

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.09.2020

Delivered on: 29.09.2020

CORAM

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

WP.No.10834 of 2020
and
WMP Nos.13152 & 13153 of 2020

Indus Towers Limited
Rep.by its Authorized Signatory,
Mr.S.Prasanna,
No.5, ESPEE IT Park,
5th Floor, Jawaharlal Nehru Road,
Ekkatuthangal,
Chennai 600 097.

... Petitioner

.vs.

The District Collector/Panchayat Inspector,
Cuddalore District,
Cuddalore.

...Respondent

Prayer :- Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus, calling for the records of the respondent's order dated 31.08.2019 in Na.Ka.No.A3/003/2019, served on the petitioner in March 2020 and quash the same as illegal and direct the respondent to act according to the deemed permission available to the petitioner under the Right of Way Rules, 2016, for the installation of their mobile phone tower in the premises being land measuring about 2000 sq.ft at No.1-A, Gopal Nagar, Pathirikuppam, Cuddalore - 607002, situated in Old S.F.No.37/1, in R.S.No.41/9, Pathirikuppam, Cuddalore District, in accordance with the petitioner's representation dated 09.09.2019.

For Petitioner: Mr.R.Yashod Varadhan
Senior Counsel
for Mr.Anil Sandeep

For Respondent: Mrs.Narmadha Sampath
Additional Advocate General
Assd by:
Mr.E.Balamurugan
Special Government Pleader

ORDER

The present writ petition has been filed challenging the order passed by the respondent dated 31.08.2019 and for a consequential direction to the respondent to grant permission to the petitioner for the installation of their Mobile Phone Tower in the subject property.

2.The case of the petitioner is that they are engaged in the business of establishing and maintaining Telecommunication Infrastructure and assets. They are carrying on their operations throughout India. The petitioner entered into a lease agreement dated 06.03.2019, with one Tmt.J.Chithra for the purpose of taking her property on lease and establishing a Mobile Phone Tower. The land owner is said to have given the No Objection Certificate for putting up the Mobile Phone Tower and to carry on with the other allied works.

3.The petitioner thereafter applied for the clearance/acceptance before the concerned authority belonging to the Central Government and the Certificate was issued by the Department of Telecommunications on 11.03.2019, giving clearance for carrying on with the project.

4.The petitioner sought for permission from the respondent in accordance with G.O.Ms.No.2, dated 01.04.2002 and Right of Way Rules, 2016. In spite of the receipt of the application, no action was taken. According to the petitioner, the application must be processed within a period of three weeks and in absence of the same, it is deemed to have been granted. Therefore, the petitioner started commencing the preliminary work before the erection of the tower. At this point of time, the respondent issued the impugned order dated 31.08.2019, directing the petitioner not to carry on with any work till the approval is granted by the respondent. Aggrieved by the same, the present writ petition has been filed before this Court.

5.Mr.Yasodh Varadhan, learned Senior Counsel appearing on behalf of the petitioner submitted that G.O.Ms.No.2, dated 01.04.2002, specifically provides for licensed Telecom Company to be granted permission to install towers, equipment room etc., and exemption is also granted with respect to the setback rules of Chennai Metropolitan Development Authority and also the rules under the Town and Country Planning Act. The learned Senior Counsel further submitted that the Government of Tamil Nadu, issued G.O.Ms.No.302, dated 12.12.2002, further clarifying that

such erection of Towers can be installed even on private land/buildings. The learned Senior Counsel further submitted that the Division Bench of this Court after taking into consideration, the relevant rules and notifications, in W.P.No.7544/2017 etc., dated 22.08.2019, has specifically given a direction to the effect that the application submitted before the District Collector must be processed and orders must be passed within a period of three weeks. The learned Senior Counsel submitted that this order was again reiterated by a Division Bench of this Court in WP(MD).Nos.15974 etc., of 2019 by order dated 29.08.2019. The learned Senior Counsel by bringing to the notice of this Court all the relevant rules and also the earlier orders passed by this Court, submitted that the respondent did not take any steps to process the application submitted by the petitioner on 09.09.2019 and did not comply with the directions issued by this Court and thereby the petitioner has been prevented from erecting the Mobile Phone Tower for more than an year inspite of getting the permission of the Central Government.

