Before Adarsh Kumar Goel, ACJ & Rajesh Bindal, J.

M/S WIRELESS TT. INFO. SERVICES LIMITED AND ANOTHER,—*Petitioners*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P. No. 20354 of 2009

3rd June, 2011

Constitution of India, 1950—Arts.19(1)(g) & 226 & 265, entry 31 of List-I and entry 5, 6, 18, 49 & 66 of List-II of Seventy Schedule— Haryana Municipal (Erection of Communication Tower) Bye Laws, 2009—Haryana Municipal Act 1973—Sec. 2(2), 12 70(1)(i) to (xiv), 70(2) & 200(XXX)—Haryana Municipal Corporation Act, 1994—Ss. 88, 392 & 393—Haryana Municipal Building Bye-laws, 1982—Bye-laws 2(Xii)—Indian Telegraph Act, 1885—Ss. 3(5), 6, 10 & 12—Towers erected for using/renting out to licencees of telecom companies—Premissions obtained from local authorities on payment of requisite fee—Draft Bye-Laws notified—Objections invited—Objection that telecommunication falls within domain of Union Government and State Government was incompetent to issue the Bye-Laws.

Held, Definition of building u/s 2(2) is an inclusive definition and does not restrict the word "building" in any manner. It includes and structure made of metal. Courts are required to interpret the statues in a manner that updates the wording with the changing times.

Further held that contention that telecom services fell within domain of Union Government in terms of Entry 31 of List-I of the Seventh Schedule also held not tenable. Merely because central law takes care of one aspect, it does not mean that any other authority cannot regulate its other aspects. If building has to be constructed or tower to be erected within jurisdiction of a local authority, the same has to be necessarily in compliance of the provisions in any stature applicable for the purpse. Building bye-laws framed under the 1973 Act clearly provide for area of the plot, zoning plan, maximum height etc. State is not transgressing the power conferred of Union of India with reference to Entry 31 of List-I of the Seventh Schedule.

Further held that threre is no absolute to carry on business as it is always subject to reasonable restriction and regulation. Thus there was no violation of Articles 19, 1(g) & 265 of the Constitution. Entry 66 in List-II to the Seventh Schedule enables the State to levy fee in respect of any of the matters in the List. Section 70(1)(XV) provides that with prior sanction of the State Government any other toll, tax or fee which the State Legislature has power to impose can be levied provide the same does not exceed the maximum limits which may be notified by the State Government from time to time. Validity of Haryana Municipal (Erection of Communication Towers) Bye-Laws, 2009 upheld. Licence fee however directed to be as per the maximum limit prescribed by the Government in terms of the powers conferred U/s 70(1)(XV) and final rate is to be fixed by the Municipal Committee in accordance with S. 70(2).

(Paras 16, 21, 22, 24, 26, 30, 31, 34, 35 & 36)

A. K. Chopra and Kanwaljit Singh, Senior Advocates with Vishal Gupta, Rohit Khanna, V. K. Sharma, D. K. Singal, Sandeep Chabbra and Arjun Lakhanpal, Advocates *for the petitioners.*

H S. Hooda, Senior Advocate, Kulvir Narwal and Randhir Singh, Additional Advocates General, Haryana and Sanjay Chauhan, Advocate for respondent Nos. 3 and 4 and Deepak Balyan, Advocate for respondent No. 5 in C.W.P. No. 11489 of 2010.

RAJESH BINDAL, J.

(1) This order will dispose of a bunch of writ petitions bearing Nos. 20354 of 2009, 577, 586, 711, 713, 1700, 1701, 2159, 2380, 2420, 4285, 10663, 11489 of 2010 and 6029 of 2011, primarily challenging the validity of Haryana Municipal (Erection of Communication Towers) Bye-laws, 2009 (for short, the 'the Bye-laws').

(2) The facts have been extracted from C.W.P. No. 20354 of 2009.

(3) The petitioners in this bunch of writ petitions are claiming to be registered Infrastructure Provider Category-I (IP-1). They erect towers for the purpose of using or renting out the same to the licensees of telecom services. The petitioners in furtherance to the permission granted by the

Central Government as per registration certificate, started the work for erecting and maintaining towers over the premises of private persons on mutually agreed terms. The petitioners had obtained permission from the local authorities in whose jurisdiction the towers were being installed in terms of Section 12 of the Indian Telegraph Act, 1885 (for short 'the 1885 Act') and paid the requisite fee also. However, later on the authorities started demanding huge money. On 12th August, 2009, in exercise of powers conferred under Section 200(xxx) of the Haryana Municipal Act, 1973 (for short, 'the 1973 Act'), the State of Haryana notified draft Bye-laws for the purpose and invited objections. Petitioner No. 1 filed detailed objections which included objection regarding incompetence of the State on the subject considering the fact that telecommunication falls within the domain of Union Government. Without considering the objections filed by petitioner No. 1, final notification was issued on 11th November, 2009 notifying the Bye-laws. It is these Bye-laws, which have been impugned in the bunch of writ petition.

(4) In some of the writ petitions, the Bye-laws so impugned have been framed in exercise of power conferred under Sections 88, 392 and 393 of the Haryana Municipal Corporation Act, 1994 (for short, 'the 1994 Act'). These are in similar lines.

