

(2014) 11 DEL CK 0096

In the Delhi High Court

Case No : Writ Petition (Civil) 4436/2010 and CM No. 9944/2011

Sports and Leisure Apparel Ltd.

APPELLANT

Vs

MCD

RESPONDENT

Date of Decision : 18-11-2014

Acts Referred:

Constitution of India, 1950 — Article 141, 142, 21, 226, 243X

Delhi Municipal Corporation Act, 1957 — Section 142, 143, 143(1), 146, 481

Citation : (2015) 3 AD 183 : AIR 2015 Delhi 15 : (2015) 216 DLT 115 : (2014) 146 DRJ 246

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Sandeep Sethi, Vinay K. Garg, Sr. Advocate, Lalit Gupta, Payal Gupta, Garima Goel and Ashish Kumar, Advocate for the Appellant; H.S. Phoolka, Sr. Advocate, Mini Pushkarna, Shilpa Dewan and Yoothica Pallavi, Advocate for the Respondent

Judgement

Vibhu Bakhru, J.—The petitioner inter alia impugns an order dated 24.06.2010 (hereafter the "impugned order") passed by the Officer on Special Duty of the Municipal Corporation of Delhi (MCD), imposing "damages" at the rate of Rs. 7,36,000/- per month w.e.f. April 2010 for displaying an advertisement in contravention of the MCD's Outdoor Advertisement Policy, 2007 (hereafter the "Outdoor Policy"). It was further held the advertisement was unauthorized as no permission was taken from the MCD under Section 143 of the Delhi Municipal Corporation Act, 1957 (hereinafter variously referred to as the "Act" or "DMC Act").

2. The petitioner impugns the levy of damages/damage charges (hereafter also variously referred to as "impugned charges" or "impugned demand") as being without authority of law. This is disputed by the MCD by contending that the levy of penalty and regulatory fee for displaying advertisement are contemplated under the Outdoor Policy, which has been affirmed by the Supreme Court and, therefore, authorized under Article 142 of the Constitution of India. Thus, the

principal question that is to be addressed is whether impugned charges levied by the MCD are authorized by law.

3. Briefly stated the relevant facts necessary for considering the controversy are adumbrated as under:

3.1. The petitioner is in the business of manufacturing, marketing and selling apparels, footwear and accessories etc. under the brand name "Lacoste". The petitioner owns a three storied building at E-1, South Extension Part-II, New Delhi (hereafter "said premises") and operates a retail outlet from the said premises.

3.2. The respondent, MCD, issued an order dated 16.04.2010 to the petitioner alleging that on an inspection conducted on 10.04.2010, it was found that the petitioner had put up a display of a size of 400 sq. ft. on the "Two Wall Wrap" at the premises, without permission of the MCD and without paying any charges. It was further held that "financial loss caused to MCD needs to be realized" and the petitioner was called upon to deposit damage charges of Rs. 92,000/- for the month of April 2010. The said charges were computed in the following manner: "400 (size) x Rs. 115/-(approved rate for wall wrap in Central Zone) x 2 (penalty) = Rs. 92,000/"

3.3. Subsequently, MCD issued another order dated 29.04.2010 stating that the petitioner has unauthorisedly put up a wall wrap advertisement of size of 3,200 sq. ft. on the premises displaying company's name and its products and therefore, directed the petitioner to deposit "damages charges" of a sum of Rs. 7,36,000/- for the month of April 2010 for causing financial loss to MCD. The petitioner, by its letter dated 06.05.2010, informed MCD that the wall wrap was a mere display of its brand name "Lacoste" and its products which were sold in the same building and, thus, the said display could not be said to be an advertisement

3.4. Thereafter, the petitioner filed a writ petition (W.P. (C) No. 3751/2010) before this Court, inter alia, seeking quashing of the orders dated 16.04.2010 and 29.04.2010. The said writ petition was disposed of by this Court, by an order dated 28.05.2010, permitting the petitioner to file a representation with the MCD and directing the MCD to decide the same after affording the petitioner an opportunity to be heard. The said representation of the petitioner was disposed of by the MCD, by its impugned order dated 24.06.2010. MCD held that the advertisement displayed by the petitioner was commercial in nature as it exceeded the permitted free self-signage size of 2.5 sq. mtr and therefore, imposed impugned damages of Rs. 7,36,000/- per month w.e.f. April 2010 on the petitioner.

4. The learned senior counsel for the petitioner contended:-

4.1. that the impugned charges of Rs. 7.3 lacs per month as demanded by the impugned order are without any authority of law as the said levy is not

authorized by any provision of the DMC Act or bye-laws made thereunder. And, such levy is also violative of Article 243X and 265 of the Constitution of India.

4.2. that, in the absence of express or specific provision, the power to levy any tax or fee cannot be inferred by implication. Reliance was placed on Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, .

4.3. that the impost is in the nature of tax and not fees as there is neither any element of quid pro quo nor any nexus with the costs or expenses for administering any regulation. Reliance was placed on M. Chandru Vs. The Member Secretary, Chennai Metropolitan Development Authority and Another, , Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, , Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, and State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, .

4.4. that such impost cannot be read as authorized by the Supreme Court under Article 142 of the Constitution of India. Reliance was placed on Leila David Vs. State of Maharashtra and Others, and Bharat Sewa Sansthan Vs. U.P. Electronics Corporation Limited, . That Article 142 of the Constitution of India, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieving something indirectly which cannot be achieved directly. Reliance was placed on Supreme Court Bar Association Vs. Union of India and Another, and U.P. State Road Transport Corporation Vs. Assistant Comnr. of Police (Traffic) Delhi, .

