

(2013) 04 GUJ CK 0121

In the Gujarat High Court

Case No : Special Civil Application No. 4084 of 2012 with Spl. C.A. Nos. 11059 and 11730 of 2008 with Spl. C.A. No. 2843 of 2009 with C.A. No. 2967 of 2010 in Spl. C.A. Nos. 2843 and 3157 of 2009 with C.A. No. 3446 of 2010 in Spl. C.A. Nos. 3157, 8407, 9162 to 9197

G.T.L. Infrastructure Ltd.

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-04-2013

Acts Referred:

Citation : (2014) 1 GLR 725

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Judgement

Akil Abdul Hamid Kureshi, J.—Civil Application No. 3446 of 2010 in Special Civil Application No. 3157 of 2009 for amendment is allowed as unopposed and disposed of accordingly. These petitions raise the question of property tax on mobile towers. As simple as the question may appear, the answer is neither simple nor short. In fact, factual aspects concerning such ultimate question are also quite complicated. We may, however, refer to the broad facts at first to be able to explain the background in which such question has arisen.

2. Several petitions have been filed by different mobile companies questioning the authority of the local bodies to tax the mobile towers treating them as buildings. Such local bodies fall in three different categories, namely, Municipal Corporations, Municipalities and Panchayats. The challenge of the petitioners can be bifurcated into two broad areas. Their first attack is on the ground of legislative competence. They contend that the mobile towers are not buildings. That being so, the State Legislature does not have competence to enact any law to tax such mobile towers under Entry 49 of List-II to Seventh Schedule of the Constitution which pertains to taxation on lands and buildings. There are several contentions raised in this respect to which we would advert at a later stage. Second limb of the petitioners challenge is with respect to the mechanism for

collection of such taxes. They contend that proper rules after following the procedure provided under the respective Acts have not been framed to enable the local authorities to collect tax on the mobile towers. They contend that some of the Gram Panchayats have raised the bills of property taxes without any authority whatsoever. They also contend that some of the local authorities have relied upon Government Resolutions which have been struck down by this Court. In some of the Municipal Corporations such as Surat Municipal Corporation, where the tax rules have been duly amended empowering the Municipal Corporation to recover such taxes on mobile towers, challenge of the petitioners is that such rules are ultra vires on the same ground of lack of legislative competence as also excessive delegation. Thus the petitioners have challenged different property tax bills raised by the local authorities on the ground of invalidity of the statute under which the same are sought to be collected. Alternatively and additionally, they contend that even if the concerned statutes are valid, the tax collection mechanisms suffer from legal defects.

3. Group of petitions led by Special Civil Application No. 4084 of 2012 have been filed challenging the vires of Gujarat Local Authorities Laws (Amendment) Act, 2011 (hereinafter referred to as "the Amending Act") which makes certain changes in Bombay Provincial Municipal Corporations Act, 1949 now renamed as Gujarat Provincial Municipal Corporations Act, 1949 (hereinafter referred to as "the G.P.M.C. Act"), the Gujarat Municipalities Act and the Gujarat Panchayats Act. Like-wise group of petitions including Special Civil Application No. 677 of 2010 have been filed challenging various taxation rules of the Municipal Corporations and other local bodies.

4. Regarding the petitioners' first challenge to the validity of the statutory provisions in context of the legislative competence, we may refer to the pleadings from Special Civil Application No. 4084 of 2012. The petitioner is a company registered under the Companies Act. The petitioner is engaged in providing infrastructure for Mobile Telecommunication Services. The petitioner enjoys necessary licence and registration issued by the competent authority under the Telegraph Act, 1885. For providing such infrastructure to its customers, the petitioner-Company is required to install Base Transceiver Station (B.T.S. for short), more commonly known as mobile towers. For setting up such mobile towers, the petitioner enters into agreements with private owners. Armed with such agreements, the petitioner would apply to the local authorities for permission to erect such a structure. As pointed out by the petitioner in the petition, such structure consists of the following:

- (a) A pre-fabricated shelter made of insulating P.U.F. material made of fibres.
- (b) Electronic Panel.
- (c) Base Transceiver Station (B.T.S.) and other radio transmission and reception equipment.
- (d) A diesel generator set.

(e) Six poles of 6 to 9 metres length each made of hollow steel galvanized pipes.

The B.T.S. is installed either on the open land or on the terrace of existing building belonging to the agreeing parties. The petitioner has installed such B.T.S. at various places in the State of Gujarat.

5. To understand the purpose of such B.T.S., we may refer to the booklet circulated by the Department of Telecommunications Ministry of Communications & I.T., Government of India and titled as Mobile Communication Radio Waves & Safety, in which it is stated as under:

Cellular Phone tower and waves:

Mobile phone base stations are radio transmitter with antennae mounted on either transmission towers or roof tops on buildings. The antennae need to be located at optimum locations and heights so they can adequately cover the area. Antenna position usually range in height from 50-200 feet. When a person makes a cell phone call, a signal is sent from the mobile phones antenna to the nearest base station antenna. The base station responds to this signal by assigning it an available radio frequency channel. R.F. waves transfer the information to the base station. The voice/data signals are then sent to a switching centre, which transfers the call to its destination. The voice signals are then relayed back and forth during the call. In India mobile phones operate in the frequency range of:

869-890 MHz (CDMA)

935-960 MHz (GSM900)

1805-1880 MHz (GSM1800)

2110-2170 Mhz (3G)

Cell phones connect with the base station as frequently as every minute so as to relay information about your location which generates a near-field by the cell phone even when you are not making a call. When you make a call on a mobile phone, the phone transmits radio waves to the antenna of a nearby base station. The base station then transmits the call using the mobile telecommunications network to the phone of the person you are calling.

In town and cities where there are many phone users, more base stations are needed than in rural areas. The antenna of the base stations are mounted on mast, buildings or towers. The intensity of the radio waves emitted from base stations in places where the public have access are generally found to be hundreds of times below the health and safety guidelines.

The intensity of electro-magnetic wave (power density) weakens very quickly as it moves away from the antenna. It is reduced to 1/4 when the distance from the antenna double and to 1/9 when the distance is three times.

For better understanding of these details, the pictures of mobile towers as available on the internet is reproduced hereunder:

6. Respondent No. 2-Ahmedabad Municipal Corporation ("A.M.C." for short) and respondent No. 3-Surat Municipal Corporation ("S.M.C." for short) issued various municipal tax bills to the petitioner demanding property tax on such B.T.Ss. erected by the petitioner within the limits of such Corporations. Copies of such tax bills are produced by the petitioner at Annexure-A collectively. These bills the petitioner has challenged on the ground that it is outside the competence of the State Corporation to tax the petitioners B.T.S. and ultra vires the G.P.M.C. Act. By way of an amendment, the petitioner also prayed for a declaration that Sec. 145A of the G.P.M.C. Act is ultra vires Arts. 14, 243 and 265 of the Constitution.

