint (Section 341 I.P.C.), criminal trespass (Section 447 I.P.C.), etc. In that event, the police have a duty to register crimes and investigate. If the police have failed to do that, the aggrieved persons have a remedy of moving the superior police officers and/or moving the criminal court concerned u/s 156(3) of the Cr.P.C., as stated by the Apex Court in *Sakiri Vasu v. State of U.P.* 2008(1) KLT 724 (SC). Normally, this Court is not supposed to interfere with the operational freedom of the police under Article 226 of the Constitution of India. The founding fathers of our Constitution did not define the scope of various writs mentioned under Article 226. But, the Apex Court said that the writs mentioned therein are the writs issued by English courts and the principles evolved by the English courts may be followed by the Indian courts also. In this context, it may be apposite to quote the words of the Apex Court from the decision in *Union of India (UOI) and Others Vs. Upendra Singh*, , which read as follows:

It is true that a High Court acting under Article 226 is not bound by the technical rules applying to the issuance of prerogative writs like certiorari, prohibition and mandamus in United Kingdom, yet the basic principles and norms applying to the said writs must be kept in view, as observed by this Court in *T.C. Basappa v. T. Nagappa*. It was observed by Mukherjea, J., speaking for the Constitution Bench:

The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any

difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of "certiorari" in all appropriate cases and in appropriate, manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English Law".

If we do not keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law, the exercise of jurisdiction becomes rudderless and unguided; it tends to become arbitrary and capricious. There will be no uniformity of approach and there will be the danger of the jurisdiction becoming personalised. The parameters of jurisdiction would vary from Judge to Judge and from Court to Court. (Some say, this has already happened.) Law does advance. Jurisprudence does undoubtedly develop with the passage of time, but not by forgetting the fundamentals. You have to build upon the existing foundation and not by abandoning them. It leads to confusion; it does not assist in coherence in thought or action.

(Emphasis supplied)

Noticing the large number of writ petitions filed before this Court, seeking writ of mandamus, B.N. Srikrishna, C.J.,(as His Lordship then was) in Jayachandran v. State of Kerala 2002 (3) KLT 125 lamented:

15. A writ of mandamus is to be issued after circumspection, and only upon the Court being satisfied that the "state" is either refusing or unduly delaying to act, ignoring its statutory responsibilities and has thus failed to discharge its constitutional duties. That too can be done after a specific notice drawing the attention of the statutory authority demanding redressal has failed to evoke satisfactory response. It appears that the principle underlying Article 226 of the Constitution is not being paid the attention it really deserves. Orders are often issued under Article 226 as if emanating from a slot machine at the drop of a coin and the pulling of a handle. It is time to change. Petitions under Article 226 need to be considered with greater circumspection and dealt with the seriousness they deserve. It may, perhaps, be said in extenuation, that the learned Judges are overburdened and inundated by the unabated deluge of Original Petitions in this Court under Article 226 of the Constitution of India. The contributing factors appear to be two-fold. First, there is no court fee levied on Original Petitions. We are informed that originally a court fee of Rs. 25 had been levied, but now that has been abolished. A Full Court Resolution of this Court recommending re-imposition of a reasonable court fee sent to the State Government is yet to elicit action from the State Government, despite reminders. The second; and by far the saddest factor is that Original Petitions are being filed in the most undeserving and flimsiest of cases. It is high time that legal fraternity also realises its responsibility and exercises its discretion by ensuring that constitutional remedies are resorted to only in deserving cases where there is no other equally efficacious alternative remedy and that the High Prerogative Writs remain really High Prerogative Writs and do not become devalued and

degenerated by over use and abuse. We make these observations with the sad realisation of what is happening and with the hope that both the State and members of the bar will rise to the occasion and co-operate with us to effectively grapple with this problem of menacing proportions which is fast getting out of control.

(Emphasis supplied)

10. Concerning issuance of a writ of mandamus to the police, we would like to refer to a decision of the Court of Appeal in Regina v. Chief Constable of Devon and Cornwall, Ex Parte Central Electricity Generating Board reported in (1982) 1 QB 458. Going by the facts of that case, if on similar facts, a writ petition was filed before this court, in view of the several reported and unreported decisions rendered by it, this Court would have definitely issued a writ of mandamus to the police to remove the protesters. But, the Divisional Court as well as the Court of Appeal declined to grant relief to the petitioner/appellant therein. The relevant portion of the said decision reads as follows:

Lord Denning M.R.

