

(2002) 12 SHI CK 0016

In the High Court Of Himachal Pradesh

Case No : Civil Revision No"s. 325 and 364 of 2002

Kultar Singh Dogra and Yog Raj and Another

APPELLANT

Vs

Bharti Telenet Ltd. and Others

RESPONDENT

Date of Decision : 16-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, Order 7 Rule 3, 115

Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 118

Citation : (2002) 3 ShimLC 5

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : Kuldip Singh and Jyotika, for the Appellant; K.D. Sood, Deepak Gupta, Aneesh Garg and Dalip Sharma, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Verma, J.—Since both these revision petitions u/s 115 of the CPC (hereafter referred to as "the Code") arise out of the same judgment rendered in two consolidated Civil Miscellaneous Appeals by the learned District Judge, Hamirpur, therefore, are being disposed of by this common judgment.

2. Yog Raj and Mohinder Singh (Petitioners in Civil Revision No. 364 of 2002) and Kultar Singh Dogra (Petitioner in Civil Revision No. 325 of 2002) instituted two different suits against the Respondents, claiming permanent prohibitory injunction restraining the Respondents from raising any construction/installation of a tower for mobile telephone services adjoining the property owned by them and in case they succeed in raising the tower, for mandatory injunction directing the Respondents to remove such tower and restoring the land to its original condition. As per the plaint, Petitioner Yog Raj is owner in possession of land comprising Khasra No. 70, situate in Up Mohal, Hira Nagar, Mauza Jhaniara, Teh. and Distt. Hamirpur, to the extent of 1/2 share. Petitioner Mohinder Singh is owner in possession of Khasra No. 232/73, situate in the same village. Petitioner

Kultar Singh Dogra is the owner in possession of land Khasra Nos. 230/72 and 234/ 74 situate in the aforesaid village. Land Khasra No. 62, situate in the aforesaid village, as per the revenue records, is owned and possessed by Rattan Singh, Respondent in both the petitions which is in the close vicinity of the land owned by the Petitioners. Respondents M/s. Bharti Telenet Ltd. and M/s. Airtel Ltd. have started construction of a tower for mobile telephone services on a corner of land khasra No. 62, which they have taken on lease from Respondent Rattan Singh. The aforesaid land is within residential area and Petitioner Yog Raj had purchased the land for the purpose of construction of a residential house. Petitioner Mohinder Singh had a residential double storeyed house on his land. Petitioner Kultar Singh Dogra has also his residential house over the land owned by him. There are other residential houses of various persons on the land adjacent to khasra No. 62, as specified in the site plans filed with the plaints. The Deputy Commissioner, Hamirpur had allotted Government land in Dang Kowali for construction of the tower which was approved by the Municipal Council, Hamirpur. However, the Respondents, other than Respondent Rattan Singh, have started construction of tower over the land given to them by Rattan Singh for the purpose. The residents of the locality raised objections to the installation of the tower before the Deputy Commissioner but of no avail. It is further claimed that the proposed height of the tower under construction is 55 metres, which will become a permanent nuisance to the Petitioners, their family members and other inhabitants of the area and will also endanger their lives and property and will also result in causing noise, pollution, air pollution and other health hazards leading to loss of life and the environment/atmosphere will also be adversely affected. The land on which tower is being constructed is meant for residential construction. Even on this count, no industrial concern can be constructed thereon. Moreover, the construction of the tower is against the policy and rules framed by the Central Government prohibiting such installation within the residential and thickly populated areas. Hence the suits by the Petitioners.

3. Along with the suits, the Petitioners in each case, filed applications Under Order 39 Rules 1 and 2 of the Code seeking temporary injunction restraining the Respondents from raising the tower on the land khasra No. 62 till the disposal of the suits. Vide order dated 13.3.2002, as an ad interim measure, the trial Court directed maintaining of the status quo qua the installation of the tower.

