

(2000) 04 AHC CK 0090

In the Allahabad High Court

Case No : Writ Petition No. 8922 (M/B) of 1986 with W.P. Nos. 6636 and 8723 of 1986, 420/96 and 3962/97

Lucknow Grih Swami Parishad, Lucknow

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 20-04-2000

Acts Referred:

Constitution of India, 1950 — Article 21, 226
Uttar Pradesh Nagar Mahapalika Act, 1959 — Section 173
Uttar Pradesh Nagar Mahapalika Water Supply Rules, 1968 — Rule 10
Uttar Pradesh Water Supply and Sewerage Act, 1975 — Section 269, 270, 271, 30, 44

Citation : (2000) 04 AHC CK 0090

Hon'ble Judges : Ikram-Ul-Bari, J and A.K.Yog, J

Final Decision : Dismissed

Judgement

A.K. Yog, J.—These six petitions give rise to the controversy pertaining to duties and obligation of LocalBodies" (as part of local self government) to ensure "watersupply", within their area for which said authorities are created under legislative enactment visavis rights, duties and obligations of the citizens who enjoy the basic amenity like water which is, like air the core of life. Duty to supply water in modern times, largely and invariably barring exceptions rests with local selfgovernment. No local selfgovernment can in the present day complex growth of society perform its duties unless it has funds and provision to generate funds for its continued existence.

2. Resolution No. 2312A, dated May 1, 1901 Government of India (F and C) dealt with the concept of taxation and its limits. It justifies imposition of tax and mentions that limit may be exceeded in special cases, such as sinking funds for discharging duties, or to meet expenditure of project on a large scale. Resolution, however, notes that surplus available for investment should be taken into account for administrative measures for reduction of taxes.

3. Another Resolution No. 3463/XI271E, dated September 19, 1916 gives an

insight to the object and purpose of vesting local self government with right to impose taxes, octroi, surcharge etc. By passage of time, experience showed that system of indirect taxes could be resorted. As the people got involved in the process they became enlightened and realised additional measures have to be taken, i.e. to resort to taxes subject to balance between two factors namely : (i) payment for "definite service" rendered, and (ii) to determine actual expenses of that burden to be borne by a local authority. Payment of tax for "definite services" covered taxes such as "water tax" "scavenging tax" tax on "vehicle", "animals", "property", etc.

4. The aforementioned Resolution dated September 19, 1916 mentions that in modern community it cannot be left to each individual members to make voluntary provision for all essential things for communal life. Whether need is of supply of water or a system of drainage or education, it is incumbent on local authority to place some provision at the service of every member of the community whether he is able to make a proportionate contribution or not. Municipal activity cannot be left on any basis of purely economic exchange but it must be regarded as "a necessary contribution towards public at large, which must meet as a civic duty." Some basis is, therefore, necessary for the levy of such compulsory taxes. Resolution also noted the necessity of fairness in the actual work of assessment. Unless assessing authority and the process for assessing is scrupulously honest and its imposition is impartial, tax otherwise becomes as bad as the worst and municipal government will immediately show cracks symbolising its failure.

5. The fundamental principles of taxation in such matters should be limited to meet the requirements of actual expenditure and in special cases to take care of expenditure like sinking fund for repayment of debt or projects on large scale. (Vide Government of India (F) and (C) Resolution No. 2312 dated May 1, 1905, See (1990) SCC109. No fee to be levied if revenue earning is substantial. There should be no unjust enrichment particularly in the matter of public law. JT 1999 (5) SC 237 (Pr 40 to 43). The other important factor is that it is kept as low as possible and as nearly uniform as possible, it does not bear unfairly upon any section/class.

Importance of Water

6. No city, town, locality or area, not even as an exception, is there which is not affected by water crisis. Scarcity of water and its erratic supply in urban area is a chronic problem. Situation becomes acute, sometimes unbearable with mercury shooting up. Even the towns, surrounded by rivers or which are situated on the banks of rivers (like Allahabad, Kanpur, Varanasi and Lucknow) are no exception. One is reminded of the famous lines "water water every where but not a drop to drink."

7. Crisis is primarily due to apathy on the part of authorities who invariably failed to take prompt remedial measures at initial stage and failed to comprehend

miseries of the citizens. Tendency reflecting lack of "will" and "sense of involvement" both politically and administratively, though unfortunate alarmingly growing and become a fashion of the day reflecting on ones, detachment towards public duty. Responsibility and accountability have been handed over by Government to Nagar Nigam, to Jal Sansthan. It has further compounded the problem reflecting upon perplex psyche authority in command. It is a matter of common experience that authorities do not care to look into plethora of complaints by the consumers. Such is the matter of compliant in the present petitions.

8. Editorial in the magazine titled "World Resources 199899" reads :

"Implementing preventive actions to reduce environmental threats to health risks will entail devising public policies and making financial investments that explicitly recognise the relationship between environment and health. Many actions can be taken now that are practical sensible and costeffectiveand are not now being done. One of the best opportunities to improve health through preventive action is through efforts to improve community environment in developing countries. Such actions include expanding access to water, sanitation and hygiene education; ensuring that garbage is collected and disposed property ; promoting the use of clear household fuels; and controlling the insect and animal vectors that carry diseaseespecially the mosquitoes that transmit malaria, dengue fever, yellow fever and other tropical illnesses. Such improvements would greatly contribute to reducing the 17 milliondeaths each year from infectious diseases. The failure to undertake such basic measures as providing clean water and waste management for all people is an unnecessary and continuing plight on humanity."

9., Article "Environmental Change and Human Health" in Part I of the magazine reads:

"Environmental health problems vary dramatically from region to region, reflecting geography, climate and perhaps most important a country's level of economic development and policy choices. Many environmental health problems are associated with poverty and a lack of essential resources chief among them sufficient and clean water, food, shelter, fuel and air."

10. Article titled "Critical Shortages Ahead" in the magazineNoted

"The world's thirst for water is likely to become one of the most processing resource issues of the 21st Century. Global water consumption rose six fold between 1900 and 1995 more than double the rate of population growth and continues to grow rapidly with agricultural, industrial and domestic demand on constant increases."

11. Broadly following salient aspects may be highlighted:

I. Access to potable water is entitlement by birth. Use of water and its management depends upon different distribution patterns changing according to areas such as rural, urban and suburban, etc. Occasionally it is also regulated by

the people under whom it is in custody or by destitute, impoverished people, slumdweller, pavement dwellers and squatter settlements. In Municipal and Notified Area Councils are responsible for providing basic amenity like potable water for drinking purpose.

II. India having solemnly pledged to the International Drinking Water Supply and Sanitation Decade Programme (1980-81), tried to cover 10% of its rural population for safe drinking water supply. Since 1954 the National Programme for providing safe drinking water was launched as a result of which urban areas are better placed in supply of safe drinking water in comparison to rural area. Efforts are being made under Accelerated Rural Water Supply Programme (ARWSP) and Minimum Programme (MNP) to provide tubewell with hand pump or stand post for the benefit of the rural people. These works are being supervised by the National Drinking Water Mission which also monitors (i) control of brackishness (ii) control of flourish (iii) removal of excess iron, (iv) guinea from eradication, (v) water quality surveillance and community involvement for supply of safe drinking water.

III. There are many areas in India, which could be regarded as real monuments of miseries with an acute shortage of drinking water. There are also areas where organised means of water supply through pipes are forced to receive muddy or contaminated water through such systems. In some villages women spend half their time and life for fetching water from ponds, wells, etc. They have to carry pots of water for about six to seven hours every day (Report by Sandy Caimcross ; Water, World Health 21 (Jan. Feb., 1990) and in some parts of the villages people have to walk several kilometres for portable water.

