(2010) 10 AHC CK 0291

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No''s. 2716, 2394, 2534, 2846, 2709, 2710, 2714, 3054, 3070, 3336, 3938 and 7128 (M/B) of 2010

Purvanchan Advertising Association and Others		APPELLANT
	Vs	
State of U.P. and Others		RESPONDENT

Date of Decision: Oct. 28, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 19, 19(1), 19(2), 285
- Uttar Pradesh Municipal Corporation (Assessment and Collection of Tax on Advertisement) Rules, 2009 - Rule 10, 2, 20, 20(2), 21
- Uttar Pradesh Municipal Corporation Act, 1959 - Section 172, 172(1), 172(2), 192, 193
- Uttar Pradesh Municipalities Act, 1916 - Section 128, 135(3)

Citation: (2011) 2 ADJ 161

Hon'ble Judges: Ritu Raj Awasthi, J; Pradeep Kant, J

Bench: Division Bench

Final Decision: Disposed Of

Judgement

1. This is a bunch of writ petitions filed by the advertising agencies challenging the vires of the U.P. Municipal Corporation (Assessment and Collection of Tax on Advertisement) Rules, 2009, hereinafter referred to as the Rules, 2009, mainly on the ground that they are ultra vires to the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India. The Rules, 2009 are also being challenged on the ground that the State Government has acted beyond the rule making powers conferred under Sections 192, 219, 227 and 540 of the Act.

2. A further prayer has been made that enforcement of these rules be restrained permanently and that the Respondents be also restrained from refusing permission to the advertising agencies for setting up rooftop hoardings, ground hoardings or pole kiosks on the ground that such hoardings are beyond the permissible height

mentioned in the impugned rules.

3. Various pleas have been raised in one or the other petition of this bunch and likewise, various reliefs have been claimed, though they are substantially the same.

4. The State represented by Sri H.P. Srivastava, learned Additional Chief Standing Counsel, produced before us a Division Bench judgment of this Court passed in Civil Misc. Writ Petition No. 373 of 2010 in re Taj Advertising and Ors. v. State of U.P. and Ors. alongwith a connected writ petition, where challenge to the Rules, 2009 was considered and the writ petitions have been dismissed. This order was passed on 28.4.2010.

5. Learned Counsel for the Petitioners submitted that the aforesaid judgment passed in the case of Taj Advertising (supra) is per incurium and that it cannot bind this Court from passing an independent order for the reasons, (I) that the relevant provisions of the Act, namely Section 172(2) of the U.P. Municipal Corporation Act, 1959, hereafter referred to as the Act, and other provisions of the Act have not been considered in context with the issue involved; besides, the provisions of Article 19(1)(a) of the Constitution have been totally ignored; and (ii) the legislative competence of the State Government to frame the said Rules, a plea which has been specifically taken in the writ petitions, was not considered at all at Allahabad, as is evident from the recitals made in the judgment that there was no challenge to the legislative competence of the State Government to frame the Rules.

6. Analysing the judgment of the Allahabad High Court, learned Counsel for the Petitioners have formulated the following points which were raised before the Division Bench at Allahabad:

(i) The licence for advertising cannot be given by public auction;

(ii) The impugned rules tend to create a monopoly in favour of big advertising companies and would result in driving out small advertisers like the Petitioners;

(iii) The requirement of the owner of the building, where the advertisement is to be set up, to give an undertaking that in the event of default by the advertising company/firm to pay the tax, the owner of the building concerned would pay the tax, is unreasonable and unfair; ''

(iv) The impugned rules are violative of the fundamental right of the advertisers to carry on the business of advertising; and

(v) The provisions of Sections 199 to 203 of the Act have not been followed while framing the impugned rules and as such the impugned rules are invalid.

The submission is that the said judgment is not binding upon this Court as the petitions here have raised additional questions, and as a matter of fact, such questions were not raised before the High Court at Allahabad nor they were considered. Further plea is that even on the points considered, the findings in the

aforesaid judgment require reconsideration as they do not take into account the legality of the issues raised and without giving any finding about the competence of the State Government to make such rules, their validity has been upheld.

7. Learned Counsel for the Petitioners have summarized their pleas in the present bunch as follows:

(1) in view of the provisions of Section 172(2)(h) read with Sections 192 to 203 of the Act, it is only a particular Municipal Corporation which can impose advertisement tax in its own area, and the power to frame rules u/s 540 of the said Act cannot be read so as to nullify the provisions of Sections 192 to 203 as such the State Government lacks the legislative competence to frame the impugned rules.

(2) A tax of any kind cannot be imposed by rules and as such also the impugned rules are beyond the rule making power of the State Government. In support, they have relied upon Municipal Board, Bareilly Vs. Bharat Oil Company and Others, According to the Petitioners, this decision has been relied upon by the Respondents also, but, in fact the observations made in para 14 of the aforesaid decision support the contention of the Petitioners rather than that of the Respondents.

