

(2011) 04 KL CK 0098

In the High Court Of Kerala

Case No : Writ Petition (C) No. 19137 of 2010

Wireless T.T. Info Services Ltd.

APPELLANT

Vs

S.I. of Police

RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Kerala Municipality Building Rules, 1999 — Rule 12, 126, 13, 14, 141
Kerala Panchayat Raj Act, 1994 — Section 233
Municipalities Act, 1994 — Section 387, 390, 391, 392, 406
States Reorganisation Act, 1956 — Section 51

Citation : (2011) 2 KLT 820 : (2011) 6 RCR(Civil) 815

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

Bench : Division Bench

**Advocate : A. Mohammed Mustaque and Santhosh Mathew, for the Appellant;
T.K. Vipindas, Government Pleader, T.B. Shajimon, Govindu P. Renukadevi, E.
Narayanan and K. Muraleedharan, for the Respondent**

Judgement

K.M. Joseph, J.—In all these Writ Petitions except as herein after stated the Petitioners have approached this Court seeking writ of mandamus to grant police protection for construction of mobile towers on the strength of what is described as deemed permits. In W.P.(C) No. 15118/2010 there is a prayer for police protection for operation of the mobile tower and also to give protection to the workers of the Petitioner and its assets. In W.P.(C) No. 14313/2010 there is a prayer to give protection for installation and energisation of the mobile tower.

2. The Respondents would oppose the prayers. They would point out health hazards. Various other objections are also raised. They include whether apart from the permit any other permission is required ? Whether a mobile tower is a workplace? Whether the component parts are machinery u/s 233 of the Kerala Panchayat Raj Act? Whether the tower is a building? We heard these matters along with a batch of other Writ Petitions. We have already in a batch of Writ Petitions, (W.P.(C) No. 14094/2010 and connected cases) Essar Telecom Infrastructure (P) Ltd. Vs. State of Kerala,) decided these issues and we follow

the said judgment and the principles laid down in those cases will apply in these cases also. We have inter alia held that the mobile tower is a building as defined. However, as regards the specific issue raised whether the Petitioners should be granted relief on the strength of what is described as deemed permit we are of the following view. Petitioners would rely on the following provisions for claiming the benefit of deemed permit.

143. Power of the Secretary to regularize certain constructions:

The Secretary shall have the power to regularize construction or reconstruction or addition or alteration of any building or digging of any well or telecommunication tower or any structure or land development or any work for which permission of the Secretary is necessary under this rule, commenced, being carried on or completed without obtaining approved plan or in deviation of the approved plan:

Provided that such construction or reconstruction or addition or alteration of any building or digging of any well shall not be in violation of any of the provisions of the Act or these rules:

Provided further that such power shall not relieve the Secretary of his responsibility in detecting and preventing such work and in taking other actions as per these rules:

Provided also that where the construction or work was commenced, being carried on or completed after the statutory period specified in Rules 15, 97, 126 or 141 and as per rules-construction or work shall be considered as duly permitted and not one requiring regularization.

They rely on the third proviso. It is necessary to refer to Rules 13 and 14 of the Building Rules which read as follows:

13. Period within which approval or disapproval shall be intimated.-- The Secretary, shall, within thirty days from the date of receipt of the application for approval of site plan, or any information or further information required under these rules or bye laws under the Act, by written order either approve or refuse to approve the site plan on any of the grounds mentioned in Rule 12 and intimate the same to the applicant.

14. Period within which Secretary is to grant or refuse permission to execute work.--

The Secretary shall within thirty days from the date of receipt of an application for permission to execute any work or any information or document or further information or further document required under these rules or bye laws made under the Act, by written order either grant or refuse to grant such permission on any of the grounds mentioned in Rule 12 and intimate the same to the applicant:

Provided that the said thirty days shall not begin to run until the site has been

approved under Rule 13.

Rules 13 and 14 fall in Chapter II of the Kerala Municipality Building Rules, 1999. Rule 16 also falls in Chapter II. Rule 16 provides inter alia for suspension and revocation of permit issued under these rules on certain conditions being satisfied.