6.The respondent has filed a counter affidavit and the relevant portions are extracted hereunder:

4. Regarding the history of the case it is submitted that, a lease agreement was entered between the petitioner and the landlord Chitra for establishing mobile phone tower and installation of BTS Room at old S.No.37/1 in R.S.No41/9 Pathirikuppam village, Cuddalore. While the petitioner was in the process of installation of Tower the resident of Co-operative Nagar, Pathirikuppam, Cuddalore gave representation to the District Collector, Cuddalore in the Grievence day, stating that the mobile phone tower is installed without any proper permission and the area where the mobile Phone Tower is installed is a residential area largely populated and the tower is installed in a proximity to the primary health center, two schools and worshipping area. Further, the work is done obstructing the path to the graveyard & Traffic in the area. The Residents were repeatedly making representations to the District Collector requesting to stop the installation. The District Collector, Cuddalore therefore considering the repeated representations of the residents and in view of the directions conferred in GO(Ms) No.I, IT, (B4) dated:21.0.2018 & GO (MS)No.2 IT dated:01.04.2002 the District Collector has directed to stop the installation process vide Doc Proceedings No.A3/003/2019 dated : 31.08.2019.

5. In this regard, it is submitted that the state Government has issued various Government Orders governing the guidelines for setting up of BTS Room and installation of Mobile Towers. Initially the Government have issued G.O.Ms.No.2 I.T dated 1.04.2002 regarding installation of BTS Towers. Under said G.O, Government have accorded permission to any licenced telecom company which is committed to the cause of Government of Tamil Nadu to install its Base stations consisting of Tower, equipment room & Generator Room on Roof Top or on the ground of premises & buildings belonging to Government of Tamil Nadu subject to the availability & technical feasibility on a non exclusive basis and also in the said G.O. it is clearly stated that the District Collectors can accord permission for installing towers, equipment & generator etc on case to case basis in consultation with District officers concerned. As the said G.O. was applicable only to public buildings, the Government Vide G.O.Ms.No.302 Housing & Urban Development (UD4.2) Dept dt.12.02.2012 accorded permission for BTS to be installed in Private Land / buildings.

6. Further the Government of Tamil Nadu have issued notification in G.O.Ms.No 1 IT(B4) Dept, dt.21.02.2018 for the procedure for grant of Right of Way (ROW) Permission for laying optical Fibre Cables & installation of cell phone towers. The above G.O Reads as Follows

"2. In the Government Order 2nd read above and in the Government letter 3rd read above, guidelines have been issued to telecom companies for installation of Base Stations consisting of Tower, Equipment room and Generator room, on roof top or on the ground of premises and buildings belonging to Government of Tamil Nadu/Quasi Governments/Public Sector Undertakings /Local Bodies/ Private Lands and buildings subject to availability and technical feasibility on a non-exclusive basis subject to certain terms and conditions. As per clause 4(i) of the Government Order 2nd read above. permission for installing towers equipment and generator etc., on case to case basis will be issued by the District Collectors concerned in consultation with the district offices concerned.

5. The Government, after careful examination, have decided to implement the Indian telegraph Right of Way Rules, 2016, notified by Government of India, in the Gazette Notification No. GSR 1070 (E) dated 15.11.2016, in the State of Tamil Nadu.

The Government further direct that:-

- 1.The District Collectors, in respect of all Districts and the Commissioner for Greater Chennai Corporation in respect of Chennai, be designated as the Nodal Officers for the respective jurisdictions and authorized to issue Right of Way (RoW) permissions for Overground Telecom infrastructure (Towers) and Underground Telecom Infrastructure (OFC) in respect of all areas in the Districts (including Highways, Public Works Department, Forest etc.,) under the provisions of Indian Telegraph Right of Way Rules .2016"

A Perusal of G.O.Ms.No.2 Information Technology Department, dated:12.02.2001, G.O.Ms.No.302 dt. 12.02.2012 & G.O.Ms.No 1 I.T (B4) dt.21.02.2018 makes it clear that installation of towers, equipment and generator on case to case basis will be issued by the D.C subject to technical feasibility, either in public / Private lands.

7.Mrs.Narmadha Sampath, learned Additional Advocate General appearing on behalf of the respondent submitted that the impugned order has been passed by the respondent after carefully considering the objections raised by the general public. It was further submitted that the petitioner was carrying on with the installation works even without getting the permission from the respondent. The learned Additional Advocate General by drawing the attention of this Court to G.O.Ms.No.1, dated 21.02.2018, submitted that the said G.O., will also apply in the present case and the respondent is entitled to consider the application only on a case to case basis and there is no question of deemed permission. The learned Additional Advocate General concluded her arguments by drawing the attention of this Court about the various objections stated in para 4 of the counter affidavit and submitted that the respondent will process the application submitted by the petitioner after taking into consideration all aspects and will take a decision in accordance with law.