4.5. that the Supreme Court, while passing the order dated 12.10.2007 in W.P. (C) 13029/1985, considered only the technical matters relating to public safety in view of hazardous hoardings and advertisements and there was no occasion to consider levy of any tax or fee on such advertisements. That the impugned demand is not traceable to the outdoor policy and cannot be stated to have imprimatur of the Supreme Court.

4.6. that reliance on the report of M/s. A.C. Nielsen for making the demand is arbitrary and without application of mind as the said report has neither considered any such levy nor was made in relation to any such levy.

5. The learned senior counsel for MCD contended:-

5.1. that the present petition is not maintainable as the petitioner infact sought to challenge the outdoor policy and as per the order dated 12.10.2007 of the Supreme Court in W.P. (C) 13029/1985, no such challenge could be entertained by any other Court;

5.2. that the impugned order has been issued under the terms of the Outdoor Policy and not under the provisions of the Act. And, the fee as such, is in addition to the advertisement tax or tax by state, centre or corporation.

5.3. that the outdoor policy was approved by the Supreme Court and the said policy empowered the Commissioner to fix rights for outdoor advertisement. And as such, the same was authorized by virtue of Article 142 of the Constitution of India as the outdoor policy had been directed to be implemented by the Supreme Court.

5.4. that the damage charges were in the nature of regulatory fee which did not require any element of quid pro quo and rendering of any service. Reliance was placed on Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another, , Delhi Race Club Ltd. Vs. Union of India (UOI) and Others, and Sona Chandi Oal Committee and Others Vs. State of Maharashtra, .

5.5. that the fee is reasonable and not excessive and the report of M/s. A.C. Nielsen was accepted by MCD who fixed the rates after conducting surveys and considering rates at different areas.

5.6. that the advertisement displayed by the petitioner was in violation of the norms of the outdoor policy as the outdoor policy permits only one free self signage per facade per enterprise not exceeding the size of 2.5 sq. mtr. displaying its brand name and logo etc. and on all other advertisement displays exceeding 2.5 sq. mtr., commercial advertising fee shall be levied and no permission or licence from the Commissioner was taken by the petitioner.

Analysis and Conclusion

6. Before proceeding further to address the controversy, it would be necessary to ascertain the nature and the basis of the impugned charges. Whilst the petitioner contends that the impugned charges are in the nature of a "tax", the learned senior counsel for the MCD has sought to justify the same as a "regulatory fee". The first clue as to the nature of the impugned charges is the term used to describe them-"damage charges". The second clue is found in the impugned orders dated 16.04.2010 and 29.04.2010 which reason the demand by explaining that "financial loss caused to the MCD must be realized". The third clue is a reference, in the impugned orders, to a circular dated 09.03.2010 (hereafter "the circular"). The said circular indicates the basis and the scheme for imposing the impugned demand and it is necessary to examine the same. The circular is reproduced below:-

"Circular

Sub: Imposition of damages on display of unauthorized advertisements.

"In order to implement the directions of the Hon"ble Supreme Court issued vide order dated 12.10.2007 in Writ petition (Civil) No. 13029/1985 titled "Shri M.C. Mehta Vs. Union of India & others" in letter and spirit, the Corporation has decided (i) to create suitable conditions for a regime where unauthorized advertisement is discouraged and legal advertisement is encouraged by making the unauthorized advertisement financially costlier. This will ensure that the

Outdoor Advertisement Policy, 2007 is strictly adhered to and enforced, as directed by the Hon''ble Supreme Court, and (ii) the concept of damage needs to be seen in the context of financial loss to the Corporation because of display of unauthorized advertisement.

Accordingly, a decision has been taken by the Corporation to impose damages on the advertisements erected, exhibited, fixed or retained upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or displayed in any manner whatsoever in any place within Delhi without the written permission of the Commissioner granted in accordance with bye-laws made under the relevant provisions of DMC Act, 1957 and the Outdoor Advertisement Policy as approved by the Hon''ble Supreme Court on the following terms & conditions:-

1. To take damages for putting up unauthorized advertisement which shall be double the rate charged by MCD for that mode in a particular zone. This means that if the MCD's rate is "X" per month for a particular mode of display in a particular zone, then damages shall be "2X" for illegal displays through that mode in that zone.
2. In case of non-availability of rate for charging such damages, MCD rate applicable shall be that of wall wrap in the zone.
3. Since the unauthorized advertisement is for the benefit of some person or a company or other body corporate or an association of persons (whether incorporated or not), then such person and every President, Chairman, Director, Partner, Manager, Secretary, Agent or any other officer or person concerned with the management thereof, as the case may be, unless he proves that the unauthorized advertisement was displayed without his knowledge or consent, shall be accountable for payment of damages.
4. In case of such unauthorized advertisement where the advertising agency and the owner/occupier of the property is known, then identical demand shall be raised against each of them, in addition to the beneficiaries at point 3 above and shall be realized in similar fashion.
5. Even for illegal display of one day, damages for the whole month shall be taken. Similarly, for the month and one day, damage charges will be for two months, and so on.
6. Charging of damages will in no way regularize the unauthorized outdoor advertisement. In fact, other legal and administrative steps, including penal action, will be taken simultaneously against such unauthorized advertisements.
7. Once a demand for damages is raised, the payment will have to be made within 15 days of receipt of such demand notice. Any delay in payment shall attract 2% compounded interest, per month.
8. Any such due to the Corporation may be recoverable from any person from

whom such sum is due as an arrear of tax under DMC Act, 1957.