7. Previously, the local authorities under a Government Resolution had attempted to collect annual permission fees and installation charges on the mobile towers erected by various cellular companies. Legality of such tax demand came up for consideration before the Division Bench of this Court in case of Indus Towers Ltd. Vs. State of Gujarat and Another, . The Court struck down the tax bills on the ground that the resolution of the Government was neither an ordinance, bye-law, rule, regulation, notification, custom nor usage having the force of law. It was concluded in Para 34 of the judgment that it is apparent that insofar as Municipal Corporations are concerned, the respondents were not in a position to point out any statutory force behind the levy of annual permission fee and/or installation charges on such mobile towers. Perhaps in wake of such judgment in case of Indus Towers Ltd. (supra), the State Legislature was prompted to enact the Amending Act. Such Act made simultaneous changes in the G.P.M.C. Act, the Gujarat Municipalities Act and the Gujarat Panchayats Act. Since the effect of such legislative changes in the above-noted three State Acts is similar and since in the present petition from which we are recording the facts concern the changes made in the G.P.M.C. Act, we may briefly refer to Sec. 145A added in the G.P.M.C. Act by the Amending Act. Sub-section (1) of Sec. 145A provides that a tax at the rates not exceeding those prescribed by order in writing by the State Government in this behalf from time to time shall be levied on mobile towers from the person engaged in providing telecommunication services through such mobile towers. This provision is challenged in this petition.

8. The respondents have appeared and filed replies opposing the petition. Reply of respondent No. 1-State Government deals mainly with the validity of the said provision. It is stated that the State Legislature is competent to enact the laws pertaining to taxes on lands and buildings as provided in Entry 49 of the State List contained in Seventh Schedule to the Constitution. It is pointed out that B.T.S. comprises of steel fabricated tower or antenna fixed on a pole, pre-fabricated shelters of fibre glass or P.V.C. installed on the building roof top/terrace for equipment, masonry structure/shelter on the ground for equipment, D.G. Set with sound proof cover to reduce the noise level.

9. Respondent No. 3-Surat Municipal Corporation also has filed its reply. Reliance is placed on Sec. 2(5) of the G.P.M.C. Act defining the term building to contend that the definition is wide and includes a variety of structures. It is contended

that the activities undertaken by the petitioners of installing a cabin and B.T.S. structure fall within the definition of term development as contained under the Gujarat Town Planning and Urban Development Act, 1976. It is contended that under the regulations particularly, General Development Control Regulation ("G.D.C.R." for short) framed under the Town Planning law, the mobile companies are required to obtain necessary permission from the competent authorities before erection of the structure.

10. Respondent No. 2-A.M.C. has also filed its separate reply and taken similar contentions.

11. On behalf of the petitioners, learned Counsel Shri Shalin Mehta and Senior Counsel Shri Saurabh Soparkar appeared and raised the following contentions:

(1) A mobile tower is a telegraph, and therefore, falls in Entry 31, List-I of the Seventh Schedule which is in a Union list. Union legislation alone therefore, is competent to enact laws connected therewith. It is contended that Telegraph Act, 1885 is a complete code providing for detailed provisions in connection with telegraph. When the field is thus occupied by a Union legislation, the State Legislature would not be competent to enact laws concerning therewith.

(2) A mobile tower is neither land nor building. Section 145A of the G.P.M.C. Act which has been enacted by the State Legislature is outside its competence since only reliance is placed on Entry 49 of List-II to the Seventh Schedule pertaining to the taxes on lands and buildings. In this context, it is contended that the definition of mobile tower under Sec. 2(34AA) of the G.P.M.C. Act introduced under the Amending Act itself makes it clear that a mobile tower is nothing but a plant and machinery. It was contended that any artificial meaning or definition contained in the Act expanding the meaning of term building cannot be utilised to test the legislative competence under Entry 49. Like-wise, it was also contended that any reference to the G.D.C.R. would not be a useful tool to ascertain whether a mobile tower is a land or a building as referred to in Entry 49 List-II. In this context, it was further submitted that the decision of this Court in case of Indus Towers Ltd. (supra) had concluded the controversy. It was precisely because the Court found that the local bodies could not be permitted to tax the mobile towers, that the bills were quashed. Any amendment brought under the G.P.M.C. Act or the other local Acts, would not permit the respondents to collect taxes in face of the decision of this Court in case of Indus Towers Ltd. (supra).

(3) It was also contended that Sec. 145A gives uncanalised and unguided powers to the delegatee to collect tax. It was submitted that on such ground also Sec. 145A of the G.P.M.C. Act was ultra vires.

(4) In support of their contentions, learned Counsel relied on the following decisions:

? In case of The Senior Electric Inspector and Others Vs. Laxmi Narayan Chopra and Others, , in which the Supreme Court held that the Telegraph Wireless

Receiving Station comes within the definition of telegraph as contained in the Telegraph Act, 1885.

? In case of *New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others*, , in which in context of property tax on textile mills, factories, etc., imposed by the A.M.C., Supreme Court came to two important conclusions. Firstly, that plant and machinery would not be covered by the expression lands and buildings and secondly, that for different buildings situated in different areas having different characters cannot be clubbed together for collection of taxes at flat rate method. It was observed that such flat rate method of collection of tax on the floor area could only be applied where majority of the properties are so nearly alike in character as to be regarded identical for rating purposes.

? In case of *The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd.*, , in which the Supreme Court in the context of the provisions contained in the Bombay Municipal Corporation Act, 1988, examined the decision of the Municipal Corporation of Greater Bombay to collect the tax from the oil company on oil storage tanks. In the course of such examination, the Apex Court made certain observations with respect to which structures can be called buildings. Interestingly, the respondents have also relied on this decision. Further, reference to such judgment at a later stage is inevitable.

? Our attention was drawn to the decision of Karnataka High Court in case of *Wireless -TT Info Services Ltd. Vs. State of Karnataka and Others* , in which a very similar issue came up for consideration before the Division Bench of Karnataka High Court. The local bodies had raised demands against the petitioners of property taxes on the mobile towers. Learned Single Judge held that there was no provision to collect permission fees or installation charges in respect of communication towers but he proceeded to hold that such towers satisfy the definition of building contained in Sec. 2(3) of the Karnataka Municipalities Act and such similar provisions contained in Karnataka Municipal Corporations Act and Karnataka Panchayat Raj Act. While quashing the demands, the learned Judge gave a direction for framing appropriate law and rules in this respect. The petitioners therefore, challenged the decision of the learned Single Judge before the Division Bench. Before, the Division Bench respondents relied on Entry 49 in List-II in support of the tax collection legislation. Division Bench concluded that telecommunication structures are not included in the definition of building and such towers, are therefore, not liable to tax under the existing power available to impose taxes on lands and buildings.