8.This Court has carefully considered the submissions made on either side and the materials available on record.

9.The narration of the facts stated supra makes it very clear that the petitioner has already entered into a lease agreement with the owner of the property and has also obtained an NOC to erect the Mobile Phone Tower. The Department of Telecommunication, Government of India, has also granted SACFA [Standing Advisory Committee on Radio Frequency Allocation] Certificate authorising the petitioner to put up the Tower in the subject property. This certificate is granted after taking into consideration various parameters that are fixed by the

Department and after satisfying themselves that the site and the location is feasible for the erection of the Mobile Tower.

10.G.O.Ms.No.2, dated 01.04.2002 and G.O.Ms.No.302 dated 12.12.2002, also makes it clear that Telecom Companies can instal Towers both in the properties belonging to the Government as well as the properties belonging to the private individuals. Exemption has also been given for erection of such Towers from the various development rules and such Towers can be permitted to be erected in all the land use Zones in the master plan.

11.The Secretary to Government through letter dated 26.03.2009, has intimated the Collectors of all Districts that the concerned authorities should not insist for any building permission from the Telecom Companies for the purpose of erecting Mobile Phone Tower.

12.The Division Bench of this Court in WP(MD).Nos.15974 etc., of 2019, has dealt with the entire issue in detail and has also taken into consideration the earlier order passed by another Division Bench. The relevant portions in the order is extracted hereunder:

13.14.However, the State Level Telecom Committee and District Level Telecom Committee as recommended under the guidelines to address the public grievances relating to the installation of towers and issues relating to telecom infrastructures, are not yet constituted by the Government of Tamil Nadu.

13.15.The Indian Telegraph Right of Way Rules, 2016 was notified by the Government of India on 15.11.2016 to regulate the underground telegraph infrastructure optical fiber and overhead telegraph infrastructure (mobile towers) under / upon any immovable property in or under the control or management of any appropriate authority.

13.16.The Government of Tamil Nadu, vide G.O.Ms.No.1, Information Technology (B4) Department, dated 21.02.2018, implemented the Indian Telegraph Right of Way Rules, 2016, in the state of Tamil Nadu and while implementing the said rules, it has specifically mentioned that detailed guidelines will be issued by the Information Technology Department for the successful implementation of Indian Telegraph Right of Way Rules, 2016. But no such guidelines have been framed so far.

13.17.Rule 9 of Indian Telegraph Right of Way Rules, 2016 deals with the application by a

licensee for the purpose of establishing overground telegraph infrastructure and Rule 10 deals with the grant of permission by the appropriate authority. The District Collectors in respect of all Districts and the Commissioner for Greater Chennai Corporation in respect of Chennai, are designated as the Nodal Officers for the respective jurisdictions and authorised to issue Right of Way (RoW) permissions for Overground Telecom Infrastructure (Towers) and Underground Telecom Infrastructure (OFC) in respect of all areas in the Districts (including Highways, Public Works Department, Forest etc.,) under the provisions of Indian Telegraph Right of Way Rules, 2016. The ELCOT is designated as the nodal agency for the purposes of the Indian Telegraph Right of Way Rules, 2016 and to develop an electronic application process, as required under sub rule (2) of rule (4) of the said Rules and the Principal Secretary to Government, Information Technology Department is nominated as the Dispute Resolution Officer. It is also made clear that the existing guidelines as per G.O(Ms)No.2, Information Technology Department dated 1.4.2002, for installation of Overground Telecom Infrastructure (Towers) in Private Buildings, be continued as it was not covered by the Indian Telegraph Right of Way Rules, 2016.

13.18.A Division Bench of this Court in the case of S.P.Loganathan and others Vs.The Secretary to the Government, Department of Town and Country Planning, Chennai - 600 009 Nos.7544 of 2017 and 15144 of 2019] by order dated 22.08.2019, has held as follows:

"18. We are afraid that the contention of Mr.Om Prakash can be accepted. Clause (e) of paragraph 5 of G.O.Ms.1, Information Technology (B 4) Department, dated 21/12/2018, would show that the existence guidelines as per G.O.Ms.No.2 Information Technology Department, dated 1/4/2002, for installation of Overground Telecom Infrastructure (Towers) in Private Buildings will be continued to apply, since they are not covered by the Indian Telegraphic Right of Way Rules, 2016.

