

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No.95 of 2011

Dated: 13th November, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

Bharat Sanchar Nigam Limited,

Rep. by its Deputy General Manager
(Network Planning & Development-1),
Mobile Services, RTTC Complex, Kaimanam,
Thiruvananthapuram-40

... **Appellant**

Versus

1. **Kerala State Electricity Board,**

Vydyuthi Bhavanam,
Pattom, Thiruvananthapuram-695004
Rep. by its Chief Engineer (Commercial & Tariff)

2. **Kerala State Electricity Regulatory Commission,**

KPFC Bhavanam,
C.V. Raman Pillai Road,
Vellayambalam,
Thiruvananthapuram-695010

...**Respondent(s)**

Counsel for the Appellant(s) : Mr. Sharat Kapoor,
Mr. Mohd. Aaqil
Mr. C.B. Tiwari, Mr. Noor Alam

Counsel for the Respondent(s) : Mr. M.T. George,
Ms. Kavitha K.T. for R-1
Mr. M.R. Ramesh Babu,
Mr. B.R. Mohan Kumar for R-2

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Bharat Sanchar Nigam Ltd. is the Appellant
herein.

This Appeal has been filed by the Appellant challenging the impugned order dated 24.03.2011 passed by the Kerala State Electricity Regulatory Commission declining to allow the prayers of the Appellant for exemption from production of clearance from Local Self Government bodies for their telecommunication towers for obtaining electricity supply and application of the relevant tariff.

2. Kerala State Electricity Board (“Electricity Board”) is the first Respondent. Kerala State Electricity Regulatory Commission (“State Commission”) is the Respondent no. 2.

3. The brief facts of the case are as under:

3.1 Bharat Sanchar Nigam Limited (“BSNL”) is a Central Government Enterprise engaged in the

business of telecommunication including transmission of communication by means of electric signals.

3.2 In a Petition filed by the Electricity Board regarding tariff applicable to Cellular Mobile Towers, the State Commission in its Order dated 7.1.2010 decided that in future, connections of Cellular Mobile Towers would be effected only on permanent basis after complying with the formalities required such as application for supply, completion and test report of installation, submission of required clearances and service connection agreement and the tariff applicable would be LT VII A Commercial. Further, in case of Cellular Mobile Towers that had already been given power supply on temporary basis in the past and continue as temporary service since the clearances have not been produced even after six months, service could be allowed to continue for a period of three

months from the date of the order within which period they would obtain all the stipulated clearances, failing which the service connection would be disconnected.

3.3 Accordingly, the Electricity Board issued notices to the Appellant to submit relevant documents including permits from local bodies failing which the supply to Cellular Mobile Towers would be disconnected.

3.4 Aggrieved by the order of the State Commission dated 7.1.2010 and the steps taken by the Electricity Board issuing notices pursuant to the orders of the State Commission dated 7.1.2010, BSNL filed a Review Petition 9 of 2010 before the State Commission wherein it was pointed out that BSNL was a fully government owned company and accordingly all the mandatory legal requirements regarding construction

and structural stability would be fulfilled and that Rule 130 of Chapter XIX of Kerala Municipality Building Rules exempted Governmental towers and accordingly, BSNL towers were also exempted from the ambit of Municipality Rules.

3.5 The State Commission by its order dated 31.08.2010 in Review Petition no. 9 of 2010 of BSNL, ordered that electricity connections would be extended to Cellular Mobile Towers as per the Electricity Board's Terms and Conditions of Supply, 2005 on production of records of building permit or NOC from local authority or proof of deemed permit as per proviso to Rule 143 of Kerala Municipality Building Rules, 1999 or use certificate/building number or proof of deemed use certificate as per proviso to Rule 142(2) of the Municipality Rules. Further, the Cellular Mobile Towers that had been given temporary connections in

the past and continue as temporary service since the clearance had not been produced even after six months, the supply would be continued for a period of three months from the date of the order within which period they would comply with the stipulated conditions of the Terms and Conditions of Supply, 2005 as applicable to regular connections. It was also decided that the service connection would be disconnected if records of deemed permit/deemed use certificate as per Kerala Municipality Building Rules 1999 were not produced within a period of three months from the date of the order. The Electricity Board was directed to accept the deemed permit or certificate and provide the connection and if the amendment in Terms and Conditions of Supply was required, action for the same should be initiated.

3.6 Subsequently, the State Government issued a circular dated 30.10.2010 clarifying to the effect that BSNL being fully owned by Central Government need not be reckoned as a non-Governmental establishment for the purpose of Rule 130 of Kerala Municipality Building Rules and accordingly there would be no necessity for obtaining permit in respect of BSNL Mobile Towers under Rule 130. However, the stability of the Mobile Tower constructed/erected by BSNL, the safety of the public, etc., would be the responsibility of BSNL.