12. On the other hand, learned Advocate General Shri Kamal Trivedi opposed the petitions contending that the authority to tax lands and buildings is exclusively vested in the State Legislature under Entry 49 of List-II. A mobile tower is neither a telegraph nor the State Legislature would be deprived of its power to enact law for collection of tax on such mobile towers even if it were, for the purpose of licensing procedures, to be considered as a telegraph. He submitted

that the Telegraph Act, 1885 operates in an entirely different field and has nothing to do with tax collection on any structure if it happens to be a building.

12.1. He further contended that the mobile towers are buildings as defined in different Acts and in particular, the G.P.M.C. Act. Relying on various decisions, he contended that the term building may be understood in an extended sense and cannot be confined only to dwelling houses. Referring to the dictionaries and law lexicon, he submitted that for a structure to be a building, it is not always necessary that same must have a roof at the top. It was contended that with technological advancement and with changing times, the Court must interpret the provisions of different statutes keeping pace with such changes.

12.2. He further submitted that every entry in the Constitution must be given its widest possible amplitude and even extended meaning of the term building should be seen to have been covered under such entry. He submitted that looking to the pith and substance of the impugned Amending Act, the competence of the State Legislature to enact such an Act should be recognised with reference to Entry 49 of the Second Schedule.

12.3. In support of his contentions, he relied on the following decisions:

? In case of the Municipal Corporation of Greater Bombay (supra) from which he pointed out that the Apex Court had upheld the levy of property tax on oil storage tanks erected by the oil company.

? In case of Bharti Tele-Ventures Limited and Mr. Sunil Bharti Mittal Vs. State of Maharashtra, Urban Development Department and Pune Municipal Corporation, , wherein Division Bench of the Bombay High Court held that mobile tower and cabin would be included within the meaning of term building contained in the Bombay Provincial Municipal Corporations Act.

? On the Full Bench decision of Delhi High Court in case of Municipal Corporation of Delhi Vs. Pradeep Oil Mills P. Ltd., , in which once again relying on the decision of Supreme Court in case of the Municipal Corporation of Greater Bombay (supra), the High Court held that erection of petroleum storage tank amounts to erection of building which is taxable under the Delhi Municipal Corporation Act.

? In case of Indian Organic Chemicals Ltd. and others Vs. Khopoli New Township Municipal Council and others, , wherein following the decision in case of the Municipal Corporation of Greater Bombay (supra), Division Bench of Bombay High Court held that storage tanks of chemical factory can be termed as lands and buildings within the meaning of Entry 49.

In case of Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another, , in which it was observed as under:

43. By reason of the provisions of the D.M.C. Act, the M.C.D. is required to render several services as specified therein for the purpose whereof, tax is required to be imposed both on land as also on building. The definition of land

and building as provided in the D.M.C. Act must be given its full effect. As mentioned hereinbefore in the case of Municipal Corporation of Greater Bombay case, even an oil tanker has been held to be building. ? In case of Cellular Operators Association of India and Others Vs. Municipal Corporation of Delhi etc. etc., , wherein the learned Single Judge of Delhi High Court held that temporary structures/towers on roof tops for providing Cellular Basic Phone Services are building within the meaning of Municipal Acts, and hence, cannot be erected or installed without obtaining permission of the Municipality.

? In case of the The Tata Engineering and Locomotive Company Ltd. Vs. Gram Panchayat, Pimpri Waghere, , wherein the Apex Court observed that the words houses and lands used in the Bombay Village Panchayat Act, 1933 mean all buildings and factory building would be included within that meaning.

? In case of State of West Bengal and Others Vs. Lal Chand Agarwalla and Others, , wherein it was observed that legislative intent was to tax nuts. It was, therefore, held that groundnuts would be taxable irrespective of the fact that they are also oil seeds.

12.4. In the context of Entry 49 to Second Schedule and its true interpretation, learned Advocate General relied on the following decisions:

? In case of Empire Industries Limited and Others Vs. Union of India and Others, , in which in context of the petitioners challenge to the amendment to the definition of term manufacture contained in Central Excises and Salt Act, 1944, in context of Entry 84 of List-I, the Apex Court held that the processes of the type which have been incorporated by the impugned Act were not so alien or foreign to the concept of manufacture that these could not come within that concept.

? Reliance was also placed on decision of Division Bench in case of Ujagar Prints Vs. Union of India (UOI) and Others etc. etc., , in which it was observed that entries in the legislative lists must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense.

? Reliance was placed on decision of the Apex Court in case of The State of Rajasthan Vs. G. Chawla and Dr. Pohumal, , in which referring to the theory of pith and substance, control on loudspeakers was recognised as a necessary power under the entry of public health.

? Reliance was made to decision of Division Bench of this Court in case of Reliance Industries Ltd. v. State of Gujarat passed in Special Civil Application No. 4690 of 2012 and connected matters in which this Court had made certain observations while coming to the conclusion that the Electricity Act, 2003 and Gujarat Green Cess Act, 2011 operate in different field.

Reliance was also made to decision in case of Gulabchand Bapalal Modi Vs. Municipal Corporation of Ahmedabad City, , in the context of petitioners contention of excessive delegation of taxation powers. It was pointed out that

the Apex Court had occasion to examine similar statutory provision contained in the same Act which was previously called Bombay Provincial Municipal Corporation Act. It was held that taxation provisions do not suffer from excessive delegation.

13. Detailed submissions have been made before us also in the group of petitions concerning the tax collection mechanism. We would advert to such issues once we decide the validity of the provisions of different Acts under challenge before us.

14. For the purpose of the present discussion, we may note the relevant provisions contained in G.P.M.C. Act.

? Section 2(5) of the G.P.M.C. Act defines the term building as under:

(5) "building" includes a house, out-house, stable, shed, hut and other enclosure or structure whether of masonry, bricks, wood, mud, metal or any other material whatever whether used as a human dwelling or otherwise, and also includes verandas, fixed platforms, plinths, doorsteps, walls including compound walls and fencing and the like;

Like-wise Sec. 2(30) of the G.P.M.C. Act defines the term land as under:

(30) "land" includes land which is being built upon or is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street.

Section 2(34AA) of the G.P.M.C. Act which was introduced in the Act by the impugned Amending Act defines the term mobile tower as under:

2(34AA) "Mobile lower" means a temporary or permanent structure, equipment or instrument erected or installed on land or upon any part of the building or premises for providing telecommunication services.

? Section 127 of the G.P.M.C. Act pertains to taxes to be imposed under the Act. Sub-section (1) thereof provides that for the purpose of the Act, the Corporation shall impose the following taxes, namely,

(a) property tax either under Sec. 129 or under Sec. 141AA.

(b) a tax on vehicles, boats and animals.

(c) a tax on mobile towers.

Clause (c) noted above was inserted by the impugned Amending Act.

? Section 129 of G.P.M.C. Act pertains to property tax of what to consist and at what rate leviable. It is not necessary for the purpose of this discussion to take a detailed note of provisions contained therein. Suffice to note that such provision permits the Corporation to collect property tax on rateable value of the property.

