
(2010) 04 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application No's. 799, 1566, 1696, 1898, 2019, 2024, 4259, 5170, 9204 and 9205 of 2009

Indus Towers Ltd.

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 22-04-2010

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 127, 127(1), 127(2), 127(3), 149
Constitution of India, 1950 — Article 13(3), 162, 226, 243X, 265
Development Control Regulations for Greater Bombay, 1991 — Regulation 21.11, 21.11(1), 21.11(2), 3.1, 3.2
Gujarat Municipalities Act, 1963 — Section 101, 118, 176, 207, 213
Gujarat Town Planning and Urban Development Act, 1976 — Section 2, 26, 29
Telegraph Act, 1885 — Section 10, 12

Citation : (2010) 2 GLH 564

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Shalin N. Mehta, for the Appellant; P.K. Jani, Government Pleader, Mythili Mehta, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—These petitions under Article 226 of the Constitution of India challenge Government Resolution dated 11th December, 2008 issued by the Government of Gujarat, Urban Development and Urban Housing Department and demand notices issued pursuant thereto providing for levy and recovery of Annual Permission Fees and Installation Charges on mobile telecommunication towers in the areas covered under Municipal Corporations/Municipalities in the State of Gujarat. Since common facts and questions of law are involved in all these petitions the same were heard together and are being disposed of by this common judgment. For the sake of convenience, the facts are taken from Special Civil Application No.1898 of 2009.

2. The petitioner is a public limited company incorporated under the Companies

Act, 1956 and holds a licence to operate cellular telecom services under the provisions of the Telegraph Act, 1885. For the purpose of providing mobile/telecommunication service to its customers/subscribers, the petitioner company is required to have Base Trans-receiver Stations installed, which are popularly known as mobile towers. For setting up such mobile towers, the company enters into agreements with private property owners and thereafter, applies for permission from the concerned local authority to place towers in the said properties. Mobile towers are placed on structures, either on the open ground or on the terrace of the buildings belonging to private persons. The petitioner company has installed or is in the process of installing such equipment in various places in the State of Gujarat.

3. The Director of Municipalities issued circular dated 12th May, 2006, under the heading "Instructions for levying fees for installation of mobile telecommunications towers and N.O.C. Permit." The said circular provided for levy of property tax and permission fee. Based upon the said circular, different municipalities started charging different permission fees and annual fees.

4. Since there was no uniform policy prevailing for grant of permission for installment of the mobile towers more particularly in the matter of charging of fees for installment, the Idea Cellular Limited, a cellular company challenged the same by way of a writ petition before this Court being Special Civil Application No.13653 of 2006. Vide judgment and order dated 16.11.2006, the said writ petition came to be disposed of interalia with the following directions:

(2) It is further directed that the State Government through Secretary, Urban Development Department shall examine the matter for providing of uniform policy in the matter of installation charges and annual fees for cellular tower of the Mobile services provider Company, keeping in view the various factors like population of the local authority etc. and such decision shall be taken as early as possible preferably within period of 3 months from the receipt of the order of this Court.

It appears that in the said petition, the legality and validity of such fees was not an issue and as such, had not been examined by the Court.

5. The General Body of the Junagadh Municipal Corporation passed a resolution dated 30.8.2007 interalia making provision for payment of permission fees/administrative penalty and annual rent in relation to mobile telecommunication towers. The legality and validity of the said resolution insofar as the same provided for levy of permission fee, annual rent and administrative penalty for installment of mobile towers on private property, came to be challenged by Reliance Communication Limited by way of a writ petition before this Court being Special Civil Application No.531 of 2008. Vide judgment and order dated 09th September, 2008, passed by a Division Bench of this Court the said petition came to be allowed and the impugned resolution dated 30th August, 2007 insofar as the same provided for determination of permission fees, annual rent and

administrative penalty came to be quashed and set aside. The Court held that levy of permission fee, annual rent and penalty was without authority of law as the Bombay Provincial Municipal Corporations, 1949 (BPMC Act) does not authorize levy of such fees.

6. Subsequently, pursuant to the directions issued by the learned Single Judge vide order dated 16.11.2006 made in Special Civil Application No. 13653 of 2006, the Government of Gujarat issued a Resolution dated 11.12.2008 making provision for recovery of installation charges, annual permission fees, administrative charges in lieu of penalty fees etc. by the municipal corporations/municipalities in relation to mobile telecommunication towers erected by the cellular companies in the Municipal Corporation/Municipality areas of the State.

7. Being aggrieved, the petitioners have moved the present petitions, challenging the aforesaid Government Resolution and the consequential action taken pursuant thereto.

8. Heard the learned advocates appearing on behalf of the petitioners as well as the respondents in each of the petitions.

