

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.11.2017

Delivered on: 12-12-2017

Coram

The Honourable **Mr.Justice V.PARTHIBAN**

W.P. No.5065 of 2012

1. M/s.Bhari Infratel Ventures Ltd.,
(Previously Bharti Infratel Ltd. and earlier
Bharti Televentures Ltd.,)
represented by its Authorized Signatory
Mr.D.Harikrishnan

2. Mr.T.Krishnaraj .. Petitioners

Versus

The Commissioner,
Coimbatore Corporation,
Coimbatore District.

.. Respondent

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, to call for the records of the respondent in Demand Notice dated 31.01.2012, claiming a license fee of Rs.37,500/- for 2011-2012 for the business of Airtel Tower and on failure to pay the same, threatening further action and quash the said notice being in derogation of law.

For Petitioner : Mr.Omprakash, SC for
M/s.Ramalingam Associates

For Respondent : Mr.R.Sivakumar

ORDER

The present writ petition has filed, seeking for the following relief:

"To issue a Writ of Certiorari, to call for the records of the respondent in Demand Notice dated 31.01.2012, claiming a license fee of Rs.37,500/- for 2011-2012 for the business of Airtel Tower and on failure to pay the same, threatening further action and quash the said notice being in derogation of law."

2. The first petitioner is a licensed telecom infrastructure service provider and was a part of group company, called M/s.Bharti Airtel, which will provide telecom services in the brand name of "AIRTEL". The licensing authority in respect of providing telecom services is the Central Government and the power of grant of license is provided under the Indian Telegraph Act. As

regards the telecom service is concerned, the Central Government alone has exclusive jurisdiction for regulating the various activities of telecom services in the country.

3. In furtherance of their business, the first respondent had entered into an agreement with the second petitioner, who is the owner of the land and building situated at SF No.178, T.S.No.10/169, No.38/1, GKD Nagar, P.N.Palayam, Coimbatore-641 037 for putting up a telecom tower, which is otherwise known as 'Base Trans-receiver Station Tower' (BTS tower). A lease agreement was also entered into for the said purpose by the first petitioner with the second petitioner on 30.4.2006. According to the first petitioner, the land and building owned by the second petitioner was properly assessed to property tax by the respondent Corporation and the taxes have been paid regularly without any default. After entering into a lease agreement with the second petitioner, the first petitioner had erected a BTS tower atop the building located in the aforesaid property for providing telecom services to the neighbourhood.

4. The Government of Tamil Nadu also issued various instructions regulating such procedure and streamlining the process of putting up the infrastructure facility. In order to encourage the telecom services with the emerging global trends, the Government of Tamil Nadu had also issued various orders, granting exemption from the applicability of Municipal Building Rules.

5. Initially, the Government has issued G.O.Ms.No.2 dated 1.4.2002, granting permission to licensed telecom operators to install BTS tower on the roof top or on the ground of premises and buildings belonging to Government of Tamil Nadu on the basis of technical feasibility. Thereafter, another order was issued vide G.O.Ms.No.302 dated 30.1.1997, extending the facility to private buildings also. Further, another order in G.O.Ms.No.177, dated 17.12.2002 was issued, granting exemption of BTS tower constructed by the telecom companies from the provisions of Tamil Nadu District Municipal Building Rules, 1972 and Multi Storied and Public Building Rules, 1973. The operative portion of the said Government Order, is extracted hereunder:

"3. The Government after careful examination grant exemption to BTS Towers constructed by Telecom Companies, from the Tamil Nadu District Municipalities Building Rules 1972 and Multi-storyed and Public building Rules, 1973, subject to the conditions imposed in the G.O. and letter first and fourth read above. However, the exemption granted is subject to the height restrictions in heritage towns ordered in respect of the Madurai Corporation in G.O.(Ms.) No.164, MA & WS, dt. 16.6.1994 and in respect of other heritage towns in G.O.(Ms.)No.22 MA & WS dt.30.1.1997."

6. While matters stood thus, the respondent Corporation has issued a demand notice dated 31.1.2012, claiming license fee of Rs.37,500/- from the second petitioner for the year 2011-2012 purported to be under Sections 360 and 361 of the Coimbatore City Municipal Corporation Act, 1981 (in short, 'the Act'). This impugned demand notice is put to challenge in the present writ petition.