IV. Consequently it is obligatory on the part of States to ensure the creation of conditions congenial to good health. And for that it is the bounden duty of the State to assure the supply of sufficient amount of qualitative drinking water to its people.

V. Article 47 of the Constitution of India proclaims that the State shall ensure its primary duty to (i) raise the level of nutrition, (ii) standard of living of its people; and (iii) improvement of public health. Article 51A states that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and the wild life and to have compassion for all living creatures. Apart from that the State Municipal Act and Panchayat Act make it very clear that potable water supply is one of the primary objectives of such local bodies.

12. In Consumer Education and Reassert Society v. Ahmedabad Municipal Corporation, 1991 (1) Consumer Protection Reporter, 191 (NC), it is held that "It is the bounden duty of the local bodies to take adequate preventive measures before the onset of the monsoon so as to avoid Contamination of drinking water supplied to the public and for the prevention of possible outbreak of epidemic or cholera or gastroenteritis."

13. Pollutionfree water has been declared as a fundamental right. Involvement of people through social awareness campaign and attempt to make them realise that water is a "scarce resource" is very much essential. Keeping in view the everincreasing demand for water and worries caused due to depletion of water resources year after year, it is very much essential to conserve the available resources.

14. The people, therefore, have constitutional right under Article 21, Constitution of India to demand for fixing accountability and action for failure to provide such public service against persons responsible for supply of drinking water not fit for human consumption.

"Water is gift of nature. Human hand cannot be permitted to convert this bounty into a curse, oppression. The primary use to which water is put being drinking, it would be mocking nature to force the people who live on the bank of river to remain thirsty." (1996) 2 SCC 572PrIDelhi Water Supply and Sewerage Disposal Undertaking and another v. State of Haryana and others.

15. Its need is so paramount that it cannot be made subservient evident to any other use of water. Right to use water for domestic purpose would prevail over other needs. (See American Jurisprudence Vol. 782 P 293 : Slate of Connecticut v. Common Wealth of Massachusetts).

16. The Management of potable water need meticulous handling and requires an excellent mechanism particularly when it is becoming scarce day by day.

17. Unfortunately, the Local Self Government and statutory authorities entrusted with the job, general experience shows, have utterly failed or at least not performed their functions satisfactorily. News reports appearing now and then in Newspaper bear testimony to the above. Severe water crisis, in various cities, particularly (KAVAL towns in the State) manifested itself in the form of public agitationlike Dharna, Road blockades (Chakka Jam), etc., sometimes turning into law and order problem.

18. Problem is invariably tackled by temporary measures resorting to superfluous dressing instead of finding permanent cure through well planned project, keeping side by side in mind future requirement and also cope up with the maintenance of its infrastructure but still keeping the cost on "no profit no loss "basis.

FACTS:

19. Plight of residents of Lucknow, like any other town in U.P. on the bank of river in absence of sufficient or no supply of water on "quid pro quo" basis even for drinking purposes prompted petitioners to file public interest petitions seeking issuance of writs against Jal Sansthan (called Sansthan) to maintain water supply by charging cost permissible under law and save the people of Lucknow from facing crisis of drinking water paying alleged unreasonable charges, imposed by the Sansthan.

20. There could be no better time than the months of summers for hearing and deciding this bunch of writ petitions dwelling upon the subjectmatter of water" and its "supply" in the city of Lucknow.

21. Present bunch of six petitions, based on more or less similar facts, raises common issues for determination by this Court and hence decided together.

22. Salient facts of each petition, in brief, are as follows:

1. Writ Petition No. 8922 (MB) of 1986

(Lucknow Grih Swami Parishad, U.P. Lucknow v. State of U.P. and others)

23. It shall be treated as leading case.

24. Petitioner, Lucknow Grih Swami Parishad a registered society (Under Societies Registration Act, 1860, as applicable to the State of Uttar Pradesh) Khurshed Bagh, Lucknow, through its Secretary has filed this petition challenging Notification dated 5101985 (whereby State Government exercising power under Section 52 of the Act prescribed 12.5 % and 13% rate of water tax and sewerage charges respectively) and Notification dated 831986 (whereby cost of water supplied by Jal Sansthan was increased) copies of said Notifications have been filed as Annexures 1 and 12 to the petition.

25. Petitioner contends that cost of water by resorting to revised rate, has been increased without logic and has no reasonable basis since under the provisions of said Notification those who did not have metered connections are given an added advantage by requiring to pay fixed amount irrespective of quantity of water consumed. Whereas those, who have metered connections are required minimum charges even if water is not consumed and also to pay as per meter reading. It is contended that unmetered consumer will pay maximum Rs. 360 per annum, whereas metered consumer has to pay Rs. 120 as minimum charges even if water is not consumed and also more than Rs. 360, if calculated by meter. Petitioner also pleaded that levy of Rs. 24 per annum as "service charge" for no specific service to be rendered and not backed by no provision of the Act, is illegal. Petitioner's grievance is, in nut shell that Jal Sansthan is supposed to fix water and sewerage tax and charges etc. keeping in view Section (sic) of U.P. Water (Supply and Sewerage Act, 1975 (Act, 1975) resorting to increase arbitrarily rates of water and sewerage tax as well as cost of water. Jal Sansthan is not expected to indulge in unreasonable profiteering and/or burden the public for its losses due to its callous working, apathy, malfunctioning, mismanagement etc. by enhancing rates of water and sewerage tax and service charges. Petitioner, laboured to demonstrate by filing a chart to the petition as Annexure 3, that in respect of water charges (in respect of an unmetered connection) becomes nil as the annual letting value of the building increases by showing through calculations in a tabulated form.

26. During pendency of the petition Notifications dated 2081994 and 2481996 were issued and Jal Sansthan, Lucknow sought to revise cost of water to be

supplied to its consumers. These Notifications also prescribed certain terms and conditions and criterion for determining consumers liability to pay cost of water for metered and unmetered connections. It contemplated rebate on payment of Bills subject to certain conditions, namely payment before specified date. It also imposed levy of surcharge. In view of aforementioned Notificationsof1994and1996during pendency of writ, petitioner applied for amendments which were allowed by Court and writ petition was amended and paragraph 35A was inserted as per Court order dated May 3,1996. It was subsequently allowed to be substituted vide Court order dated 2841998. Petitioner also amended "relief clause" and besides seeking to quash Notification of 1985, prayed that Notifications of 1994 and 1996 (Annexures 5 and 7 by amendment) be also quashed.

27. Paragraph 35A of the petition enumerates relative rates under different Notifications as given below;

"Pr. 35A. That pending decisions of the writ petition, opposite parties Nos. 1 to 3 have made hikes twice in water rates and tax by Notifications dated 20894 and 24896 as per below:

1.1.85 1.4.94 1.8.96

75 Paise Rs. 1.50 Rs.2.00

Rs. 144.00 Rs.480.00 Rs. 720.00

Rs. 36.00 Rs. 540.00 Rs.96.00

28. On this writ petition, notices were issued on 19121986. On 3011988 an interim order was passed, which reads thus:

"No counteraffidavit has been filed.

Heard learned Counsel for the petitioner and perused order dated 14th January, 87 passed in Writ Petition No. 8722 of 1986. Until further orders it is provided that the member of the Lucknow Grih Swami Parishad as contained in Annexure 4 to the petition shall continue to pay the charges only on the old rates.