9. The main submission advanced by the learned Counsel for the petitioners is that the impugned Government Resolution is ultra vires Article 265 of the Constitution of India as well as ultra vires the provisions of the BPMC Act and the Gujarat Municipalities Act, 1963 (Municipalities Act). Elaborating upon the said submission the learned Counsel have invited the attention of the Court to the provisions of Article 265 as well as Clause (28) of Article 366 of the Constitution of India which defines "taxation" to submit that tax includes any tax or impost, whether general or special or local and that in view of the said provisions it is not permissible for the State to levy or collect any tax or even a duty, cess or fee except by authority of law. Attention is also invited to List II of the Seventh Schedule to the Constitution which enumerates the matters with respect to which the Legislature of any State has power to make laws and more particularly to Entry 66 thereof which relates to "Fees in respect of any of the matters in the said List, but not including any fee taken in any Court" to submit that the State Legislature has the power to levy a fee, which is coextensive with its power to legislate with respect to substantive matters and that the Legislature while making a law relating to a subject matter within its competence can levy a fee with reference to the services that would be rendered by the State under such law. Referring to Entry 5 of List II of Schedule 7 which reads thus "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" it is submitted that it is clear that for levy of permission fee and annual permission fee on mobile telecommunication towers there should be a specific provision for such a levy in the BPMC Act and the Municipalities Act. It is accordingly submitted that it is permissible for the respondent authorities to levy and collect only tax and fee as provided under the provisions of the BPMC Act

and the Municipalities Act.

10. Attention is invited to the provisions of Section 127 of the BPMC Act which provides for "Taxes to be imposed under the Act" to submit that the fees sought to be levied by the impugned Resolution dated 11th December, 2008 namely, annual permission fees and installment charges on the mobile telecommunication towers do not fall within any of the categories enumerated therein.

11. Learned Counsel for the petitioners, have also invited attention to Chapter XXII of the BPMC Act which provides for "Licences and Permits". Referring to the provisions of Part I to Part VIII thereunder, which provide for the conditions and mode of grant of licences in respect of the categories specified thereunder; as well as to the provisions of Section 386 of the BPMC Act which lays down general provisions regarding grant, suspension or revocation of licences and levy of fees etc. it is submitted that in view of the provisions of Section 386 of the BPMC Act, it is permissible for the Corporation to grant, suspend or revoke licences or levy fees only in respect of matters specified in Part I to Part VIII of Chapter XXII. It is submitted that Part I to Part VIII do not envisage grant of licences or permission under the Act for the purpose of installation of mobile towers or poles or other telecommunication equipment. Thus, under the BPMC Act, there is no provision either for grant of any permission or licence for installation of mobile telecommunication towers etc. nor does it contain any provision for levy of any installment fee or annual permission fee on such mobile towers. It is contended that in view of the provisions of Article 265 of the Constitution which stipulates that no tax shall be levied or collected, except by authority of law, the levy and collection of annual permission fees and installment charges on mobile telecommunication towers under the impugned GR dated 11th December, 2008 without there being any corresponding authority to levy such fees under the BPMC Act, is ultra vires the Constitution as well as the BPMC Act. It is submitted that without there being any provision in the relevant statute providing for levy of any such fee or impost, it is not permissible under law for the executive to levy any such fee or impost merely on the basis of executive instructions.

12. The learned Counsel for the petitioners have also invited attention to the General Development Control Regulations (GDCR) framed by the Government of Gujarat under the Gujarat Town Planning and Urban Development Act, 1976 (the Town Planning Act) and more particularly to Chapter 21 thereof which provides for "Control of signs (hoardings) and outdoor display structures and paging tower and telephone tower and outdoor display structures". Referring to Regulation 21.11 thereof which provides for "Telecommunication infrastructure (paging, cellular mobiles, "V" Sat, MTNL, etc.) it is submitted that the said Regulation does not provide for levy of any permission fee or recurring permission fee nor does the same provide for levy of any kind of fees in respect of telecommunication infrastructure.

