

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
MISC. CIVIL APPLICATION NO. 614 OF 2023
IN
WRIT PETITION NO. 2250 OF 2021 (FILING)

Reliance Jio Infratel Pvt. Ltd. Thr. Authorised ... Applicant
Sig. Jayesh Naik

V e r s u s

1. State of Goa, Thr. Secretary & 23 Ors. ... Respondents

Mr. Nitin N. Sardessai, Senior Advocate with Mr. Shivraj Gaonkar, Mr. Deepak Rai and Mr. P. Sirvoicar, Advocates for the Applicant.

Mr. D. J. Pangam, Advocate General, with Mr. P. Arolkar, Additional Government Advocate for the Respondent Nos. 1 and 2.

Mr. Pravin Faldessai, Deputy Solicitor General for the Respondent no. 4.

Mr. Nigel Da Costa Frias, Advocate with Mr. Shane Coutinho, Advocate for the Respondent nos. 5 to 24.

**CORAM: M. S. SONAK &
VALMIKI SA MENEZES, JJ.**

DATED: 2nd JANUARY 2024

ORDER

1. Heard Mr. Sardessai, learned Senior Advocate for the Applicant; Mr. D. Pangam, learned Advocate General for the first and second Respondents; Mr. Faldessai, learned Deputy Solicitor General for the

fourth Respondent; and Mr. Nigel Da Costa Frias, learned Counsel for the Respondent nos. 5 to 24.

2. This application seeks vacation/variation of Orders dated 17.12.2021 and 16.02.2022, by which this Court had granted interim relief restraining the Applicant [original Respondent no.3 in Writ Petition no.2250 of 2021 (F)] from operating the telecom tower installed in the property surveyed under no. 125/5 of Colva, Salcete, Goa, pending hearing and final disposal of the Petition.

3. From the perusal of our Orders dated 18.11.2021, 16.12.2021, 17.12.2021 and 16.02.2022, it is apparent that the interim Orders were made because this Court found that the Applicant had *prima facie* failed to comply with the conditions in clauses 8 and 9 of the NOC dated 01.06.2021 issued by the State of Goa. Compliance with these conditions was crucial to operating the tower.

4. Clauses 8 and 9 of the NOC dated 01.06.2021 read as follows :

“8. Upon erection and testing of GBM, the Agency shall produce:-

A) Copy of SACFA clearance/copy of SACFA application for the said location submitted in WPC wing of DoT with registration number as WPC acknowledgment along with undertaking that in case of any objection/rejection, TSPs will take corrective actions/remove the tower.

B) Copy of the type test certificate issued by Automotive Research Association of India (ARAI) to the manufacturers of Diesel Generator (DG) sets.

C) Copy of clearance from Fire Safety Department only in case for high rise buildings where Fire Clearance is mandatory.

D) Acknowledgement receipts issued by TERM cells (DoT) of the self certificate submitted by Telecom Service provider / Infrastructure provide in respect of mobile tower / BTS (ground based/roof-to/Pole/wall mounted) establishing/certifying that all General Public areas around the tower will be within safe Electro-magnetic Radiation (EMR) exposure limit as per peak traffic measurement after the antennas starts radiating.

9. Upon full completion & testing of GBM/RBM & submission of mandatory documents as above, the Agency shall intimate this office the intention of commissioning of said GBM/RBM, which shall be then inspected by this office, without which no commissioning shall be undertaken.”

5. In the context of compliance with the above-referred clauses 8 and 9, a memo dated 17.01.2023 was placed on record by the Advocate for the first and second Respondent, i.e. the State Government. To this memo was annexed a report dated 13.01.2023, made by Executive Engineer-VI, PWD, Fatorda, Margao, Goa. To this Memo was also annexed a report dated 09.01.2023 of the Assistant Engineer-IV, PWD, Fatorda, Margao, Goa. The memo and both these reports, in clear and unequivocal terms, state that the Applicant has now complied with the conditions in clauses 8 and 9 of the NOC dated 01.06.2021.

6. The learned Advocate General also confirmed that the Applicant has now complied with the conditions in clauses 8 and 9 of the NOC

dated 01.06.2021. Even Mr. Nigel Costa Frias did not dispute that the Applicant has complied with the conditions in clauses 8 and 9 of the NOC dated 01.06.2021.

7. Based upon the above and considering the specific liberty which we had granted to the Applicant to apply for variation/vacation, once there was compliance with the conditions in clauses 8 and 9 of the NOC dated 01.06.2021 (vide our Order dated 16.02.2022), normally, we would have agreed to the request for vacation of the restraint order without considering the other issues raised in the main petition.