Rule 97 falls under Chapter XIV dealing with walls and fences. It, inter alia, provides in Rule 97(5) that the Secretary shall, if convinced of the Plan and the genuineness of the ownership, issue Permit not later than thirty days from the date of receipt of the application. Rule 126 comes in Chapter XVIII which deals with huts. It reads as follows:

126. Council bound to decide on application.--

(1) The Council shall be bound to take a decision as to whether permit shall be given or rejected, if the applicant makes a request in writing after the expiry of fourteen days from the date of submission of application that the Secretary has failed to dispose the application.

(2) The applicant may commence with the construction or reconstruction in conformity with the provisions contained in the Act and these Rules, as if the permit has been granted, if the Council fails to dispose of the application within 30 days from the date of submission of the request in writing.

Rule 141 falls in Chapter XIX dealing with mobile towers inter alia. The relevant Sub-rule of Rule 141 dealing with the period referred to in Rule 143 is Sub-rule (8). It reads as follows:

141. Submission of application and its disposal.--

(8) The Secretary shall, if convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates, issue permit, not later than 30 days from the date of receipt of the application.

3. Therefore, going by the aforesaid provisions, there appears to be some merit in the contention of the Petitioners that if the period of 30 days elapses under Rule 141 (8), then under Rule 143, the carrying on of any work is to be treated as duly permitted and it does not require regularization. However, learned Counsel for the Corporation of Cochin brought to our notice the provisions contained in Rule 15 of the Building Rules. It reads as follows:

15. Reference to council where the Secretary delays to grant or refuse to approve or permit--

(1) The Council shall, if the Secretary neither approves nor disapproves a building site, neither gives nor refuses permission to execute any work within thirty days from the date of receipt of the application, on the written request of the applicant, be bound to determine whether such approval or permission should be given or not.

(2) Where the Council does not, within one month from the date of receipt of such written request, determine whether such approval or permission should be given or not, such approval or permission shall be deemed to have been given, and the applicant may proceed to execute work, but not so as to contravene any provision of the Act or these rules or bye-laws made thereunder:

Provided that such execution of work shall be considered as duly permitted and not one for regularization and permit shall be issued as per rules even if the work has been commenced, being carried on or completed if it otherwise complies with rule provisions.

He would point out that if the Council is moved by a written request and it does not within a month of the receipt of the written request decide whether approval or permission is to be given or not, there would be a deemed approval or permission and the applicant would be free to proceed to execute the work, but without contravening any provisions of the act or the rules or by-law made thereunder. In this regard he relies on Section 392 of the Municipality Act. It is to be noted that Rule 15 falls in Chapter II of the Building Rules. Chapter II contains general provisions. Chapter II contains Rule 16 providing for suspension or revocation of Permit which is also a provision which is applicable to all kinds of Permits issued under the Rules including Permits issued under Rule 141 relating to mobile towers. In fact, such a provision akin to Rule 15 is not found in Chapter XIII containing Rule 97. Rule 97, it must be remembered, is also referred to in Rule 143. As far as Rule 126 which is also referred in Rule 143 is concerned, Rule 126 is a provision almost akin to Rule 15 which we have extracted. That is to say, it contemplates a procedure by which the party must apply to the Council after the expiry of 14 days of the submission of the application that the Secretary has failed to dispose of the application and thereafter, a deemed Permit is contemplated if the Council does not decide on his application within 30 days from the date of submission of the same in writing. Therefore, on a conspectus of the Rules, it would appear to us that in case of a building covered generally and also huts, the applicant will get the benefit of the deemed Permit only after moving the Council and waiting for the requisite period. But, in the case of mobile towers covered by Rule 141, the construction can be commenced, carried on and completed after the period of 30 days mentioned in Sub-rule (8) of Rule 141 as per rules and such work would be treated as duly Permitted, going by Rule 143.