13. Next it is submitted that similar is the case under the Gujarat Municipalities Act, 1963 inasmuch as the said Act also does not make any provision for the levy

and collection of annual permission fees and installment charges on mobile telecommunication towers. Attention is invited to Chapter VIII of the Municipalities Act which provides for "Municipal Taxation". Referring to the provisions of Section 99 which falls under the sub-heading "Imposition of taxes" under the said Chapter and provides for "Taxes that may be imposed" it is pointed out annual permission fees and installation charges on mobile telecommunication towers do not find place among the categories specified there under. Referring to Section 118 under sub-heading (3) "Power to charge fees" under the said Chapter, it is submitted that the said provision provides for charging fees when any licence is granted under the Act or any permission is given thereunder in relation to the categories specified thereunder. It is pointed out that under the Act there is no provision for grant of licence in respect of Mobile telecommunication towers nor does the present case fall within any of the categories in relation to which permission can be granted by the municipality, in the circumstances, the levy of annual permission fees and installation charges, not being backed by any statutory provision under the Municipalities Act is without authority of law and mere executive instructions cannot vest in the concerned local authority the power to levy such fees or impost without any statutory authority. Thus, even under the Gujarat Municipalities Act, no annual permission/licence fee can be levied on the mobile telecommunication towers. It is further submitted that Section 271 of the Act enjoins upon the Municipalities to make rules prescribing the fees to be charged for the licence/permission granted u/s 118. In the circumstances without making rules prescribing the rates of fees to be charged, the Municipality cannot levy such fee.

14. Referring to the decision of this Court in *Reliance Communication Limited v. Junagadh Municipal Corporation* (supra), it is submitted that this Court has clearly held that levy of permission fees, annual rent and penalty is without authority of law as the BPMC Act does not authorize levy of such fees despite which the State Government has subsequent thereto, issued the Government Resolution in question which is contrary to the said decision.

15. It is accordingly submitted that the impugned Government Resolution which purports to levy Annual Permission Fee and Installation charge on Mobile Telecommunication Towers in the Municipal Corporation/Municipality areas at the rates specified therein is without authority of law and is ultra vires the Constitution as well the provisions of the BPMC Act and the Municipalities Act.

16. Attention is also invited to the provisions of Sections 10 and 12 of the Indian Telegraph Act, 1885 to submit that the Telegraph Act and in particular Sections 10 and 12 thereof clearly preclude a local authority from seeking to recover anything apart from expenses incurred by it from the telegraph authority or a licensee seeking to place a telegraph line/posts/telephone equipment necessary for the operation of a telegraph/telephone system. It is submitted that the said provisions were enacted to prevent local authorities from making licences granted by the Central Government unworkable or hampering licensees by

seeking to exact fees for permission.

17. On the other hand, Mr. P.K. Jani learned Government Pleader has vehemently opposed the petitions. Reliance is placed upon the provisions of Article 162 of the Constitution to submit that where the Legislature is competent to legislate, the State would be competent to make a resolution in that regard in exercise of its executive power. It is submitted that the challenge to the impugned resolution is barred by acquiescence inasmuch as it was at the instance of some of the petitioners that the Court had directed the Government to frame a policy for maintaining uniformity in the rates imposed by various Municipal Corporations and municipalities in the State; and that it is pursuant to the directions issued by this Court that the impugned resolution has been framed. It is submitted that prior to issuing the said Government Resolution several meetings were held and the representatives of the petitioners had remained present before the committee in five meetings. It is contended that in the circumstances, it is now not open to the petitioners to challenge the said Government Resolution on the ground of competence of the State to levy such fees.

18. It is urged that despite the fact that it was well within the knowledge of the petitioners that this Court had struck down the levy of annual rent and permission fees vide judgment and order dated 9/9/2008, the same had not been brought to the notice of the State Government and that despite the decision of this Court the petitioners and other companies have agreed to pay annual fees. In the circumstances, the petitioners are now estopped from contending that the State Government has no authority to provide for levy and recovery of such fees and charges.

19. Mr. R.M. Chhaya appearing on behalf of the Rajkot Municipal Corporation has drawn the attention of the Court to the impugned Government Resolution. It is submitted that the Government Resolution can be divided into different heads. It is submitted that insofar as installation charges for mobile telecommunication towers is concerned, for erection of tower on building, permission is required to be obtained from the Municipal Corporation under the provisions of the BPMC Act. Reference is made to the provisions of Sub-section (5) of Section 2 of the BPMC Act which defines "building" to submit that mobile telecommunication towers would fall within the ambit of the said provision. Attention is invited to Clauses (viii) and (xvii) of Section 2 of the Town Planning Act which define "development" and "operational construction" respectively. It is further submitted that in view of the provisions of Section 26 and 29 of the Town Planning Act, it is incumbent to obtain permission for installation of mobile telecommunication towers. It is submitted that when an application is made for permission to put up a mobile telecommunication tower, the authority is well within its right to levy scrutiny fees etc. under the provisions of the Town Planning Act. Hence insofar as installation charges are concerned, the decision of the Division Bench in the case of Reliance Communication Ltd. (supra) would not be applicable. It is also submitted that under the General Development Control Regulations specific

provision has been made for deposit and fees in relation to telecommunication infrastructure (Paging, Cellular Mobiles, "V" Sat, MTNL etc.) under Regulation 21.11 thereof. It is submitted that in clause (2) of the said Regulation inadvertently the words "maintenance of the hoarding" appear to have crept in. However, since the said clause appears under Regulation 21.11 it is apparent that the intention of the Rule making body is to provide for deposit and fee in relation to telecommunication infrastructure. It is submitted that in the circumstances, the Municipal Corporations also being urban development authorities under the TP Act, the Corporations are empowered to levy and collect fees in respect of telecommunication towers.