8. However, Mr. Costa Frias, the learned Counsel for the original Petitioners, referred us to the alternative prayer clause (b) of the Civil Application No. 614 of 2023 seeking directions to the Public Works Department to carry out necessary inspection of the site and report on compliance. Mr. Costa Frias further submitted that even the NOC granted by the State was not in terms of the Goa Land Development and Building Construction Regulations, 2010, since the tower was installed in a road widening area under the regional plan. He requested that the PWD officials and the Planning Authority be directed to inspect the site and report on the status of compliances.

9. Accordingly, on 15.03.2022, we made the following Order :

“P.C.:

1. Heard learned Counsel for the parties.
2. Before we take up this Misc. Civil Application, having regard to the alternate prayer clause 'b', we think that it would be appropriate if respondent No.2 visits the site, inspects the installation and files an affidavit on whether all the terms and conditions of the NOC dated 01/06/2021 have been complied with. Respondent No.2 to also inspect the site and report whether the installation is in terms of The Goa Land Development and Building Construction Regulations, 2010. We direct respondent No.2 accordingly.
3. The learned Advocate General states that the inspection will be held and the necessary affidavit / report will be filed within two weeks from today.
4. Accordingly, we stand over this application for further consideration on 06/04/2022."

10. Pursuant to the above order, the PWD officials, after inspecting the site, reported compliance with the conditions in clauses 8 and 9 of the NOC dated 01.06.2021. As noted earlier, the position regarding this compliance was not disputed by any of the Counsel appearing on behalf of the Respondents in the present Civil Application.

11. On 29.04.2022, learned Additional Government Advocate filed a memo to place on record a site inspection report prepared by Vinod Kumar Chandra, Town Planner, on behalf of the Town and Country Planning Department.

12. The Town Planner's report records that the site was inspected on 12.04.2022, and the sketch prepared upon inspection is annexed at 'A'. The report states that during the site inspection, it was observed that one of the structures in the property surveyed under no. 125/5, is a tower having a concrete platform of size 4.7 metres x 4.7 metres. The second structure comprises a tin roof over an MS pipe frame having a size of 3.9 metres x 4.8 metres. The photographs of these structures were annexed at 'B'. The above site inspection report prepared by Vinod Kumar Chandra then proceeds to state that the tower is at a distance of 7.7 metres from the existing compound wall. Further, the said tower is partly under the road widening area/setback area, considering the right of way of said road as 25.00 metres on the basis of the Regional Plan for Goa 2021. The report also states that the other structure with a tin roof is entirely within the road widening area and, hence, an illegal structure.

13. In short, therefore, the report of the Town Planner *prima facie* suggests that a portion of the tower and the structure covered with tin roof are *prima facie* within the road widening area and, consequently, do not comply with the requirements of the Goa Land Development and Building Construction Regulations, 2010.

14. Mr Sardesai submitted that the Applicant had obtained the necessary licence under the Indian Telegraph Act of 1885. He referred

us to the provisions of Section 4 and Section 19-B of this Act. He also referred us to the provisions of Section 16-A of the Goa Daman and Diu Town and Country Planning Act, 1974, as amended in 2020. He submitted that the Applicant stepped into the shoes of the Central Government or, in any case, was acting under the licence of the Central Government for putting up the tower/installation. He submitted that Section 16-A to the Town and Country Planning Act, makes an exception in respect of project/schemes/development works undertaken by the Central Government or the State Government either by himself or through his servant or agent or any other person. He submits that once a licence is obtained under the Indian Telegraph Act, the rigours of the Goa Daman and Diu Town and Country Planning Act, 1974 or the Goa Land Development and Building Construction Regulations, 2010, would not apply. He also placed on record a Notification dated 24.05.1999 issued by the Central Government in the exercise of the provisions of Section 19B of the Telegraph Act of 1885.

15. Mr. Costa Frias countered Mr. Sardessai's contention. The learned Advocate General also did not fully support the contention raised. The learned Advocate General submitted that Section 16A was not a charter to put up any constructions in breach of the planning laws or regulations. He submitted, however, that if it were a question of laying pipelines or such similar works, then the same would be

permissible given the object of Section 16A. He submitted that such matters will have to be considered on a case-to-case basis. He submitted that in the present case, only a tower had been put up. He submitted that under the Goa Telecom Infrastructure Policy, 2020, the State/Authorities had the power to seek removal of the mobile towers if the situation so warranted. He submitted that this was also the position under the Indian Telegraph Right of Way Rules, 2016, upon which Mr Sardesai placed reliance. Learned Advocate General submitted that as and when there is any proposal for road widening, therefore, necessary directions can always be issued to the Applicant for dismantling the tower and removing the concrete platform upon which it is erected to facilitate the road widening works.