4. However, u/s 391 of the Municipality Act, the Secretary shall by a written order, either grant or refuse such permission on an application u/s 387 within 30 days. The proviso to Section 391 contemplates that the period of 30 days shall not begin to run until a site has been approved u/s 390. Thereafter, Section 392 of the Municipality Act reads as follows:

392. Reference to Council where Secretary delays grant or refusal of approval or permission.-- (1) Where, within the period specified in Section 390 or Section 391, as the case may be, the Secretary has neither given nor refused his

approval of a building site, or his permission to execute any work, as the case may be, the Council shall be bound, on the written request of the applicant, to determine whether such approval or permission should be given or not.

(2) Where the Council does not, within one month from the date of receipt of such written request, determine whether such approval or permission should be given or not, such approval or permission shall be deemed to have been given, and the applicant may proceed to execute the work, but not so as to contravene any of the provisions of this Act or any rules or bye-laws made thereunder.

Thus, this is a provision in the parent enactment on which Rules 15 and 126 of the Building Rules are apparently patterned. There is no similar rule however, in respect of Rules 97 and 141. In view of Section 392 learned Counsel for the Cochin Corporation contended that Petitioners cannot claim the benefit of deemed permit relying on Rule 143. Accordingly, the learned Counsel for the Corporation argued that being a building Petitioners cannot claim the benefit of deemed permit on the basis of Rule 143 merely upon the lapse of 30 days time of filing of application before the Secretary. According to him, if no permit is issued within 30 days it may be open to the parties to seek appropriate relief. He would say that the Council may be moved u/s 392 of the Kerala Municipality Act, 1994 and it is only when there is no decision under Sub-section (2) by the Council within the time that the law speaks of permission being deemed to have been given or there being a deemed permit. Further more Section 406 of the Municipality Act reads as follows:

406. Demolition or alteration of building work unlawfully commenced, carried on or completed.--

(1) Where the Secretary is satisfied-

(i) that the construction, reconstruction or alteration of any building or digging of any well-

(a) has been commenced without obtaining the permission of the Secretary or in contravention of the decision of the Council; or

(b) is being carried on, or has been completed otherwise than in accordance with the plans or specifications on which such permission or decision was based; or

(c) is being carried on, or has been completed in breach of any of the provisions of this Act or any rule or bye-law or order made or issued thereunder or any direction or requisition lawfully given or made under this Act, such rule, bye-law or order; or

(ii) that any alteration required by any notice issued u/s 395 has not been duly made; or

(iii) that any alteration of or addition to any building or any other work made or done for any purpose in or upon any building has been commenced or is being carried on or has been completed in contravention of the provisions of Section

405.

Provided that the Secretary may, on realization of a compounding fees as may be fixed by the Government, regularize any constructions, reconstruction or alteration of any building or digging of any well, commenced, carried on or completed without getting a plan approved by the Secretary or in deviation of the approved plan, if such construction, reconstruction or alteration of the building or digging of the well does not contravene any of the provisions and specifications mentioned in this Act or the Building Rules made thereunder.

(4) Notwithstanding anything contained in Sub-section (2) or Sub-section (3), prosecution proceedings against the owner or the person for whom the work is done may be initiated.

This is a power to regularize on receipt of compounding fees vested with the Secretary which extends to cases where the construction is commenced without obtaining permission of the Secretary. Thus, the Act vests a statutory power with the Secretary to regularize, provided the construction does not contravene any of the provisions in the Act or the Building Rules. However, the rule maker has proceeded to enact in the third proviso to Rule 143 that even regularization is not necessary, even without a deemed Permit as contemplated u/s 392 of the Act in respect of a mobile tower inter alia. We have reposted the matters and we heard the learned Counsel for the parties on the issue.