7. Shri Om Prakash, learned senior counsel appearing for the petitioner, at the outset would submit that the impugned demand notice by the respondent Corporation suffers from want of jurisdiction and the same is without authority of law. According to the learned senior counsel, no license is required in the first place from any local authority as the license issuing authority is only vested in the Central Government under the Indian Telegraph Act. In the absence of any power to issue license, the claim of license fee is without authority of law and therefore, the same is liable to be set aside.

8. Learned senior counsel would also draw the attention of this Court to Sections 360 and 361 of the Coimbatore City Municipal Corporation Act, which are extracted as under:

"360. Purposes for which places within the limits of the city may not be used without a licence.

(1) No place within the limits of the city shall be used for any of the purposes mentioned in Schedule IV without a license obtained from the commissioner and except in accordance with

the conditions specified therein.

Provided that no such licence shall be required for the use of any place for a lodging house as defined in the Tamil Nadu Public health Act, 939 (Tamil Nadu Act III of 1939), if the keeper thereof has been registered under that Act.

(2) The owner or occupier of every place for the use of which for any purpose a licence is required under sub-section (1) shall apply to the Commissioner for such licence not less than forty-five and not more than ninety days before the place is used, for such purpose.

(3) Every application for a licence for the use of any place for the purpose of storing or selling explosives, timber or other combustible materials shall contain a statement showing the boundaries and measurement of such place.

(4) (a) On receipt of any such application as is referred to in sub-section (2), the Commissioner may subject to the provisions of clauses (b) and (c), grant the licence specifying therein such conditions as he may think fit to impose in accordance with the rules, if any, made by the Government in this behalf, or refuse to grant the same.

(b) Before granting or refusing to grant a licence under clause (a), the commissioner shall cause a full and complete investigation to be made in the prescribed manner in respect of the application and shall have due regard to

(i) the suitability of the place in respect of which the licence is applied for;

(ii) the possibility of any danger to life or health or property or the likelihood of any nuisance being created either by reason of the manner in which or by the conditions under which the place is proposed to be used or by the nature of such use; (iii) the provisions of other Acts, if any, and the rules and by-laws made thereunder, regulating the use of places for the purpose for which a licence is applied for under this Act; and

iv) Such other matters as may be prescribed.

"361. Application to be made for construction, establishment or installation of factory, workshop or work-place in which steam or other power is to be employed.

(1) Every person intending- Application to be made for

(a) to construct or establish any factory,

work location, shop or work-place in which it is proposed to employ establishment steam-power, water-power or other mechanical power or installation or electric power, or

(b) to construct any building, hut or structure which is intended to be used for any of the purposes or other mentioned in Schedule IV, or

(c) to install in any place any machinery or manufacturing plant driven by steam, water, electric or other power as aforesaid, not being machinery or manufacturing plant exempted by rules, shall before beginning such construction, establishment or installation make an application in writing to the - commissioner for permission to undertake the intended work.

(2) The application in respect of matters specified in clauses (a) and (c) of sub-section (I) shall specify the maximum number of workers proposed to be simultaneously employed at any time in the factory, workshop, work-place or premises and shall be accompanied by-

(a) a plan of the factory, workshop, work-place or premises prepared in such manner as may be prescribed by rules made in this behalf by the Government, and

(b) such particulars as to the power, machinery' ' plant or premises as the council may require by by-laws-. made in this behalf."

9. According to the learned senior counsel, intallation of telecom tower is not included in any of the activities as mentioned in schedule IV under Section 36 of the Act and therefore, the demand notice invoking such provision, cannot be countenanced in law. He would also draw the attention of this Court to the aforementioned Government Orders, namely, G.O.Ms.Nos.2 dated 1.4.2002; 22 dated 30.01.1997, 302 dated 12.12.2002 and 177 dated 17.12.2002, in and by which, the telecom companies were permitted to install BTS towers and the application of Municipal laws/rules is also exempted for such activity. Even otherwise, he would contend that the local authority, namely, the respondent Corporation cannot levy any licence fee on the activities of the petitioner without any source of power. Therefore, the impugned action, according to the learned counsel, is colourable exercise of power and the same is liable to be interfered with.

10. Upon notice, Shri R.Sivakumar, learned counsel entered appearance for the respondent Corporation and filed a detailed counter affidavit.

11. According to the learned counsel for the respondent Corporation, the Corporation is empowered to levy the property tax under Section 121 of the Act. He would also submit that under Section 360 of the Act, no place within the limits of the city shall be used for any of the purposes mentioned in Schedule IV without the license obtained from the Commissioner. He would also draw the attention of this Court to Section 361 of the Act and submit that sub para (a) of the said section would be applicable to the case on hand. According to him, the work place in which it is proposed to employ steam-power, water-power, etc. as expressed in sub para (a) of Section 361 would be directly applicable to the case of the petitioner and therefore, levy of license fee cannot be faulted with and cannot be said to be without jurisdiction.