? Section 141AA of the G.P.M.C. Act which was inserted by virtue of Bombay Provincial Municipal Corporations (Gujarat Amendment and Validation) Act, 2007 pertains to property taxes of what to consist and at what rate leviable. Provisions made therein permit the Municipal Corporation to collect tax on carpet area basis.

? Section 141B of the G.P.M.C. Act pertains to general tax at what rate leviable and provides for a detailed mechanism for assessing and levying annually general tax on buildings and lands situated in the Municipal Corporations.

Section 145A of the G.P.M.C. Act which was introduced in the G.P.M.C. Act by the impugned Amending Act pertains to tax on mobile towers and reads as under:

145A. Tax on mobile towers:-(1) A tax at the rates not exceeding those prescribed by order in writing by the State Government in this behalf from time to time shall be levied on mobile towers from the person engaged in providing telecommunication services through such mobile towers.

(2) The Corporation shall from year to year, in accordance with Sec. 99, determine the rates at which the tax shall be levied.

15. On the basis of above statutory provisions and submissions made before us, we would be required to answer two questions:

(1) Is the Amending Act ultra vires as it provides for a legislation for tax collection on a telegraph which is a subject of Union Legislature and already included in the Union Legislation in the form of Telegraph Act, 1885?

(2) Whether, the Amending Act and in particular, Sec. 145A of the G.P.M.C. Act (and other similar provisions introduced in the Gujarat Municipalities Act and Gujarat Panchayats Act) introduced by the Amending Act, is ultra vires the Constitution being beyond the competence of State Legislature?

16. We would consider the first question first. We have already noticed the relevant statutory provisions contained in the G.P.M.C. Act insofar as collection of tax on mobile towers is concerned. We have noticed that the respondents seek to trace such legislation to Entry 49 in List-II to the Seventh Schedule. We may now have a brief look at some of the provisions contained in Telegraph Act, 1885.

? In order to amend the law relating to Telegraph in India, the said Act was enacted. Section 3(1-AA) defines the term telegraph as under:

3(1-AA) "Telegraph" means any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means.

Dated: 25-4-2013:

? Part-II of the Telegraph Act, 1885 pertains to privileges and powers of the Government. Sub-section (1) of Sec. 4 contained in said Part-II provides that

within the country, the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs. First proviso to said sub-section, however, authorises the Central Government to grant licence to any person on such conditions and on consideration of such payments as it thinks fit, to establish, maintain or work a telegraph within any part of India. Section 7 pertains to power to make rules for the conduct of telegraphs. Sub-section (1) thereof authorises the Central Government to frame rules by issuing notification consistent with the Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under the Act.

? Part-III of the Telegraph Act, 1885 pertains to power to place telegraph lines and posts. Section 10 thereof authorises the telegraph authority to place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property.

? Part-IV of the Telegraph Act, 1885 pertains to penalties. Various provisions contained in the said part provide for differing penalties for different breaches connected with the telegraph. For example, Sec. 20 provides for punishment of imprisonment which may extend to three years or with fine, or with both, if any person establishes, maintains or works a telegraph within India in contravention of the provisions of Sec. 4 or otherwise than as permitted by the Rules. Section 21 prescribes punishment for using unauthorised telegraphs. Section 25 provides for punishment for intentionally damaging or tampering with telegraphs.

? Part-V pertains to supplemental provisions. Section 33 thereof pertains to power to employ additional police in places where mischief to telegraphs is repeatedly committed.

17. The Statement of Objects and Reasons for enactment of Telegraph Act, 1885 would reveal that the main object was to give power to the Government and to any company or person licenced under Sec. 4, to place telegraph lines under or over property belonging whether to private persons or to public bodies. Bearing in mind such objects and perusing different statutory provisions made in the Telegraph Act, 1885 would immediately reveal that the said Act operates in the field controlling the telegraphs. Looking to its considerable importance, powers of establishing, maintaining or working of telegraphs are retained by the Central Government but with a power to grant licence on suitable conditions and on payment of appropriate charges to any other person to establish, maintain or work telegraphs within the country. Several provisions in the Act have been made for smooth establishment, maintenance and working of telegraphs either by the Central Government or by the licensee. Thus, as noted above, the provisions have been made in Part-III of the Act with respect to power to place telegraph lines and posts. Detailed provisions have been made in Part-IV providing for penalties and punishment for establishing, maintaining or working unauthorised telegraph, for breach of condition of licence, for using unauthorised telegraphs, for intentionally damaging or tampering with telegraphs etc. These provisions suggest that the Telegraph Act, 1885 occupies the field where the

establishment, maintenance or working of telegraphs is the main purpose.

18. In comparison, the G.P.M.C. Act was enacted finding it expedient to provide for establishment of Municipal Corporations in the city of Ahmedabad and certain other cities with a view to ensure a better Municipal Government of the said cities. The Act makes detailed provisions for constitution of such Municipal Corporations through elections, for holding elections of the Councillors and all issues related therewith. Detailed provisions also have been made for constitution of different committees in the Municipal Corporation such as, Transport Committee. Provisions have also been made for functioning of several Municipal Authorities envisaged under the Act as also for conducting of the business of Municipal Corporation and its different governing bodies. Detailed provisions have been made with respect to municipal property and acquisition of property by the Municipal Corporations. Chapter-IX of the G.P.M.C. Act pertains to municipal fund and other funds. Section 82 envisages constitution of municipal fund. It is but natural that any Municipal Corporation to carry out its duties and functions, would require funds. The G.P.M.C. Act authorises the Corporations to collect tax for raising its revenue. Chapter-XI of the G.P.M.C. Act pertains to municipal taxation. Section 127 pertains to taxes to be imposed under the Act. Section 128 pertains to the manner of recovering municipal taxes. Section 129 pertains to property tax of what to consist and at what rate leviable. Section 141AA makes provision for property taxes to be levied on carpet area bases. Section 145A which is at the center of controversy pertains to tax on mobile towers. Sub-section (1) thereof provides that a tax at the rates not exceeding those prescribed by order in writing by the State Government shall be levied on the mobile towers from the person engaged in providing telecommunication services through such mobile towers.

19. From the various provisions contained in the G.P.M.C. Act, it can be seen that the same operates in a field entirely different from one occupied by the Telegraph Act, 1885. The G.P.M.C. Act, as noted, makes detailed provisions for establishment of Provincial Municipal Corporations for its constitution and functioning, for election of Councillors and working of the corporation through different committees. For the purpose of carrying out its duties and functions, Municipal Corporations are also authorised to levy taxes subject to certain conditions.

20. We are, therefore, unable to accept the contention of the petitioners that the mobile tower being telegraphs, cannot be the subject-matter of any legislation by the State Legislature under Entry 49 of List-II. Both the Acts operate in vastly different fields. Entry 31 of Union List of Seventh Schedule pertains to posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication. The Telegraph Act, 1885 is thus enacted by Union legislation in terms of the said legislative entry. On the other hand, Sec. 145A of the G.P.M.C. Act and other taxing provisions relied upon by the respondents for levying taxes on mobile towers, are based on Entry 49 of List-II which is a State list pertaining

to taxes on lands and buildings.