(5) Learned counsel for the petitioners submitted that telecommunication being covered under Entry 31 in List-I of Seventh Schedule to the Constitution of India (Union List), the towers erected by the petitioners meant for use for telecommunication purposes, the State is totally incompetent to frame any law to control the same. It was submitted that towers are the integral part of telecommunication system for which the power vests in the Union Government. The definition of terms 'post' and 'telegraph authority' as contained in Section 3(5) and (6) of the 1885 Act were referred to. It was submitted that the petitioners have been notified as telegraph authority. Further it was submitted that Section 10 thereof provides power to the telegraph authority to place and maintain telegraph line under, over, along, or across, and posts in or upon, any immovable property subject to certain exceptions provided therein. In the absence of any competence with the State, exercise of power in any manner in the form of grant of licences/permission or levy of fee etc. for setting up of tower will be totally incompetent.

(6) It was further submitted that there being no substantive provision as such even in the 1973 Act, Section 200, sub-section (xxx) was added enabling the State to make Bye-laws, *inter alia,* to regulate erection of communication tower. Under the garb of power so delegated, the State Government has notified the impugned Bye-laws which not only provide for the power to the concerned authority even to see the location of the tower without realising the fact that towers at different places are not erected for the sake of it rather it is either to boost the signal or maintain the requisite radio frequency. Even maximum height of the tower has also been fixed in the Bye-laws though the same has to be need based. Exhorbitant amount of licence fee has been fixed to be paid for each of the site. In addition thereto, annual renewal fee @ 10% of the licence fee has been prescribed. In fact, there is no power conferred in the 1973 Act to the local authority to levy any tax of this kind. Article 265 of the Constitution of India comes to the rescue of the petitioners, which provides that no tax can be imposed or recovered without any authority of law. Even if the same is considered as a fee, the element of *quid pro quo* is totally missing. Even for levy of fee there is no enabling provision under the 1973 Act. The petitioners are erecting towers by taking land on lease/rent or otherwise from the owners thereof on mutually agreed terms. In fact, it clearly violates the petitioners' fundamental rights guaranteed under Article 19(1)(g) of the Constitution of India. The levy of such exhorbitant fee is sought to be justified by the local authority by stating in the reply that the local authorities are also entitled to share huge income earned by the telecom service providers as they need huge funds for developing and maintaining infrastructure in cities/towns and there financial health is quite poor. The levy of fee would strengthen the financial condition of the local authority. The submission of learned counsel for the petitioners was that the aforesaid reason given by the State to levy fee, though beyond its legislative or delegated authority, cannot be justified.

(7) Referring to the definition of 'building', as contained in Section 2(2) of the 1973 Act, it was submitted that tower cannot be said to be a building used for the purpose of human habitation. Once the tower is not a building, the local authorities do not have any power to direct the petitioners to obtain licences/permission or pay any fee for the purpose. In fact, the same would amount to interference in the telecom services being provided by the petitioners, which clearly falls within the domain of Union Government. In case, as per the requirement, a tower is to be erected at a particular

place and of a particular height and the local authorities refuse the permission therefore, the petitioners will not be able to provide telecom services or non-grant of permission for any reason would lead to interference in the telecom services. The Bye-laws notified by the State confer arbitrary power on the authorities to grant or refuse permission or even point out the premises where such towers should be erected. These things cannot be provided in the Bye-laws, as it is need based considering the strength of signal and frequency, which is highly technical. In fact, the local authorities do not have any expertise to examine these aspects while granting or refusing the permission.

(8) Learned counsel further referred to the recommendations made by the Telecom Regulatory Authority to the Department of Telecommunication to clarify that the local authority's power in terms of the 1885 Act is limited only to those properties which are vested or controlled or managed by the local authority and also opined that a Joint Secretary in the Department of Telecommunication be set up as a dispute resolution authority for dealing with the cases of refusal of permission or imposition of condition for grant of permission by the local authorities. The submission was that such directions were issued by the statutorily constituted authority for the reason that there were numerous problems being faced by the telecom service providers on account of different conditions/restrictions put by the local authorities while granting/refusing permission for erection of tower, as the same were causing hurdles in the smooth implementation of the telecom policy of the government.

(9) In support of the submissions, learned counsel for the petitioners placed reliance upon **The Hingir-Rampur Coal Co. Ltd. and others** *versus* **State of Orissa and others, (1) ; Om Parkash Agarwal etc.** *versus* **Giri Raj Kishori and others, (2) ; Calcutta Municipal Corporation and others** *versus* **Shrey Mercantile (P) Ltd. and others, (3) ; Jindal Stainless Ltd. and another versus State of Haryana and others, (4) ; Gupta Modern Breweries versus State of J&K and others, (5) and M/s Indian Oil Corporation Limited versus State of Haryana and another, (6)**

(1) AIR 1961 SC 459
(2) AIR 1986 SC 726
(3) (2005) 4 SCC 245
(4) AIR 2006 SC 2550
(5) (2007) 6 SCC 317
(6) 2008 (4) RCR (Civil) 620