Sd.B. Kumar, J.

30189."

2.Writ Petition No. 6636 of 1986

29. Petitioner, Rajendra Nagar Kalyan Samiti is registered society and has filed this petition challenging the Notification dated 5101985 (Annexure 1) and Notification dated 831986 (Annexure 2). Similar pleas as taken in Writ Petition Nos. 8922 of 1986 and 8722 of 1986, were also raised in this petition. It is contended that water works run under control of Nagar Mahapalika, Lucknow and after constitution of Jal Sansthan the responsibility to supply water and realise water tax and sewerage tax and general tax ultimately came to be vested with

the Jal Sansthan Lucknow. Petitioner raised plea of limitation contained under Section 173 of U.P. Nagar Mahapalika Adhiniyam and contended that aggregated liability of water tax and sewerage tax and other taxes in aggregate could not be more than 25%. Therefore, petitioner contended that by imposing taxes they have revised tariff which exceeds limit of 25% and therefore, bad. It is contended that Section 52 of Act, 1975 is inconsistent with the provisions of Section 173 of Nagar Mahapalika Adhiniyam. Petitioner also contended that no Rules, Regulations or byelaws were framed as required under Section 25 (2) (vi) and under Sections 59,61,62 and 63 of Act, 1975. Petitioner also contended that Jal Sansthan has acted illegally and arbitrarily in imposing service charge as no extra service was provided and consequently realisation of service charge was arbitrary and unreasonable. Petitioner also contended that hike in the cost of water was unreasonable and arbitrary besides suffering from vice of discrimination. Petitioner also raised grievance that enhancement of water charge by 40% (Le. Rs. 7.50 to 30 per month in case of metered connection) and increase of 50% in the charge (for metered connection) is without justification. Petitioner claimed a writ for quashing Notifications dated 510 1985 and 831986 (Annexures 1 and 2 to the petition).

30. In this writ petition interim order dated 2291986 was passed, which reads thus:

"Notice on behalf of opposite party No. 1 has been accepted by the Chief Standing Counsel, notice on behalf of opposite party No. 2 has been accepted by Sri Mahesh Chandra while on behalf of opposite party No. 3 Sri S.C. Mishra and on belief of opposite party No. 4 by Sri Umesh Chandra. List of the petition for orders in the next week. Till the next date of listing of the case the water connection of petitioner No. 2 shall not be disconnected on the ground he has not paid the water charges at the enhanced rate.

Sd/U.C.Srivastava,J.

Sd/S.S. Ahmad, J.

22986"

31. The above order was never extended nor the Court granted interim order on subsequent Interim Stay Application (See Application No. 9425 of 1990) filed on 1751990

3. Writ Petition No. 8722 of 1986

(Nagrik Kafyan Parishad Registered Society v. State of U.P. and others)

32. Petitioner, Nagrik Kalyan Parishad is a society registered under Societies Registration Act and its members are house and water tax payers and that since matter pertains public grievance steps were taken to file the petition and as such they had locus standi to present the petition. Vide copy of memorandum of association list of members has also been annexed alongwith the petition.

Petitioner also seeks to challenge Notification dated 831986 (Annexure 16 to the petition) and Notification dated 5101985 (Annexure 15). Relief seeking a writ to declare Sections 59 and 72 of Act, 1975 to be illegal, inoperative, ultra vires, null and void, writ of mandamus commanding opposite parties from disconnecting water supply to the premises of the members of the petitioner in the event of nonpayment of enhanced water tax if charges, meter rent surcharge, etc. Facts alleged in the writ petition are also practically similar as the one made in Writ Petition No. 8722 of 1986.

33. An interim order dated 1411987 was passed by Division Bench, which reads thus:

"Admit and connect with Writ Petition No. 6636 of 1986. The opposite party may file counteraffidavit within three weeks whereafter the petitioner may file rejoinderaffidavit within one week. Meanwhile it is directed that the members of the Nagrik Kaiyan Parishd as contained in Annexure 2A of the petitions shall continue to pay the charges on the old rates till further orders.

Sd.U.C.Srivastava,J.

Sd.P.Dayal,J.

14187"

34. There is no interim order staying Gazette Notification dated 2081954 and 2481996 revising Tariff of watercharges and petitioner must have paid the same by now. These subsequent Notifications have not been challenged by seeking Amendment of the writ petition.

4. Writ Petition No. 98 (MB) of 1995

(Bhartiya Janta Sangarsh Morcha v. State of U.P. and others)

35. Petitioner has challenged Notification dated 2081994 (Annexure 1) as well as Gazette Notifications dated 581985 and 831986 (Annexures 2 and 3 to the petition) and prays for that Sections 59 and 72 of Act, 1975 (Act No. 43 of 1975) be declared ultra vires, inoperative and void.

36. In paragraph 1 of the petition it is asserted that petitioner is a society committed to the cause of public and work for welfare of entire public which is affected by the arbitrary and illegal enhancement of water charges by issuing impugned Notifications. Gazette Notification dated 2081994 issued under Section 59 of Act, 1975 sought to revise rates of water charges and enhanced the same by arbitrarily introducing new rates with effect from 141994. Petitioner also raised grievance against levy of service charges, which were not earlier imposed. Petitioner raised grievance that rate of levy of water charges, water tax was enhanced from 12.5% of the assessed letting value of a premises under Notification dated 5101985 issued under Sections 52 (2) and 54 (4) of Act, 1975 and revised rate for water charge/cost was imposed with effect from 111986 vide Notification dated 831986. Petitioner alleged that under Section 173 of U.P.

Mahapalika Adhiniyam, 1959 aggregate of property tax could not exceed more than 25% of annual letting value of a building. According to the petitioner, enhancement of water charges and water tax was against the very purpose and object of the Act. Petitioner also contended that imposition of flat rate of Rs. 360 per annum as water charges on building in case of nonmetered connection was in fact in nature of penalty under the garb of water tax. Petitioner also stressed that no Rules, Byelaws or guidelines in respect of the terms and conditions for supply of water for domestic and other purposes effecting general public in utter disregard of provisions of Section 98 of the Act were framed. Petitioner also disputed authority of Jal Sansthan to impose service charge on flat rate of Rs. 24 per year as it was unwarranted and not permissible under Act, 1975 (See paragraphs 22 and 24 of the petition). Petitioner also pleaded "that for enhancing the rate of tariff, proper resolution by twothird majority is to be passed under Section 25 (vi) of the Act and the same should be communicated to the Jal Sansthan for approval. In the instant case approval has been accorded without proper resolution (paragraph 33 of the petition). Petitioner also contended that water supply in the whole city of Lucknow is too poor, consumers were not getting supply of water, duration for supply of water has neither been appropriately fixed nor any norms have been followed and no improvement has been done in respect of supply of water and, therefore, enhancement in rates pertaining to water cost by the impugned Notifications is absolutely illegal and arbitrary. Jal Sansthan, Lucknow, a public service undertaking has miserably failed to cater to the basic need of the consumers in having failed to maintain proper and adequate supply of water and therefore, it was not entitled to even impose water tax or water charge. Petitioner, therefore, submitted that arbitrary and excessive enhancement in the rate of water tax and water charges by the impugned Notification were unconstitutional and colourable exercise of power by the Jal Sansthan.

37. There is no interim order whatsoever, in this case. From the ordersheet, it appears that petitioner did not press for interim order.