5. Learned Counsel for the Petitioners would point out that in a Writ Petition seeking police protection it may not be open to this Court to go into the question whether Rule 143 is opposed to Section 406 or Section 392. Sri. Santhosh Mathew, learned Counsel for the Petitioners in two of these cases would place before us the decision in *State of U.P. and Others Vs. Neeraj Chaubey and Others*, . In the said decision the Apex Court held as follows:

9. The High Court had taken note of various judgments of this Court including *State of Maharashtra Vs. Narayan Shamrao Puranik and Others*, , *Inder Mani and Others Vs. Matheshwari Prasad and Others*, , *State of Rajasthan Vs. Prakash Chand and Others*, , *R. Rathinam Vs. State by DSP, District Crime Branch Madurai District, Madurai and Another*, , *Jasbir Singh Vs. State of Punjab*, and various judgments of the High Courts and came to the conclusion that the Chief Justice is the master of roster. The Chief Justice has full power, authority and jurisdiction in the matter of allocation of business of the High Court which flows not only from the provisions contained in Sub-section (3) of Section 51 of the States Reorganisation Act, 1956, but inheres in him in the very nature of things. The Chief Justice enjoys a special status and he alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or Full Bench. He has jurisdiction to decide which case will be heard by which Bench. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial work of the Court would cease by generation of

internal strife on account of hankering for a particular jurisdiction or a particular case. The Court held that a Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court only if the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from this procedure is permissible.

10. In case an application is filed and the Bench comes to the conclusion that it involves some issues relating to public interest, the Bench may not entertain it as a public interest litigation but the court has its option to convert it into a public interest litigation and ask the Registry to place it before a Bench which has jurisdiction to entertain the PIL as per the Rules, guidelines or by the roster fixed by the Chief Justice but the Bench cannot convert itself into a PIL and proceed with the matter itself.

Accordingly, he would attempt to persuade us not to decline the prayer for police protection on the ground of any question of ultra vires being detected. He would point out that under Rule 143 the law permits construction. Sri. Satheesan would also contend that the Court may not decline the relief with reference to Section 392 or Section 406 of the Kerala Municipality Act.

6. Sri. Mohamed Mustaque, learned Counsel for the Petitioners in most of these cases would contend that actually Rule 143 permits construction after the expiry of 30 days contemplated in Rule 141(8) inter alia. He would point out that u/s 406 in fact a person making the construction on the basis of expiry of 30 days under Rule 141(8) can be proceeded with under the provisions of the Municipality Act and all that is permitted is construction. He also contended that there is no challenge as such by anybody to the construction on the ground that it is violative of Section 406 or Section 392. He also adopts the contention that the Court may not consider the question on the basis of the conflict between Section 392 and Section 406 and the rule. He points out that the rules have been laid before the legislature which would have set right any excess by the rule maker. He would of course say that mobile tower may not be a building. Learned Counsel for the Petitioners would reiterate that construction is already over and in case there is any decision against the Petitioners it may operate in future. Learned Counsel for the Corporation would point out that there is no deemed permit which was the claim made by the Petitioners.

7. Of course, the learned Counsel for the Petitioners would contend that mobile tower may not be a building as such. This argument we have dealt with more elaborately in the batch of cases (W.P.(C) No. 14094/2010 and connected cases) Essar Telecom Infrastructure (P) Ltd. Vs. State of Kerala, .

Section 406 of the Municipality Act reads as under:

406. Demolition or alteration of building work unlawfully commenced, carried on or completed.-

(1) Where the Secretary is satisfied -

(i) that the construction, reconstruction or alteration of any building or digging of any well-

We may notice that Section 406 of the Act provides for power for invoking the said provision where construction, reconstruction or alteration of any building or digging of any well is done in the manner as provided therein. If the argument of the Petitioners is accepted that the mobile tower is not a building then there would be no provision at all to deal with any illegal construction of a mobile tower. Apart from the word "building" in Section 406 only well is used. Such an anomalous position whereunder the authorities are denuded of power to deal with the illegality in the construction of mobile tower is not to be inferred. In Section 406 the word even structure is not used. Certainly the word building is capable of taking in its embrace, a mobile tower. All this read together further reinforce us in the view that the word "building" would certainly take in a mobile tower also.

We may also note that even in Rule 143 there is no doubt separate reference to mobile towers after referring to the word "building" but structure is also separately referred to in Rule 143. This shows that the mobile tower is not a structure as contended. We see no reason to hold that mobile tower is not a building going by the nature of the construction and particularly the dimension of the construction and also more importantly the definition of the word "building" both in the Act and the Rules.