21. The principle of pith and substance is neither recent nor unknown.

? In case of Union of India (UOI) and Others Vs. Shah Goverdhan L. Kabra Teachers College, , it was observed that when it appears to the Court that there is apparent overlapping between the two entries, the doctrine of pith and substance has to be applied to find out the true nature of a legislation and the entry within which it would fall. In case of conflict between entries in List-I and List-II, the same has to be decided by application of the principle of "pith and substance". The doctrine of "pith and substance" means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another Legislature. When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. It was further observed that on such examination if it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence.

In case of Rajiv Sarin and Another Vs. State of Uttarakhand and Others, , it was observed that in order to find out the subject-matter of an enactment, even in the context of enactments relatable to Schedule Seven List-III of the Constitution, passed by different legislatures, the doctrine of pith and substance can be relied upon and would apply. The Court held and observed as under:

57. In a nutshell, whether on account of the exhaustive code doctrine or whether on account of irreconcilable conflict concept, the real test is that would there be a room or possibility for both the Acts to apply.

Repugnancy would follow only if there is no such room or possibility.

? In case of Abhay Singh Chautala Vs. C.B.I., , the Constitution Bench of Supreme Court observed as under:

173. The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Center and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the Court is called upon to examine the enactment to be ultra vires on account of legislative incompetence.

174. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance find, its origin from the principle that it is necessary to examine the true nature and character of the legislation to know

whether it falls in a forbidden sphere. This doctrine was first applied in India in *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.* (supra). The principle has been applied to the cases of alleged repugnancy and we see no reason why its application cannot be extended even to the cases of present kind which ultimately relates to statutory interpretation founded on source of legislation.

22. The question may arise if the principle of repugnancy could be applied when two statutes have been framed with reference to entries of exclusive jurisdiction, one of Union and another of State List. The petitioners could, however, contend that in view of principle of federal supremacy accepted in our Constitution and flowing from Art. 246, in case of any conflict in such a case also, Union legislation must prevail. For the purpose of present discussion, we are prepared to proceed on such basis. We are, however, unmoved by the petitioners contention that the Telegraph Act, 1885 leaves the State legislation incompetent to levy any tax on the mobile towers subject of course, to the rider that same is established to be a building as urged by the respondents. In other words, we are of the opinion that the Telegraph Act, 1885 operates in a vastly different field and has an entire different purpose to achieve from that compared to G.P.M.C. Act. Section 145A contained in the G.P.M.C. Act authorises the Corporation to levy taxes on mobile towers. Merely because even if we were to so assume, a mobile tower is a telegraph, in our opinion, would not prevent the State legislation from framing a law authorising collection of taxes on such a structure. Any trenching in the process is wholly incidental and looking to the pith and substance of two respective Acts, we do not see any repugnancy or conflict.

23. This brings us to the second question namely, Whether, the Amending Act and in particular, Sec. 145A of the G.P.M.C. Act is ultra vires the Constitution?

24. Before addressing the core issue, we may clear a couple of peripheral issues. One of the contentions of the petitioners was that in view of decision of this Court in case of *Indus Towers Ltd.* (supra), no tax on mobile towers could have been levied even post-amendment in the G.P.M.C. Act.

We may refer to the said decision at some length. In the said case, the petitioners had challenged a Government Resolution dated 11-12-2008 pursuant to which demand notices for levy and recovery of annual permission fees and installation charges on mobile telecommunication towers situated in the Municipal Corporations and Municipalities of State of Gujarat were issued. The Court was pleased to strike down such resolution primarily on the ground that such resolution is neither an ordinance, bye-law, rule, regulation, notification, custom nor usage having the force of law. The Court was, therefore, of the opinion that such resolution cannot be stated to have been issued under the authority of law as envisaged in Art. 265 of the Constitution. Interestingly, in Paragraph 26 of the judgment, it was observed that to put it differently insofar as legislative competence is concerned, there is no dispute that the State Legislature is competent to enact a legislation providing for the imposts in question. Two things immediately become clear. Before the Court, the question

was collection of permission fees and installation charges on mobile telecommunication towers and such levy was authorised by a resolution passed by the Government. The Court held that such resolution would not fit the description of tax collected under the authority of law. Controversy before the Court was entirely different. Such decision would not cast any shadow on the present controversy which we are trying to decide.

25. We are also not influenced by the contention of the petitioners that Sec. 145A of the G.P.M.C. Act gives uncanalised and unguided powers to Corporations to collect tax on mobile towers. Such provisions cannot be read in isolation and must be seen in light of several other provisions contained in the said Act with respect to taxation. The impugned Sec. 145A itself provides for tax at the rates not exceeding those prescribed by order in writing by the State Government shall be levied on mobile towers. Sub-section (2) of Sec. 145A further provides that Corporation shall from year to year, in accordance with Sec. 99, determine the rates at which the tax shall be levied. Section 99, in turn, provides for fixing of rates of taxes and refers to determination of such rates, subject to limitation and conditions prescribed in Chapter-XI, the rates at which Municipal taxes referred to in sub-sec. (1) of Sec. 127 shall be levied in the next ensuing official year. Section 127 of the G.P.M.C. Act pertains to taxes to be imposed under the Act. Sub-section (1) thereof provides for collection of tax namely, the property tax either under Sec. 129 or under Sec. 141AA, a tax on vehicles, boats and animals and a tax on mobile towers. Secs. 129 and 141AA prescribe property taxes of what to consist and at what rate leviable.

26. Various provisions noted above thus provide for detailed guidelines, limitations and procedures under which taxes by Municipal Corporations would be collected. The purpose of collection of taxes can be gathered from the Act itself which mainly is for the purpose of carrying out duties and functions of Municipal Corporations. Sub-section (1) of Sec. 127 itself provides that for the purposes of the Act, the Corporation shall impose taxes specified therein. Such taxes thus have to be collected for the purpose of the Act. In case of *Gulabchand Bapalal Modi (supra)*, the Apex Court considered various provisions contained in B.P.M.C. Act (which is now renamed as the "Gujarat Provincial Municipal Corporations Act, 1949") in context of contention that such provisions would amount to excessive delegation of legislative powers and whether in absence of any maximum rate for collection of taxes, such delegation would be rendered invalid. It was held and observed as under:

16. As aforesaid, the assessment and levy of the property taxes have to be in conformity with the Act and the rules. These rules contain inter alia Taxation Rules, which are part of the Act. Section 454, no doubt, empowers the Corporation to amend, alter and add to those rules, but such power is made under Sec. 455 subject to the sanction of the State Government. Under Sec. 456, the State Government can at any time require the Corporation to make rules under Sec. 454 in respect of any purpose or matter specified in Sec. 457,

which includes item "(7) Municipal Taxes-(a) The assessment and recovery of Municipal taxes". Thus, although the Act does not prescribe the maximum rate at which the property taxes can be raised, the ultimate control for raising them is with the Councillors responsible to the people. It is difficult, therefore, to sustain the plea that the power to levy the property tax is so unbridled as to make it possible for the Corporation to levy it in arbitrary manner or extent.