5. Writ Petition No. 420 (MB) of 1996:

(Indira Nagar Avasiya Maha Samitiv. State of U. P. and others)

38. Petitioner is a registered society of residents of Indira Nagar, Lucknow.

The facts as stated in this writ petition are the same as given in earlier writ petitions. The petitioner has claimed a writ in the nature of writ of certiorari to quash impugned Notification dated August 20, 1994 and declare Sections 59 and 60 of the U.P. Water Supply and Sewerage Act as ultra vires Constitution of India.

39. Writ Petition was filed and entertained on 621996. An interim order dated 821996 was passed in this writ petition, which reads thus:

"Standing Counsel as well as Sri Ratnesh Lal on behalf of Jal Sansthan has accepted notice. They pray for and are granted 6 weeks time to file response.

List this writ petition along with Writ Petition No. 8722 of 1986 (MB) and 6636 of 1986 (MB) after expiry of the said period.

Meanwhile it is provided that in case members of the petitioner's association deposit 14% of water tax and 4% sewerage charge on the annual assessment their water connection shall not be disconnected till further orders of this Court.

Sd. S.H.A.Raza,J.

Sd.I.P.Vasishth,J.

40. There is no interim order staying payment of watercharges as per Notification dated 2081994and 2481996.

41. Petitioners have urged and pressed the following points only

No other plea/ground in these writ petitions have been pressed. 6. Writ Petition No. 3962 (MB) of 1997

(Vikas Nagar Resident Society v. State of UP.)

42. Petitioner is a registered society and its members are residents of Vikas Nagar locality in Lucknow City. In support of the said fact byelaws of the society and list of office bearers of management swell as members has been filed as Annexures 1, 2 and 3 to the petition. In this petition relief sought is to the effect that writ in the nature of certiorari be issued for striking down Section 59 of the Act, 1975, another writ in the nature of certiorari by issued quashing Notification dated 2481996 Annexure 5 to the petition). Pleas raised in this petition are practically the same as in earlier Writ Petition No. 420of 19%.

43. Petitioner contends that by issuing impugned Notification tariff provided under earlier Notification dated 2081994 was doubled. Bills have also been annexed to strive the point home. Petitioner in this petition also challenges vires of Section 59 and further plea was taken that water supply to the citizens of Lucknow dirty, mixed with mud and causing different types of diseases and hence there was no justification for Lucknow Jal Sansthan to revise tariff and charge and exploit the citizens. Petitioner also fell aggrieved by introduction of a clause providing for automatic enhancement of water charges at the rate of 15% per annum automatically. Petitioner has taken ground in the petition that in last 2 years, both quantity and quality of water had gone bad to worse and hence there was no justification for enhancement of water charges by double as it was not in consonance with the inflation rate either.

44. No counteraffidavit has been filed in the present petition.

45. There is no interim order in this case.

46. It is to be noted that the operation of the Government Notifications, Gazette on 2081994 (Annexure 5pp 95) and the Notification dated 2481996 (Annexure 7pp 166) were not stayed and the revised tariff of water charges provided by said Notifications has remained operative and in force.

47. Heard learned Counsels for the parties at length.

48. On behalf of Lucknow Jal Sansthan, the learned Counsel for the respondents raised two preliminary objections .

PRELIMINARY OBJECTIONS BY RESPONDENTS:

1. These petitions are not maintainable on behalf of the societies and each member ought to have filed separate petitions and paid Court fee separately.

49. It is contended that the Societies as such have no locus standi to espouse the cause of its members who are aggrieved and have separate cause of actions.

50. The learned Counsel for the petitioners submitted that the Societies represent their common interest as per its aims and objects and as the subjectmatter of these petitions pertains to the public interest at large these petitions can be treated as public interest litigation.

51. Looking to the nature of the subjectmatter and the issues raised in these petitions coupled with the settled approach of our Court as well as that of the apex Court in several other matters in the past, we are of the opinion that these petitions are maintainable at the behest of the Societies which are constituted for the welfare of its members and to watch their interest. In this context reliance is placed upon:

1. AIR 1980 SC 1622 (Pr. 1), Rattan Municipality" v. Vardhichand.

2. 1996 (2) SCC 572, PIL Maintainable, Delhi Water Supply and Sewerage Disposal. Undertaking and another v. State of Haryana and othersHeld case can be treated as PIL and writ will be maintainable.

3. AIR 1982 SC 149S.B Gupta v. Union of India.

52. Further, in the instant case, no objection was taken on this score in the original counteraffidavit (pp 66 to 74). The society and its members are espousing public cause in general and also championing the issue relating to the welfare of its members. Averments in paragraph 4 of the Supplementary Rejoinder Affidavit (pp 192193) do support the above position and completely belie the contention of the respondents. Hence writ in the name of the society for the benefit of its members is maintainable. Objection raised for the first time vide Pr. 3 of Second CounterAffidavit of Respondent No. 2 (sworn by D.K. Sharma, Secretary, Jal SansthanPP 182) filed on 5th November, 1998, i.e. after twelve years of filing of writ petition is rejected.

II. Writs are liable to be rejected on the ground of availability of Alternative Remedy Petitioners have adequate and efficacious remedy under Section 30 of the Act, 1975(See Supplementary counteraffidavit Pr 10particular page 237).

53. Parties exchanged pleadings long back. Petitions amended from time to time but no objection on this score raised in 1st counteraffidavit i,e. at the earliest opportunity and promptly and therefore, it will not be expedient to relegate the

petitioner now to resort to alternative remedy. Respondent took this objection vide Pr 9 of Supplementary counteraffidavit not properly sworn. Le. particulars of Deponent not disclosed nor swearing clause filled in. It is, therefore, liable to be ignored. Moreover, certain questions relating to vires of the Sections of Act, 1975 cannot be decided under Section 30 of Act, 1975.

PETITIONERS' CONTENTIONS:

54. Learned Counsels for the petitioners on merit made following submissions which are being dealt hereinafter.

ARELATING TO WATER TAXICONTENTION No. I :

55. Levy of water tax under Sections 52 and 58. The U.P. Water Supply and Sewerage Act, 1975, hereinafter called Act, 1975", is illegal because these sections are ultra vires of the Constitution inasmuch as the State Legislature could not legislate on the subject relating to tax on the supply of water, which is not included in List II of Eighth Schedule of the Constitution of India.

56. Sections 52 to 58 of Act, 1975 are contained in Chapter VI (titled "Tax, Fees and Charges"). Sections 52 to 58 are relevant to appreciate the scheme providing for basis of assessment, imposition and realisation of water tax.

57. Argument lacks merit and is misconceived in view of Item Nos. 49 and 54 of List II of Seventh Schedule of the Constitution of India. A similar contention was repelled by this Court in the "case of Kendriya Nagar"ik Saniiti v. Jal Sansthan, 1982 UPLBEC 446 (DB), photo copy filed as Annexure SCAI (pp 243 of PB of leading case). This judgment was subsequently affirmed by the Supreme Court vide judgment and order dated 23rd January 1987 rendered in Civil Appeal Nos. 346465 of 1982 (vide photo copy supplied by the respondents and its contents not disputed by the Counsels for the petitioners). Relevant extract of the judgment is reproduced:

"In these appeals the only question raised is whether the imposition of water and sewerage tax at 12 1/2% and 3% of the annual value of the premises, under the U.P. Water Supply and Sewerage Act, 1975, can be enhanced to 14% and 4% respectively.