This issues with the prior approval of the Competent Authority dated 08.03.2010 on file No. OSD(Advtt.)/2010/D-927 and comes into force with immediate effect.

(B.N. Singh)

Officer on Special Duty (Advtt.)"

7. It is apparent that the impugned charges have been fixed by MCD on the basis of the notional perceived loss caused to the MCD on account of display of unauthorized advertisement. The MCD decided to levy a charge, which is twice the amount that the MCD would have received for permitting display at its sites. The said circular also provides for payment of interest at the rate of 2% per month as well as a mechanism for recovery of the impugned charges. Plainly, the MCD's endeavor has been to frame the circular to contain a complete code for the imposition, computation and recovery of the impugned charges.

8. In the aforesaid view, the question to be answered is whether a levy based on perceived loss of revenue could be considered as a fee/regulatory fee? In order for the said damage charges to be considered as a fee (in the traditional sense), an element of quid pro quo is necessary. It is well settled that a charge, which has no relation to the value of services performed, is not a fee but a tax. This was explained by the Supreme Court in *Sri Krishna Das Vs. Town Area Committee, Chirgaon*, and the relevant portion is quoted as under:-

"22. A fee is paid for performing a function. A fee is not ordinarily considered to be a tax. If the fee is merely to compensate an authority for services performed or as compensation for the services rendered, it can hardly be called a tax. However, if the object of the fee is to provide general revenue of the authority rather than to compensate it, and the amount of the fee has no relation to the value of the services, the fee will amount to a tax. In the words of Cooley, "A charge fixed by statute for the service to be performed by an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the government whose officer or officers collect the charge is not a fee but a tax."

23. Under the Indian Constitution the State Government's power to levy a tax is not identical with that of its power to levy a fee. While the powers to levy taxes is conferred on the State legislatures by the various entries in List II, in it there is Entry 66 relating to fees, empowering the State Government to levy fees "in respect of any of the matters in this list, but not including fees taken in any court". The result is that each State legislature has the power, to levy fees, which is co-extensive with its powers to legislate with respect to substantive matters and it may levy a fee with reference to the services that would be rendered by the State under such law. The State may also delegate such a power to a local authority. When a levy or an imposition is questioned, the court has to inquire into its real nature inasmuch as though an imposition is labelled as a fee, in

reality it may not be a fee but a tax, and vice versa. The question to be determined is whether the power to levy the tax or fee is conferred on that authority and if it falls beyond, to declare it ultra vires.

24. We have seen that a fee is a payment levied by an authority in respect of services performed by it for the benefit of the payer, while a tax is payable for the common benefits conferred by the authority on all tax payers. A fee is a payment made for some special benefit enjoyed by the payer and the payment is proportional to such benefit. Money raised by fee is appropriated for the performance of the service and does not merge in the general revenue. Where, however, the service is indistinguishable from the public services and forms part of the latter it is necessary to inquire what is the primary object of the levy and the essential purpose which it is intended to achieve. While there is no quid pro quo between a tax payer and the authority in case of a tax, there is a necessary co-relation between fee collected and the service intended to be rendered. Of course the quid pro quo need not be understood in mathematical equivalence but only in a fair correspondence between the two. A broad co-relationship is all that is necessary."

9. In *M. Chandru (supra)*, the Supreme Court considered the levy of infrastructure development charges which were levied by Chennai Metropolitan Development Authority (CMDA) for issuing planning permission in regard to construction of multi-storeyed buildings and/or special buildings. The Supreme Court examined the nature of the levy and found that it did not have any co-relation to the services rendered by the CMDA. After noting several earlier decisions including *Sri Krishna Das (supra)*, the Court remitted the matter to the High Court permitting the State of Tamil Nadu to justify the levy.

10. The distinction between a tax and a fee has been reiterated in several decisions. In the present case, it is plainly clear that the impugned charges are not related to any services being rendered by the MCD and thus, in the traditional sense, the levy cannot be considered as a fee.

11. The learned counsel for the MCD had contended that the impugned charges should be considered as a regulatory fee and had relied upon the decisions of the Supreme Court in *Secunderabad Hyderabad Hotel Owners' Association (supra)*, *Delhi Race Club Limited (supra)* and *Sona Chandi Oal Committee (supra)*.

12. In *Sona Chandi Oal Committee (supra)*, the Supreme Court was concerned with a challenge to the validity of provisions of Section 9A of the Bombay Money Lenders Act, 1946 by virtue of which, a fee at the rate of 1% of the maximum capital utilized by the moneylender or Rs. 5,000/- whichever is less was imposed as inspection fee for renewing the moneylender's license. The appellants therein, challenged that levy; it was contended that the inspection fee would vary in case of each moneylender and the said fee did not have any co-relation with service rendered by the licensing authorities. It was further contended that inspection of books of accounts could not, by any stretch of imagination, be considered as a

service rendered to moneylenders. The Supreme Court after considering the rival contentions concluded that the authorities were required to inspect various books of accounts that a moneylender was required to maintain and to ensure that the moneylender had complied with the statutory provisions before a moneylender's licence could be renewed. It was held that "this is the direct service rendered to the moneylenders as the renewal of licence depends upon the inspection of their accounts which is required to be carried out under the Act". In addition, the Court also held that the fee charged was regulatory in nature to control and supervise the functioning of money lending business to protect the debtors and the act in question serves larger public interest.