8. We notice that a learned Single Judge of this Court has proceeded to take the view that if there is no decision taken after 30 days under Rule 141 (8) there would be a deemed permit for constructing a mobile tower. We are of the view that it does not represent the correct position in law. A deemed permit as such is contemplated in Section 392 of the Act in respect of a building other than a hut and Section 401 in the case of a hut. The procedure is to apply, wait for the period mentioned and upon there being no decision taken to move the Council and it is only when the Council also does not take a decision during the stipulated time that the law provides for deemed permission or permit. This procedure is reflected in Rule 15 as also in Rule 126. Rule 141 (8) only provides that the Secretary is to issue a permit not later than 30 days if convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates. Thus, Rule 141(8) only prescribes the duty to issue a permit if the Secretary is convinced as contemplated in the provision. We cannot assume that upon expiry of 30 days the Secretary is to be treated as convinced of the boundaries and ownership of the plot, plans and drawings and genuineness of the certificates. Resultantly, irrespective of the Secretary being convinced or not as contemplated Rule 143 treats construction etc., of mobile tower "as duly permitted". No doubt, it is contended by Sri. Mohamed Mustaque that it is duly permitted provided that the construction is in accordance with the Rules. We must notice in this regard that in fact Section 392(2) provides that on the

strength of the deemed permission work can be executed but without contravening the Act and any Rules inter alia. More importantly, in the light of our reasoning there is no deemed permission only on the basis of expiry of 30 days under Rule 141 (8) and it is not open to the rule maker to provide for consequences of a deemed permission without following the procedure by which alone a deemed permission can be obtained. Hence, we are of the view that the Petitioners cannot contend that they are entitled to proceed on the basis of a deemed permit upon the mere expiry of 30 days from the date of submission of application under Rule 141. We must notice that the rule maker has treated cases falling under Rules 15 and 126 of the Building Rules on the one hand on par with the cases covered under Rules 97 and 141 oblivious of the fundamental difference between the two categories of cases and also the mandate of Section 392 of the Municipality Act.

9. We notice that u/s 406 of the Kerala Municipality Act there is a power on realisation of compounding fees to order regularization in case construction is commenced without permission. We also notice that u/s 406 of the Kerala Municipality Act which is the parent enactment the law provides for the making of provisional order directing demolition, in a case where the work was commenced without obtaining permission of the Secretary or is being carried on or completed otherwise than in accordance with the plans or specifications or is carried on or has been completed in breach of any of the provisions of the Act or any rule or bye-law made or issued thereunder inter alia.

10. We may notice that Sections 382 and Section 389 of the Kerala Municipality Act read as under:

382. Building site and construction or reconstruction of buildings.-- No piece of land shall be used as a site for the construction of a building and no building shall be constructed or reconstructed otherwise than in accordance with the provisions of this part and of any rules or bye-laws made under this act relating to the use of building sites or the construction or reconstruction of buildings.

389. Prohibition of commencement of work without permission.-- The construction or reconstruction of a building shall not be begun unless and until the Secretary has granted permission for the execution of the work.

11. Section 406 inter alia categorically declares that commencement of construction of any building without obtaining permission of the Secretary inter alia attracts the wrath of the section. If the Petitioners cannot claim the benefit of a deemed permit, then certainly Section 406 would be attracted. Likewise Clause "c" also refers to carrying on or completion of construction in breach of provisions of the Act inter alia providing foundation for proceeding u/s 406. Thus, if the Act would stand violated when construction or reconstruction takes place Section 406 stands attracted. In this context Section 382 and Section 389 which we have extracted assumes significance. Further, we fail to see when Section 389 prohibits construction without permission being obtained, how construction can

be carried on or completed without obtaining permission. Permission must be permission which is obtained as per the provisions of the Act and the Rules that is the actual order of permission or deemed permission as contemplated u/s 392. We are also not impressed by the argument of Sri. Mohamed Mustaque that rules have to be laid before the legislature and the legislature would consider whether the rule maker has exceeded the authority. It is settled law that the fact that rules have to be placed before the legislature will not clothe the rules with immunity from judicial scrutiny even though it may be a matter to be kept in mind. In view of the discussion which we have made we are of the view that this is a palpable case of conflict Section 387 of the Kerala Municipality Act read with Section 388 provides for obtaining site approval. We have already held that site approval is essential even in the case of mobile tower.