16. For the present, what we can observe is that the contention based upon Section 16A of the Goa Daman and Diu Town and Country Planning Act, 1974, read with the provisions of the Indian Telegraph Act, is an arguable one. But at least *prima facie*, we do not think that Section 16-A is a charter to any parties or the Governments to put up any constructions in breach of the planning laws or the regulations. Besides, the issue as to whether the provisions of Section 16A cover the Applicant is also required to be considered because, admittedly, the Applicant is neither the Central Government nor the State Government. The Applicant, at least *prima facie*, appears to be acting upon a licence

from the Central Government. Even the notification dated 24.05.1999 requires a licensee to comply with the laws for the time being in force.

17. Be that as it may, the record bears out that the tower and the other structure covered with tin roof are almost 7.7 metres away from an existing compound wall put up on a private property licensed to the Applicant. None of the parties contended, nor is any material placed on record to show that there is any immediate proposal for road widening or that such proposal would in any manner be hampered due to the Applicant being allowed to make the tower operational. Though the part of the tower and the structure covered with tin roof is found to be within the road widening area, is not as if the tower or the structure is presently causing any obstruction to the right of way or to the vehicular traffic.

18. Accordingly, no purpose would be served by simply continuing the restraint on operating the tower now that the applicant has complied with the conditions in clauses 8 and 9 of the NOC dated 1.6.2021. The balance of convenience is certainly not in favour of continuing the interim relief. As noted earlier, the interim relief was primarily granted because it was found that there was no compliance with the conditions of clauses 8 and 9 of the NOC dated 01.06.2021. Admittedly, now there is compliance with these conditions. Therefore, even assuming that the argument based on the violation of the Goa

Land Development and Building Construction Regulations, 2010, is liable to be *prima facie* accepted, no useful purpose would be served by simply restraining the Applicants from operating the tower, which is already put up after obtaining permissions from the State and Central Authorities. The applicant can always be put to terms about discontinuing the operations and dismantling/relocating the structures should there be any proposal for road widening.

19. Mr. Sardesai, on instructions, stated that the Applicant would file an affidavit-cum-undertaking that the Applicant would remove the tower and the other structure in case of any road widening proposal at the site. He submitted that the undertaking would be in terms of clause 11 of the Goa Telecom Infrastructure Policy, 2020 and Rule 13 of the Indian Telegraph Right of Way Rules, 2016. Mr. Sardesai submitted that such an undertaking would be filed within a week if directed. Mr Sardesai also submitted that since there is no present proposal for road widening, no useful purpose would be served by continuing the restraint on operating the telecom tower, which has been put up after making considerable investments. He, therefore, submitted that the interim order may be varied or vacated subject to the Applicant filing the above undertaking.

20. Considering all the above circumstances cumulatively, we lift the restraint on operating the telecom tower subject to the Applicant filing

an undertaking in this Court within seven days about the removal of the telecom tower and the structure covered with tin roof in case of any proposal for widening of the road and on receipt of any direction under clause 11 of the Goa Telecom Infrastructure Policy, 2020 or any direction from the appropriate authority in terms of Rule 13 of the Indian Telegraph Right of Way Rules, 2016. A copy of this affidavit-cum-undertaking must be furnished to the learned Counsel for the Respondents and learned Additional Government Advocate before the same is filed in the Court. Further, we clarify that the Applicant will not claim any equities in the matter or obstruct or delay the road widening.

21. At the request of Mr. Costa Frias, we place the Writ Petition no. 2250 of 2021(F) for final hearing in the week commencing from 01.04.2024. If any of the parties wish to file additional compliance, they should do so by 16.03.2024 at the latest. A copy of the various Orders must be retained in the main Writ Petition file.

22. This Miscellaneous Application is disposed of by vacating the restraint on operating the telecom tower subject to the Applicant filing affidavit-cum-undertaking in the above terms within seven days. Further, we clarify that the Applicant will not claim any equities in the matter or obstruct or delay the road widening. Further, the Applicant

must not put up any further towers or structures in the road widening areas or without permission from the planning authorities.

23. Misc. Civil Application No. 614 of 2023 is disposed of in the above terms. without any order for costs.

24. All concerned to act on an authenticated copy of this order.

VALMIKI SA MENEZES, J.

M. S. SONAK, J.