13. In my view, the decision in Sona Chandi Oal Committee (supra) does not support the view that a fee could be charged without any reference to the service rendered or any work required for the purposes of regulation of the activity in respect of which the fee was imposed. Indisputably, the traditional view that for levy of a fee, a service has to be rendered has been significantly diluted; a fee may also be a regulatory fee. However, a charge which is neither related to the service rendered nor has any nexus with the costs and effort required for the purpose of regulating any business activity cannot be considered as a fee but would be a tax.

14. The learned counsel for the MCD also referred to the decision of the Supreme Court in Secunderabad Hyderabad Hotel Owners' Association (supra), rendered in the context of a challenge to increase in licence fee charged under Section 622 of the Hyderabad Municipal Corporation Act, 1955. Section 622(2) of the said Act, mandated that a fee would be charged for a licence or a written permission given for any purpose under the said Act. The licence fee payable for lodging houses and eating houses were significantly increased. And, this was impugned, inter alia, on the ground that licence fee was not in the nature of fees but a tax. The Court observed that the licence fee was not a fee for rendering any service but was a regulatory fee for regulating the activities for which a licence was required. The court noted various obligations of a licensee and the efforts required of a corporation in ensuring compliance by way of inspection and supervising the activities of the licensees. The Court also noted that eating houses and lodging houses did impose an additional burden on the Municipal Corporation. It is in this context that the Court held as under:-

"9. It is, by now, well settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fees can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An

element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."

15. In my view, this decision also does not support the contention that a regulatory fee could be charged without any nexus with the costs or the efforts required in the process of regulating the activity for which such regulatory fees are charged. On the contrary, the Court clearly indicated that the regulatory fee could not be excessive. It cannot be disputed that levy of a regulatory fee is permissible, however, the question is whether such fee could be levied, without any reference or relation to the costs incurred. The question whether a regulatory fee is excessive or not would have to be adjudged in the context of activity sought to be regulated and the reasonable outlay required for such regulation.

16. The aforesaid decisions were also noted by the Supreme Court in its subsequent decision in *Delhi Race Club Limited* (supra) rendered in the context of increase in the licence fee levied under the *Delhi Race Course Licensing Rules, 1985*. The Supreme Court noted that the purpose and object of the *Mysore Race Courses Licensing Act, 1952* (as extended to the Union Territory of Delhi) was to regulate, monitor, control and encourage the sport of horse racing and the license granted was subject to certain conditions, the compliance of which were required to be monitored. For the said purpose, trained officers were required to keep a constant vigil on the activities of the race course and the expenses incurred in carrying out such regular inspections would be considerable. In this perspective, the Court rejected the challenge to the increase in the licence fee. This decision also does not support the view that a fee could be levied without any nexus to the required regulatory functions.

17. A Constitution Bench of the Supreme Court in the case of *The State of West Bengal Vs. Kesoram Industries Ltd. and Others*, explained the difference between tax and a fee in the following words:-

"146..... The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged."

18. It is distinctly clear from the above that the impugned charges are not in a nature of a fee, regulatory or otherwise. It is further important to note that the impugned charges are also not in relation to grant of any privilege by the State- as in the case of activities where the doctrine of *res extra commercium* are

applicable-or for allocation of any natural resource.

19. Plainly, a levy which has no element of quid pro quo with any service rendered cannot be considered as a fee. Further, a charge for granting any permission to carry any activity, which has no nexus with the costs, effort or infrastructure required for regulating the said activity cannot be considered as a regulatory fee. Thus, in my view, the impugned charges cannot be considered as a fee.

20. However, the dispute whether the impugned charges are a tax or a regulatory fee need not detain one's attention any further as it is indisputable that neither a regulatory fee nor a tax can be levied without the authority of law. Therefore, the core issue in point is whether the impugned levy is authorized by law.

21. It is next necessary to ascertain whether the power for such levy can be found under provisions of the DMC Act. Section 142 of the DMC Act provides for levy of tax on display of advertisement and specifies that tax at rates specified in the fifth schedule to the DMC Act are payable in respect of display of advertisements. Section 143(1) of the DMC Act prohibits any advertisement without the written permission of the Commissioner. And, Section 146 of the DMC Act provides for the consequences for contravening Section 143 of the DMC Act. Section 142, 143 and 146 of the DMC Act are relevant and are quoted below:-

"142. Tax on advertisements.-(1) Every person, who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle any advertisement or, who displays any advertisement to public view in any manner whatsoever, visible from a public street or public place (including any advertisement exhibited by means of cinematographs), shall pay for every advertisement which is so erected, exhibited, fixed or retained or so displayed to public view, a tax calculated at such rates not exceeding those specified in the Fifth Schedule as a Corporation may determine:

Provided that no tax shall be levied under this section on any advertisement which--

(a) relates to a public meeting, or to an election to Parliament or a Corporation or to candidature in respect of such election; or

(b) is exhibited within the window of any building if the advertisement relates to the trade, profession or business carried on in that building; or

(c) relates to the trade, profession or business carried on within the land or building upon or over which such advertisement is exhibited or to any sale or letting of such land or building or any effects therein or to any sale, entertainment or meeting to be held on or upon or in the same; or

(d) relates to the name of the land or building upon or over which the

advertisement is exhibited, or to the name of the owner or occupier of such land or building; or

(e) relates to the business of a railway administration and is exhibited within any railway station or upon any wall or other property of a railway administration; or

(f) relates to any activity of the Central Government or the Corporation.

