

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4070 of 2008
With
SPECIAL CIVIL APPLICATION No. 4509 of 2008
With
SPECIAL CIVIL APPLICATION No. 9251 of 2008
With
SPECIAL CIVIL APPLICATION No. 9252 of 2008
With
SPECIAL CIVIL APPLICATION No. 9253 of 2008
With
SPECIAL CIVIL APPLICATION No. 9254 of 2008
With
SPECIAL CIVIL APPLICATION No. 12552 of 2008

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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BHARAT SANCHAR NIGAM LIMITED - Petitioner(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR GAURANG H BHATT for Petitioner in SCA Nos. 4070 & 4509 of 2008
 MS PATEL for Petitioner in SCA Nos. 9251, 9252, 9253 9254 and 12552 of 2008
 MR DN VAKIL for H.L. PATEL ADVOCATES For Respondent No. 2 in SCA No. 4509 of 2008
 MR HM PARIKH & MR RH PARIKH for Respondent No. 2 in SCA No. 9254 of 2008
 MR YATIN SONI for Respondent No. 2 in SCA No. 9253 of 2008

MR SUNIT S SHAH, GP for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 1,
MR ASHISH M DAGLI for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 16/12/2008

COMMON ORAL JUDGMENT

- 1.As in all the petitions common questions are to be considered, they are considered by this common order.
- 2.In all the petitions principal challenge made by the petitioners is for challenging legality and validity of the resolution of the State Government dated 4.5.2007, whereby the State Government has formed a uniform policy for charging of restoration charge, yearly rent, security deposit etc., for the various classes of the municipality/corporation in cases where licensee company under the Indian Telegraph Act, 1885 (hereinafter referred to as the 'Act) are required lay down cables for the purpose of providing services or for their connection of the lines etc. As the Municipality/Municipal Corporation in the present case have also issued

notices for recovery of the charges for such purpose by giving effect to the policy of the State Government, such consequential order issued by the respective Municipalities are also challenged in the present petitions. It may be recorded that in SCA No. 4070 of 2008, the additional challenge is to the decision of the respective Municipality/Municipal Corporation to recover charges for installation of Mobile Tower in a private land or land owned by the petitioner company itself/Central Government.

3. Heard Mr. Bhatt and Ms. Patel learned Counsel appearing for the petitioners in the respective petitions, Mr DN Vakil for H.L. Patel Advocates learned Counsel appearing for the Respondent No. 2 in SCA No. 4509 of 2008, Mr. Soni learned Counsel appearing for the respondent No. 2 in SCA No. 9253 of 2008, Mr. HM Parikh & Mr RH Parikh learned Counsel appearing for the Respondent No. 2 in SCA No. 9254 of 2008 and Mr. Sunit S Shah learned GP for the State Government in all petitions.

4. Upon hearing learned advocates appearing for

both the sides, it appears that the challenge can be broadly classified into two categories, one is for collection of the restoration charges, annual rent, security deposit etc., for the purpose of laying down cables by the petitioners, who are licensee companies under the Act. The second aspect is for charging of municipal taxes/fees over Mobile Towers for sanctioning the same and/or for permitting the continuation thereof by way of municipal taxation over the private land or land owned by the petitioners company/Central Government.

5. So far as the first aspect is concerned, perusal of the Government Resolution, annexure-A, shows that the State Government has formed a uniform policy for the purpose of various rates of restoration charges, annual rent and of the security deposits and such policy framed by the Government, may not be binding to the petitioners, but would be binding to the Municipality/Municipal Corporation, so as to maintain uniformity in collection of such charges from various licensee company. It also

appears that the respective local authorities have acted based on resolution of the State Government and has also given prospective as well as retrospective effect by calling upon the petitioners to make payment of the charges. As the petitioners are aggrieved by the action, the present petitions. Since, all the local authorities in the present case have passed order to collect the rent, based on the policy of the State Government vide impugned resolution dated 4.5.2007, the petitioners have also challenged the said resolution of the State Government in the present petitions.

6. As per scheme of the Act, the telegraph authority and local authorities are defined as under:

3(6) "telegraph authority" means the Director-General of [Posts and Telegraphs], and includes any officer empowered by him to perform all or any of the functions of the telegraph authority under this Act;

(7) "local authority" means any municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by [the Central

or any State Government] with, the control or management or nay municipal or local fund.

7. Further, Section 19B of the Act provides for enabling power of the Central Government to confer the power upon the licensee as that of the telegraph authority. Section 19B, for ready reference can be extracted as under:

“19B. Power to confer upon licensee powers of telegraph authority under this Part.-
The Central Government may, by notification in the Official Gazette, confer upon any licensee under section 4, in respect of the extent of his license and subject to any conditions and restrictions with the Central Government may think fit to impose and to the provisions of this Part, all or any of the powers which the telegraph authority possesses under this Part with regard to a telegraph established or maintained by the Government or to be so established or maintained:

Provide that the notice prescribed in section 19A shall always be given to the telegraph authority or officer empowered to receive notice under section 19A(1).]”