19. Perusal of Clause 4(e) (supra) would state that all the conditions in G.O.Ms.No.2

Information Technology Department, dated 1/4/2002, which has been extended to mobile towers to be erected on private buildings still occupies the field and holds till date.

20. In view of the above, it cannot be said that till the guidelines are framed, no permission is required. Similar issue regarding the very same respondent arose before a Hon'ble Division Bench of this Court in W.P.No.21979 and 14877 of 2017, Indus Towers Limited and another & 1 Vs. The Secretary to the Government, Municipal Administration Department, Chennai and two others), wherein the learned Division Bench has observed as under:-

"12. The sum and substance of the case is that the petitioners in W.P.No.21979 of 2017 like to have the Base Trans Receiver Station Towers in a private land, for which, whether the planning approval is required in terms of the provisions of the Tamil Nadu District Municipalities Building Rules and Multi-storey and Public Building Rules. But for G.O.Ms.No.2, Information Technology Department, dated 1/4/2002, G.O.Ms.No.302, Housing and Urban Development Department, dated 12/2/2002 and G.O.Ms.No.177, Municipal Administration and Water Supply Department, dated 17/12/2002, the exemption has been granted with regard to the Base Trans Receiver Station Tower from the aforesaid Act/Rules. The petitioners get their right only based on the said G.O.Ms.No.177, dated 17/12/2002. On a reading of paragraph 3 of the said G.O.Ms.No.177, it would make it clear that the Government has granted exemption to BTS Towers constructed by Telecom Companies from the Tamil Nadu District Municipalities Building Rules and the Multi-Storeyed and Public Building Rules, subject to the conditions imposed in the said G.O.Ms.No.2 and the Government's letter dated 18/9/2002, which means that the conditions mentioned in G.O.Ms.No.2 have been bodily incorporated into G.O.Ms.No.177. Unless the petitioners satisfy/fulfil the conditions laid down in the said G.O.Ms.No. 2, the petitioners cannot have a right to have the cell phone towers - Base Trans Receiver Station Towers.

13. It is true that there is no need for any building plan or permission from the authorities. What is required as per the said G.Os, is that an application has got to be obtained. A ready of G.O.Ms.No.2 makes it clear that permission may be granted initially for a period of ten years and the word "permission" would mean that there shall be an application and that the authorities will have to scrutinise the papers and permit the person to operate the cell phone towers in a particular place.

14. A reading of G.O.Ms.No.177 in isolation without reference to G.O.Ms.No.2, would not be correct. No prejudice is going to be caused to the petitioners, if all the particulars/documents that are required by the authorities are produced. There are Advisory Guidelines for the State Government framed by the DOT (Department of Telecommunication) for issuance of Clearance Certificate for the purpose of installing Mobile Towers with effect from 1/8/2013, wherein it is stated that detailed scrutiny has got to be done including structural stability, etc. As the cell phone towers are going to be used for the purpose of making the citizens to use the cell phones, it is mandatory on the part of the petitioners in W.P.No.21979 of 2017 to seek prior permission from the authorities concerned. Without the permission from them, the petitioners cannot be permitted to operated the cell phone towers from the Base Trans Receiver Station Towers. However, it is mandatory that even before the installation, such permission has got to be granted and taking note of the present case that the installation has already commenced, the necessary papers along with the request may be made to the authorities and the said authorities will have to consider the request of the petitioners in W.P.No.21979 of 2017 in terms of G.O.Ms.No.2. It will not preclude the authorities from looking into the Advisory Guidelines of the DOT for the purpose of granting the relief sought for by the petitioners. It is open for the petitioners in W.P.No.21979 of 2017 to make an application to the authorities within a period of one month from the date of receipt of a copy of this order, enclosing all the necessary documents.

When once such application is received, the authorities shall hear the petitioners in W.P.No.21979 of 2017 and also the petitioner in W.P.No.14877 of 2017 and others who are interested in the matter, including the complainant and pass appropriate orders within a period of one month from the date of receipt of such application from the petitioners. It is needless to mention that the observations touching upon the merits of the issue in question, are only for the purpose of disposal of these writ petitions and the petitioners and others are entitled to put forth their factual and legal submissions before the authorities, who shall consider the request of the petitioners in accordance with the statutory provisions/Rules/guidelines, if any."

21. The said judgment has come prior to G.O.Ms.No.1 dated 21/2/2018 which makes the position very clear. In view of the above, we hold that general permission to any licensed telecom company and erect towers can be granted subject to the terms and conditions, laid down in G.O.Ms.No.2 dated 01.04.2002, passed by the Information Technology Department.