The appellants filed a writ petition in the High Court of Allahabad challenging the enhancement of the water and sewerage tax rates, and the writ petition was dismissed. In appeal, learned Counsel for the appellant contended that the enhancement of the water and sewerage tax rates is invalid because having regard to the general tax at 17 1/4% already imposed by the Nagar Mahapalika under the U.P. Nagar Mahapalika Adhiniyam, 1959, the aggregate of the general tax and the water and sewerage taxes cannot by reason of the proviso to subsection (2) of Section 173 of the U.P. Nagar Mahapalika Adhiniyam, 1959 exceed 25%. The submission rests on the basis that the imposition under the U.P. Water Supply and Sewerage Act, 1975 is governed by the limitation imposed under the U.P. Nagar Mahapalika Adhiniyam 1959, and that for that purpose the

provisions of the two Acts must be read together. In our opinion, the contention is without substance.

The U.P. Water Supply and Sewerage Act, 1975 provides for the Constitution of Jal Sansthan, which are entrusted with function, planning, promoting and executing scheme of and operating an efficient system of water supply and sewerage and sewerage treatment. Section 52 of the Act empowers a Jal Sansthan to levy water tax and sewerage tax. It is provided that the water tax and sewerage tax will be levied at a determined rate on the assessed annual value of the premises. It seems to us that having regard to the provisions of U.P. Water Supply and Sewerage Act, 1975 the Legislature has enacted a complete code in regard to providing for the amenities of water supply and sewerage facilities. It is true that Section 114 of the U.P. Nagar Mahapalika Adhiniyam 1959 empowers the Nagar Mahapalika to take provisions for these amenities. But in respect of certain areas that responsibility has been entrusted exclusively to the Jal Sansthan constituted by the U.P. Water Supply and Sewerage Act, 1975. Section 100 of the Act provides that from the day the Jal Sansthan comes into being Section 114 and other Sections of the U.P. Nagar Mahapalika Adhiniyam, 1959 cannot be brought into play. In respect of the area serviced by the Jal Sansthan the obligation of providing the amenities of water supply and sewerage facilities cease to be the responsibility of the Nagar Mahapalika and instead become responsibility of Jal Sansthan. No reference is therefore, justified to the proviso to subsection (2) of Section 173 of the U.P. Nagar Mahapalika Adhiniyam, 1959.

58. Item No. 17 in List II of Seventh Schedule is confined to water its supplies and canals, drainage irrigation embankment, water storage, water power, etc. the expression "water its supplies" in the List is to be read on the basis of the rule *ejus dem generis*, i.e. supplies of water through rivers, canal, drainage, embankment, natural storage of water, hydro plants etc. Supply of water through local bodies is not covered under said Item. Item No. 56 in List I of Seventh Schedule read with Article 288 (1), Constitution of India has no relevance to the present case.

59. The above contention even otherwise, has no merit in view of Constitution (Seventy Fourth Amendment) Act, 1992, which commenced with effect from April 20, 1993 and inserted in Part IX titled as "Municipalities" in the Constitution of India as well as Article 243 read with Item No. 5 in Twelfth Schedule dealing with "water supply" for domestic, industrial and commercial purposes. It completely sweeps the basis of the argument.

CONTENTION No. II :

60. Sections 52 and 58 of Act, 1975 are in conflict with and run contrary to Section 173, U.P. Nagar Mahapalika Adhiniyam, 1959 (called Act, 1959) inasmuch as the total quantum of taxes provided under the two Acts, if coupled together will exceed the maximum limit provided under Section 52 (2) of Act,

1975.

61. The Supreme Court in the case of Kendriya Nagrik Samiti (supra) had the occasion to deal with this aspect. The Court found that the limit prescribed under Section 173, Act 1959 was not to be stretched to be applicable to the imposition of tax under Act, 1975. Shri K.B. Jindal and others appearing on behalf of the petitioners, who raised the above issue did not finally press their Contention Nos. I and II in view of Supreme Court judgment in Kendriya Nagrik Samiti (supra).

62. Petitioner have not challenged imposition of tax on the ground of breach of any provision of Act, 1975 or the same being invalid or ultra vires of the Constitution on any score whatsoever. None of the petitioners claim to have filed appeal under Section 54 to challenge assessment of annual value under Section 53 of the said Act. Hence, impugned Gazette Notifications cannot be said to be bad; as also held by this Court in 1970 ALJ 325 Hari Lal Arya v. Town Area Committee. In AIR 1962 SC 795, it is held that both the taxes on same commodity, if earlier or later law not repealed, shall be valid.

B. WATER CHARGES: CONTENTION No. III :

63. (i) Jal Sansthan is under obligation under Section 69 of Act, 1975 (as also provided previously under Sections 269 to 271, Act 1959 read with Rule 10, U.P. Nagar Mahapalika Water Supply Rules, 1968) to install "Meter" and realise charges for water consumed on actual consumption of water. See para 31 of leading writ petition as well as para 8 of Supplementary Rejoinder Affidavit (PP192).

64. According to the petitioners, Jal Sansthan failed to discharge its statutory obligation under Section 59 of Act, 1975 since it failed to fix Meters in large number of connections and in also resorting to impose of minimum flat rate at the rate of Rs. 360 per annum (fixed) with respect to "unmetered connections". It cannot justify realisation of enhanced water charges (50% in case of metered, and 40%, in case of unmetered connections respectively). Such a tariff of water, under impugned Gazette Notifications, according to the petitioners, is illegal, unsound and based on no intelligible differentia and suffers from vice of unintelligible and arbitrary discrimination.

65. Jal Sansthan, thus arbitrarily and illegally created two categories of consumers for same privilege e.g.: (i) Consumers "With Metered Connections liable to pay as per actual consumption measured as per Reading by meter (ii) Consumers "Without Metered Connections" liable to pay solely on the basis of estimated consumption (i.e. alleged minimum charges). It is against statutory mandate given under Section 59 (I) of Act, 1975.

66. Contention is without merit. It is in ignorance of Section 59 (2) of Act, 1975 which specifically confers power on a Jal Sansthan to charge cost of water on the "basis" expected consumption b} providing fixed sum for a specified period. Section 59 (2) of Act, 1975 reads:

"A Jal Sansthan may in lieu of charging cost of water according to volume, accept a fixed sum for specified period on the basis of expected consumption of water during that period."

(ii) Metered and unmetered connection

67. Grievance in this respect is contained in Pr 22 to 28 of the leading writ petition and it is argued that minimum charges for metered connection fixed at Rs. 144 per annum and whereas minimum charges for unmetered connection fixed at Rs. 360 are apparently arbitrary. Petitioners submitted that Jal Sansthan is under statutory obligation to fix meter and cannot create distinction between metered and unmetered connections. Tracing the history, it was submitted that distinction between the metered and unmetered connections continued up to 1930 but in 1948 under statutory enactment it became mandatory to fix a meter, but again in the year 1986 an option was given for having either metered or unmetered connection. Jal Sansthan justified such an approach in view of its stand that the Companies manufacturing meters Government Precision Instrument Factory and U.P. Instrument Limited had failed to supply meters and hence the necessity to provide unmetered connections (See Pr 6 Supplementary Rejoinder Affidavit PP194).