(10) On the other hand, learned counsel for the State submitted that the subject on which the State has framed Bye-laws does not fall in Entry 31 of List-I of Seventh Schedule to the Constitution of India, as it has nothing to do with the telecommunication, rather, the State has wide power under Entries 5, 6, 18 and 49 of List-II of Seventh Schedule to the Constitution of India to deal with building activities in the local areas. There are two different aspects, namely, erection of a structure in the form of a tower and secondly providing of service. The State/local authorities do not want to interfere with the working of the petitioners with regard to their providing telecom service. However, they certainly have a right to regulate the erection of towers. It would be totally misconceived to argue that the towers do not fall within the term 'building'. The definition as contained in Section 2(2) of the 1973 Act does not include only the premises which are used for human habitation, rather, it also uses the term 'or otherwise' and further 'steel structure' is also included therein. Along with this, the definition of 'building' as contained in Bye-law 2(xii) of Haryana Municipal Building Bye-laws, 1982 (for short, 'Building Bye-laws') was referred to. The Building Bye-laws provide that various aspects, such as safety, structural strength, height, load carrying capacity etc. of the building to be erected in different areas within the municipal limits, are to be considered by the local authority while granting or refusing permission. The petitioners in the present case erect towers which have the height of 30 to 50 metres. The case projected by them is that they enter into agreement with the owners of various private buildings and erect the towers on the top of the building. As to who will ensure that a tower of such a height should not be erected at a particular place for the reason that the same may either be not safe considering the strength of the building beneath or it may result in spoiling the skyline of the city. It would be totally misconceived to argue that tower has not specifically been mentioned in the definition of 'building'. The definitions as contained in the statute are to be considered in the light of changing times. The statutes are living documents. These have to be given purposive interpretation. In addition to that, the impact of electromagnetic wave on the health of the people residing in the area is also to be considered by the local authority as the same also falls within the domain of the local authority.

(11) Still further, it was pleaded that reliance of the petitioners on Articles 19(1)(g) or 265 of the Constitution of India is totally mis-placed for the reason that the local authority in the present case has not levied any tax as it has levied only a regulatory fee. The amount being charged as a licence fee per tower is quite nominal. The same is one time. The renewal fee is 10% p.a. thereafter. A reasonable classification has been made considering the potential of the town where the towers have to be erected. No specific service as such is required to be provided as the element of *quid pro quo* is not required. The impugned Bye-laws have been framed strictly in terms of the powers conferred under Section 200(xxx) of the 1973 Act. In support of his submissions, reliance was placed upon **Aircel Digilink India Ltd., Allahabad *versus* Nagar Nigam, Allahabad and another, (7) Bharti Tele-Ventures Limited, a company incorporated under the Companies Act, 1956 and Mr. Sunil Bharti Mittal *versus* State of Maharashtra, through the Secretary, Urban Development Department and Pune Municipal Corporation, (8) Reliance Telecommunication Ltd. *versus* S.I. of Police,** MANU/KE/2352/2010 : **Cellular Operators Association of India and others *versus* MCD,** MANU/DE/1198/2010 : **Kerala State Science and Technology Museum *versus* Rambal Co. and others, (9) and Cellular Operators Association of India and others *versus* Municipal Corporation of Delhi, W.P. (C) No. 3267 of 2010, decided on 29th April, 2011.**

(12) No other argument was raised.

(13) Heard learned counsel for the parties and perused the paper book.

(14) The relevant provisions of various statutes/Bye-laws, as referred to above, are extracted below :

"Articles 19(1)(g) and 265 and Entries 31 of List-I, Entries 5, 6, 18, 49 and 66 of List-II of the Constitution of India Article 19(1)(g).

(7) 2000 (1) AWC 562
(8) 2007 (2) ALLMR 841
(9) (2006) 6 SCC 258

19. **Protection of certain rights regarding freedom of speech, etc.**–(1) All citizens shall have the right–

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(g) to practise any profession, or to carry on any occupation, trade or business.

Article 265

265. **Taxes not to be imposed save by authority of law.**–No tax shall be levied or collected except by authority of law.

Entry 31 of List-I

31. Post and telegraphs, telephones, wireless, broadcasting and other like forms of communication.

Entries 5, 6, 18, 49 and 66 of List-II

5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

6. Public health and sanitation; hospitals and dispensaries.

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18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

xx xx xx

49. Taxes on lands and buildings.

xx xx xx

66. Fee in respect of any of the matters in this List, but not including fees taken in any court.

Section 3(5) and (6) and 10 of the 1885 Act

3. **Definitions.**–In this Act, unless there is something repugnant in the subject or context,–

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(5) "post" means a post, pole, standard, stay, strut or other above ground contrivance for carrying, suspending or supporting a telegraph line :

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

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10. **Power for telegraph authority to place and maintain telegraph lines and posts.**–The telegraph authority may, from time to time, place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property :

Provided that—

(a) the telegraph authority shall not exercise the powers conferred by this section for the purposes of a telegraph established or maintained by the Central Government or to be so established or maintained;

(b) the Central Government shall not acquire any right other than that of user only in the property under, over, along, across, in or upon which the telegraph authority places any telegraph line or post; and

(c) except as hereinafter provided, the telegraph authority shall not exercise those powers in respect of any property vested in or under the control or management of any local authority, without the permission of that authority; and

(d) in the exercise of the powers conferred by this section, the telegraph authority shall do as little damage as possible, and, when it has exercised those powers in respect of any property other than that referred to in clause (c), shall pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers.