8. It is an admitted position that the petitioners

are the licensee company and the powers are conferred upon the Central Government upon the petitioners companies under section 19B of the Act.

- 9.If any licensee company has to place and maintain the telegraph lines under, over, along with or across over any immovable property, the provisions of section 10 (c) would be applicable to the present case, as in the present petitions, the subject matter concerned is to lay down of the line over the road and other properties of the local authority. The other provisions may not have any applicability. But the pertinent aspect is that in view of the aforesaid provisions of section 10(c) of the Act laying down of the line by exercise of the power by the telegraph authority is not permitted without prior permission of the local authority.
- 10.Section 12 of the Act provides for enabling power with the local authority to grant permission, which reads as under:

“12. Power for local authority to give permission under section 10, clause (c), subject to conditions.- Any permission

given by a local authority under section 10, clause (c) may be given subject to such reasonable conditions as that authority thinks fit to impose, as to the payment of any expenses to which the authority will necessarily be put in consequence of the exercise of the powers conferred by that section, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work undertaken by the telegraph authority under those powers."

11. The perusal of the aforesaid scheme of the Act shows that the permission of the local authority is required to be obtained by the telegraph authority including licensee companies, who have been conferred such power while laying down line/cable etc. As per the scheme of the Act, such local authority would be required to consider the matter for grant of permission on payment of any expenses, to which the authority will be necessarily required to put as a consequence of laying down of such line or work. It appears that as per the Government Resolution, annexure-A which is classified and

identified by the State Government by way of uniform policy for all local authorities in the State Government. It is true that the policy is framed by the Government by way of uniform charges in the respective Municipality/Corporation as the case may be, but grant of permission and charging of such fees is by the respective local authorities in exercise of the power under section 12 of the Act.

12.If the question is to be examined for enabling power of the State Government to provide uniform policy for all municipalities in the State Government, such can hardly be said as unreasonable or arbitrary. The reason being that no room will be left to the Municipality/Corporation as the case may be, to act arbitrarily in the matter of charging of the amount or while considering the case for grant of permission to the concerned licensee company. Therefore, if the State Government by way of policy has tried to maintain the uniformity in collection of the charges amongst municipality on the respective classification of the

municipality, such cannot be said as arbitrary or unreasonable.

13. However, so far as the quantification of the amount as provided in the resolution of the State Government is concerned, as per the licensee company, amount quantified in the Government Resolution dated 4.5.2007 is exorbitant, and it is not meet with the actual expenses to be borne by the Municipality for restoration or rent prescribed is also not meeting with the valuation for rental basis of the respective properties/road of the Municipality/Corporation. Whereas the State Government has on the basis of the material available before it, as stated in the resolution, has quantified amount and the local authorities, who are exercised power under section 12 of the Act, have acted, based on such quantification of the amount/charges. Therefore, it appears that it is essentially disputes between telegraph authority/licensee company conferred with the power of the telegraph authority and the respective local authorities.

14. The Act itself provides the mechanism for adjudication of such disputes as per section 15 of the Act. Section 15 of the Act reads as under:

“15. Disputes between telegraph authority and local authority.-(1) If any dispute arises between the telegraph authority and a local authority in consequence of the local authority refusing the permission referred to in section 10, clause (c), or prescribing any condition under section 12, or in consequence of the telegraph authority omitting to comply with a requisition made under section 13, or otherwise in respect of the exercise of the powers conferred by this Act, it shall be determined by such officer as the [Central Government] may appoint either generally or specifically in this behalf.

(2) An appeal from the determination of the officer so appointed shall lie to the [Central Government]; and the order of the [Central Government] shall be final.”

15. Therefore, such disputes are required to be determined by such officer as the Central Government may appoint either generally or specifically in this behalf and the decision of

such officer is also appealable to the Central Government and order of the Central Government is final as per scheme of the Act, unless modified or reversed by any higher forum. In the present group of the petitions up till now the petitioners have not approached before the officer as per section 15 (1) of the Act nor there is any decision of such officer.

16. It was also contended on behalf of the petitioners that expenses for restoration are only recoverable and no other charges by way of rent or security deposit etc., are recoverable and therefore, action for charging other expenses is not warranted under the law.

17. Section 12 of the Act speaks for "payment of any expenses to which the authority will necessarily be put in consequence of the exercise of the powers conferred by that section, or as to the time or mode of execution of any work, or as to any other thing connected with or relative to any work undertaken by the telegraph authority under those powers". Therefore, any expenses connected therewith are

recoverable. What is the expenses or quantification thereof is to be finalized by the authority concerned as per section 15 of the Act. Further, such charges are recoverable or not, can also be examined by such authority. Therefore, it is not necessary for this Court to finally express any view on the said aspect.

18. Under the above circumstances, it will be required for the petitioners to approach before the concerned authority as per section 15 of the Act for ventilating their grievances.

19. So far as the second aspect of challenge pertaining to municipal charges/taxes over the Mobile Tower, its installation over the private property or the property of the licensee company itself is concerned, it would be essentially the taxation dispute and for such purpose the petitioners would be required to prefer separate petition before this Court, if they are so advised.