(2) The tax on any advertisement leviable under this section shall be payable in advance in such number of instalments and in such manner as may be determined by bye-laws made in this behalf.

Explanation 1.--The word "structure" in this section includes any movable board on wheels used as an advertisement or an advertisement medium.

Explanation 2.--The word "advertisement" in relation to a tax on advertisement under this Act means any word, letter, model, sign, placard, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction.

143. Prohibition of advertisements without written permission of the Commissioner.-(1) No advertisement shall be erected, exhibited, fixed or retained upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall be displayed in any manner whatsoever in any place within Delhi without the written permission of the Commissioner granted in accordance with bye-laws made under this Act.

(2) The Commissioner shall not grant such permission if--

(a) the advertisement contravenes any bye-law made under this Act; or

(b) the tax, if any, due in respect of the advertisement has not been paid.

(3) Subject to the provisions of sub-section (2), in the case of an advertisement liable to the advertisement tax, the Commissioner shall grant permission for the period to which the payment of the tax relates and no fee shall be charged in respect of such permission"

"146. Power of Commissioner in case of contravention.-If any advertisement is erected, exhibited, fixed or retained in contravention of the provisions of section 143, the Commissioner may require the owner or occupier of the land, building, wall, hoarding, frame, post or structure or vehicle upon, or over or in which the same is erected, exhibited, fixed or retained, to take down or remove such advertisement or may enter any land, building, property or vehicle and have the advertisement dismantled, taken down or removed or spoiled, defaced or screened."

22. In addition, the MCD in exercise of its powers under Section 481 of the DMC Act, has also made bye laws with respect to tax on advertisements called "Delhi Municipal Corporation Tax on Advertisements (Other Than Advertisement Published in Newspapers) Bye-Laws, 1996." The said bye laws, amongst other

provisions, provides for the size of advertisement as well as the fee chargeable on applications submitted to the Commissioner for permission to put up advertisements.

23. It is apparent from the above that the circular and the impugned charges cannot be traced to any of the provisions under the DMC Act. Clearly, the damage charges as contemplated under the circular are not a tax on advertisement as contemplated under Section 142 of the DMC Act. Whilst Section 143 of the Act prohibits advertisement without permission of the Commissioner, it does not provide for any levy, impost or penalty in respect of an unauthorized advertisement. Section 146 of the DMC Act empowers the Commissioner to dismantle, take down, remove, spoil, deface, or screen an advertisement, which is in contravention to the provisions of Section 143 of the DMC Act. The bye laws made under the DMC Act also do not support or authorize the levy of any damage charges. Thus, undeniably, the impugned charges are not imposed pursuant to or in exercise of any statutory power under the DMC Act.

24. Mr. Phoolka, learned senior counsel appearing on behalf of the MCD fairly conceded that the levy imposed by the impugned order was in addition to the tax or fee that was chargeable under the provisions of the DMC Act and/or any other bye laws made thereunder. He ascribed the source of authority for the impost solely to Article 142 of the Constitution of India. Therefore, the controversy is considerably narrowed down to the question whether the impugned levy could be supported solely on the basis of the order dated 12.10.2007 passed by the Supreme Court reported as *M.C. Mehta Vs. Union of India (UOI) and Others*, (hereinafter referred to as "*M.C. Mehta II*") And, whether a tax can be imposed under Article 142 of the Constitution of India.

25. The learned senior counsel for the petitioner contended that recourse to Article 142 of the Constitution of India cannot be taken to supplant any existing law, impose a tax or ignore the substantive rights of parties. And therefore, the orders passed by the Supreme Court for implementation of the outdoor policy cannot be read to include imposition of the impugned charges. This was disputed by the learned counsel for the MCD and it was contended that the Supreme Court had adopted a specific policy which included imposition of "a fine as decided by MCD Commissioner". It was further submitted that since the outdoor policy specifically included charging regulatory fee for advertisement, such fee could be charged by virtue of the order dated 12.10.2007 passed by the Supreme Court in *M.C. Mehta II* (supra). The learned counsel relied on the decision of the Supreme Court in *Vishaka and others Vs. State of Rajasthan and Others*, in support of its contention that the decision of the Supreme Court could be read as declared law for imposing the impugned charges.

26. Indisputably, the powers conferred on the Supreme Court under Article 142 of the Constitution of India are wide and are not limited by any statute. In *Supreme Court Bar Association* (supra), the Supreme Court had explained the width of the power in the following words:-

"47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article viz. to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling.

It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute settling. It is a "problem-solver in the nebulous areas". (See. *K. Verraswami v. Union of India* but the substantive statutory provisions dealing with the subject-matter of a given case, cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in statute dealing expressly with the subject.

27. Although, the learned counsel for the petitioner relied upon several decisions of the Supreme Court with respect to its power under Article 142 of the Constitution of India. I do not find it necessary to refer to all of the said decisions as the width of power of Supreme Court under Article 142 of the Constitution of India has been adequately explained by the Supreme Court in *Supreme Court Bar Association (supra)*.

28. In *Vishaka (supra)*, the Supreme Court while exercising its powers under Article 142 of the Constitution of India observed as under:-

"11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

"Objectives of the Judiciary:

10. The objectives and functions of the Judiciary include the following:

- (a) to ensure that all persons are able to live securely under the rule of law;
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State."

xxxx xxxx xxxx xxxx

16. In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental

rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution."