Sections 2(2), 70 and 200 (xxx) of the 1973 Act

2. Definitions.–In this Act, unless there is anything repayment in the subject or context,–

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(2) **"building"** means any shop, out-house, hut, house, shed or stable, whether used for the purpose of human habitation or otherwise and whether of masonary, bricks, wood, mud, thatch, metal or any other material whatever, and includes a wall and a well ;

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70. Taxes that may be imposed.–(1) Subject to any general or special orders of the State Government in this behalf and to the rules, a committee may, from time to time, for the purposes of this Act, impose in the whole or any part of the municipality any of the following taxes, tolls and fees, namely :

(i) a tax on professions, trades, callings and employments ;

(ii) a tax on vehicle plying for hire or kept or registered under the, the Motor Vehicles Act, 1988 (Act 59 of 1988), within the municipality;

(iii) a tax on animals used of riding, draught or burden, kept for use within the municipality, whether they are actually kept within or outside the municipality ;

(iv) a tax on dogs kept within the municipality ;

(v) a show tax ;

(vi) a toll on vehicles entering the municipality ;

(vii) a tax on boats moved within the municipality ;

(viii) a tax on the consumption of electricity at the rate of not more than five paise for every unit of electricity consumed by any person within the limits of the municipality ;

(viiia) a fire fix ;

(viiib) a sanitation tax ;

(viiic) a tax on driving licences issued under the Motor Vehicles Act, 1988 (Act 59 of 1988), within the municipality ;

(viiid) a development tax on the increase in urban land values caused by the execution of any development or improvement work ;

(viiie) a general tax not more than 15% of the annual value of buildings and lands within the municipal area ;

Provided that general tax may be levied on a graduated scale, if the government so determines :

Provided further that the general tax would not be leviable on the buildings and land within the Lal Dora of villages forming part of the municipal area provided they are self-occupied.

(ix) a fee with regard to pilgrimages ;

(x) a fee with regard to drainage ;

(xi) a fee with regard to lighting ;

(xii) a fee with regard to scavenging ;

(xiii) a fee for cleansing of latrines and privies ;

(xiv) a fee in the nature of costs for providing internal services under the scheme framed under section 203 ;

(xv) with the previous sanction of the State Government, any other tax, toll or fee which the State Legislature has power to impose in the State under the Constitution of India.

(2) The rates of any tax, toll or fee under sub-section (1) except that under clause (viii) thereof shall be determined by the Committee:

Provided that such rates shall not exceed the maximum limits which the State Government may, from time to time, by notification, specify in this behalf.

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200. General bye-laws–The State Government shall make bye-laws applicable to all or any of the municipalities as it may, by notification, specify, by which the committees shall–

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(xxx) regulate the laying of communication cables (underground as well as overground), erection of communication towers and dish antennas established and maintained by private agencies as well as semi-Government agencies ; and

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(15) The contention raised by learned counsel for the petitioners that erection of towers cannot be regulated by the local authority for the reason that it does not fall within the definition of building and there being no other provision in the 1973 Act under which it can be controlled, is untenable. The contention raised that any premises to be included in the definition of 'building' should be used only for human habitation is also misconceived. A perusal of the definition of 'building' as contained in Section 2(2) of the 1973 Act shows that the same means any shop, out-house, hut, house, shed or stable whether used for the purpose of human habitation or otherwise and whether of masonary, bricks, wood, mud, thatch, metal or any other material whatever and includes a wall and a well. The aforesaid definition is inclusive in character. It is not restricting the meaning of word 'building' in any manner. It includes any structure, which is made of metal. Along with this, reference can be made to the definition of 'building' as contained in Building Bye-laws as well, which provides that it can be any structure may be any part of the building or affixed thereto. The towers in the present case are made of steel and they are erected on the roof tops or in a compound of the building.

(16) Even if the word 'tower' as such has not been mentioned in the definition of the term 'building', as contained in the 1973 Act or the Building Bye-laws framed thereunder, but still when the aforesaid laws were framed, the erection of towers in such a large number within the residential area was not foreseen. The courts cannot be silent spectators in such a situation and allow an activity unabated which is required to be controlled. The courts are required to interpret the statutes in a manner that continuously

updates its wordings with the changing time. It is to be presumed that enactment has to be applied at any future time, considering the changed conditions and need of the hour. Reliance for the purpose can be placed upon a judgment of Hon'ble the Supreme Court in **State of Maharashtra** *versus* **Dr. Praful B. Desai, (10)** where their Lordships on the principle of interpretation of an ongoing statute (in that case Cr. P.C.) relied on the commentary titled "Statutory Interpretation", 2nd Edition of Francis Bennion and opined as under :

> "It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.
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> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.
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> An enactment of former days is thus to be read today, in the light of dynamic processing over the years, with such modification for the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

(10) AIR 2003 SC 2053

(17) Further, it has been consistently opined by Hon'ble the Apex Court that where a definition in a statute uses the word "includes", the word defined not only bears its ordinary, popular and natural meaning, but in addition also bears the extended statutory meaning. The word must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Reference can be made to **Dhampur Sugar Mills Ltd.** *versus* **Commissioner of Trade Tax, (11) Ramanlal Bhailal Patel** *versus* **State of Gujarat, (12) and Delhi Development Authority** *versus* **Bhola Nath Sharma (Dead) by LRs and others, (13).**

(18) A Full Bench of Delhi High Court in **MCD** *versus* **Pradeep Oil Mills P. Ltd., (14)** has held underground storage tank to be building and upheld the levy of property tax thereon. The said judgment was upheld by Hon'ble the Supreme Court in MANU/SC/0414/2011.