17. In all statutes dealing with local administration Municipal authorities have inevitably to be delegated the power of taxation. Such power is a necessary adjunct to a system of Local Self-Government. Whether such delegation is excessive and amounts to abdication of an essential legislative function has to be considered from the scheme, the objects, and the provisions of the statute in question.

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22. From the provisions of the present Act, cited earlier, it will be seen that though factor (3) of the factors relied on by Mr. Wanchoo, C.J., is absent in Sec. 127, the rest are present. It is impossible to say that when a provision requiring sanction of the Government to the maximum rate fixed by the Corporation is absent, the rest of the factors which exist in the Act lose their efficacy and cease to be guidelines. Furthermore, if the Corporation were to misuse the flexibility of the power given to it in fixing the rates, the State legislature can at any moment withdraw that flexibility by fixing the maximum limit up to which the Corporation can tax. Indeed, the State Legislature has now done so by Sec. 4 of Gujarat Act, 8 of 1968. In view of the decisions cited above it is not possible for us to agree with Counsel's contention that the Act confers on the Corporation such arbitrary and uncontrolled power as to render such conferment an excessive delegation.

27. This brings us to the central question which was hotly debated before us i.e. whether mobile tower can be stated to be a building? This question arises since the State legislation traces enactment under the Amending Act and in particular, Sec. 145A of the G.P.M.C. Act to legislative Entry 49 of List-II pertaining to taxes on lands and buildings. Contention of the respondents is that the mobile towers are buildings, and therefore, within the competence of the State Legislature to provide for taxation on such buildings. On the other hand, the petitioners hotly contest that by no stretch of imagination, mobile towers can be termed as building.

28. Though, an attempt was made on part of the Advocate General to support the stand of the State on the basis of definition of term building contained in Sec. 2(5) of the G.P.M.C. Act and such analogous provisions contained in Gujarat Municipalities Act and Gujarat Panchayats Act, we are afraid insofar as our inquiry whether the State Legislature has necessary competence to enact the law, we must interpret Entry 49 as it stands in the Constitution. When we are in the process of ascertaining whether mobile towers are building or not within the meaning of Entry 49 of List-II, any definition of term building contained in the

G.P.M.C. Act or for that matter any other legislation, would not be a useful tool for interpretation. What we need to ascertain for ourselves is whether the term building used in Entry 49 as is understood in common parlance and understanding, would include a mobile tower or not. A legislation, be it a State or the Union legislation, may contain definition of a term which may be either restrictive or expansive. It may be exhaustive or it may not. A definition may also have deeming fiction and thereby include articles or things which are ordinarily not includable in the term being defined, if it is otherwise competent for a Legislature to do so. A definition may be expressed in an expansive manner or may even provide for inclusion of an Article or a thing artificially by a deeming fiction. Any such definition or a deeming fiction would not be a safe tool to interpret the entry of the Constitution when we are trying to ascertain the legislative competence. If we adopt a definition contained in the Act which itself is under challenge and persuade ourselves to believe that such definition being wide in its application, would expand the very meaning of such term in the legislative entry, we would be putting the cart before the horse. What we need to judge is whether the term building as is ordinarily known and understood would include a mobile tower. We cannot judge for ourselves whether a mobile tower would be included in a wider definition contained in Sec. 2(5) of the G.P.M.C. Act and on the basis of such an answer try to decide the legislative competence of the State Legislature on the basis of Entry 49 of List-II.

? In case of *Aruna Ramchandra Shanbaug Vs. Union of India (UOI) and Others*, , a reverse situation arose. While interpreting the scope of Entry 54 of List-II pertaining to tax on sale or purchase of goods, it was observed that restrictive meaning given to such term in Sale of Goods Act cannot be adopted. In our attempt, therefore, to ascertain legislative competence for collecting tax on mobile towers, we shall have to interpret legislative Entry 49 pertaining to taxes on lands and buildings as contained in the Constitution on the basis of common understanding of term building ignoring the special meaning which may have been given in an expansive definition contained in Sec. 2(5) of the G.P.M.C. Act. It is undoubtedly true that legislative entries contained in three Lists to Seventh Schedule are to be interpreted liberally and widest amplitude is to be given. It is often stated that such entries are not source of legislative power. Legislative power is derived from Art. 246 and entries are only in the nature of subjects dividing such powers between the Union and the State.

? In case of *Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority and Others*, , the Constitution Bench of Supreme Court observed that Art. 246 is one of the sources confirming power to legislate. Entries in the legislative lists are not powers of legislation, but are fields of legislation. It was observed that such entries are to be construed liberally and widely so as to attain the purpose of their enactment.

In case of *K.T. Plantation Pvt. Ltd. and Another Vs. State of Karnataka*, , the Apex Court in Para 185 observed that the correct way of construing the statute is

to apply the plain meaning of the words. It was further observed that the initial presumption is in favour of the literal meaning since Parliament is taken to mean as it says.

29. Bearing in mind the above principles, we may advert to the said entry. We may recall that Entry 49 pertains to taxes on lands and buildings. Term building has been explained in various dictionaries. The Living Websters Encyclopaedic Dictionary of the English language explains the word build as to construct or erect, as a house; to form by uniting materials into a regular structure; to fashion; to make; to establish by gradual means; to raise as on a support or foundation; to erect a dwelling or other edifice. Corresponding term building is explained as the act of one who builds; a structure, usually with a roof and four walls, generally intended for use as a working or dwelling place. Likewise The Websters Third New International Dictionary (unabridged version) describes the term building as a thing built; a constructed edifice designed to stand more or less permanently; covering a space of land usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals or other useful structure distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.

30. The term "building" came up for consideration before the Apex Court in case of the Municipal Corporation of Greater Bombay (supra). The issue pertained to tax on oil storage tanks sought to be collected by the Municipal Corporation. In such context, the Apex Court observed as under:

14. Thus, it is clear that a tank to be a building must be a structure designed for either habitation or shelter for human habitation or storage of inanimate objects in storehouse or stable for horses shed or a hut etc. within the four corners of the walls built with masonry or otherwise with ingress or egress. The word, "building" must be given its ordinary natural meaning ascribable to it including the fabric and the ground on which it stands. On a mere look at the tank, by no stretch of imagination, it could be said to be a building.