68. The argument of the petitioners has no merit in view of the provision of Act, 1975. Section 59 (2) of the Act, 1975 (quoted earlier) itself contemplates charging of water charges according to volume, except a fixed sum for a specified period on the basis of expected consumption of water. Section 61 of the Act says that Jal Sansthan "may" provide water meters. This word "may" clearly shows that it is not mandatory for Jal Sansthan to provide meter. Section 66 (4) of the Act, 1975 again contemplates that supply of water shall be on such terms and conditions as may be provided by Byelaws. Petitioners have not filed copy of Byelaws to show that there could be no unraetered connections. In Section 69 of the Act also word "may" is used. Therefore, it is not mandatory for Jal Sansthan in Law to fix meters. Over and above "meter" and its fixation is to be regulated by Byelaws. Unfortunately, no party has produced Byelaws for perusal of the Court. Therefore, we find no irregularity, in absence of relevant material on record, if Jal Sansthan provided tariff for both metered and unmetered connections. In this context provisions of Uttar Pradesh Nagarmahapalika Water Supply Rules, 1968 are also relevant and may be perused. According to these Rules, meter may be got fixed by the consumer himself in case meter is not provided by Jal Sansthan. Perusal of these Rules 10 to 11 shows that Jal Sansthan can legally charge both on measured and expected/estimated volume of water consumed.

CONTENTION No. IV :

69. Enhancement of water charges by 400% (Le. Rs. 7.75 to Rs. 30 p.m.) in case of unmetered connections and 50% in case of metered Connections without sound foundation is unprecedented and exorbitant. It shows unjust enrichment

opposed to fair sense and against legal norms, besides being vitiated due to unreasonable discrimination and, therefore, violative of Article 14, Constitution of India. Enhancement of water charges under Notification dated 8th March, 1986 (Annexure 2 to the leading case). Notification dated 20th August, 1994 (Annexure 5 to 1st Amendment Application in leading case (pp 99) and Notification dated 21st August, 1996 with effect from 1st August, 1996, 540 to 960 (Annexure 7pp 169) is a fortiori and indefeasible.

70. Petitioners did not plead that Jal Sansthan had undertaken no exercise to fix "tariffs" for "watercharge" on considerations/criterion contemplated under Sections 25 (2)(vi), 44 and 59 of Act, 1975. Petitioners thus failed to lay factual foundation to enable them to press this issue. Hence, it is to be presumed that Jal Sansthan must have worked out "water cost" in accordance with law. There is no material or foundation on record to test the correctness of petitioners' argument on this aspect.

71. This Court cannot, for the first time at argument stage, be called upon to ascertain whether decision to introduce or amend such tariff has been taken by passing a special resolution in that behalf after giving such notice as may be prescribed by Rules and passed by the majority of two thirds of the members of the Jal Sansthan. See proviso to Section 25 (2)(vi) of Act, 1975. Section. 2 (2) of Act, 1975 defines "Prescribed" means "Rules made under this Act" Jal Sansthan submits that rules, in force prior to commencement of the Act, 1975 continue by virtue of Section 99 and that they have provided tariffs strictly in accordance with the same representation 99 and that they have provided tariffs strictly in accordance with the same. In absence of relevant pleadings by the petitioners, Jal Sansthan cannot be faulted and no adverse inference can be drawn against it. Nor this Court will be justified in directing probe into its accounts and test reasonableness of the "tariff enforced from time to time. It is not permissible for this Court while exercising jurisdiction under Article 226, Constitution of India.

CONTENTION No. V :

72. Learned Counsel for the petitioners submitted that in actual practice, meters even if fixed were not working and if such meters were working there was none to have the meter reading. The contention of the petitioner is that in actual practice fixing of meter was of no consequence as in majority of cases there were no meters or if meters are fixed, they are not working and further there were no meter readers. Learned Counsel for the petitioners in view of the existing state of affairs, submitted that there was no reasonable basis for providing two different rates for metered and unmetered connections.

73. Petitioners allege impugned "Water tariff has no nexus with Actual Consumption" of water. Petitioners have not laid foundation for such a plea by incorporating requisite pleadings so as to make Jal Sansthan aware of their precise grievance and thus enable it to meet the submission effectively. Petitioners appear to have made no complaint at least not pleaded, with

reference to Rules 25 to 30 U.P. Nagar Mahapalika Water Supply Rules, 1968.

74. Further, the petitioners would have been better advised to file appeal under Section 30 of Act, 1975, if they wanted to agitate matters depending on facts, statistics and data, i.e. convening of meeting by giving notice, special resolution, etc. which shall require adjudication of issues dependent on verification of facts from records and then to ascertain the basis and the calculations adopted to fix "tariffs" from time to time.

75. Section 30 of Act, 1975 reads

"30. Disputes with consumers Subject to the provisions of this Act, any dispute arising between the Jal Sansthan and the consumer shall be referred to the Nigam whose decision shall be final."

76. Jal Sansthan vide its Supplementary Counter Affidavit filed on 23rd March 1999 (PP 239) and vide Annexure SCA2 (PP 256) tried to demonstrate that it is in financial crisis. No Supplementary Rejoinder Affidavit has been filed by the petitioners to controvert the facts stated therein though time was granted by the Court vide order dated 23rd March, 1999 and 6th April, 1999 on the ordersheet. On the other hand an attempt is being made by petitioners to bring on record figures and certain statistics to demonstrate that Jal Sansthan was making profit and it was unduly enriching itself by prescribing exorbitant water charges. "News Reports" filed by the parties are not relevant and liable to be ignored. Documents annexed with written arguments (PP 131 to 148) are not part of the pleadings and hence Court cannot legally take them into consideration for deciding the case. Facts alleged in the rejoinder and supplementary rejoinder affidavits (PP 192 to 199) as well as the documents annexed therein are also liable to be ignored as the respondent had no opportunity to meet the same. Court cannot decide disputed facts in absence of proper pleadings and absence of relevant material brought on record at relevant time nor it has requisite expertise to appreciate the niceties of accountancy involved in the case.

77. Challenge to the tariff on the ground of being arbitrary and being far in excess over and above actual cost (to be worked out on consideration permissible under law) escalation in price and expenditure, responsible for precipitating rise in "water charges" (allegedly attributed to "negligence", "carelessness" and "apathy") on the part of the "officers" and staff of Jal Sansthan" (See writ Pr. 22, 27 and 31) can be better appreciated by Uie Nigam in appeal under Section 30 of Act, 1975 by the Jal Nigam which is an overall supervisory/controlling authority of a "Jal Sansthan" and also comprised of experts of the subject.

CONTENTION No VI :

78. Incorporation of clause 12 (pp 171) providing for automatic enhancement? 15% every year in the Notification dated 24th August, 1996 (pp 171) and Government letter dated 31st October, 1998 reduced to 7.5% subsequently (pp

219) is per se bad.

79. This argument had already been repelled by a Division Bench vide Judgment and order dated 31st July, 1997 in Writ Petition No. 36331 of 1996 (Shri Ram Chandra Agarwal v. State of U.P. and another). Relevant extract of the judgment (filed as Annexure II to Supplementary CounterAffidavit of Respondent No. 2 in leading case pp 254) reads:

"Heard learned Counsel for the petitioner.

This writ petition has been filed against the impugned Gazette Notification dated 10121994 (Annexure 5 in the writ petition). The aforesaid Notification appears to have been issued under Section 59 (i) read with section 59(2) of the Uttar Pradesh Water Supply and Sewerage Act, 1975. There is no dispute that this Notification has been published in the U.P. Gazette and hence it is in conformity with Section 59 of the aforesaid Act.

Learned Counsel for the petitioner has objection to a clause in the said Notification being clause (a) which says that in view of the rise in the prices and the rise in the construction and the maintenance costs, there shall be 15% increase in the water chargers of the Jal Sansthan per year. The submission of the learned Counsel for the petitioner is that the Jal Sansthan cannot pass such an order raising the water charges by 15% every year.