(19) Delhi High Court in **Cellular Operators Association of India and others** *versus* **MCD,** MANU/DE/1198/2010 and Bombay High Court in **Bharti Tele-Ventures Limited** *versus* **State of Maharashtra,** MANU/MH/0123/207, have opined that tower falls within the definition of 'building'.

(20) In view of our aforesaid discussions, it can very well be opined that the tower would be included in the definition of building.

(21) Second contention raised by learned counsel for the petitioners was that telecom services falling within the domain of Union Government in terms of Entry 31 of List-I to the Seventh Schedule of the Constitution of India, any interference in the process may be in the form of grant of permission for erection of tower, would be totally incompetent. A 'thing' or an 'activity' may and necessarily has several aspects. Merely because central law takes care of its one aspect, it does not mean that any other authority cannot regulate its other aspects. Entry 31 in List-I to the Seventh Schedule of the Constitution of India provides for posts and telegraphs,

(11) (2006) 5 SCC 624
(12) AIR 2008 SC 1246
(13) (2011) 2 SCC 54
(14) AIR 2010 Delhi 119

telephones, wireless, broadcasting and other like forms of communication. It deals with various modes of communication. Under the aforesaid enabling power and also as is provided for under the 1885 Act, Union Government has the exclusive right to grant licences for providing telecom service. It does not in any manner deal with the issue where any infrastructure, may be erection of building or tower, is to be created. If any building is to be constructed or a tower is to be erected within the jurisdiction of a local authority, the same necessarily has to be in compliance to the provisions in any structure applicable for the purpose.

(22) The impugned Bye-laws framed by the State Government, *inter alia,* provide for location of the tower, the maximum height and structural stability certificate of the tower, subject to clearance from defence, civil aviation and doordarshan authority. The aforesaid aspects are not considered by the licensing authority. The area falling within the jurisdiction of a local authority cannot be permitted to be developed haphazardly. We are living in a civilized society. We expect the local authority to provide various amenities at its best. We also expect that in the immediate neighbourhood no high-rise building or structure is erected, which may either cause danger to the safety of the adjoining buildings or aesthetically may not be suitable in the locality or in any way affects the quality of life. If the people are permitted to erect buildings or structures in any local area in the manner they like, that would certainly lead to creation of an urban slum. Density of population in any area is controlled considering the infrastructure which is either available or could be provided.

(23) An owner of a building considering his private interest involved, while entering into an agreement with any telecom service provider may allow it to erect the tower either on his roof top or in the compound of the building. He may or may not be living there. He may not be concerned with the safety or effect on the health of the people living in the area, but the local authority is certainly duty-bound to consider the general well being and safety of the people living in the area. It is keeping in view that larger public interest that local authority has been conferred and is required to exercise its power while dealing with the applications for grant of permission for erection of towers.

(24) The local authority is also duty-bound to take care of the environmental aspect of any activity before the permission therefore is granted. In the present case, the impact on the health of the people may not be only in the form of air and water pollution, but it is in the form of electromagnetic waves as well for which there are various studies available opining that these are effecting the health of the people. The mobiles emit signals in the form of radio waves. These microwaves are in the form of electromagnetic radiation. It is feared that this radiation can cause changes to the cells in our brain. If the DNA in the brain cells get damaged, they may become cancerous and cause brain tumors in particular gliomas. It is also feared that the radio waves can alter chemical and electrical reactions in our brain, changing, in effect, the way that the brain cells communicate. This may even cause emotional disorders. The house sparrows in the recent past have seen a gradual decrease in their population. Studies conducted revealed that sparrows have declined in most contaminated electromagnetic fields.

(25) Recently a study by World Health Organisation on the potential danger of mobile phones was published. It was concluded that mobile use is possibly carcinogenic to humans', a term that places mobile in the middle of a rating scale that contains five levels of carcinogens. It means that mobiles are ranked below things that are definitely known to cause cancer, such as smoking and sun beds. It has been put along side things over which there are still questions, such as pesticide DDT and lead.

(26) The Building Bye-laws framed under the 1973 Act clearly provide for the area which can be covered on a plot, zoning plan, maximum height of a building, its foundation which should be strengthen enough to sustain the combined dead load of the building as well as the super imposed load and to transmit those loads to the sub-soil within the permissible limits, kind of material to be used and various other allied things. If the service providers, like the petitioners are permitted to erect a tower at any place they like merely by entering into an understanding or agreement with the owners or occupiers of the buildings without taking care of the safety and security of the people living in the neighbourhood, the results may be preposterous.

(27) One of the conditions contained in the registration certificate provided to the petitioners by the Department of Telecommunication, Government of India also leaves this area within the domain of local authorities. The same is extracted below :

> "7.6 The Registered compay will ensure that the Telecommunication installation carried out by it should not become a safety hazard and is or in contravention of any statute, rule or regulation and public policy.