In case of Ghanshiam Das Vs. Devi Prasad and Another, , the Apex Court considered whether a brick kiln can be stated to be a building. Observing that U.P. Zamindari Abolition and Land Reforms Act did not define the term building, and that therefore, such term must be construed in its ordinary grammatical sense, the Apex Court held that a brick kiln which is more in the nature of pit and some bricks by sides and has no roof, cannot be stated to be a building. It was observed as under:

4. The word "building" has not been defined in the Act and must, therefore, be construed in its ordinary grammatical sense unless there is something in the context or object of the statute to show that it is used in a special sense different from its ordinary grammatical sense. In Websters New International Dictionary

the word "building" has been defined as follows:

That which is built specific: (a) as now generally used a fabric or edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land for use as a dwelling, store house, factory, shelter for beasts or some other useful purpose. Building in this sense does not include a mere wall, fence, monument, hoarding or similar structure though designed for permanent use where it stands, nor a steamboat ship or other vessel of navigation.

From this definition it does not appear that the existence of a roof is always necessary for a structure to be regarded as a building. Residential buildings ordinarily have roofs but there can be a non-residential building for which a roof is not necessary. A large stadium or an open-air swimming pool constructed at a considerable expense would be a building as it is a permanent structure and designed for a useful purpose. The question as to what is a "building" under Sec. 9 of the Act must always be a question of degree a question depending on the facts and circumstances of each case. As Blackburn, J. observed in *R. v. Neath Canal Navigation Co.*, 1871 (40) LJMC 198 (197):

The masonry on the sides of a canal is not sufficient to constitute it a "building". A London street, though paved and faced with stonework, would yet be "land", whilst the Holborn Viaduct would be a "building." The question for determination in the present case, therefore, is whether the kiln leased out to the appellant is a "building" within the meaning of Sec. 9 of the Act. It has been found by the first appellate Court that the brick kiln has no site and is not a roofed structure. It was a mere pit with some bricks by its sides. It is also admitted in this case that there was no structure standing on the Bhattha. Upon these facts, it is clear that the brick kiln has no walls and no roof but it is a mere pit dug in the ground with bricks by its side. In the circumstances, we are of the opinion that the brick kiln leased out to the appellant, in the present case, is not a "building" within the meaning of Sec. 9 of the Act. It follows, therefore that the title to both the plots Nos. 596 and 597 along with the brick kiln vested in the State Government with effect from 1-7-1952 and the respondents are not entitled to claim any rent from the appellant for the period from 1-10-1952 to 30-9-1953.

31. On the basis of such understanding of the term building, we may examine the nature of structure in question. From the record, it emerges that a B.T.S. consists of a tower which is erected through use of 6 to 9 metres long poles made of hollow steel galvanised pipes. It also has a cabin in the shape of pre-fabricated shelter using P.V.C. or some such similar material. Such cabin or shelter houses radio transmission and reception equipment, a diesel generator set and electronic panel. The tower is used for positioning the antenna at a height to enable uninterrupted wireless internet connectivity. In essence, thus a B.T.S. comprises of a tower on which an antenna is hoisted and a cabin which usually is not more than 10 x 10 x 10. The tower, we are informed has the height of upto 30 metres.

32. By no stretch of imagination, the tower can fit the description of a structure, usually with a roof and four walls, generally intended for use as a working or dwelling place; a constructed edifice designed to stand more or less permanently; covering a space of land usually covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals or other useful structure or as observed by the Supreme Court in case of the Municipal Corporation of Greater Bombay (supra), a structure designed for either habitation or shelter for human habitation or storage of inanimate objects in storehouse or stable for horses shed or a hut etc. within the four corners of the walls built with masonry or otherwise with ingress or egress. The tower structure does not fit any of these descriptions. It does not have walls; it does not have a roof; it is not a structure designed for either habitation or shelter for human habitation or storage of inanimate objects or is a stable for horses, shed or a hut within the four corners of the walls. In our opinion, the tower is a structure which may be a plant and machinery. It is well-known that every structure is not a building. In the present case, the tower stands on a frame of hollow iron pipes. It does not have a roof or walls. It is used principally for the purpose of fitting an antenna at the top for receiving and transmitting waves. The structure is neither used or meant to be used as shelter for human habitation, storage or as a stable. We are conscious that with advancement in technology and with changing times, new issues may come up and techniques may have to be adopted to interpret old terms in tune with such changing times. However, by no stretch trying to keep pace with time, we can extend the meaning of the term building to such an extent where a bare structure standing on the iron frame can be categorised as a building. It would be doing violence to the concept of the term building as understood and accepted since long in common parlance and in English language.

33. Our above observations must be confined to the tower itself. The cabin which the B.T.S. system contains certainly is a building. It has four walls and a roof. It is made of fibre or some such similar material. It shelters certain essential equipments such as, diesel generator set and other equipments. The two structures are however, not integrated. It may be that B.T.S. system cannot function without cabin to protect equipments and it may be that without a mobile tower, the B.T.S. would not be functional. The two therefore, for functioning of B.T.S. system may be essential, two are different structures. It is, therefore, necessary for us to view these structures separately. The towers themselves, therefore, are not building, but cabins constructed by the petitioners would certainly fit the description of building. We, therefore, hold that the State Legislature did not have competence to enact the law permitting the collection of taxes on towers constructed by the Mobile companies for the purpose of establishment of their B.T.S. system. We, however, hold that the cabin so set up by them would definitely be a building and exigible to tax even as per the existing tax regime without any aid to Sec. 145A of the Act.

? In case of Wireless-TT Info Services Ltd. (supra), Division Bench of Karnataka

High Court held that the tower set up by the mobile tower company is not a building. It was observed as under:

10. If in the above manner, the structure which is the subject-matter in the instant case is considered, it is a metal pole or tower to which the antenna is attached and has the backup system at its base. No doubt, it would have to be fastened to the roof of the building or embedded to the land with concrete base, nuts, bolts and the height of the pole may vary from case to case. Such structure though may suggest an element of permanency, in our opinion does not belong to the genus of the type previously mentioned in the Section defining the building. If the phrase used was other structures, the term would have been wider to include other structures without reference to the first part of the Section. But when it states other such structure, the structure in question will have to be of nature of the items mentioned in the first part of the Section. Therefore, the tower/post which is not relatable to the items mentioned in the first part cannot be construed as a building to bring it within the sweep of Sec. 94 of the Karnataka Municipalities Act, 1964, Sec. 103(b)(i) of Karnataka Municipal Corporations Act, 1976 and Sec. 64 of Karnataka Panchayath Raj Act, 1993.

34. We may advert to some of the decisions cited by the respondents in this respect.

? First reference would necessarily have to be to the decision in case of the Municipal Corporation of Greater Bombay (supra). In the said case, having observed that the oil storage tank by no stretch of imagination could be stated to be a building, the Apex Court proceeded to examine whether despite the said findings, it was exigible to Municipal tax. Referring to the definition of the term building contained in the B.P.M.C. Act, and finding that such term is defined in an inclusive manner bringing within its ambit variety of structures, the Apex Court held that it would be open for the Corporation to collect tax since in fact when the tanks are erected and used for commercial purposes, the value of the demised property would get appreciated and the annual letting value is capable of increase. In the said case, competence of the State Legislature was never in question. What was under challenge was whether an oil storage tank can be subject to property tax under the B.P.M.C. Act in terms of special definition of the term building contained in the said Act. We have already observed earlier in order to ascertain whether the mobile tower structure is a building or not, we would not be guided by the definition of the said term contained in the Act but would have to ascertain the true meaning of word building as used in legislative Entry No. 49 of List-II.