12. We are not impressed by the argument of the Petitioners based on the decision relied on by Sri. Santhosh Mathew in State of U.P. and Others Vs. Neeraj Chaubey and Others, . That was a case where the Apex Court reiterated that the Chief Justice is the master of roster and the Court took the view that the Bench may not entertain application but it may convert it into Public Interest Litigation and ask the Registry to place the matter before the Bench which has jurisdiction to entertain Public Interest Litigation as per rules. In this case we only considered the conspectus of legal provisions with reference to well established principles of law to come to a conclusion as to whether we should exercise our extra ordinary and discretionary jurisdiction in favour of the Petitioners. As far as the argument of Sri. Mohamed Mustaque that under Rule 143 it is open to the authorities to take action under Sub-section (4) of Section 406 we do not think that that by itself should persuade us to hold that the Petitioners are entitled to a deemed permit on the strength of the provisions contained in Rule 141(8) by itself or in conjunction with Rule 143. We are equally unimpressed by the contention taken by Sri. Mohamed Mustaque that what Rule 143 provides for is construction being duly permitted on the expiry of 30 days.

13. Section 392 applies to all buildings other than huts. Mobile tower is a building other than a hut. However, the rules do not prescribe the procedure to obtain a deemed permission which accords with Section 392 in respect of mobile towers. The Petitioners, of course have no case that they have invoked Section 392 and moved the Council either. The writ jurisdiction being discretionary and in the light of our understanding of the law, namely that merely because of the lapse of the time prescribed in Rule 141(8) of the Building Rules, there is no deemed permit and that the provisions contained in the third proviso to Rule 143, in so far as it relates to the case covered by Rule 141, appears to us to not square with the mandate of Sections 406 and 392 of the Municipality Act, we decline jurisdiction.

14. The question that remains is what is to be done in the facts of these cases when the construction has already been completed on the basis of interim orders. No doubt, in one of these cases there is no interim order. But, it is submitted by Sri. Santhosh Mathew that the construction is already over. In

another case of Sri. Santhosh Mathew in W.P.(C) No. 14313/2010 we notice that a Bench of this Court had even at the stage of admission granted interim order for police protection for carrying out works and even apparently for energisation of towers. In a few cases it has been specifically ordered that if the case of the Petitioners based on deemed permit is not found acceptable the towers have to be demolished. It is pointed out by Sri. Mohamed Mustaque that even if construction is made without permission there can be regularization.

15. We would think that in view of the questions which arose and the reasoning adopted by us which persuaded us not to give effect to Rule 143 under which the Petitioners apparently claim what they call deemed permit which also found favour with a Single Judge, we need not order demolition as such. Instead of we direct the Secretaries of the local authorities concerned to take proceedings against the Petitioners u/s 406(1) and it is for the authorities to take a decision as provided in law. If in any of these cases proceedings u/s 406(1) have already been commenced, they shall be continued in accordance with law. We declare that a party cannot claim the benefit of deemed permit for construction of mobile tower only on the basis of expiry of 30 days under Rule 141 (8). Petitioners/operators cannot energise the mobile towers unless it is found that the mobile tower is capable of being regularized in accordance with law and is actually regularized. We also make it clear that in the event of there being regularization it will not stand in the way of the authorities taking action in respect of any component parts as we have already held in the connected cases. Needless to say, the direction to take action u/s 406(1) will not preclude any other action which may be taken as per law.

16. We make it clear that in view of the fact that we have declined jurisdiction, we are not granting any order for police protection for operating the mobile tower in W.P.(C) No. 14313/2010.