29. A bare perusal of the aforesaid passages from the judgment in Vishaka (supra) clearly indicate that the powers under Article 142 of the Constitution of India were exercised by the Supreme Court for enforcement of fundamental rights in the absence of a legislation. It is doubtful whether such powers could be exercised to supplant the legislative powers of the State to impose a tax or a regulatory fee. In this view, the orders passed by the Supreme Court in M.C. Mehta II (supra) must be read in the context in which the order was issued. And for the said purpose, it would be essential to refer to the judgment of the Supreme Court in M.C. Mehta Vs. Union of India (UOI) and Others, (hereinafter referred to as "M.C. Mehta I"). By the said judgment, the Supreme Court expressed its concern with regard to proper management and control of traffic in the National Capital Region and National Capital Territory (NCR and NCT, Delhi) and the Court passed directions to ensure maximum possible safeguards that were necessary for public safety. The Supreme Court further clarified that it was entertaining the petition as the entire scope of matter fell within the ambit of Article 21 of the Constitution of India. Paragraph 14 of the said judgment, which clearly indicates the above, is quoted below:-

"14. It is needless for us to add that the entire scope of this matter and particularly this aspect to which this order relates, namely, the control and regulation of traffic in NCR and NCT, Delhi, is a matter of paramount public safety and, therefore, is evidently within the ambit of Article 21 of the Constitution. That being so, the making of this order has become necessary and can no longer be delayed because of the obligation of this Court under Article 32 of the Constitution which is invoked with the aid of Article 142 to give the necessary directions given today separately."

30. Paragraph 2 of the judgment of Supreme Court in M.C. Mehta I (supra) also indicates that the directions issued by the Supreme Court were for implementation of the existing law and not to supplant any existing statutory provision. Paragraph 2 of the said judgment reads as under:-

"2. Having heard all of them and after taking into account the various suggestions which have been given at the hearing, we find that there are adequate provisions in the existing law which, if properly enforced, would take care of the immediate problem and to a great extent eliminate the reasons which are the cause of the road accidents in NCR and NCT, Delhi. In view of the fact that the above officers expressed some doubt about the extent of powers of the authorities concerned to take adequate and suitable measures for speedy enforcement of these provisions and the remedial steps needed to curb the growing menace of unregulated and disorderly traffic on the roads, we consider it expedient to clarify that position in this order with reference to the relevant provisions of the existing law. It is obvious that it is primarily for the Executive to devise suitable measures and provide the machinery for rigid enforcement of

those measures to curb this menace. However, the inaction in this behalf of the Executive in spite of the fact that this writ petition is pending since 1985 and the menace instead of being controlled continues to grow in perpetuation of this hazard to public safety, it has become necessary for this Court to also issue certain directions which are required to be promptly implemented to achieve the desired result. It is needless to add that these directions are to remain effective till such time as necessary action in this behalf is taken by the Executive authorities concerned so that the continuance thereafter of these directions may not be necessary."

31. One of the directions issued by the Supreme Court and annexed with the aforesaid judgment related to hoardings; the said direction is quoted below for ready reference:-

"(i) The civic authorities including DDA, the Railways, the police and transport authorities, are directed to identify and remove all hoardings which are on roadsides and which are hazardous and a disturbance to safe traffic movement. In addition, steps be taken to put up road/traffic signs which facilitate free flow of traffic."

32. It is important to refer to the aforesaid decision as it not only indicates the scope of the matter before the Supreme Court but also reveals that its focus was not on any revenue generating exercise for MCD or to provide for a law to impose any fee, tax or penalty, but was entirely on control and regulation of traffic for public safety. Therefore, the order dated 12.10.2007 in M.C. Mehta II (supra), must be read in the context of public safety and preservation of fundamental rights under Article 21 of the Constitution of India. The outdoor policy considered by the Supreme Court was in the context of protecting the public from hoardings which were considered to be "hazardous" and constituted disturbance to safe traffic movement.

33. Subsequently, pursuant to the orders passed by the Supreme Court, the Enforcement Pollution (Prevention and Control) Authority for the National Capital Region prepared a report regarding the outdoor policy which was examined in detail and the Supreme Court, by an order dated 12.10.2007 in M.C. Mehta II (supra), permitted the MCD to go ahead with the implementation of the said policy.

34. It would now be apposite to examine the order dated 12.10.2007 of the Supreme Court in M.C. Mehta II (supra), which according to the MCD clothes it with the power to levy a regulatory fee/tax. The said order is quoted below:-

"1. Pursuant to the order passed by this Court, the Environment Pollution (Prevention and Control) Authority for the National Capital Region has prepared a report regarding the outdoor advertisement policy. The matter was examined in detail and report has been submitted before us. The various parameters have been laid down as to how the billboards and hoardings can be fixed on the city roads within the jurisdiction of MCD.

2. Certain objections have been raised by some persons who intend to file applications i.e. those who have put up hoardings in the rooftops of their houses or buildings. They contended that these hoardings were permitted to be put under the earlier policy and if this proposed policy is implemented, they will not be allowed to put hoardings on their buildings and this would cause serious prejudice to them by the implementation of the policy. If any such persons are aggrieved by the implementation of the proposed policies, they would be at liberty to challenge the same.

3. MCD would be at liberty to go ahead with the policy and the persons who feel aggrieved may file appropriate application before this Court and appropriate orders would be passed. MCD may go ahead with the implementation of the policy, notwithstanding any order passed by any court."