22. Keeping in mind the statement of Mr.Om Prakash, learned Senior counsel that his clients have approached the Officers concerned and they have not processed the request further, we direct Indus Towers Limited, Chennai, sixth respondent in W.P.No.15144 of 2017 and tenth respondent in W.P.No.7544 of 2017, to make a fresh application, in terms of G.O.Ms.No.2, Information Technology Department, dated 1/4/2002, for erection of towers (even if they are already installed), within a period of three weeks from the date of receipt of a copy of this order. On receipt of the same, respondent Nos.1 to 4 in W.P.No. 15144 of 2017 are directed to consider the application and take a decision in accordance with law, within a period of six weeks, thereafter.

23. In those areas where Mobile Towers have been erected without following the G.O.Ms.No.2, Information Technology Department, dated 1/4/2002, the Collectors are directed to issue notices to the operators directing them to make applications for erection of the Mobile Towers, within one week from the date of receipt of this

order and on the receipt of the application, the District Collectors shall pass orders on merits in accordance with rules, but not later than three weeks and issue directions in accordance with the decision taken."

13.19. In view of the above Government Order and the above cited decisions rendered by this Court, the private respondents / service providers have to obtain permission from the District Collectors concerned as per G.O.Ms.No.2 Information Technology Department, dated 01.04.2002. Issue No.2 is answered accordingly.

13. In the above order, this Court has categorically held that there is no scientific proof to confirm that there is health hazard from exposure to the low level electric magnetic field from the Mobile Phone Tower. This Court after taking into consideration all the relevant Government orders and rules also came to a conclusion that permission must be obtained from the District Collectors as per G.O.Ms.No.2, dated 01.04.2002, before carrying on with the work of erection of Towers.

14. This Court had taken into consideration the provisions of the Indian Telegraph Right of Way Rules, 2016 and held that the existing guidelines as per G.O.Ms.No.2, dated 01.04.2002, for installation of Towers in private properties, will be continued since it was not covered by the above said rules.

15. In today's scenario, the whole world is functioning through Mobile Phones and Mobile Phones have got the status of necessity for every individual. That is the reason why the Department of Telecommunication laid emphasis for fast clearance of all Telecom Infrastructure Operations. Unfortunately in this case, even though the application was submitted by the petitioner on 09.09.2019, the same was not processed and even in the counter affidavit there is absolutely no indication as to what happened to the application submitted by the petitioner. The counter affidavit is completely silent about it.

16. Paragraph 4 in the counter affidavit gives some indication as to why the respondent was keeping the application pending. There seems to have been some objection given by the residents of the locality. Except one of the objection, all the other objections have been raised more out of apprehension. On the one hand, everyone is seeking for a proper network connection to operate their Mobile Phones and on the other hand, they are objecting for the Erection of Towers on mere apprehensions and fears which do not have a scientific backing. That has been repeatedly made clear by this Court. The only objection that may require consideration is with regard to obstruction in the path leading to the graveyard and other

traffic obstructions. The tower is going to be erected inside a private land into which the general public cannot have access. Therefore, if during the course of erecting the Tower, some safeguards will have to be taken to ensure that it does not affect the free flow of traffic or movement of the general public in the public road, the respondent can always himself conditions while granting the permission to the petitioner. That is not a ground to keep the application pending endlessly without taking a decision. In cases of this nature, speed is the essence since usage of Mobile Phones has become a lifeline for the citizens.

17. In view of the above discussion, there shall be a direction to the respondent to process the application submitted by the petitioner on 09.09.2019, for erection of the Mobile Phone Tower and grant sanction/permission, if the petitioner has obtained all the other necessary permissions, by imposing reasonable conditions to ensure that the free flow of traffic and movement of general public is not in any way affected while carrying on with the work. This process shall be completed within a period of four weeks from the date of receipt of copy of this order. The petitioner shall carry on with the work only after the sanction/permission is granted by the respondent.

18. This writ petition is disposed of with the above directions. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar
//True Copy//

Sub Assistant Registrar

KP
To
The District Collector/Panchayat Inspector,
Cuddalore District,
Cuddalore.

+1 cc to Mr. Anil Sandeep, Advocate Sr.No. 31834
+1 cc to The Government Pleader, Sr.No. 31709

WP.No.10834 of 2020

KS (CO)

RMP (16/10/2020)