(28) Dispute resolution, if there is any apparent overlapping of power between Union and the State in terms of the Entries contained in Seventh Schedule of the Constitution of India, is well guided by various pronouncements of Hon'ble the Supreme Court. In **Federation of Hotel and Restaurant Assn. of India** *versus* **Union of India, (15)** the levy considered was expenditure tax under Cental law with reference to the contention that the same was in substance tax on luxury under Entry 62 of List II. Stand of the Central Government was that expenditure aspect was different from luxury aspect and expenditure aspect could be held to be excluded from the luxury aspect. The plea was upheld. It was observed :—

> "26. Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result the two provisions must be read together, and the language of one interpreted, and, where necessary modified by that of the other.
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> (27) The Judicial Committee in **Prafulla Kumar Mukherjee** *versus* **Bank of Commerce, (16)** referred to with approval the

(15) (1989) 3 SCC 634

(16) AIR 1947 PC 60

following observations of Sir Maurice Gwyer 'C.J.' in *Subrahmanyan Chettiar* case 4 :

> "It must inveitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely interwined that blind observance to a strictly verbal interpretation would result in a larger number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the pruposе of determining whether it is legislation with respect to matters in this list or in that."

(28) This necessitates as an "essential of federal Government the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of division of powers. The court is this body.

(29) The position in the present case assumes a slightly different complexion. It is not any part of the petitioners' case that "expenditure tax" is one of the taxes within the States' power or that it is a forbidden filed for the Union Parliament. On the contrary, it is not disputed that a law imposing "expenditure tax" is well within the legislative competence of Union Parliament under Article 248 read with Entry 97 of List-I. But the specific contention is that the particular impost under the impugned law, having regard to its nature and incidents, is really not an "expenditure tax" at all as it does not accord with the economists' notion of such a tax. That is one limb of the argument. The other is that the law is, in pity and substance, really one imposing a tax on luxuries or on the price paid for the sale of goods. The crucial questions, there, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly, whether "expenditure" laid out

on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation.

(30) In Lefroy's *Canada's Federal System* the learned Author referring to the "aspects of legislation" under Sections 91 and 92 of the Canadian Constitution i.e. British North America Act, 1867 observes that "one of the most interesting and important principles which have been evolved by judicial decisions in connection with the distribution of legislative power is that subjects which in one aspect and for one purpose fall within the power of a particular legislature may in another aspect and for another purpose fall within another legislative power". Learned Author says :

> "...that by 'aspect' must be understood the aspect or point of view of the legislator in legislating the object, purpose, and scope of the legislation that the word is used subjectively of the legislator, rather than objectively of the matter legislated upon."

In **Union Colliery Co. of Brithish Columbia** *v.* **Bryden, (17)** Lord Haldane said :

> "It is remarkable the way this Board has reconciled the provisions of Section 91 and Section 92, by recognising that the subjects which fall within Section 91 in one aspect, may, under another aspect, fall under Section 92."

(31) Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects. Lord Simonds in **Governor-General-in-Council** *v.* **Province of Madras, (18)** in the

(17) 1899 AC 580

(18) AIR 1945 PC 98

context of concepts of Duties of Excise and Tax on Sale of Goods said :

"...The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of, his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separated and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale...."

(32) Referring to the "aspect" doctrine Laskin's *Canadian Constitutional Law* states:

"The 'aspect' doctrine bears some resemblance to those just noted but, unlike them, deals not with what the 'matter' is but with what it 'comes within' .....(p. 115)

.... it applies where some of the constitutive elements about whose combination the statute is concerned (that is, they are its 'matter'), are a kind most often met within connection with one class of subjects and others are of a kind mostly dealt within connection with another. As in the case of a pocket gadget compactly assembling knife blade, screwdriver, fishscaler, nailfile, etc., a description of it must mention everything but in characterizing it the particular use proposed to be made of it determines what it is. (p. 116)

"...I pause to comment on certain correlations of operative incompatibility and the 'aspect' doctrine. Both grapple with the issues arising from the composite nature of a statute, one as regards the preclusory impact of federal law on provincial measures bearing on constituents of federally regulated conduct, the other to identify what parts of the whole making up a 'matter' bring it within a class of subjects...." (p. 117).

26. By way of instance of different aspects of the same matter, illustration was also given of tax on property uinder the State law and tax on income under the Central law:

"**38.** Indeed, as an instance of different aspects of the same matter, being the topic of legislation under different legislative powers, reference may be made to the annual letting value of a property in the occupation of a person for his own residence being, in one aspect, the measure for levy of property tax under State law and in another aspect constitute the notional or presumed income for the purpose of income tax.

(29) In ***All-India Federation of Tax Practitioners** versus **Union of India, (19)*** challenge was to the levy of service tax on service rendered by practicing chartered accounts, cost accountants and architects by the Central Legislature and objection thereto was based on Entry 60 List II providing for power of State Legislature to tax professions, trades, callings and employment. Repelling the challenge, it was held that Entry 60 of List II did not include tax on services. Tax on profession was different from tax on professional service. It was observed :

"34. As stated above, Entry 60, List II refers to taxes on professions, etc. It is the tax on the individual person/firm or company. It is the tax on the status. A chartered accountant or a cost accountant obtains a licence or a privilege from the competent body to practise. On that privilege as such the State is competent to levy a tax under Entry 60. However, as stated above, Entry 60 is not a general entry. It cannot be read to include every activity undertaken by a chartered accountant/cost accountant architect for consideration Service tax is a tax on each activity undertaken by a chartered accountant/cost accountant or an architect. The cost accountant/chartered accountant/architect charges his client for advice or for auditing of accounts. Similarly, a cost accountant charges his client for advice as well as doing the work of costing. For each transaction or contract, the chartered accountant/cost accountant renders profession based services. The activity undertaken by the chartered accountant or the cost accountant

(19) (2007) 7 SCC 527

or an architect has two aspects. From the point of view of the chartered accountant/cost accountant it is an activity undertaken by him based on his performance and skill. But from the point of view of his client, the chartered accountant/cost accountant is his service provider. It is a tax on "services". The activity undertaken by the chartered accountant or cost accountant is similar to saleable or marketable commodities produced by the assessee and cleared by the assessee for home consumption under the Central Excise Act.

