
(2013) 07 KL CK 0015

In the High Court Of Kerala

Case No : Writ Petition (C) No. 20597 of 2012

Indus Towers Ltd.

APPELLANT

Vs

Sub Inspector of Police

RESPONDENT

Date of Decision : 18-07-2013

Acts Referred:

Citation : (2013) 3 ILR (Ker) 755 : (2013) 3 KHC 653 : (2013) 3 KLT 828

Hon'ble Judges : K.M. Joseph, J;K. Harilal, J

Bench : Division Bench

Advocate : V. Philip Mathew, for the Appellant; P. Parameswaran Nair, Asst. Solicitor General of India, K.M. Jamaludheen, Latha Prabhakaran and M.K. Aboobacker, for the Respondent

Judgement

K. Harilal, J.—Is an unregistered document which is required to be registered under S. 17 of the Registration Act an invalid document for all purposes? If not what are the purposes for which such document can be availed of? These are the larger issues that arise for consideration in this Writ Petition. Briefly put, the facts of the case is as follows:

The Petitioner is a leading Mobile Tower Company in India incorporated under the Companies Act, 1956. Ext. P1 is the certificate of incorporation issued by the Assistant Registrar of Companies. The company is a registered infrastructure provider duly licensed by the Department of Telecommunications, Ministry of Communications & I.T., Government of India engaged in the business of providing telecommunication infrastructure which includes erection of towers for various mobile telecommunication service providers. Ext. P3 is a copy of the registration certificate issued by the Ministry of Communications & I.T., Department of Telecommunications. The Company has been promoted under a joint venture between Bharati Group (Airtel), Vodafone, Aditya Birla Telecom (Idea) to render passive infrastructure services to telecom service providers.

2. The 4th respondent Panchayat has issued Ext. P6 building permit to the petitioner for the construction of Mobile telecommunication tower in the property

owned by the 5th respondent situated in Survey No. 302/4 of Porur Village, Nilambur Taluk, Malappuram District. Ext. P6 is issued after complying with all the legal requirements and after being convinced that construction of tower will not cause any kind of inconvenience to anyone and the site is situated in an unobjectionable place and that there is no legal bar in making the constructions. But, when the petitioner started the construction work of mobile tower based on Ext. P6, on 25/10/2011, the 4th respondent issued Ext. P7 stop memo directing the petitioner to stop the construction of the mobile communication tower and to show cause why the permit (Ext. P6) granted to the petitioner shall not be cancelled. Challenging Ext. P7, the petitioner filed Appeal No. 798/2011 before the Tribunal for Local Self Government Institutions, Thiruvananthapuram. The Tribunal by Ext. P8 order set aside the direction in Ext. P7, which directs the petitioner to show cause against the cancellation of the permit. But the Tribunal confirmed the direction in Ext. P7 which directs the petitioner to stop the construction of the tower. The petitioner challenged Ext. P8 before this Court by filing W.P. (C) No. 13461/2012.

3. While so, the 4th respondent had issued Ext. P9 communication dated 13.8.2012 to the petitioner permitting the petitioner to proceed with the construction of the mobile telecommunication tower. Thus, there is no bar to proceed with the construction of the tower.

4. Pursuant to Ext. P9, the petitioner started the construction work of the tower. At that time, respondents 6 to 10 and their henchmen physically obstructed the work saying that they will not permit the construction work of mobile tower. Respondents 6 to 10 and their henchmen threatened the petitioner's workers saying that they will be killed if they continue with the work of mobile tower. Thus, the petitioner is not in a position to carry out the construction work of the mobile tower. It is understood that respondents 6 to 10 are raising objections on the mistaken assumption that mobile towers will cause health hazards.

5. Aggrieved by the unlawful obstruction caused by respondents 6 to 10, the petitioner filed a petition before the respondents 1 to 3 requesting them to grant police protection to construct the mobile tower without any threat or obstruction from respondents 6 to 10 or their men under law. But respondents 1 to 3 have not taken any steps to remove the threat and obstruction and refused to grant police protection to continue the construction work. Filing of a civil suit is not an effective and adequate remedy in this case. Hence, this Writ Petition is filed, inter alia, seeking issuance of a writ of mandamus or other appropriate writ, order or direction commanding respondents 1 to 3 to grant adequate and effective police protection to the petitioner and their agents and workers for constructing, erecting and operating mobile telecommunication tower as per Ext. P6 building permit in the property taken on lease from the 5th respondent.

6. Respondents 6 to 10 filed a counter affidavit challenging the maintainability of the Writ Petition and the locus standi of the petitioner to file this Writ Petition. It is contended, inter alia, that the proposed tower is going to be constructed in a

thickly populated area. The house of the 9th respondent is situated only 3 metres away from the pit, the other houses are situated within a radius of 14 to 32 metres from the proposed tower. The construction proposed is in violation of a Circular issued by the Central Government directing that no tower can be constructed, if there are houses within a radius of 35 Mtrs.; but they are unable to produce that Circular, despite their best efforts. The Panchayat has granted the permit due to undue influence exerted by the petitioner and the licence issued without complying with the legal formalities cannot be enforced and cannot be relied on as there is no permit in the strict application of law. The allegation that no radiation will emanate from the tower is a false allegation. The petitioner has produced only a copy of the permit and they had not produced the sketch showing the plinth area of the tower to know the height of the tower. In Ext. P9, the Panchayat has stated that the petitioner has to make sure the safety of the tower; but the petitioner has not taken any safety measures to ensure peaceful life of the neighbours. Therefore, the Writ Petition is liable to be dismissed.