It is common knowledge that there has been extraordinary inflation in this country. The petitioner has not provided any date that in any year the inflation was less than 15% or that over several years the average inflation per year was less than 15%. It is common knowledge that the price of every thing has gone up in this country, including Labour charges, material charges, maintenance charges etc. That water which has to be supplied to the citizens for drinking purpose has to be treated by some chemicals like chlorine etc, to make it fit for human consumption. It is also common knowledge that the prices of these chemicals etc. have also increased.

Thus, we find no infirmity in the impugned Notification. Petition is dismissed.

Sd/M.Katju,J.

Sd/P.K.Jain,J. 3171997"

80. Relevant Section 44 of Act, 1975 does not find reference and appears to have remained unnoticed by the Bench. This judgment, therefore, does not have force of a "precedent. Court decided that case primarily on facts and arguments of the case placed before it, i.e. the petitioner had failed in that case to demonstrate that average inflation was less than 15% p.a. We are, with respect, in part agreement with the reasons contained in the judgment. We are, however, not able to persuade ourselves to agree to the conclusion. In our considered opinion, there cannot be a clause providing in general terms, an automatic revision/enhancement of water charges at a fixed rate every year. Such an enhancement

will be mere ipse dixit of the authority conferred under law. Causes responsible for increase or decrease of "cost; being variable and fluctuating each year, their effect on "cost" factor cannot be consistent. Circumstances and factors influencing "cost", being unstable and variable in nature, the relevant factors contemplated under Section 44 of Act, 1975 in particular and otherwise prescribed in the said Act cannot be assumed to be on constant rise. Jal Sansthan is under statutory duty to work out "cost" factor and revise tariffs on actual existing data. Revision of tariff has to be real, based on actual statistics. Therefore, the exercise contemplated under the Act is always a condition precedent before Jal Sansthan can change or amend existing tariff. It cannot be a "mechanical" feat by providing an automatic clause. Concerned authority must apply its mind and on relevant calculation alone recommend increase in tariff. Providing for an "automatic" increase is nothing but camouflaging real object of imposing tariff correlated to actual cost factor. Automatic clause providing for mechanical revision in the impugned Notification cannot be sustained in law. The automatic clause No. 12 (in Notification dated 20th August, 1994) has been continued vide clause 12 of Notification dated 24th August, 1996 is thus held illegal.

CONTENTION No. VII.

81. Imposition of water charges at flat rate is not in consonance with the provisions of the Act, 1975 and, therefore, arbitrary and illegal.

82. Argument runs contrary to Section 59 (2) of the Act, 1975 and hence without merits. Section 59 (2), Act, 1975 for ready reference again reproduced:

"A Jal Sansthan may in lieu of charging cost of water according to volume, accept a fixed sum for specified period on the basis of expected consumption of water during that period."

83. Argument, in the alternative is that schedule of water charges based on the two different footing under Notification dated 8th March, 1986 (Annexure 2 to leading writ petition) namely (i) metered connection on the basis of consumption as per kilo litre rate plus meter rent, and (ii) unmetered connection on the minimum flat rate of Rs. 360 p.a. on the basis of 10 mm. ferrule is arbitrary as it has no logical basis or reasonable nexus. There is no basis for the argument. There is neither relevant pleading nor sufficient material on record to prove arbitrariness on the part of the respondent. Jal Sansthan can charge on the basis of expected quantity of water supplied and consumed and it is not bad in view of Section 59 (2) of Act, 1975. It is to be noted that in case the device to measure exact consumption of water namely METER fails then the measurement is to be done on the basis of estimated consumption. Jal Sansthan has power to levy charges only in respect of water that has, in fact, been supplied to and consumed by the consumer and it is to be on the basis of measurement or estimated consumption depending upon the capacity of the supply line through which water is to be supplied as well as the aperture of the connecting apparatus fixed to the

main (ferrule); as held in AIR 1988 SC1009. (Pr 7 and 8). Municipal Corporation Greater Bombay v. Nagpal Printing Mills and another.

The argument of the petitioners contrary to the above is thus without substance.

CONTENTION No VIII :

84. Water charges and taxes could not be enhanced and levied retrospectively. Petitioners argue that the revised rates of water charges vide impugned Notification dated 22nd October 1982 (published in U.P. Gazette dated 8th March 1986) could not be imposed with retrospective effect.

85. Section 59 (i) does not confer power to promulgate rates retrospectively. Section 59 (i) lays down that "Jal Sansthan shall, by Notification in the Gazette fix the cost of water to be supplied....." This expression shows "water charges" have to be fixed before actual supply of the water.

86. It is well settled that only Legislature is competent to make a retrospective provision by legal fiction. See 1992 (Suppl) T83(Pr79).

87. Section 5 (I)(b), U.P. General Clauses Act, 1904 reads:

"5. Coming into operation of enactments (1) Where any United Provinces Act is not expressed to come into operation on a particular day. then

00.....

(b) in the case of an Uttar Pradesh Act made after the commencement of the Constitution it shall come into operation on the day on which the assent thereto of the Governor or the President as the case may require, is first published in the official Gazette."

88. This makes it clear that a Notification cannot be said to be effective before its publication. Hence, the "tariff in the impugned Notifications could not be enforced/applied before the date of their Gazette publication.

"Tariff contained in the impugned Notifications shall be relevant and operative from the date of sale of Gazette and not earlier as held in 1992. AIJ 1153 (DB) Notification in question prescribing water charges, therefore, could not be applied with retrospective effect. To that extent these impugned Notifications (pp 95 and 166) are held to be ineffective and bad in law.

CONTENTION No. IX:

89. Consolidated bills with respect to water tax, water charges, surcharge, service charge, etc. is illegal.

90. This point has not been raised in the leading writ petition nor substantiated and pressed in the arguments.

CSERVICE/SUPERVISION CHARGES:

CONTENTION NO. X :

91. Jal Sansthan is not competent in absence legal provision in law to realise service charges. There is no provision wherefrom Jal Sansthan may derive authority to impose service charges (leading writ pr. 29 and pr. 34 of Writ Petition No. 6636 of 1986).

92. Chapter V "Property contract finance and accounts and audit" Sections 39 and 51 deal with financial aspects of Jal Sansthan.

93. Section 44 of Act, 1975 reads:

"44. General principles for Jal Sansthan's Finance. A Jal Sansthan shall from time to time so fix and adjust its rates of taxes and charges under this Act as to enable it to meet as soon as feasible the cost of its operation, maintenance and debt service and where practicable to achieve an economic return on its fixed assets."

94. Aforesaid section requires Jal Sansthan to "fix and adjust" from time to time, "rates" of "taxes" and charge provided under Act, 1975 and confers upon Jal Sansthan power to adjust income and expenditure and adopt its own budget annually vide Section 25 (2)(v) of Act, 1975.

95. Pr. 32 of Writ Petition No. 6636 of 1986 reveals that certain amount towards service charge were paid by consumers without protest or objection, hence such amount cannot be claimed back by the consumers.

96. Sections 52 to 64 (in Chapter VI titled Taxes, Fees and Charges) contain no provision authorising Jal Sansthan to realise "service charges" to make good the overall loss.