20. In rejoinder, as regards the contention that the impugned Government Resolution had been issued in exercise of powers under Article 162 of the Constitution, the learned Counsel for the petitioners have placed reliance upon a decision of the Apex Court in *Commissioner of Income Tax, Udaipur Rajasthan Vs. Mcdowell and Co. Ltd.*, for the proposition that to support a tax legislative action is essential, it cannot be levied and collected in absence of any legislative sanction by exercise of executive power of the State under Article 73 by the Union or Article 162 by the State. Attention is invited to the provisions of Article 243X of the Constitution which provides for the power to impose tax by, and the Funds, of the Municipalities. It is submitted that unless the Legislature of a State in exercise of powers under Article 243X of the Constitution authorizes Municipalities in the State to levy, collect and appropriate taxes, duties, tolls and fees, in the light of the provisions of Article 265, which expressly prohibit the levy and collection of tax except by authority of law, it is not permissible for any municipality to impose any tax or fee. It is submitted that the expression "law" is defined under Article 13(3)(a) to include any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. It is submitted that the opening words of Article 162 are "subject to the provisions of this Constitution", hence exercise of powers under the said provision is subject to the other provisions, including Article 265 and 243X of the Constitution. Hence, any levy has to be under legislative power and in absence of the same the levy of Annual Permission fee and installation charges in exercise of powers under Article 162 is bad in law and deserves to be struck down. Insofar as the contentions regarding acquiescence and estoppel are concerned, it is submitted that it is well settled that there can be no estoppel against statute. It is submitted that there was no acquiescence on the part of the petitioners. However, assuming without admitting that there was acquiescence on the part of the petitioners that by itself would not render an otherwise unconstitutional levy, valid.

21. A perusal of the impugned Government Resolution shows that the same has been issued in the matter of determining installation charge and annual fee etc. within the limits of Municipal Corporations/Municipalities. Under the said resolution it has been decided to fix the rates of installation charge as well as annual permission fee in respect of mobile telecommunication towers erected by

Cellular Companies in the Municipal Corporation/Municipal areas of the State as provided there under. The resolution then provides for (i) initial installation charge at the rate of Rs.25,000/- per tower; (ii) annual permission fee according to the height of a tower at the rate of Rs.1000/- per metre; (iii) fees for amended permission at the rate of 10% of the prevailing rate; (iv) where towers have been erected on buildings constructed without building use permission or where towers have been erected without permit, a fee at the rate of the prevailing annual permission fee, additionally Rs.50,000/- administrative charges towards penalty fee; (v) increase in rates as per (i) and (ii) above-annual fee to be computed by increasing the annual fee by 10% every two years; (vi) in respect of recovery of property tax on telecommunication towers it is provided that as annual fees are being recovered no property tax shall be recovered in respect of towers.

22. The aforesaid Government Resolution is challenged to the extent it seeks to levy and recover Annual Permission fees and Installation Charges on Mobile Telecommunication Towers in the areas falling under Municipal Corporation/Municipalities in the State.

23. In the light of the submissions advanced on behalf of the respondent State, it is apparent that the impugned Government Resolution has been issued in exercise of powers under Article 162 of the Constitution of India. Article 162 reads thus:

162. Extent of executive power of State."Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

Thus, under Article 162 the executive power of the State extends to the matter which the Legislature of the State has power to make laws. However, as the opening portion of the said provision suggests, the power conferred under Article 162 is subject to the provisions of the Constitution. Thus, in case any provision of the Constitution provides otherwise, the executive power of the State would stand circumscribed to that extent.

24. In this regard it may be germane to refer to the provisions of Articles 265 and 243-X of the Constitution which read thus:

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

"243-X. Power to impose taxes by, and Funds of, the Municipalities."The Legislature of a State may, by law,"

- (a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;
- (b) assign to a Municipality such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits;
- (c) provide for making such grants-in-aid to the Municipalities from the Consolidated Fund of the State; and
- (d) provide for constitution of such Funds for crediting all moneys received, respectively, by or on behalf of the Municipalities and also for the withdrawal of such moneys therefrom, as may be specified in the law.