12. According to the learned counsel, the demand of license fee was preceded by a proper resolution by the Municipal Corporation on 12.9.2011 and therefore, the impugned action cannot be said to be without any authority of law.

13. At this, the learned senior counsel for the petitioner would submit that providing telecom services cannot come within the business as envisaged in Sub para (a) of Section 361 for any standards and therefore, such interpretation by the learned counsel for the Corporation is misconceived and preposterous. He would further rely on the letter dated 26.3.2009 addressed by the Energy Department, Government of Tamil Nadu to the Tamil Nadu Electricity Board, in which, it is clearly stated that the Municipal Administration and Water Supply Department and Rural Development and Panchayat Raj Departments have instructed to issue necessary instructions to the Corporation/Municipalities/Local bodies not to insist upon building permission from the cell phone companies for erecting of BTS towers in view of G.Os.No.177 dated 17.12.2002 and G.O.Ms.No.302 dated 12.12.2002. He would further draw the

attention of this Court to a recent order dated 23.3.2017 passed by a learned single Judge of this Court in W.P.(MD) No.17 of 2015, wherein, similar issue came up for consideration and the learned single Judge has held as under in para 3 and 4:

"3. The impugned notice refers to Section 277 of the Dindigul Municipal Corporation Act which deals with construction or reconstruction of a building. The learned Senior Counsel appearing for the Petitioner would contend that the said provision cannot be invoked in respect of tower which is put up by the Petitioner. The learned Senior Counsel would also draw the attention of this Court to G.O.Ms.No.177, dated 17.2.2002 wherein, these towers have been exempted from the Tamil Nadu District Municipalities Building Rules 1972 and Multi-storeyed and Public Building Rules, 1973 and by G.O.Ms.No.302, dated 12.12.2002, the Government has also directed that the installation of Base Transfer Receiver Station Towers shall be permitted in all the land use zones in the master plan. The learned Senior Counsel would also draw my attention to the letter No.5742/C3/2008-G, dated 26.3.2009 by the Secretary to Government, Energy Department, Chennai addressed to the Principal

Secretary and Chairman, Tamil Nadu Electricity Board, Chennai-2, wherein, it is very clearly stated that all Municipalities and local bodies have been instructed not to insist upon building permission from the cell phone companies for erection of Base Trans Receiver Station Towers, in view of the orders issued in G.O.Ms.No.177. Apart from the above, Secretary to the Department of Telecommunications by D.O.No.17-2/2013-S-1, dated 8.8.2013 made it clear that necessary guidelines should be framed by the State Governments for issue of clearance for installation of mobile towers. In the said guidelines, it has been made clear that the telecom towers have been given infrastructure status by the Government of India and all benefits as applicable to infrastructure Industry should be extended to the construction of towers. It is also stated that considering the essentiality of service, sealing of BTS towers/disconnection of electricity may not be resorted to without the consent of the respective TERM Cell of DoT in respect of the EMF related issues. The said guidelines also require State Governments to frame guidelines fixing a nominal administrative fee and provide for a single window clearance

for construction of such towers. It is seen from the letter, dated 2.6.2014 from the Deputy Secretary to the Government, Municipal Administration Department to the Principal Secretary and Commissioner, Corporation of Chennai, Commissioner of Municipal Administration, Chennai and Director General of Panchayats that all efforts are taken to frame proper guidelines and comments have been requested from the authorities and that it is admitted case that as on date no such guideline has been framed by the Government. Therefore the action of the Municipality in insisting on licence/permission for construction of tower is not in accordance with the existing law as well as the Government orders issued referred to supra.

"4. Hence the Writ Petition is allowed and the impugned proceedings, dated 18.12.2014 are quashed. However, it is open to the respondent to take appropriate action after the required guidelines are framed by the Government of Tamil Nadu as directed by the Central Government in letter, dated 8.8.2013. Consequently, connected Miscellaneous Petitions are closed. No costs."

14. Therefore, the learned senior counsel would submit in all fours that the writ petition is entitled to be succeeded.

15. This Court has given its anxious consideration to the rival submissions of the learned counsel for the parties after perusing the entire materials and pleadings placed on record.