97. Sections 52 to 58 deal with tax. Sections 59 and 60 deal with cost of water for "supply" and "disposal." Section 61 deal with meter rent. Sections 62 and 63 refer to security and fee. Section 64 (i) specifically refers to and provides for recovery of "tax" "fee" and "cost" of water. Cost of disposal of waste water, the meter rent, penalty damages or surcharge under the Act to be recovered as arrears of land revenue under Section 64 (2) provides for disconnection as per Byelaws in the event of nonpayment of dues, Act, 1975 nowhere talks of service charges as such. "Heads" under which any amount can be realised have been specifically enumerated. Realisation of money by enforcing a fix amount to be paid by all without rendering specific service besides water tax water charges and other statutory head, like Meter Rent, Service Fee, etc. is wholly illegal,

98. "Service charge" is, therefore, outside the scope of Act, 1975. Therefore, Clause 7 of Government Order dated 24th August, 1986 (pp 170) is without lawful authority (See Pr 29 leading writ petition pp 10) and its reply (vide counter affidavit Pr IO and II pp 69).

99. Petitioners vehemently argued that charging fix amount under the head "Service Charge" at the rate of Rs. 24 p.a. from each consumer, without

rendering specific "service" is against the concept of "fee" and in effect it is in the nature of "tax" contemplated under Act, 1975 without following the procedure under the said Act for imposing tax.

100. Fee to be charged on "quid pro quo" basis is universally accepted basis, as also held in 1971 ALJ 558.

101. Court in the past held (4 to 8 times) hike in fee. See AIR 1963 SC 996, AIR 1980 SC 1, AIR 1965 SC 1107 and AIR 1975 SC 2037).

102. Even otherwise Section 53 of Act, 1975 details out the extent in respect of which fee can be imposed by making provisions in the Byelaws. Byelaws has not been brought on record nor referred to by any of the parties to show violation of any of its relevant provisions. Hence, the impugned "Notifications" providing for general "service charges" in absence of "particular service" being rendered is illegal and without authority.

103. Writs are liable to succeed to this extent also.

CONTENTION No. XI :

104. Shri K.B. Jindal also urged that "service charge" apart from being beyond the scheme contemplated under the Act, 1975, could not be imposed unless supply of water by Jal Sansthan was notified under Section 66, Finance Act, 1994 and provisions of service, tax will not apply. He argued that unless the service to supply water was made taxable service as defined under Section 65 (6), Finance Act, no servicetax could be legally charged.

105. It will be noted that in the instant case it is not "servicetax" but claimed as "service charge." Since this "service charge" is not in lieu of particular service to an individual consumer, it is nothing but a "tax". Even if such an amount is to be treated as "fee or water charge" the same is not warranted under Section 64 of Act, 1975. This amount described as service charge must fall under "tax" or, water charges" and could be levied only issuing relevant Notification/water tariff as contemplated under Act, 1975 vide Sections 52 to 64 read with Section 25 (2) (vi), Act, 1975.

106. It will be noted that neither petitioners nor the respondents laid foundation dependent upon certain essential facts for making such arguments.

CONTENTION No. XII :

107. On behalf of the petitioner it has been argued that no Rules, ByeLaws or Regulations have been framed under Act, 1975 and consequently it was vehemently contended that no "water charge" or "fee" could be charged unless necessary Rules/ByeLaws were framed under the Act, 1975.

108. The respondents, however, on the other hand, submitted that old Rules, ByeLaws and Regulation on the subject shall be deemed to continue and could not be said to be repealed in view of "transitory provision" in Act, 1975 (Le.

Section 99). The respondents submitted that Section 99 of Act, 1975 preserved the erstwhile Rules, ByeLaws and Regulations framed under U.P. Municipalities Act, 1959 and that the same have not been repealed.

109. We are in agreement with the contention of the respondents. Subsection 2 of Section 99 of Act, 1975 does not take away the power of a Jal Sansthan to frame Rules and ByeLaws beyond September 30, 1978. The said provision merely contemplated that no Rule or ByeLaws framed under Act, 1975 shall be made with retrospective effect, which may be made applicable prior to May 20, 1975 under Sections 96, 97 and 98 of the Act. This means that Rules, Regulation or ByeLaws could be made at any time, but it would not be given retrospective effect prior to a date earlier than May 20, 1975 if such Rules, Regulations and ByeLaws were framed after September 30, 1978.

CONTENTION NO. XIII

110. Learned Counsels for the petitioners in the end attempted to demonstrate, with reference to the calculation annexed as Annexure 3 to the writ petition (pp 20 of the leading petition) that the "tariff in question is wholly unfair and unconscionable inasmuch as, according to it the cost of water becomes nil when the annual letting value of the building goes up.

111. During the course of the above argument, Court pertinently enquired the petitioners to specify the members, whose building carried annual letting value over and above Rs. 500 per annum inasmuch as only such consumers whose buildings were assessed at Rs. 500 and above could be said to be seriously affected and such members alone could be aggrieved and justified the contention before this Court. The Court held the view that "illegality" is abstract should not receive notice and cannot be properly scrutinised. No useful purpose, hence, was going to be served by adjudicating an issue in vacuum. None of the petitioners' Counsels could show that any of its members had building whose annual letting value was over and above Rs. 500 per annum. In view of it, Court refuses to entertain this argument,

112. In the last, this Court invited attention of the learned Counsels representing the petitioners, to the fact that several scores of persons (Who were not members earlier when the petitions were filed) got enrolled as members of the petitioners' societies only to seek advantage of the interim order and rushed to this Court on that basis by filing application for impleadment. List of original members has been annexed as Annexure 4 to the leading writ petition) pp 22 to 29 showing 209 members only. The application No. 4791 of 1993 (filed through another Counsel along with an affidavit in support of the said application) dated 8th February 1993 contains list of 47 persons (pp 48 to 57) to show that these people became members of the society later and as an afterthought in order to seek benefit of the interim order. Obviously those persons were not initially aggrieved and did not care to challenging the tariff. Similar is the position in some of the other petitions also. The above fact will be borne out by perusing

record of Writ Petition No. 8722 of 1986 (Nagrik Kalyan Parishad Registered Society v. State of U.P. and others). In this case list of members was initially filed as Annexure 2A Subsequently by another list of additional members numbering 207 was filed along with Misc. Application No. 19160 of 1989 (MB) marked as Annexure 2AAA. This shows that large number of persons who were not initially aggrieved and did not care to approach the Court at initial stage.

113. In view of the foregoing discussion, these writ petitions are allowed in part as indicated below:

(i) "Service charge" or automatic enhancement clause cannot be imposed and Jal Sansthan shall not realise it under impugned Notification from the petitioners in future i.e. after the date of this judgment.

(ii) Amount paid by the consumers (including the petitioners) as "service charge" or otherwise against bills of the Jal Sansthan without protest in the past before this judgment, will not be refunded by the Jal Sansthan. Consumers (including petitioners) shall pay according to their Bills ignoring automatic clause and without service charges (past arrears) voluntarily or on receiving corrected/ revised bills to be issued within four months of the date of this judgment as the case may be. No interest will be charged on arrears.

(iii) Aggrieved consumer may challenge if so advised, the watertariff by filing an appeal under Section 30 and/or Section 54, U.P. Water Supply and Sewerage Act, 1975 in accordance with law with respect to future bill pertaining to period after 1st April, 2000. The appeal, if any, shall be decided on merit by concerned Jal Nigam in accordance with law, preferably within six months of receipt of the appeal without being prejudiced or influenced in any manner, by this judgment.

114. Writ petitions fail with regard to the order reliefs.

115. In peculiar facts and circumstances of the present case including the fact that Jal Sansthan is to render public service, we direct the parties to bear their own costs. Ordered accordingly.