7. The question to be considered is whether the petitioner is entitled to get police protection for constructing and energizing the Mobile tower as prayed for in the Writ Petition. The main thrust of the argument advanced by Mr. K.M. Jamaludheen, the learned counsel for respondents 6 to 10 is that the lease deed allegedly executed between the petitioner and the 5th respondent is for a period of more than one year. Therefore, according to S. 17 of the Registration Act, it is a compulsorily registrable document. But here the lease deed submitted along with the application for building permit to prove the ownership of the property and the consent given by the owner to the petitioner is not a registered document which is an invalid document in the eye of law and this legal infirmity by itself renders the permit invalid. Therefore, by virtue of prohibition under S. 49(c) of the Registration Act, the 4th respondent should not have received the lease deed along with the application and granted Ext. P6 permit.

8. Per contra, Sri. Philip Mathew, the learned counsel, drew our attention to the proviso to S. 49 of the Registration Act and the Note appended to R. 141(1) of the Kerala Municipality Building Rules and argued that a "consent document" of the owner alone is required to grant building permit for construction in a property taken on lease. There is no statutory form or requirements to make a consent document. A mere document manifesting consent given by the owner to make construction alone need be required. An unregistered lease deed expressing consent given by the owner can be availed of as consent document and such lease deed can be taken as evidence of consent given by the owner to the Panchayat to issue permit to the petitioner. Such transaction between the owner and the Panchayat is not required to be effected by registered instrument and that transaction is only a collateral transaction. Thus, unregistered lease deed can be used as evidence of collateral transaction, in the proceedings for issuing permit, in view of the proviso to S. 49 of the Registration Act. The learned counsel cited the decisions reported in Anthony Vs. K.C. Ittoop and Sons

and Others, and K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., to fortify his argument.

9. Going by the counter affidavit, it could be seen that no such specific pleadings were raised in the counter affidavit. In the counter affidavit regarding the issuance of permit the only allegation is that the Panchayat has granted permit due to undue influence exerted by the petitioner and the licence which was issued without complying with the legal formalities cannot be enforced and cannot be relied on and there is no permit in the strict application of law. Though there is a vague pleading without legal backing, we feel that the point raised at the time of argument deserves to be considered, as it is a question of law. The question is whether an unregistered lease deed which is required to be registered under S. 17 of the Registration Act can be availed of as consent document, to prove the ownership of the property and consent given by the owner to the petitioner to make construction, for granting building permit under R. 141 of the Kerala Municipality Building Rules?

10. Let us see the embargo created under S. 49(c) of the Registration Act and consequences thereof. S. 49 of the Registration Act is extracted below:

49. Effect of non-registration of documents required to be registered.

No document required by S. 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882) to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property, 1882 (of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument.

(emphasis supplied)

11. Going by the last limb of the proviso, it could be seen that an unregistered document can be received as evidence of any collateral transaction not required to be effected by the registered instrument. The legal position is well settled by this Court and later the Supreme Court also. In the decision reported in Mohammed Kunju Isha Beevi Vs. Elayakunju Shahul Hameed this Court held as follows:

Under Clause (a) of S. 49 a document which is required to be registered shall not affect any immoveable property comprised therein unless it has been registered. The word "affect" takes in all transactions which may produce an effect upon or

produce a material influence upon immoveable property. See in this connection *Atluru Saraswatamma Vs. Atluru Paddayya and Others*, Reading S. 17 of the Registration Act and S. 91 of the Evidence Act along with S. 49 of the Registration the word "affect" will have to be taken as expressing the meaning "purporting" or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest vested or contingent. It is well settled that even though an agreement could not create any such right for the reason that the agreement was unregistered, it can be admitted and taken as evidence of collateral facts or purposes like character of possession. (See *Rana Vidya Bhushan Singh Vs. Ratiram*,

This legal position was upheld in *Anthony Vs. K.C. Ittoop and Sons and Others*, and later in *K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd.*, .

The Apex Court then culled out the following principles: (*K.B. Saha case* (SCC p. 577, para. 34)

1. A document required to be registered, if unregistered is not admissible into evidence under S. 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to S. 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc., any right, title or interest in immovable property of the value of one hundred rupees and upwards.
5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance.

12. The principle that can be culled out on a reading of the proviso to S. 49 of the Registration Act in the light of the above referred decision is that an unregistered document which is required to be registered under S. 17 of the Registration Act is not an absolutely invalid document; but the same can be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Performance Act or as evidence of any collateral transaction not required to be effected by registered instrument. A collateral transaction must be independent of or divisible from, the transaction to effect which the law required registration and must be a transaction not itself required to be effected by a registered document.