25. On a plain reading of Article 265 of the Constitution, it is apparent that under the said Article there is an express bar against levy or recovery of tax except by authority of law. The expression "law" has been defined under Article 13(3)(a) to include any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The question that therefore, arises is whether the impugned Government Resolution falls within any of the categories enumerated under Article 13(3)(a) or would otherwise fall within the inclusive definition. The impugned resolution evidently is neither an Ordinance, bye-law, rule, regulation, notification, custom nor usage having the force of law in the territory of India. At best it may fall within the definition of order in the ordinary sense. However, the expression "order" as employed in Article 13(3)(a) envisages orders made in exercise of statutory powers conferred by statutory provisions but not administrative orders having no statutory sanction. In the circumstances, it cannot be stated that the impugned resolution is issued under authority of law as envisaged under Article 265.

26. 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. In view of the provisions of Article 162 of the Constitution, the executive power of the State Government is co-extensive with the legislative power of the State legislature. If the State legislature has power to enact laws on a matter enumerated in the State List or in the Concurrent List the State has executive power to deal with those matters subject to other provisions of the Constitution. If a subject matter falls within the legislative competence of State legislature, the exercise of executive power by the State Government is not confined, as even in the absence of a law being made, the State Government is competent to deal with the subject matter in exercise of its executive power. However, Article 162, itself carves out an exception, viz., the executive power is subject to the other provisions of the Constitution. Article 265 imposes a limitation on the taxing power of the State insofar as it provides that the State shall not levy or collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. Thus, the State under the garb of exercise of powers under Article 162, cannot levy any tax, fees, cess etc.

unless the same is backed by a statutory enactment.

27. Apart from Article 265 which prohibits levy or recovery of tax except by authority of law, Article 243-X specifically provides that the Legislature of a State may, by law authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits as may be specified by law. Thus on a conjoint reading of Articles 265 and 243-X, there is a prohibition against levy and recovery of tax by a Municipality unless the Legislature of the State in exercise of powers under Article 243-X authorises the Municipality to levy and collect such taxes, fees etc. In the present case, a bare reading of the impugned Government Resolution indicates that the same has not been issued in exercise of any statutory power. However, even if the statutory provision under which the power is derived is not mentioned, so long as there is some statutory provision under which such power is derived, the Government Resolution would not stand vitiated. In the circumstances it would next be required to be examined as to whether there is any statutory provision which vests in the State or the Municipal Corporations or Municipalities, the power to levy and collect annual permission fees and installation charges for erection of mobile telecommunication towers put up by cellular companies.

28. In this regard it may be pertinent to refer to certain provisions of the BPMC Act and the Municipalities Act. Chapter XI of the BPMC Act provides for "Municipal Taxation" and Section 127 thereof lays down the categories of taxes which may be imposed by the Corporation. Sub-section (1) of Section 127 provides for imposition of (a) property taxes and (b) a tax on vehicles, boats and animals for the purposes of the Act. Sub-section (2) thereof lays down that in addition to the taxes specified in Sub-section (1) the Corporation may for the purposes of the Act and subject to the provisions thereof impose the following taxes, namely (a) octroi; (c) a tax on dogs; (d) a theatre tax; (e) a toll on animals and vehicles entering the City; (f) any other tax (not being a tax on professions, trades, calling and employment) or a tax on payments for admission to any entertainment which the State Legislature has power under the Constitution to impose in the State. Sub-section (3) of Section 127 lays down that the municipal taxes shall be assessed and levied in accordance with the provisions of the act and rules. On a plain reading of the aforesaid provision it is apparent that annual permission fee and installation charges are not among the categories specifically named there under. However, under Clause (f) of sub-section (2) other levies in the nature of tax could be levied. Therefore, it has to be ascertained as to whether the imposts in question fall within the category of "other taxes" u/s 127(2). In this regard it may be pertinent to note that under the Act specific provision is made for assessment and levy of the specified categories enumerated there under. Insofar as "other taxes" are concerned, Section 149 of the BPMC Act provides for the procedure to be followed in levying other taxes. The section lays down that in the event of the Corporation deciding to levy any of the taxes specified in Sub-section (2) of Section 127, it shall make detailed provision in so far as such provision is not made by the Act, in the form of rules,

modifying, amplifying or adding to the rules at the time in force in the matters enumerated there under which interalia are the nature of tax, the rates thereof, the class or classes of persons, articles or properties liable thereto and exemptions therefrom, if any to be granted; the system of assessment and method of recovery and the powers exercisable by the Commissioner or other officers in the collection of the tax; the information required to be given of liability to tax; the penalties to which persons evading liability or furnishing incorrect and misleading information or failing to furnish information may be subjected; such other matters, not inconsistent with the provisions of the Act as may be deemed expedient by the Corporation. The proviso to Sub-section (1) of Section 149 lays down that no rules shall be made by the Corporation in respect of any tax under Clause (f) of Sub-section (2) of Section 127 unless the State Government shall have first given provisional approval for selection of tax by the Corporation. The subsequent provisions lay down the procedure for sanction of the rules submitted by the Corporation by the State Government. Thus, for the purpose of levying tax under the heading "other taxes" an elaborate procedure is required to be followed and specific provisions have to be made. In the present case, it is an admitted position that in respect of the imposts in question no such provisions for levy and collection have been made in the rules. Thus, the said imposts clearly do not fall within the category of other taxes so as to attract the provisions of Section 127 of the BPMC Act.