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43. As stated above, every entry in the Lists has to be given a schematic interpretation. As stated above, constitutional law is about concepts and principles. Some of these principles have evolved out of judicial decisions. The said test is also applicable to taxation laws. That is the reason why the entries in the Lists have been divided into two groups, one dealing with general subjects and other dealing with taxation. The entries dealing with taxation are distinct entries vis-a-vis the general entries. It is for this reason that the doctrine of pith and substance has an important role to play while deciding the scope of each of the entries in the three Lists in the Seventh Schedule to the Constitution. This doctrine of pith and substance flows from the words in Article 246(1), quoted above, namely, "*with respect to* any of the matters enumerated in List I". The bottom line of the said doctrine is to look at the legislation as a whole and if it has a substantial connection with the entry, the matter may be taken to be legislation on the topic. That is why due weightage should be given to the words "with respect to" in Article 246 as it brings in the doctrine of "pith and substance" for understanding the scope of legislative powers.

44. Competence to legislate flows from Articles 245, 246 and the other articles in Part XI. A legislation like the Finance Act can be supported on the basis of a number of entries. In the present case, we are concerned with the constitutional status of the levy, namely, service tax. The nomenclature of a levy is not

conclusive for deciding its true character and nature. For deciding the true character and nature of a particular levy, with reference to the legislative competence, the court has to look into the pith and substance of the legislation. The powers of Parliament and the State Legislatures are subject to constitutional limitations. Tax laws are governed by Part XII and Part XIII. Article 265 takes in Article 245 when it says that the tax shall be levied by the authority of law. To repeat, various entries in the Seventh Schedule show that the power to levy tax is treated as a distinct matter for the purpose of legislative competence. This is the underlying principle to differentiate between the two groups of entries, namely, general entries and taxing entries. We are of the view that taxes on services is a different subject as compared to taxes on professions, trades, callings, etc. Therefore, Entry 60 of List II and Entries 92-C/97 of List I operate in different spheres.

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(46) In **International Tourist Corporation** *versus* **State of Haryana** *(1981) 2 SCC 318,* the appellants were transport operators. The state of Haryana levied a tax on passengers and goods under the Haryana Passengers and Goods Taxation Act, 1952. The appellants questioned the vires of Section 3(3) insofar as the levy of tax on passengers and carriage of goods by their vehicles plying along the national highways. It was urged on behalf of the appellants that there was nothing in the Constitution to prevent Parliament from combining its power to legislate with respect to any matters enumerated in Entries 1 to 96 of List I with its power to legislate under Entry 97 of List I and, if so, then the power to legislate with respect to tax on passengers and goods carried on national highways was within the exclusive legislative competence of Parliament and, therefore, Section 3(3) of the Haryana Passengers and Goods Taxation Act, 1952 was beyond the legislative competence of the State Legislature. This argument was rejected by the Division Bench of this Court, which took the view that before exclusive legislative competence can be claimed for Parliament by resort

to Entry 97, List I, the legislative competence of the State Legislature must be established. Entry 97 itself was specific. In that, a matter can be brought under that entry only if it is not enumerated in List II or III, and in the case of a tax, if it is not mentioned in those Lists. We do not dispute the above proposition. That proposition is well settled. This Court is concerned with the application of the said principle in this case. In the present matter, as stated hereinabove, the State Legislature is empowered to levy tax on professions, trades, callings, etc., *as such* and, therefore, the word "services" cannot be read as synonymous to the word 'profession' in Entry 60. Therefore, tax on services do not fall under Entry 60, List II. That, service tax would fall under Entry 92-C/Entry 97 of List I.

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48. In *T.N. Kalyana Mandapam Assn. versus Union of India, (2004) 5 SCC 632*, the Division Bench of this Court held that service tax is an indirect tax and is to be paid on all the services notified by the Government of India. It has been further held that the said tax is on "service" and not on the service provider. In para 58 it has been observed that under Article 246(1) of the Constitution, Parliament has exclusive powers to make laws with respect to any of the matters enumerated inList I in the Seventh Schedule to the Constitution. As per Article 246(3), the State Government has exclusive powers to make laws with respect to matters enumerated in List II (the State List). In the said judgment, it has been held that service tax is made by Parliament under Entry 97 of List 1. In our view, therefore, the point in issue in the present case is squarely covered by the judgment of this Court in *T.N. Kalyana Mandapam*. Of course, in the present case, we are not concerned with the services rendered by a mandap-keeper, who performs what is called as property based services. In this case, we are concerned with performance based services. However, both the categories fall within the ambit of the word "services".

(49) In *Gujarat Ambuja Cements Ltd. versus Union of India, (2005) 4 SCC 214,* it was held that service tax is not a tax on goods or on passengers but it was on the transportation *itself* and, therefore, it falls under residuary power of Parliament under Entry 97 of the Seventh Schedule to the Constitution. It was further held that service tax is not a levy on passengers or goods but on the event of service in connection with the carriage of goods and, therefore, it was not possible to hold that the Act was in pith and substance within the State's exclusive powers under Entry 56 of List II. It was held that service tax came within Entry 97 of List I. In the present case, as stated above, we are concerned with Entry 60 of List II. As stated above, service tax is on performance based services *itself.* It is on professional advice, tax planning, auditing, costing, etc. On each of the exercise undertaken tax becomes payable. Therefore, the above judgment has no applicaton."