20. Mr. Bhatt as well as Ms. Patel learned Counsel appearing for the petitioners in the respective petitions did rely upon the decision of the

Division Bench of this Court (Coram: D.A. Mehta & (Ms.) H.N. Devani,J.J.) decided on 9.9.2008 in case of ***Reliance Communication Limited v. Junagadh Municipal Corporation & others*** in SCA No. 531 of 2008. However, as this Court is not assigned with the said business of taxation matter, it may not be required for this Court to express any view on the said aspect.

21.As in the present petitions the principal challenge is against the resolution of the State Government annexure-A and as in the later part, the challenge is also made to the recovery of such charges/taxes and if the facts of the present case are examined simultaneously for such a challenge, it would be entertainment of multifarious causes of action and such a challenge deserves to be examined separately and independently. Therefore, it would be for the petitioners to challenge such collection of charges/taxes by separate substantive petition, where the Municipality/Corporation may have the defence in accordance with law.

22.It was submitted on behalf of the petitioners

that insistence is being made for collection of the charges as per the resolution annexure-A by the respective Municipality/Corporation and in certain cases notices are also issued by giving threat for attachment of the property etc. Therefore, it was submitted that even if this court is inclined to relegate the petitioners to approach before the concerned authority under section 15 of the Act, interim protection be granted to the petitioners at that stage. It was also submitted by the learned Counsel appearing for the petitioners that the attempt on the part of the municipality to give retrospective effect to the resolution or collection of the charges based on the resolution by giving retrospective effect cannot be maintained and in support thereof the learned Counsels appearing for the petitioners had relied upon the decision of the Apex Court in case of ***Mahabir Vegetable Oils (P) Ltd & another v. State of Haryana & others reported at 2006(3) SCC 620***. It was submitted that recovery may be stayed completely, until the decision is rendered by the competent

authority as per section 15 of the Act. Whereas, such is opposed by the municipality contending that the collection of charges are quantified by the Government and the collection is required to be made for restoration of the road and maintenance of the road. Therefore, such interim protection may not be granted.

23. It can hardly be disputed that the expenses for restoration are to be paid by telegraph authority or licensee company exercising power as the telegraph authority. The dispute is only on aspect of quantification of the amount. Therefore, if the blanket interim protection is granted, it may result into permitting the telegraph authority or licensee company to lay down lines/cables without payment of the restoration charges and consequently the road or other property of the local authority would remain in damaged condition, or the local authorities will have no fund available for restoration or maintenance thereof. Such can also be said as applicable for continuous maintenance upon the collection of the rent in

future. Therefore, it appears that the petitioners licensee company, if seeks interim protection, should deposit full amount after the date of resolution of the State Government and 50 percent of the amount, if demanded prior to the date of the resolution. So far later is concerned, the petitioners licensee company will be entitled to get set off the amount already paid to the concerned local authority. Of course all such will be subject to finalization of the amount by the concerned authority and the appeal if any under section 15 of the Act.

24. In order to see that the amount collected is used for the purpose for which it is collected and is not diverted so as to create situation of no ability to refund by the respective local authority, it would also be required to observe that such fund as may be collected by the concerned local authority, shall be used exclusively for the maintenance of the road and/or repairing of the road and the remaining balance if any, shall also be used for such purpose and shall not be used for any other

purpose by the respective local authorities.

25. In view of the above, following directions shall meet with the ends of justice:

A) The petitioners may approach before the concerned authority under section 15 of the Act for final quantification of the amount of charges to be collected as prescribed by the Government Resolution annexure-A.

B) If such an application is made by the petitioners within period of four weeks from today, the matter shall be considered by the concerned authority in accordance with law as early as possible. Until such decision of the concerned officer, or in absence of any express order of the concerned officer, recovery by the concerned local authority from the respective petitioners shall not be enforced, if respective petitioners deposits full amount chargeable after the date of the resolution and further deposits 50 percent of the amount chargeable prior to the date of resolution as per rate

prescribed in the resolution both with the concerned local authority. The officer shall decide the matter, if required after hearing the State Government.

C) However, so far as the direction of 50 percent of the amount is concerned, the amount already paid or deposited by the respective petitioners with such local authority prior to the date of the resolution shall be given set off and the petitioners would be required to pay only balance or remaining amount for total forming part of 50 percent.

D) It is further observed that municipality shall keep the amount in separate bank account and shall not use the same except for maintenance or repairing of the road or restoration of the road.

E) The aforesaid shall be subject to final order, if any, passed by the concerned authority under section 15 of the Act.

F) So far as the challenge to the action for collection of the charges/taxes by the Municipality/Corporation is concerned, it would be open to the petitioners to file separate petition for such purpose. If such proceedings are initiated, right and contention of both the sides, shall remain open.

26.The petitions are disposed of in terms of the aforesaid directions. No order as to cost.

(JAYANT PATEL,J.)

Suresh*