29. Since the levy in question is termed annual permission fee and installation charge, it may be pertinent to refer to the provisions of Chapter XXII of the BPMC Act which provides for "Licences and Permits". The said Chapter is subdivided into nine parts as under:

1. Licensing of Surveyors, Architects or Engineers, Structural Designers, Clerks of Works and Plumbers;
2. Trade licences and other licences for keeping animals and certain articles;
3. Licences for sale in municipal markets;
4. Licences for private markets;
5. Licences for sale of Articles of Food outside of Markets;
6. Licensing of Butchers, etc.;
7. Licensing for diary products;
8. Licences for hawking, etc.; and
9. General Provisions regarding licences and Permits.

30. A bare perusal of the categories enumerated under Chapter XXII makes it amply clear that none of the categories provide for licences or permits in relation to annual permission fee or installation charges. No other provision under the BPMC Act is pointed out by the learned advocates for the respondents which

would enable the respondents to levy and collect annual permission fee and installation charges for mobile telecommunication towers put up by Cellular companies. Thus, insofar as the BPMC Act is concerned, the same does not contain any provision which provides for levy and collection of annual permission fee and installation charge in respect of mobile telecommunication towers.

31. A faint attempt had been made to suggest that the provisions of Section 253 and 254 of the BPMC Act which provides for "Notice to be given to Commissioner of intention to erect building" and "Notice to be given to Commissioner of intention to make additions, etc. to building" both of which fall under Chapter XV under the heading "Building Regulations", would be applicable to erection of mobile telecommunication towers. However, the said contention is irrelevant inasmuch as in the present case we are concerned with the imposition of annual permission fee and installation charges and not with grant or breach of building permission.

32. It has been contended on behalf of the respondents that in view of the fact that under the provisions of Section 26 and 29 of the Town Planning Act, it is incumbent to obtain permission for installation of mobile telecommunication towers and that while processing an application for permission to put up a mobile telecommunication tower, the authority is well within its right to levy scrutiny fees etc. under the provisions of the Town Planning Act. Therefore, insofar as installation charges are concerned, the decision of the Division Bench in the case of Reliance Communication Limited (*supra*) would not be applicable. In this regard it may be pertinent to refer to Chapter 3 of the GDCR which provides for "Procedure for Securing Development". Regulation 3.1 thereof provides for "Application for development permission" and Regulation 3.2 makes provision for "scrutiny fee". Regulations 3.2.1 to 3.2.7 lay down different types of development and the corresponding rates of scrutiny fee. However, none of the types of development referred to in the said regulations are in respect of mobile telecommunication towers. Hence, there is no provision for scrutiny fee in relation to erection of mobile telecommunication towers. In the circumstances, the said provisions cannot be stated to be the source of authority to levy installation charge.

33. A perusal of the GDCR shows that specific provision is made in respect of Telecommunication infrastructure which includes cellular mobiles, under Chapter 21 thereof, and more particularly under Regulation 21.11. However, while Sub-regulation (1) provides for regulation of the location, type of structure, requirement and projection in respect of such structures, Sub-regulation (2) which provides for "Deposit and Fees" lays down that the fees for erection and maintenance of the hoarding shall be charged as decided by Competent Authority from time to time. Thus, insofar as the provision for deposit and fees is concerned, the same is in respect of hoardings and not telecommunication infrastructure. In this regard it has been submitted by the learned advocates for the respondents, there may be an error on the part of the rule making authority.

In reply to the said contention, the learned advocates for the petitioners have placed reliance upon the decision of the Supreme Court in *Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another*, and more particularly paragraph 7 thereof, wherein it has been held thus:

xxx. If the Act does not by the plain language used therein carry out the object, the Court will not be justified in supplying deficiencies in the Act. As observed by Rowlatt, J., in *Cape Brandy Syndicate v. Commissioners of Inland revenue*:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.