4. Respondents M/s. Bharti Telenet Ltd. and M/s. Airtel Ltd. (hereafter referred to as "the contesting Respondents") contested the claim of the Petitioners in each suit and filed written statements. In the written statement, preliminary objections were raised to the effect that the suits were not competent; that the Petitioners have suppressed the material facts; that the suits were bad for non joinder of necessary parties; that the plaints lack better and material particulars; that the suits were bad for want of compliance of Order 7 Rule 3 of the Code and in view of the provisions of Indian Telegraph Act, the suits are not maintainable. On merits, while denying for want of knowledge the claim of the Petitioners to be the owners in possession of the land as claimed in the plaint, it is averred that

the contesting Respondents had taken on lease a part of Khasra No. 62 owned by Respondent Rattan Singh. However, allegation of connivance has been denied. It is further averred that Respondent Bharti Telenet Ltd. has been granted a licence by the Ministry of Tele Communications, Government of India, to provide cellular telephone services in the State of H.P. and the contesting Respondents are discharging the obligation as such licensee. It is further claimed that the erection of the tower by the contesting Respondents will not render the land of the Petitioners useless and unfit for habitation and construction of residential houses and will not interfere, in any manner, with the rights of the Petitioners. The land use is not for commercial purpose as no such activity will be carried out on the suit land and the tower is being erected at an appropriate distance from the boundaries of the land of adjoining owners. Since no land was granted by the Deputy Commissioner, Hamirpur, for the erection of the tower, the present arrangement had to be made. It has been denied that the tower will be a permanent nuisance or shall endanger the lives and properties of the Petitioners and others as alleged in the plaint nor will it cause noise or air pollution and other health hazards, which may lead to loss of life, as the tower is being constructed in conformity with the technical and engineering requirements of highest standards prevalent at present and the construction will be so carried out, so as not to cause any harm whatsoever. It is also the case of the contesting Respondents that they are providing a public utility service and have already spent more than 8 lacs for the construction of the structure and the suits filed by the Petitioners at a belated stage are mala fide.

5. Replies to the applications Under Order 39 Rules 1 and 2 of the Code in each case were also filed by the contesting Respondents relying on the same averments as made in the written statement. They also filed an application Under Order 39 Rule 4 of the Code for early hearing of the case and "discharging" and "setting aside" the order of ad-interim injunction.

6. On consideration of the material on record, the learned trial judge, vide his order dated 29.4.2002, restrained the Respondents from raising construction of cellular tower for mobile telephone service on land khasra No. 62 till the disposal of the suit.

7. Being aggrieved, the Respondents preferred two appeals against the order passed by the learned trial Judge in, the Court of the learned District Judge, Hamirpur, who, by the impugned judgment, allowed both the appeals and reversed the order passed by the trial Court. The Petitioners, being aggrieved by the impugned judgment, have preferred the present petitions.

8. I have heard the learned Counsel for the parties and have also gone through the records.

9. It was contended by the learned Counsel for the Petitioners that the area on which the tower in question is being built is "residential area" and no building work of commercial nature can not be raised thereon without the prior

permission of the Town and Country Planner and no construction thereon can be carried out without the sanction of the Municipal Council.

10. A perusal of the copy of application dated 16.3.2002 placed on the trial Court file prima facie reveals that such application was made by the Respondents to the Municipal Council concerned to issue NOC for construction of Tower on land Kh. No. 62 and vide letter dated 3.4.2002 the Municipal Council conveyed that requisite NOC to raise the Tower in favor of the Respondents. It is a question to be decided at the trial as to about which portion of Kh. No. 62 and tower of which specifications, the NOC has been issued.

11. It is a notorious fact that the H.P. Government has provided Single Window Service for clearance of constructions of various structures by Municipal Bodies. There is nothing on the record to show that for construction of Towers as in hand, permission under the Town and Country Planning Act is still required to be obtained separately.

12. In view of the above discussion, the contention raised for the Petitioners is of no help to them for determination of the question relating to grant or refusal of temporary injunction.

13. It was further contended for the Petitioners that the acquisition of land Kh. No. 62 by the Respondents by way of lease is barred by Section 118 of the H.P. Tenancy and Land Reforms Act. Therefore, the transaction of lease inter se the Respondents is illegal and the contesting Respondents have no lawful rights to raise construction on the allegedly leased area of Kh. No. 62.

14. This plea has not been raised by the Petitioners in the plaint, thus, the Respondents did not have the opportunity to meet such a plea in their written statement/reply, therefore, cannot be taken into account at this stage.

15. It was next contended by the learned Counsel for the Petitioners that the learned trial Judge had appreciated the material before him in the right perspective and came to the right conclusion whereas the learned District Judge misread the document Fact Sheet 193 filed by the contesting Respondents in support of their case as a document relied upon by the Petitioners and also relied on the material brought on record by the Respondents in appeal without notice to the Petitioners and without permitting such documents to be placed on record as additional material which vitiates his findings and the judgment.