35. A plain reading of the aforesaid order also indicates that the Supreme Court was concerned with the technical aspects with respect to the display of advertisements; liberty was granted to persons who were aggrieved by implementation of the policy with regard to putting up of hoardings. The substratal theme of the orders passed by the Supreme Court was public safety and to ensure that hoardings and advertisements hazardous to the public were not put up. The issue with regard to levy of any tax or impost was not the subject matter of the controversy before the Supreme Court.

36. The learned counsel for the MCD contended that the aforesaid order of the Supreme Court encompasses the entire report including the strategy to levy regulatory fee and fines; therefore, the report titled: "Outdoor Advertisement Policy defining strategy for change" as placed before the Supreme Court must be read as having the force of law under Article 142 of the Constitution of India.

37. In my view, the said contention is wholly without merit for the following reasons:-

37.1. First of all, the order of Supreme Court does not expressly indicate that the Court had directed the entire report to be considered as its direction under Article 142 of the Constitution of India.

37.2. Secondly, the said order does not indicate that Supreme Court was concerned with the aspect of revenue at all. As discussed hereinbefore the Supreme Court had examined the issue of outdoor advertisements from the standpoint of Article 21 of the Constitution of India. Paragraph 1 of the said order clearly indicates that the Supreme Court had referred to the outdoor policy and specifically noted that "the various parameters have been laid down as to how the bill boards and hoardings can be fixed on the said roads within the jurisdiction of MCD". A bare perusal of the policy also indicates that the same was not to be construed by any revenue implications. Paragraph 1 of the guiding principles of the outdoor policy reads as under:-

"1. The policy for outdoor advertising will be driven, not by revenue imperatives,

but by city development imperatives. Therefore, in its implementation, it will be clear that outdoor hoardings are permitted only if they are not a road safety hazard or if they support the city's public service development and enhance its aesthetics."

37.3. Thirdly, the Supreme Court had referred to the report placed before it as well as the policy separately and the said expressions were not used interchangeably.

37.4. Fourthly, the role of Municipal Corporation as indicated in the outdoor policy document placed before the Supreme Court also indicated that its role was governed by the provisions of the DMC Act and as such no role could be attributed to the MCD outside the statute.

37.5. Fifthly, the report regarding the outdoor policy placed before the Supreme Court cannot be mistaken to be the outdoor policy. Although the said report contains the outdoor policy, there are several sections of the report, in addition to the outdoor policy, which explain the background or indicate the strategy for implementation of the outdoor policy. The provisions regarding implementation of the outdoor policy are clearly not a part of the said policy but only indicate a basic framework under which the policy could be implemented. Thus, portions of the report regarding charging of regulatory fee for advertisement, penalty, revenue, etc. cannot be considered as a part of the policy. The outdoor policy is spelt out on pages 8 to 22 of the report; the portion of the report titled "Implementation" although is a part of the report, is only a strategy for implementation of the outdoor policy. A bare perusal of the report under the heading "Implementation" indicates that the report is further divided under various sub-headings such as "Legal action", "Arbitration", "Jurisdiction", "Indemnity", "Insurance", "Appeals", "Tax to be paid in advance", "Penalty", "Revenue" etc. The last page of the report also indicates the commercial advertising fee for various categories. A perusal of the same indicates that, apparently, the fee as contemplated is for the MCD's own sites or sites that can be auctioned for commercial advertisements. The proposed strategy for raising revenue by inviting bids for locations cannot be read to provide MCD, the power to impose penal charges on advertisements put up on other sites. Notably, the sub-heading "Revenue from category-4 devices" bears an asterix which draws one's attention to a footnote which reads as "Not applicable currently. Will be introduced after first revision of policy". Thus, regulatory fee for advertisements is sought to be imposed on the basis of the portion of the report placed before the Supreme Court that was not proposed to be introduced at the material time.

38. In my view, the Supreme Court's order for implementation of the outdoor policy must be read in the context of the parameters set out for permissibility of outdoor advertisements.

39. As discussed hereinbefore the entire emphasis and the focus of the Supreme Court was with regard to the parameters relating to the bill boards and hoardings

towards public safety. After considering the same, the Supreme Court had permitted the MCD to go ahead with the implementation of the policy. That by any stretch of the imagination cannot mean that the Supreme Court in its plenary powers had permitted the MCD to impose any fees/tax/penalty. Even if, it is assumed that the generation of revenue by levying a regulatory fee and discouraging unauthorised advertisement by levying a penalty is a part of the outdoor policy, the direction by the Supreme Court to proceed with the implementation of the policy would not by itself authorize MCD to levy the tax/regulatory fee/penalty. The MCD would, nonetheless, have to follow the procedure as required in law for implementing the outdoor policy. And, if a statutory enactment was required, the same would have to be initiated through the legislative processes. In other words, the implementation of policy itself would require legislative action, where necessary. Thus, as far as various parameters for putting up hoardings and displaying advertisement are concerned, the same fell within the domain of the MCD and the MCD could proceed to do so in terms of the guidelines provided by the Outdoor Policy. However, in so far as levy of tax or regulatory fee is concerned, the same would require a legislative framework (either by way of an amendment to the DMC Act or by a separate statutory enactment). The direction that "MCD may go ahead with implementation of the policy, notwithstanding any order passed by any Court" would not in any manner absolve the MCD from acting in accordance with law and authorize imposition of a levy without authority of any law.