It may also be apt to refer to the following observations made by the Supreme Court in *Nalinakhya Bysack Vs. Shyam Sunder Haldar and Others*,

It must always be borne in mind, as said by Lord Halsbury in *Commissioner for Special Purposes of Income Tax v. Pemsel*, that it is not competent to any court to proceed upon the assumption that the legislature has made a mistake. The Court must proceed on the footing that the legislature intended what it has said. Even if there is some defect in the phraseology used by the legislature the court cannot, as pointed out in *Crawford v. Spooner*, aid the legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is a *casus omissus*, it is, as said by Lord Russell of Killowen in *Hansraj Gupta v. Official Liquidator of Dehra Dun-Mussoorie Electric Tramway Co., Ltd.*, for others than the courts to remedy the defect.

Thus, if at all there is any mistake in the wording of Regulation 21.11 (2), it is for the concerned rule making body to correct the same. Insofar as the Court is concerned, the Court has to go by the literal meaning of the provision. On a plain reading of Sub-regulation (2) of Regulation 21.11, it is apparent that the same does not in any manner provide for deposit or fees in relation to telecommunication infrastructure. Hence, the power to levy annual permission fees and installation charges does not originate from the said provision.

34. In the light of the aforesaid discussion, it is apparent that insofar as Municipal Corporations are concerned, the respondents have not been in a position to point out any statutory force behind the levy of annual permission fee and/or installation charges. The Apex Court in *Commissioner of Income Tax, Udaipur v. McDowell and Co. Limited* (supra) has held thus:

"Tax", "duty", "cess" or "fee" constituting a class denotes to various kinds of imposts by State in its sovereign power of taxation to raise revenue for the State. Within the expression of each specie each expression denotes different kind of impost depending on the purpose for which they are levied. This power can be exercised in any of its manifestation only under any law authorising levy

and collection of tax as envisaged under Article 265 which uses only the expression that no "tax" shall be levied and collected except authorised by law. It in its elementary meaning conveys that to support a tax legislative action is essential, it cannot be levied and collected in the absence of any legislative sanction by exercise of executive power of State under Article 73 by the Union or Article 162 by the State."

In the light of the law laid down by the Supreme Court in the decision cited hereinabove, it is apparent that in absence of legislative sanction, the State Government in exercise of its executive power under Article 162 cannot levy and collect annual permission fee and installation charges in relation to mobile telecommunication towers put up by Cellular companies.

35. Insofar as Municipalities are concerned, it has been contended on behalf of the respondent municipalities that the power to levy annual permission fee and installation charges flows from Section 99 and/or Section 118 of the Municipalities Act. Section 99 of the Municipalities Act falls under Chapter VIII of the Act which provides for "Municipal Taxation" under sub-heading (1) which provides for imposition of taxes. Section 99 makes provision for imposition of taxes by a municipality and enumerates the specific categories. A perusal of Section 99 shows that annual fee and/or installation charges for putting up mobile telecommunication towers by cellular companies does not find place among the categories enumerated thereunder. Clause (xv) of Section 99 provides for any other tax. However, as in the case of the BPMC Act, before levying any other tax, the municipality is required to follow the procedure laid down u/s 101 of the Municipalities Act which provides for "Procedure preliminary to imposing tax". In the present case it is an admitted position that no procedure u/s 101 has been followed for the purpose of levying annual permission fee and/or installation charges, hence the power to levy such imposts cannot be traced to Section 99 of the Municipalities Act. The other provision on which reliance has been placed to justify the impost is Section 118 of the Municipalities Act which provides for charging of fees for certain licences. The said provision provides for charging fees when any licence is granted under the Act or when permission is given thereunder for making any temporary erection or putting up any projection, or for the temporary occupation of any public street or other land vested in the municipality. A perusal of the provisions of the Municipalities Act shows that there are only two Sections which make provision for issuing licences, viz. Section 207 which provides for "Licensing markets and slaughter houses" and Section 213 which provides for "Licensing of dairies". Thus, insofar as grant of licence is concerned the provisions of Section 118 would clearly not be attracted. Insofar as permission u/s 118 is concerned, the same is required to be obtained in respect of the categories mentioned thereunder. Dealing with each category individually, insofar as making temporary erection or putting up any projection is concerned, it is nobody's case that the mobile telecommunication towers are temporary erections. As regards putting up any projection is concerned, Section 176 of the Municipalities Act provides for permission

necessary for certain projections. Under the said provision owners or occupiers of buildings in public streets may be given permission to put up open verandahs, balconies or rooms to project from any upper storey of such buildings, to an extent not exceeding 1.24 meters beyond the line of the plinth or basement wall of the building. Thus, written permission qua projections envisages projections beyond the line of the plinth or basement wall of the building, which is not so in the present case. The last category is for the temporary occupation of any public street or other land vested in the municipality. The present case evidently does not fall in the said category since mobile telecommunication towers are not put up by way of temporary occupation on any public street or land vested in the municipality. In the circumstances, the power to levy annual permission fee and/or installation charges also cannot be traced to the provisions of Section 118 of the Municipalities Act. No other provision is pointed out to the Court. Thus, it is apparent that there is no provision under the Gujarat Municipalities Act, which authorises the authorities thereunder to levy and collect annual permission fee and installation charges in respect of mobile telecommunication towers.