13. Let us examine the nature and purpose of the document required to be

submitted along with the application for getting building permit under R. 141 of Kerala Municipality Building Rules. The document required to prove ownership to be submitted along with the application is specified under a note which is extracted below: R. 141 of the Kerala Municipality Building Rules reads as follows:

141. Submission of application and its disposal.--(1) Application for permit shall be submitted to the Secretary in the form in Appendix A along with two copies of site plan, location, elevation, sections, 3[xx] structural stability certificate, copy of agreement executed with Department of Telecommunications or licence or permit issued by an authority approved by Government of India from time to time and document to prove ownership.

Note:-(1) Ownership document may be a sale deed or mortgage deed or deed of agreement or licence or consent document, etc.

14. On a reading of the Note, it could be seen that neither a registered lease deed nor at least a lease deed is required for proving ownership and consent. It can be a deed of agreement or licence or consent document, which does not require specific form and style.

15. Thus, going by Note (1) appended to R. 141 of the Kerala Municipality Building Rules, a mere "consent document" given by the lessor in favour of the lessee is sufficient to establish a transaction which creates a right in favour of the lessee to make construction in the property of the lessor, in the matter of issuing building permit in favour of the lessee. So far as Panchayat is concerned, in the matter of issuing building permit to the petitioner to make construction in the property of the 5th respondent/lessee, the transaction granting consent between the petitioner and the 5th respondent is only a collateral transaction and for evidencing that transaction, the Panchayat requires a mere consent document only; the Panchayat does not require a registered instrument for that purpose. Needless to say, the same cannot be used for any collateral purpose which requires a registered instrument.

16. So, a lease deed, though unregistered, can be treated as a consent document and can be availed of, for producing before the Panchayat to get the building permit for making construction in a property taken on lease. Such unregistered lease deed, for the above purpose, would get protection under the proviso to S. 49 of the Registration Act. So also, it would come under the 4th Clause specified under the above said decision in K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., This collateral purpose does not require even a registered document. Therefore, in view of the above legal position and discussions, we are of the opinion that there is no illegality in receiving an unregistered lease deed along with application for building permit produced by the lessee as consent document to prove ownership of the property and consent given by the owner to make construction and that does not vitiate the building permit. Therefore, we find that Ext. P6 is not hit by Ss. 17 and 49 of the Registration Act for granting building permit; but gets protection under proviso to

S. 49(c) of the Registration Act. In the instant case, it is pertinent to note that the 5th respondent who is a party in this Writ Petition has not denied the consent which he had given to the petitioner.

17. The next point raised by the learned counsel for the respondents 6 to 10 is that the entire people in the locality are reeling under the apprehension that radiation emanating from the tower will cause serious health hazards to the people.

18. Per contra, the learned counsel for the petitioner submitted that the larger common issue, relating to "health hazards" that may arise out of apprehension of the people in the locality is resolved by a Full Bench of this Court in *Essar Telecom Infrastructure (P) Ltd. Vs. State of Kerala*, In that decision, this Court held as follows:

The instance of any health hazards has to be established with reference to tangible materials and evidence has to be let in; for which, it could be said that the matter may require to be adjudicated before the Civil Court. But then, it is for the concerned party to plead and prove as to the specific threat to the health hazards with reference to reliable materials and also as to the alleged infringement of any statutory prescription or violation of the norms prescribed. It is not for the petitioners to prove a "negative aspect" that there is no health hazard. When the petitioners have prima facie established their right to construct and operate the mobile transmission tower by obtaining all the required licences, it is for the objectors, if any, to prove infraction of their right, if any, and to show the dis-entitlement of the petitioners to establish a mobile tower, by resorting to the remedy of approaching the licensing authorities or to approach the Civil Court or by establishing their right in the Writ Petition for police protection. If any such objection is found prima facie established, this Court can certainly decline to grant police protection or in case the respondent fails to prove their right by documentary evidence, could still reserve his right to approach the Civil Court, as the burden to prove any such infraction is on the objector who asserts any such right.

19. In the light of the above decision, the issue of alleged "health hazard" does not require any further consideration in this Writ Petition. Therefore, in the light of the decisions cited above, we are inclined to grant police protection for the construction and energisation of the mobile tower for which protection is sought for. In the result, respondents 1 to 3 are directed to grant adequate and effective police protection to the petitioner, their agents and their workers for constructing and operating telecommunication tower in the property situated in Survey No. 302/4 of Porur Village, Nilambur Taluk, Malappuram District based on Ext. P6 without any threat or obstruction from respondents 6 to 10 or any others under them. If any generator is put up, it can be done only after getting permission under S. 233 of the Panchayat Raj Act and after getting sanction from the Pollution Control Board. Antenna can be fixed in accordance with the norms prescribed by Authorities only. This will not also stand in the way of the

concerned authority taking action on the basis of the guidelines relating to distance rule from any existing tower.

The Writ Petition is allowed as above.