(30) In view of our aforesaid discussion, there is no merit in the contentions raised by learned counsel for the petitioners that the State is transgressing the power as conferred on the Union of India with reference to Entry 31 of List-I to the Seventh Schedule of the Constitution of India.

(31) As far as the contention raised by learned counsel for the petitioners that framing of the Bye-laws and levy of fee for grant of permission for erection of towers is violative of Articles 19(1)(g) and 265 of the Constitution of India is concerned, the same is totally misconceived. There is no absolute right to carry on any business. It is always subject to reasonable restriction and regulation. All what has been provided in the Bye-laws is for taking permission before erection of towers. No tax as such has been levied as it is only the fee which is sought to be charged by the local authority for grant of permission and the renewal thereof. None of the judgments sought to be relied upon by learned counsel for the petitioners is relevant in the facts and circumstances of the case on account of the fact that the issues under consideration therein was either the concept of tax and fee, the compensatory tax or levy of development fee.

(32) As far as the issue of levy of fee for grant of permission and also for renewal thereof is concerned, the contention of learned counsel for the petitioners is that as no service is being provided or is to be provided by the Municipal Committee to the petitioners, it will not attain the character

of fee, rather, has to be termed as tax for which there is no legislative competence available with the State, whereas the stand of the respondents is that it is merely a regulatory fee for which no service is required to be provided.

(33) Section 70 of the 1973 Act clearly provides power to the State as well as to the Municipal Committee to levy various type of taxes and fees. It is in exercise of those powers that vide Bye-laws in question, fee has been levied.

(34) Entry 66 contained in List-II to the Seventh Schedule of the Constitution of India enables the State to levy fee in respect of any of the matters in the list. In terms of the aforesaid entry, the State would be competent to levy regulatory fee to control the construction activity of the buildings. The erection of high rise tower being a class in itself and used for commercial purposes, separate fee as compared to the fee meant for erection of building generally for residential purposes can very well be prescribed. Though fee of the kind levied is not enumerated in Section 70(1)(i) to (xiv) of the 1973 Act, however, Section 70(1)(xv) provides that with the previous sanction of the State Government, any other tax, toll or fee which the State Legislature has power to impose can be levied. However, Section 70(2) of the 1973 Act provides that the rates of such tax, toll or fee under sub-section (1) thereof shall be determined by the Committee provided that such rates shall not exceed the maximum limits which the State Government may, from time to time, by notification, specify in this behalf.

(35) In the light of the aforesaid provisions, we are of the view that the fee, which has been prescribed in the Bye-laws in question is in exercise of power conferred on the State under Section 70(1)(xv) of the 1973 Act and prescribes an outer limit as envisaged under Section 70(2) of 1973 Act. The Municipal Committee concerned has not exercised its jurisdiction as provided under Section 70(2) of the 1973 Act by prescribing the rate at which it should be levied. Accordingly, while upholding the levy of fee as such in principle, we leave it open to the Municipal Committee to prescribe the fee, if any, in exercise of power conferred under Section 70(2) of the 1973 Act. The Municipal Committees/Corporations may do that exercise upto 31st August, 2011. The amount already paid by the petitioners shall abide by the amount of fee so determined finally.

(36) It is generally experienced that the State or various authorities constituted thereunder always try to project and enforce that they have a right to recover the taxes or fee, but when the turn for performance of duty comes, they are casual. They do not realise that they are there to serve the public. The general public silently feels that good amount of revenue collected by the State is merely wasted but they are helpless. In the recent past, the country has experienced resentment of the public at large on various issues where the government has failed. No doubt, infrastructure is required to be added, which is a sign of growth in the society but that does not mean that the State authorities should only recover taxes, fees for providing licences or grant permissions, but not perform their duty to see as to what is the effect of permissions granted by them on the general public in the form of difficulties to be faced by them or on their health.

(37) It will be the duty of the local authorities to issue a public notice for information of all concerned where the permission for erection of a tower is being considered or granted to apprise the public as to what amount of radiation it will emit and the effect thereof on the health of the people living in the area. The officers ought not to be insensitive to these problems of the general public and should be conscious of their constitutional duty. Right to life guaranteed under Article 21 of the Constitution of India is one of the fundamental rights. It has to be meaningful. The petitioners cannot be permitted to carry on business for their gain at the cost of health of the public. Even they are also duty-bound to apprise the public about the adverse effects of the electromagnetic waves to be emitted by a tower in the area to the residents thereof by issuing proper public notice.

(38) For the reasons mentioned above, as far as validity of Haryana Municipal (Erection of Communication Towers) Bye-laws, 2009 is concerned, the same is upheld. However, as far as imposition of licence fee is concerned, it is held that the same shall be the maximum limit prescribed by the Government in terms of the powers conferred under Section 70(1)(xv) of the 1973 Act and the final rate is to be fixed by the concerned Municipal Committee in exercise of powers conferred under Section 70(2) of the 1973 Act, as already observed in para 35 above.

(39) The writ petitions are disposed of in the manner indicated above.