16. This Court finds that there is merit in the contention put forth by the learned senior counsel for the petitioner that it is the Central Government alone is competent authority to issue license for providing telecom services under the Indian Telegraph Act. In the absence of any delegation of powers to the State Government or any local authorities, the impugned action by the respondent Corporation in claiming license fee is without the authority of law.

17. Moreover, the Government itself had thought it fit to encourage the telecom services in keeping with the global trends, has provided blanket permission to put up BTS tower both in private and government buildings in the aforementioned Government Orders and also granted exemption from application

of Municipal rules, etc. in G.O.Ms.No.177 dated 17.12.2002. That being the case, this Court does not appreciate as to on what legal basis, the present license fee has been demanded from the petitioner by the respondent Corporation.

18. The interpretation of the learned counsel for the respondent Corporation about the applicability of Sub para (a) of Section 361 of the Act does not cut much ice with this Court for the simply reason that the telecom service is not one of the purposes mentioned in Schedule IV of Section 360 of the Act. It is the main provision under which the license fee is being levied, the telecom service cannot be brought within the mischief above said section by any stretch of legal standards. Even otherwise, when no power is vested in the State Government or the local authority, such power cannot be read into collateral provision of the Act.

19. As rightly pointed out by the learned senior counsel, similar issue had come up for consideration before this Court and the learned single Judge of this Court in his order, has clearly

held that no permission is required from the local authority and as such, allowed the similar challenge in the aforesaid writ petition.

20. In the absence of any clinching material as to the legal basis of the claim, the impugned demand notice has to be interfered with as being illegal and void.

21. For the foregoing reasons, this Court, in acceptance of the contentions put forth by the learned senior counsel for the petitioners, holds that the impugned action by the respondent Corporation is unsustainable in law. Accordingly, the impugned demand notice dated 31.01.2012 issued by the respondent Corporation, is set aside. The Writ Petition is allowed. No costs.

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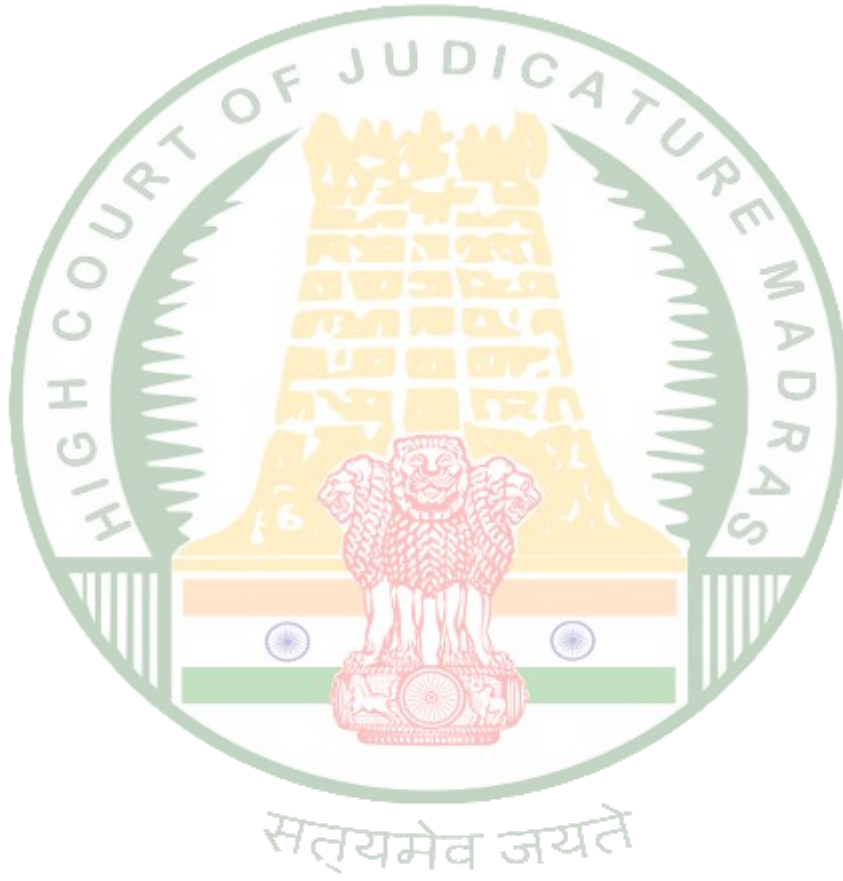
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Index: Yes/No

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To

The Commissioner,
Coimbatore Corporation,
Coimbatore District.



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V.PARTHIBAN, J.

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Pre delivery Order in
W.P.No.5065 of 2012

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