36. It has been contended on behalf of the respondents that the impugned Government Resolution has been issued pursuant to directions of the High Court in Special Civil Application No.13653 of 2006 whereby the State has come out with a uniform policy providing for levy and recovery of installation charges, annual permission fees, administrative charges in lieu of penalty fees etc. However as discussed in the preceding paragraphs in view of the provisions of Article 265 of the Constitution, no tax can be levied or collected unless the same is backed by some statutory force. Merely because the Government Resolution has been issued pursuant to directions of this Court would not vest power in the Municipal Corporations and Municipalities to impose and recover tax from the petitioners. The directions issued by the Court proceed on the footing that the uniform policy to be formulated shall be as permissible in law. The Executive cannot use the directions of the Court for doing something which the law does not permit. The Court having not issued any such direction, namely to act contrary to law, the Executive cannot be permitted to contend so, and cannot be permitted to usurp powers vested specifically in the legislature by the Constitution of India. Besides, it may be noticed that there was a supervening circumstance, between the issuance of the directions by this Court and the issuance of the impugned Government Resolution in the form of a decision of this Court rendered on 9.09.2008 in Special Civil Application No.531 of 2008 laying down that in absence of any statutory provision permitting the respondents to impose permission fees in respect of Mobile Towers, the levy of permission fees is without authority of law and violative of Article 265 of the Constitution. The Court had also held that administrative penalty could not have been imposed without first enacting any provision as to under what circumstances such penalty could be imposed. However, despite the aforesaid binding precedent of this Court, the respondent State authorities have issued the present Government Resolution which is directly in conflict with the law laid down in the said decision

and have provided for levy of annual permission fee, installation charges and administrative charge towards penalty.

37. The provision for recovering administrative charge in lieu of penalty is also not sustainable in view of the law laid down in the aforesaid decision, inasmuch as unless there is a provision for imposition of penalty, the question of recovering such penalty would not arise. When there is no question of recovery of penalty the question of administrative charges in lieu of penalty also would not arise.

38. Insofar as the contention regarding estoppel and acquiescence is concerned, it is settled legal position that there cannot be estoppel against statute. Besides in view of the law laid down by this Court there cannot be any acquiescence on the part of the petitioners. Moreover, if the impugned Government Resolution is not in accordance with law, it is bad in law. Powers cannot be derived by consent and an impost cannot be levied by concession.

39. Before parting it may be noticed that the BPMC Act has been enacted in the year 1949 whereas the Gujarat Municipalities Act, 1963 has been enacted in 1963. At the relevant time there were no mobile phones, hence the question of making any provision for mobile telecommunication towers did not arise. With the advent of new technology which was not envisaged when the legislation was framed, necessary amendments are required to be made in the Acts making provision for bringing the technological advances within the purview of the Acts. However, till such exercise is undertaken by the Legislature, it is not permissible for the respondent authorities to levy and collect taxes or fees in respect of mobile telecommunication towers which do not find place in the corresponding statutes.

40. In view of the above discussion, it is hereby declared that the impugned Government Resolution dated 11th December, 2008 issued by the Government of Gujarat Urban Development and Urban Housing Department is ultra vires the provisions of Article 265 of the Constitution as well as ultra vires the provisions of the Bombay Provincial Municipal Corporations Act, 1949 as well as the Gujarat Municipalities Act, 1963. In the aforesaid premises, the impugned Government Resolution being contrary to the decision of this Court in Reliance Communications Limited (supra) as well as having been issued without any authority of law cannot be sustained and deserves to be quashed and set aside.

41. In the result the petitions succeed and are accordingly allowed. The impugned Government Resolution dated 11th December, 2008 issued by the Government of Gujarat, Urban Development and Urban Housing Department as well as the demand notices issued pursuant thereto are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

42. In Special Civil Application No.2024 of 2009, the petitioner has challenged demand notices pursuant to the impugned Government Resolution dated 11th December, 2008. The petitioner has already challenged Government Resolution dated 11th December, 2008. In view of the fact that the impugned Government

Resolution which forms the basis for the demand notices in question has been quashed and set aside, the impugned demand notices cannot be sustained.

43. The petition is accordingly allowed. The impugned demand notices dated 01st January, 2009 and 02nd February, 2009 are hereby quashed and set aside. Rule is made absolute.

44. Registry is directed to place a copy of this judgment in each petition.