16. While conceding that some documents of the Respondents were so read as contended for the Petitioners, the learned Counsel for the Respondents contended that the documents so read by the learned District Judge are in the form of expert opinion on the subject in question and were meant only to apprise the Court about the latest opinion of the experts and was not "additional evidence" and filing of such documents and reference to them is nothing more than to enable the Court to resort to its aid as documents of reference regarding the concerned branch of science.

17. It is settled position in law that a Court of Appeal or revision, has to decide the case on the basis of the material available on the lower court file except where such court permits leading of additional evidence/ production of additional material in accordance with law.

18. It is true that Fact Sheet 193 placed on the file of the trial Court was filed by the Respondents in support of their case but in the impugned judgment, the appellate Court below read it as the basis of the suit of the Petitioners and thus not only erred in proper perusal of the document, but this document prima facie supports the case of the Respondents, therefore, its reading as a basis of the case of Petitioners has definitely caused material prejudice to the Petitioners whose claim is based on allegations regarding effects of a tower on human beings on averments contrary to what is said in the Fact Sheet relied by the Respondents. It is also true that some documents were filed by the Respondents along with appeal but without any application to or permission of the appellate Court, those documents were considered by the appellate Court below. In case these documents were meant to be additional evidence/material, these could not be read in support of the case of the Respondents unless the Court had allowed them to be brought on record as additional evidence/material.

19. The Respondents claim that such documents are merely documents regarding scientific opinions and meant only for reference by the Court and not additional evidence/material. In my view only those books and papers on science, art etc. can be referred to by the Court to get aid from them to appreciate evidence, which are shown to be authored by properly qualified person to make statement on the subject and are standard books acknowledged as authorities on the subject. What has been brought on the record by the parties in the name of such book/paper are some copies of abstracts of opinion by different persons but without any authentication and affirmation that those whose opinions are contained in such documents are properly qualified to make such statements or these abstracts form part of any acknowledged treatise. Moreover these opinions being inconsistent, contradictory and tentative deserve to be ignored at this stage.

20. The only test which can be applied at this stage to find out whether there is prima facie case in favour of the Petitioners or not, is whether the tower is being constructed as per the present day standards as prescribed and whether towers constructed as per so prescribed standards have, in any manner whatsoever, endangered the lives and property of human beings and have proved life hazards.

21. It is case of the Respondents in their written statement that Respondent No. 1 had provided similar facilities in five districts of Himachal Pradesh. These averments are not controverted nor there is anything on record that installation of towers in the aforesaid districts have endangered human life in any manner.

22. It is also case of the Respondents that Respondent No. 1 is licensee of Government of India for providing Cellular Telephone facilities and is "discharging

a job which is in the public interest and the tower is being constructed by the Respondents in conformity with the technical and engineering requirements of the highest standards prevalent these days. These averments in the written statement have also not been controverted by the Petitioners. On the contrary, it is prima facie, made out on a combined reading of the certificate issued by Yadvinder Singh, Engineer (Transmission) of BTNL, Shimla, regarding manner of installation of tower certificate issued by Santokh Sons about the quality of work being done by the Respondents, certificate by Man Standards Ltd., supplier of the tower regarding suitability and safety factors and the certificate issued by Divisional Engineer, Telecom Project, Dharamsala, Bharat Sanchar Nigam Ltd., that the tower is in conformity with the prescribed standards for safety and such tower is installed and will be as per the standards to ensure safety from lightening and effects of radiations. It is also not controverted by the Petitioners.

23. In view of the above discussion, the Petitioners have not shown a prima facie case in their favour for the purpose of grant of temporary injunction.

24. The Tower is stated to be complete and is meant to provide a public utility service. However, it has not yet been made operational because of restraint by this Court. In view of the above conclusions, there is no strong reason not to allow the Respondents to make the tower operational.

25. In view of the above findings, the impugned judgment does not call for any interference by this Court in exercise of its revisional jurisdiction.

26. As a result, both these petitions merit dismissal and are accordingly dismissed. The interim stay order dated 26.8.2002 modified on 9.9.2002 and confirmed on 23.9.2002 in C.R. No. 325 of 2002 and adopted in C.R. No. 364 of 2002 vide order dated 3.10.2002 is vacated.

27. It is clarified that the observations hereinabove are strictly for the purpose of disposal of these revisions petitions and nothing contained therein shall be construed as an expression of opinion on the merits of the suit. No order as to costs.

28. The parties through their learned Counsel are directed to appear before the trial Court on 16.1.2003.