3.7 Accordingly, based on the State Government's circular dated 30.10.2010 the BSNL approached the State Commission praying for the directions to the Electricity Board not to insist for any permits/use certificates in respect of Mobile Base Station Towers of

BSNL for providing permanent service connections to their Mobile Base Station Towers .

3.8 The State Commission, however, by the impugned order dated 24.3.2011 rejected the prayer of BSNL. Aggrieved by the impugned order dated 24.3.2011, BSNL has filed this Appeal on the aspect of exemption from production of clearances from local bodies for BSNL Mobile base station towers in the light of the Government circular dated 30.10.2010.

4. According to the Appellant, the State Commission in the impugned order has exceeded its jurisdiction regulating the provisions of other statutes or Rules made under those statutes and has not considered the clarification issued by the State Government. It is further contended that the State Commission ought to have taken into account the mandate of the State

Government's circular dated 30.10.2010 which was issued by the State Government based on clarifications sought by local self Government Secretaries regarding need of permits for towers deployed by BSNL and also taking note of difficulties encountered by BSNL, being a Government owned organization, for getting permits from local bodies. The Government of India, Ministry of Communication & IT had also issued a certificate to BSNL certifying that BSNL is a 100% Government owned Central Public Sector Enterprise, working under the administrative control of Department of Telecommunication.

5. On the other hand, the learned counsel for the Electricity Board, the circular dated 30.10.2010 by the State Government exempted BSNL only from the teeth of Rule 130 of the KMBR, however, according to the Terms and Conditions of Supply 2005, the Tower site

of Cellular operator had to obtain required clearance from the authorities concerned and as such the Electricity Board being a distribution licensee is bound to follow the Regulations formulated by the State Electricity Regulatory Commission while effecting telecommunication. It is further stated that in order to avail power connection, BSNL has to comply with Rule 142(2) of Kerala Municipality Building Rules, 1999 under which it has to obtain a use certificate from the local authority.

6. We have heard the learned counsel for the parties.

7. The only question which would arise for our consideration in this Appeal is this: “Whether the State Commission should have insisted for permit from Municipal Authorities for BSNL Mobile Base Station Towers under Rule 130 of Kerala Municipality Building

Rules, 1999, despite the clarification issued by the State Government through Circular dated 30.10.2010 that such clearance was not required in case of BSNL being fully owned by the Government of India?”

8. Let us examine the Government circular dated 30.10.2010. The contents of the circular as translated into English are as under:

“Government have examined in detail the complaints related to grant of permit by Local Self Government bodies and necessary instructions have been issued to the local self government bodies vide circulars referred above for issuance of permits for mobile towers. In respect of towers deployed by BSNL the LSG Secretaries have sought clarifications regarding need of permits and it has come to the notice of government that permits are denied for some towers of BSNL. In addition the denial of application permits for its towers have been brought to the notice of government by BSNL.

The government in detail has examined the relevant subject. As per Rule 130 of the Kerala Municipality Building Rules 1999 it is provided that “No person shall erect or re-erect any non-governmental telecommunication tower or telecommunication pole structures or accessory rooms or make alteration or cause the same to be done without first obtaining a separate permit for each such tower or telecommunication pole structures from the Secretary”. It is clarified that since BSNL is fully under the ownership of Central Govt. BSNL need not be reckoned as a non-Governmental establishment and for the deployment of BSNL Mobile towers; no permits need be taken under Rule 130. However, the structural stability of the mobile tower constructed/erected by the BSNL and safety of the public etc. will be the sole responsibility of BSNL”.

9. Thus, through above circular dated 30.10.2010, the State Government has clarified that since BSNL is fully owned by the Central Government, they need not be

reckoned as a non-Governmental establishment and for the deployment of BSNL Mobile towers they need not take permit under Rule 130 of the Kerala Municipality Building Rules 1999. However, the structural stability of their mobile towers and safety of public, etc., will be the sole responsibility of BSNL.

10. Let us now examine the impugned order. The relevant portion of the impugned order is as under:

“4.2 The circular relied on by BSNL in apparently intended as a guideline to local bodies and departmental officers in respect of the permit under Rule 130 of Kerala Municipal Building Rules 1999. However it is silent about the use certificate which is also to be provided by the Secretary of the local body. It is also not seen that the earlier Government instruction vide letter No. 15789/B3/06/LSGD dated 16-05-06 that BSNL need not be treated as a Governmental institution, pointed out by KSEB is considered in the present circular and superseded.”

4.3 *The wording used in Rule 130 of Kerala Building Rules is “Non Governmental telecommunication tower”. BSNL is only a company fully owned by Government of India and hence Towers of BSNL cannot be treated as “Governmental Telecommunication Towers.” The Commission does not feel that the circular issued by the Government in the matter can be accepted as a basis for directing KSEB to amend the Terms and Conditions of Supply as desired by the petitioner. If it was Government’s intention to exempt BSNL from the clearances of the Local Body, the Kerala Municipal Building Rules 1999 could have been suitably amended.*

4.4 *Hence the request of BSNL for exemption from production of clearances from local bodies in the light of Government circular clarifying that no permits are required for BSNL base station towers cannot be allowed amending the Terms and Conditions of Supply. However, the Commission has no objection to the local bodies acting on the circular.*

5. Commissions' decision

The request of BSNL for exemption from production of clearances from local bodies for BSNL base station towers in the light of the Government Circular No 11414 /RD2/2010/LSGD dated 30-10-2010 cannot be allowed. The order dated 7-1-2010 on TP 67/2009 as modified in the order dated 31-08-2010 on revision petition RP 9/210 will prevail.