40. It was further contended on behalf of MCD that this petition would not be maintainable as in view of the order in *M.C. Mehta II* (supra) which had directed the MCD to go ahead with the implementation of the policy notwithstanding any order passed by any Court. It was submitted that the petitioner must seek redressal to any grievance with respect to the policy only before the Supreme Court. I am unable to accept this contention since the challenge in this petition has been limited only to the levy of impugned charges and not to any technical parameters or any provision regarding permissibility of outdoor advertisement. In my view, the order dated 12.10.2007 of the Supreme Court cannot be read to preclude a challenge to the impugned charges under Article 226 of the Constitution of India.

41. The petitioner submitted that the impugned charges are based on a report furnished by M/s. A.C. Nielson which was not concerned with imposition of any tax/regulatory fee. A bare perusal of the M/s. A.C. Nielson's report clearly indicates that the object of the study was to find out the prospective value that the MCD could garner from auctioning its advertising sites. The said report was not concerned with a levy of any tax or regulatory fee. The contention that the said report found the basis of the impugned charges is without any merit.

42. Mr. Phoolka, learned senior counsel for the MCD strongly relied upon the provisions of the report placed before the Supreme Court to read into the said report, the power to impose the impugned charges. He particularly drew the

attention of this court to the portion of the report under the sub-headings "Penalty", "Revenue" and "Revenue from Category-4 devices".

43. It would be important to understand the basis on which the MCD seeks to sustain the levy of the impugned charges. It is the MCD's case that the outdoor policy permitted the MCD to raise revenue by charging commercial advertising fee to be decided on an open tender basis for different locations. The learned senior counsel for the MCD has referred to various paragraphs of the report placed before the Supreme Court which indicates this strategy. In addition the report also contemplated charging a regulatory fee for category-4 devices (described as "On premises signs and Miscellaneous signs (Advertisement pertaining to own product/services/shops)"). The report also indicated that contravention of the provisions of the DMC Act or the Bye laws would be punishable with a fine as decided by MCD Commissioner. According to the MCD, the said penalty has been fixed at twice the regulatory fee as contemplated in the report and the impugned charges have been imposed accordingly. The above referred portions of the said report are quoted below and the relevant words emphasized by the counsel are underlined:-

"Penalty

? Whoever contravenes any provisions of the Act, the Bye-laws and the terms and conditions on the subject or fails to comply with the order or directions lawfully given shall be punishable with a fine as decided by MCD Commissioner for each day during which such contravention or failure continues. The contravention of the Bye-law shall be punishable as mentioned in Sections 143 and 483 of the Act.

? The contravention still continues, the Commissioner shall require the owner or occupier of the land, wall, hoarding, frame, post, or vehicle upon or over or in which the same is erected, exhibited, fixed or retained to take down or removed such advertisement or enter any land, building, property or vehicle and have the advertisement dismantled, taken down or removed or spoiled, defaced or screened.

? Any other action including blacklisting of the defaulting agency or advertiser as the Commissioner may decide may also be taken by him."

"Revenue

An attempt has been made to lay down some suggestions based on which the reserved price for the advertisement fee can be fixed for any new device permitted by MCD or any new location/site identified. The suggestions laid are for reference only and shall not be applicable unless confirmed by MCD as per the laid process in MCD. The MCD may change or add any new fee or condition for any location or device.

A strategy wherein fewer surface are utilized to maximize returns shall be adopted. So that the city will benefit from revenue collection for a higher price

for an advertising surface, than extremely low prices for much larger surface area of advertising to create a similar value of revenue."

"4. Revenue from category-4 devices

No signage will be allowed beyond the length of the shop. Signages with a total surface area less than or equal to 2.5 sqm for advertising (sum total of all advertising devices visible from road), per property, shall not be subjected to any charges. The width of sign on shop front shall not be more than 0.75m and the length of the sign shall be as per laid down guidelines.

For all the other advertising exceeding 2.5 sqm, the commercial advertisement fee on all devices coming under Category 4 shall be linked to 8 different property tax zones identified in the city. The regulatory fee would be applicable in addition to commercial advertising fee as explained by applicable formula.

{Unit area Value (UAV)

for Applicable zone}/1000+ (1) x 100"

44. Thus, the gravamen of the MCD's contention is that the Supreme Court by its order dated 12.10.2007 declared the report, prepared by Environment Pollution (Prevention and Control) Authority, as the law of the land under Article 141 of the Constitution of India. And this clothed MCD with legislative power to impose a regulatory fee as well as penalties; the circular framed in exercise of such power contained the necessary provisions for charging, computing and recovering such impost. In my view, this cannot be accepted. The Supreme Court's order of 12.10.2007 permitting the MCD to proceed to implement the outdoor policy cannot be read to declare the said report as the law and that it delegates the legislative powers to levy the impugned charges to the MCD. The Supreme Court has not and perhaps could not have in exercise of powers under Article 142 of the Constitution of India authorized a levy of a tax/regulatory fee. Thus, the impugned charges and the circular are without authority of law.

45. It is well settled that a taxing provision cannot be inferred by implication but must be expressed unambiguously. The Supreme Court in the case of Ahmedabad Urban Development Authority (supra) held as under:-

"7. After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power."

In this view also, the MCD cannot be inferred to have the power to levy the

impugned charges.

46. In view of the aforesaid, the petition is allowed and impugned order is set aside. The parties shall bear their own costs.

47. It is clarified that the MCD shall not be precluded from taking any action against the offending advertisement in accordance with law.