? In case of Bharti Tele-Ventures Limited (supra), learned Single Judge of Bombay High Court held that the contention of the petitioners that the tower and/or the cabin set up by the mobile company would not fall within the definition of building or development, cannot be accepted. The learned Judge was interpreting such term in the context of Maharashtra Regional and Town Planning Act which

itself did not contain the definition of word building. Learned Judge fell back on definition of the term used in various statutes. Situation thus clearly emerges that the Court was not concerned with interpretation of Entry 49 and based its conclusions on various definitions of the term building contained in different statutes.

? In case of *Municipal Corporation of Delhi v. M/s. Pradeep Oil Mills P. Ltd.* (supra), the Full Bench of Delhi High Court held that storage tanks of the respondent oil companies are mere shelters for carrying on business activities of storing the petroleum products, and therefore, such structures raised on the land are not exempted as plant and machinery under Sec. 116 of the Act.

In case of *Indian Organic Chemicals Ltd.* (supra), of course, the case where legislative competence with reference to term lands and buildings used in Entry 49 was the question considered by the Division Bench of Bombay High Court following the decision of the Apex Court in case of the *Municipal Corporation of Greater Bombay* (supra). Such challenge was repelled. In Paragraph 17, it was observed as under:

17. We have already indicated that when the Supreme Court has upheld the taxation in relation to the tanks in similar statutory setting, it would be extremely difficult, if not impossible, to infer an over-looking of such a basic and fundamental objection on the part of the Apex Court. Much more than an inevitable inference and implication, is our own conclusion that the contention is unsustainable. Any structure, should ordinarily come within the term of land and building. The term occurring in the legislative entry, has to receive the widest interpretation. A narrow view is negated by Constitutional practice and the continuous stream of decisions. Looked at from a wide view of the Constitutional entry, we are clearly of the opinion that the "tanks", and such structures, would be well within the term of "land and building" sited in Entry 49. This conclusion, makes it unnecessary for us to discuss the large number of cases, where the Constitutional approach necessary in the context and in dealing with a particular subject, have been considered.

With great respect we are unable to adopt this view. Firstly, we are not convinced that Supreme Court in case of the *Municipal Corporation of Greater Bombay* (supra), should be seen to have settled the question of legislative competence in terms of Entry 49 with relation to the question whether an oil storage tank can be said to be building. No such inference can be drawn. In the said case, the Supreme Court decided the question whether such oil storage tank can be subject to tax by Municipal Corporation in view of definition of the term building contained in the Act. The question whether a storage tank can be stated to be a building as understood in Entry 49 of List-II, and therefore, Legislature had competence to enact law with respect to its taxation, was never at issue. What was not a issue before the Supreme Court cannot be seen to have been decided. Secondly, we have already held that widest possible interpretation to the term building would not enable us to include a tower of the nature erected by the

petitioners within the said term.

? In case of Pradeep Oil Corporation (supra), the Supreme Court upheld the decision of Division Bench of Delhi High Court. Once again, in this case the question of legislative competence with reference to Entry 49 and the term building was not at issue. The Apex Court observed that the Delhi Municipal Corporation is required to render several services for which tax is required to be imposed both on land and building. The definition of land and building as provided in the Act must be given its full effect. In the decision in case of the Municipal Corporation of Greater Bombay (supra) even an oil tanker was held to be a building.

Similarly, in decision in case of Cellular Operators Association of India (supra), learned Single Judge held that temporary structures/towers on rooftops for providing Cellular Basic Mobile Phone services are building within the meaning of Municipal Act and hence cannot be erected or installed without obtaining the permission of the Municipality. This decision has two distinctions. Firstly, it was not concerning the question of taxing such structures and the legislative competence for framing such a law was not at issue at all. In any case, the Court gave its findings on the basis of the term building used in the Municipal Acts. Secondly, the question was of necessary permission of Municipal Authorities for erection of such a structure. Learned Counsel Shri Shalin Mehta had in fact conceded that Municipal Authority in terms of G.D.C.R. or other provisions would be authorised to control erection and maintenance of such towers.

35. Sum total of the above discussion is that in our opinion, the respondents cannot levy tax on the towers erected by the petitioner companies. Section 145A of the G.P.M.C. Act and other provisions of Gujarat Municipalities Act and in the Gujarat Panchayats Act are ultra vires the Constitution. It is, however, clarified that cabin installed by the petitioners along side such towers are building and would be exigible to tax at appropriate rates even without the aid of statutory provision which we have declared unconstitutional. In the existing regime, the Corporations, Municipalities and Panchayats have sufficient powers for collection of tax on building at appropriate rates. On such bases, it would be open for them to do so.

36. In view of our above conclusions, we do not find it necessary to examine further challenge of the petitioners as to relevant rules and the tax collection mechanism.

37. Several interesting questions were posed before us. It was contended that under Art. 243-X of the Constitution, the State Legislature can authorise the Municipalities to levy the tax only after providing procedure and limitations for collection of such tax. It was contended that such limitations must necessarily be understood as monetary limitations. We wonder whether this would be the correct reading of Art. 243-X of the Constitution. Should we view such provision as empowering the Municipality to collect tax under the State Legislation or

should we see them as limitation in exercise of such powers? Long before Art. 243-X was introduced in the Constitution, the Municipalities across the country under authorisation from the State Legislations were collecting the taxes. Was Art. 243-X meant to limit the scope of such tax collection? Does the term subject to such limitations used in the said provision refer only to monetary limits? Whether subject to such limitations mean that limitations must be specified in the State Legislation? These are some of the interesting questions we are robbed of the opportunity of deciding in view of our earlier conclusions. Our interest in such questions, however, would not persuade us to decide the issues which are otherwise no longer necessary to be decided.

38. In the result, all the petitions are disposed of in above terms. Tax bills raised by the various Corporations, Municipalities and Panchayats impugned before us are declared to be invalid. It would be open to the local bodies to issue revised bills for the limited purpose of taxing the cabins. The petitioners are entitled to refund of the tax already paid, however, with a limit that no tax paid prior to one year of filing of the petition would be refundable. We put this limit to ensure that the petitioners who may not have approached the Court sufficiently promptly may not seek refund of the tax without any reference to time-limit.

39. At this stage, learned A.G.P. Ms. Sangeeta Vishen prayed for stay of this judgment. At her request, it is provided that this judgment shall stand stayed upto 15-6-2013. All the petitions stand disposed of accordingly. In view of above, Civil Application No. 2967 of 2010 in Special Civil Application No. 2843 of 2009 does not survive. Same is disposed of accordingly.