The coast of Cornwall is beautiful. Much of the inland is ugly. It is despoiled by china clay workings. Not far from them there is open farmland with small villages dotted around - Pleasant enough but not outstanding- The Central Electricity Generating Board view this as a possible site for a nuclear power station. They wish to survey it so as to compare it with other possible sites. The farmers objected to the survey. So did the villagers. They took up a stand against it. But on being told by the courts that it was unlawful for them to obstruct the survey, they desisted. They moved off the site. They obeyed the law. But then groups of outsiders came in from far and wide. They had no local connection with the place. They came anonymously. They would not disclose their identity. They would not give their name and addresses. They flouted the law. They wilfully obstructed the survey. Can these newcomers be moved off the site so that they obstruct no more? Can the board move them off? Or, if the board cannot do it, can the police be called in to help? The chief constable feels that he cannot use his force for the purpose. It would put his men in a bad light with the local inhabitants. What then is to be done?

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx The board here acted throughout in complete accord with their statutory powers and obligations. They gave due notice to the farmers, Mr. and Mrs. Searle, and sought their consent to the survey. It was not forthcoming. The board informed them of the statutory provision which authorised entry to their land. They have them notice that they were coming on February 24, 1981. News of it got through to the television people and the newspapers. On February 24, 1981, three of the board's staff and three surveyors approached the site. They had written authority to enter. They found the way blocked by about 60 people, including Mr. and Mrs. Searle and a group known as "Luxulyan against Nuclear Development" The television

people were there. Also newspaper reporters. Five policemen were present. Two of them controlled the crowd and the traffic. The representatives of the board said to Mr. Searie: "it is obvious that you do not intend to let us on the land." Mr. Searle said: "That is correct" So the board's representatives withdrew to the boos of the crowd.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx On May 22, 1981, the board issued a writ against 32 named persons and on the same day Talbot, J. granted an injunction against them. They too obeyed the injunction and moved off the site. They marched round the roads preceded, it is said, by the Lostwithiel Silver Band.

You might have thought that that would be the end of the matter, and that the rule of law had prevailed. But, no Groups of interlopers then came from far and wide and tried to stop the work. One group, calling itself the Cornish Republican Movement, made an overnight attack on the drilling rig. Another group calling itself the Cornwall Anti-Nuclear Alliance started a systematic campaign of obstruction. They set up headquarters in a caravan. They had seven posts on the farm manned by 17 persons. They took up position in relays. As one party went off, another came one. And so forth. They called one another by their Christian names-Tom, Dick or Harry-or Susan, Mary or Jane-so that no one could discover their true names and addresses. Their organisers issued a leaflet giving instructions to volunteers who came to help them. I will quote part of it so that you may see what they were told to do:

Welcome. 1, It is peaceful and friendly-it must be kept that way-if at any time you feel unable to respond in such a way, please walk away from the situation...5.... The drillers are basically friendly but have a job to do; be "nice" but clear about why you are there...6.... (c) If a rig gets inside the field lie down in front of it, but always warn the driver first (he cannot see in front of his wheels from the cab).... Always explain to them that your actions are non-violent.... (f) Rig 1-if an attempt is made to move the drill into the field, two people must chain themselves to the rig. (You will be told where the keys are kept). No attempt can legally be made to manhandle you. Do not panic if the drillers arrive - they often come to service the machinery. 7. If you see a seismic team crossing onto the land, follow them.... If possible put your foot (umbrella, portable windmill, etc.), under the hand-drill to stop a hold being drilled, or otherwise if you are too late for this-sit on the hold.... 10. Do not bring illegal substances onto the site or break the law in any way - it would only be an excuse for the C.E.G.B. to call the police in and have us all removed.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx These newcomers made things so difficult for the board that they approached the police for help.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx The chief constable felt, however, that neither he nor his men could do anything to remove the demonstrators.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Now, the board feel that they cannot ask their own staff, or the contractors' men, to turn these people off the

site. They want the police to do it. The chief constable says "No". He thinks he has no lawful authority to do it. He also thinks that it would harm the relationship of his men to the public.