The Petition is disposed of accordingly”.

11. The perusal of the impugned order would reveal that the State Commission has refused to accept the circular issued by the State Government for directing the Electricity Board to amend the terms and conditions of supply on the following grounds:

(a) The Government circular dated 30.10.2010 is intended as guidelines to local bodies in respect of the permit under Rule 130 of the Kerala Municipality Building Rules, 1999 but it is silent about the use

certificate which is to be provided by the Secretary of the local body. The State Government has also not considered its earlier instruction dated 16.5.2006 that BSNL need not be treated as Governmental institution.

b) BSNL is only fully owned by Government of India and hence their towers cannot be treated as Governmental Telecommunication Towers;

(c) If the Government intention was to exempt BSNL from the clearances of the local bodies, the Kerala Municipal Building Rules 1999 could have been suitably amended.

12. On the above grounds the State Commission did not accept the circular of the State Government dated 30.10.2010 and refused to exempt BSNL from production of clearances from local bodies for the

purpose of extending permanent supply to the Mobile Towers.

13. The main contention of the State Commission for insisting on the permit by local self Government bodies under Rule 130 of the Kerala Municipality Building Rules, 1999 is the structural safety of the Mobile Towers. The State Government by circular no. 30.10.2010 has already clarified that BSNL being fully owned by the Central Government, need not be reckoned as a non-Governmental establishment and for deployment of BSNL Mobile towers, no permits need be taken under Rule 130. However, the structural stability of the mobile tower constructed/erected by BSNL and safety of public, etc., would be the responsibility of BSNL. When the State Government has clarified to the local bodies that BSNL need not take permit under Rule 130, the local

bodies are expected to follow the same. Under these circumstances, it is incorrect for the Electricity Board and the State Commission to insist on a permit from the local bodies under Rule 130 of the Kerala Municipality Building Rules 1999. How could BSNL obtain the permit for its Mobile Towers under Rule 130 from the local bodies when the local bodies have been advised by the State Government by means of a clarification that BSNL being fully under the ownership of the Central Government, BSNL need not be reckoned as a Non-Governmental establishment and for the deployment of BSNL Mobile no permits need to be taken under Rule 130?

14. Learned counsel for BSNL has brought to our notice judgment of the High Court of Kerala in WP(C) no. 183 of 2011(W) dated 22.5.2013 wherein the petitioner in the writ questioned the action of BSNL in

putting up tower for Mobile connectivity alleging that it did not have valid permission as per the Kerala Municipality Rule 130, further contending that the benefit of Rule 130 cannot be extended to BSNL, being a Government company. In the judgment the learned single Judge having regard to the factual circumstances of the case held that it was not necessary to consider the vires and applicability of Rule 130 as BSNL being wholly owned by the Government of India is designated as a telegraph authority as defined under Section 3(6) of the Indian Telegraph Act. When the BSNL is a telegraph authority, it is entitled to exercise power under Section 10 of the Indian Telegraph Act which gives absolute power to the telegraph authority to place and maintain a telegraph line under, over, along or across any immovable property without any restrictions imposed

under the Rules. The High Court further held that it is not incumbent on the BSNL to seek permission from the local authority to put up any structure to enable telecommunication including putting up of Mobile tower in any immovable property and if at all any person has an objection he has to submit his objection before the District Magistrate in terms of Section 10(d) of the Telegraph Act.

15. In the above judgment, the High Court of Kerala has specifically dealt with the permit required by BSNL for installing the Mobile Towers and it was held that even the consideration of the circular of the State Government granting exemption for permits for BSNL towers is not required for consideration in view of the Appellant being a Telegraph Authority as defined under the Indian Telegraph Act.

16. In view of above, we feel that the State Commission should not insist for permission under Rule 130 of the Kerala Municipality Building Rules 1999 from local bodies for BSNL Mobile base station towers for obtaining permanent supply connection and for application of the relevant tariff.

17. Summary of our findings:

State Commission and the Electricity Board should not insist for permit from Municipal Authorities under Rule 130 of Kerala Municipality Building Rules, 1999 for BSNL Mobile Base Station Towers for the purpose of obtaining permanent supply connection and application of the relevant tariff.

18. In view of above, the impugned order is set aside. The State Commission is directed to pass consequential order in terms of the findings of the Tribunal in this judgment as expeditiously as possible.

19. Pronounced in the open court on this **13th day of November, 2013.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/NON-REPORTABLE

vs