The board feel that the chief constable is mistaken. On July, 8, 1981, they applied for an order of mandamus to compel him. It was for:

An order of mandamus directed to the Chief Constable of the Devon and Cornwall Constabulary requiring him to instruct police officers under his control to remove or assist the applicant's servants or agents to remove persons obstructing the applicants works at Luxulyan in the Country of Cornwall.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx I would add one further word. It is to my mind within the authority of the police to intervene to prevent any criminal offence being committed in their presence, even though it is only a summary offence, where the offender fails or refuses to give, or avoids giving, his name and address. Even though the statute does not give a power of arrest, the law says that a police officer can do whatever is necessary by way of restraint to prevent a criminal offence being committed or continued. So here the police would in my opinion be acting within the law if they cleared these obstructors off the site. If any resisted, or returned afterwards, the police would be entitled to take them before a justice of the peace who could require them to enter into a recognisance to be of good behaviour.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Notwithstanding all that I have said, I would not give any orders to the chief constable or his men. It is of the first importance that the police should decide on their own responsibility what action should be taken in any particular situation. As I said in *Rev. v. Commissioner of Police of the Metropolis, Ex parte Blackburn* (1968) 2 QB.118, 136:

...it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to the, as for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere.

The decision of the chief constable not to intervene in this case was a policy decision with which I think the courts should not interfere. All that I have done in this judgment is to give the "definitive legal mandate" which he sought. It should enable him to reconsider their position. I hope he will decide to use his men to clear the obstructors off the site or at any rate help the board to do so.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx For the reasons I have given, however, I would make no order against the police. The appeal should be

dismissed.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Lawton, LJ.

This is not a case for making an order of mandamus against the chief constable. It is a case for co-operation between the board and the chief constable and the use of plenty of commonsense by all concerned, including those who are on the site obstructing the board's functions.

I would dismiss the appeal.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Jemleman, J.

The present litigation is due partly to the understandable desire of the police to be certain of the extent and limitations of their powers and partly to the understandable desire of the board to obtain the assistance the obstructors so that the board can complete their survey. The powers of the police and the board are adequate to ensure that the law prevails.

But it is for the police and the board to co-operate and to decide upon and implement the most effective method of dealing with the obstructors. The court cannot tell the police how and when their powers should be exercised, for the court cannot judge the explosiveness of the situation or deal with the individual problems which will arise as a result of the activities of the obstructors. This court can and does confirm that the police have powers to remove and arrest passive resisters in the circumstances which prevail at the site when the board resume their work to complete their survey. This court can and does indicate that the time has come for the board and the police to exercise their respective powers so that the survey may be completed.

(emphasis supplied)

The restraint shown by the Court of Appeal in issuing directions to the police and the reasons given for the same deserve appreciation. We notice that no other High Court in India issues writ of mandamus to the police so generously. At the drop of the hat, writ petitions are filed against the police and they are being entertained by our High Court. It is high time we follow the wise Counsel of our former Chief Justice B.N. Srikrishna, J., which we have quoted above.

11. Going by the general principles governing issuance of mandamus against police, we feel that based on the averments of the petitioner in Ex.P3 petition, this Court is not justified in issuing a writ of mandamus to the police, as prayed for. Even assuming the petition makes out grounds like commission of cognizable offences, etc., there is yet another weighty reason for not granting the relief prayed for by the petitioner. If the local people are causing obstruction and infringing the rights of the petitioner, it can move the competent civil court and seek an injunction against them. If the injunction order is violated, the court which granted the order, has also the power to address the police to render assistance to enforce its orders. The said course appears to us more appropriate

in this case, since the police have no power or authority, as stated by us earlier, to go into the disputed question of health hazard caused by the mobile phone tower. If the people object on health grounds and if the police do not interfere, they cannot be blamed. This dispute is a matter which can be effectively adjudicated by the civil court. It can take evidence and also examine experts in the field. Efficacy of the remedy of declaration and injunction against persons infringing the rights of parties has been forcefully stated by a Division Bench of this Court in *George v. Circle Inspector of Police* 1990(1) KLT 741. In the said judgment, Paripoornam, J. (as His Lordship then was) stated as follows:

10. Ordinarily, a civil suit will lie to prevent trespass and to obtain an order of injunction. In an ordinary action in civil court, it is possible to obtain the relief of declaration and also injunction. The civil court can grant relief restraining obstruction or impediment to the enjoyment of property or the goods. So also affirmative relief to load and unload goods. So also affirmative relief to load and unload goods can be given. The civil court will be in a better position to evaluate and grant relief, appropriate to the occasion, even if circumstances require the taking of oral and documentary evidence. The court granting the injunction can implement it by giving consequential directions, including direction to the police-authorities to effectuate the order. It can also punish persons for disobeying the order of court, under Order 39 Rule 1 C.P.C. read with Rule 2-A. The advantages of declaratory judgment over mandamus need not be over stated (See-I Zamir *Declaratory Judgment* (1962 Edn.) pages 180-182. Besides the above, under Chapter XI of the Crl.P.C. - Sections 149, 150, 151, 155 and 156 contain provisions which ordain the police authorities to take preventive action. It is not stated as to why the appellants have not resorted to a civil action in the ordinary civil court. The appellants have not stated as to why the said civil action is not an equally efficacious remedy, on the facts and circumstances of the case. It is also not stated as to why the appellants did not pursue for action under Chapter XI Crl.P.C., in pursuance to Ext.P2 petition. It is true that under Chapter V, Section 29(b) and (g) of the Police Act, a statutory duty is imposed on respondents 1 and 2 to keep law and order and to afford sufficient police protection. The statutory duty so cast on the police authorities can be enforced by civil action in ordinary courts also. Ordinarily, the persons aggrieved should resort to such remedies.

(Emphasis supplied)

We respectfully follow the above statement of law made by the Division Bench. Having regard to the facts of the case, we feel that the petitioner should be turned away to approach the civil court, to vindicate its rights to establish the mobile phone tower. The contention that the service provider of mobile phone service has licence under the Indian Telegraph Act and therefore, it has a right to erect the towers and the local people cannot object to it, cannot be accepted. If the local people feel that some activity harmful to their health is going to be undertaken in their neighbouring property, they have a right to protest. The fact that the tower is being erected under licence from the statutory authority, will

not affect the contentions of the local people. Further, they have no remedy under the Telecom Regulatory Authority of India Act. They have no right to move the Telecom Regulatory Authority to redress their grievance, as contended by the learned counsel. The decision of this Court in Reliance Infocom Ltd. Vs. Chemanchery Grama Panchayat, was mainly concerned with the validity of the cancellation of the building permit by the Panchayat. The opinion expressed by this Court regarding radiation etc., was in the context of the order of the Panchayat cancelling the building permit. When failure of duty of the police is the issue concerned, as the police cannot go into such things, this Court also, as stated by us earlier, cannot go into such contentions. In the above decision, protection was granted for erecting a tower, without any reference to the rival contentions on that point or giving the reasons of the court to grant the order of protection. So, the direction, to grant protection, in the absence of giving any reasons, will not bind us, as a precedent. Further, in that decision, the principles governing issuance of mandamus to the police, adumbrated in George v. Circle Inspector of Police 1990 (1) KLT 741 were not adverted to or considered.

12. The contention of the writ petitioner that the issuance of Ext.R8(a) guidelines does not have any impact on the issue before this Court, cannot be accepted. Scientific knowledge is galloping every day. It is expanding in geometric progression. Ext.R8(a) confers certain rights on the local people, which hitherto they did not enjoy. If they say, their rights under Ext.R8(a) are infringed, the police cannot interfere in that dispute. Only the civil court can decide it.

13. Accordingly, the Writ Petition is dismissed without prejudice to the contentions of the petitioner and its right to move the competent civil court for appropriate reliefs.

14. It is made clear that we have not made any decision regarding the rival claims concerning the health hazard emanating from the electromagnetic fields generated by the mobile phone towers.

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15. In view of the dismissal of W.P.(C) No. 18568/2008, these writ petitions are also dismissed without prejudice to the contentions of the petitioners and their right to move the competent civil court for appropriate reliefs.