So far as the decision of the Apex Court in the case of State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another, is concerned, it is submitted that the said decision is clearly distinguishable as the said decision related to trade in intoxicating liquor which is not a fundamental right at all and as such it can be regulated, curtailed and even prohibited without being hit by Article 19 of the Constitution.

In the instant writ petitions, the validity of the Advertisement Tax Rules are in issue and it cannot be disputed that an ''advertisement'' is a commercial speech and is protected by Article 19(1)(a) of the Constitution of India. At the same time, the Petitioners have a fundamental right to carry on advertising business which is also a fundamental right enshrined under Article 19(1)(g) of the Constitution.

(3) The provisions of the impugned rules are unworkable which confer arbitrary, unguided and uncanalised powers on the Municipal Commissioner to decide on all questions of allowing a hoarding, including a roof-top hoarding, its size, its location, its removal as well as declaring an area as no-hoarding zone without there being any provision for affording an opportunity of hearing to the advertiser or owner of the property and also without there being any provision of an appeal against the refusal of granting permission of setting up a hoarding or directing removal of such a hoarding.

The impugned rules also give unfettered and unguided powers to the Municipal Commissioner to prescribe/impose tax upon hoardings in areas of special control and the period for which the same can be imposed. As such the impugned rules are arbitrary, which give uncanalized power to the Municipal Commissioner, in all

matters relating to hoardings, therefore, violate Article 14 of the Constitution of India. In support, the Petitioners relied upon Novva ADS Vs. Secretary, Deptt. of Municipal Administration and Water Supply and Another,

(4) ''Advertisement'' is a commercial speech protected by Article 19(1)(a) of the Constitution of India and reasonable restrictions can be imposed on the said right in terms of the parameters laid down in Sub-clause (2) of Article 19.

In the impugned rules the restrictions on the setting up of hoardings including roof-top hoardings is neither reasonable nor is within the parameters of Article 19(2) of the Constitution and as such also the impugned rules infringe the fundamental rights of the Petitioners as enshrined in Article 19(1)(a) of the Constitution of India. In support, they relied upon The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia, Santokh Singh Vs. Delhi Administration, Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others, Tata Press Ltd. Vs. Mahanagar Telephone Nigam Limited and Others, and Ajay Goswami Vs. Union of India (UOI) and Others,

(5) The Petitioners have a fundamental right of carrying on the business of advertising which is guaranteed as a fundamental right under Article 19(1)(g) of the Constitution of India and only reasonable restrictions can be imposed as laid down in Clause (6) of Article 19. However, the impugned rules impose absolutely unfair and unreasonable restrictions on the aforesaid fundamental rights of the Petitioners and as such impugned rules are ultra vires to Article 19(1)(g) and not saved by Clause (6) of Article 19.

In support, the Petitioners relied upon LaLa Hari Chand Sarda Vs. Mizo District Council and Another, Laxmi Khandsari and Others Vs. State of U.P. and Others, Viklad Coal Merchant, Patiala and Others Vs. Union of India (UOI) and Others, Sodan Singh and Others Vs. New Delhi Municipal Committee and Others, Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, Krishnan Kakkanth Vs. Government of Kerala and ohters, Indian Handicrafts Emporium and Others Vs. Union of India (UOI) and Others, Dharam Dutt and Others Vs. Union of India (UOI) and Others, and Om Prakash and Others Vs. State of U.P. and Others,

(6) The decisions referred to in the judgment rendered at Allahabad, namely, Ram and Shyam Company Vs. State of Haryana and Others, and Chenchu Rami Reddy and Another Vs. Government of Andhra Pradesh and Others, do not answer the questions raised in the instant writ petitions and as such they are distinguishable.

8. We find it expedient, to mention, at the outset, that in regard to the prayer of the Petitioners to declare the impugned Rules ultra vires the Act and the constitutional provisions on the ground of lack of legislative competence, irrespective of the judgment passed at Allahabad in the case of Taj Advertising (supra), suffice it would be to mention that there are other pleas also which have been taken in the present

writ petitions and on which findings have been recorded in the said judgment, therefore, it would not be appropriate for this Court to pass a judgment only on the plea of legislative competence of the State Government, ignoring the other findings recorded by a Bench of co-ordinate jurisdiction at Allahabad and this persuades us to make a request to Hon''ble the Chief Justice for referring the matter to the larger Bench.

9. A perusal of the order passed by the Division Bench at Allahabad shows that mainly two contentions were raised there, namely, the Petitioners have a fundamental right to carry on business of advertising and the impugned Rules infringe their aforesaid right and as such they are ultra vires to the provisions of the Constitution. Secondly, the procedure prescribed under Sections 199 to 203 of the Act has not been followed in enacting the aforesaid Rules.

10. The defence taken by the Respondents was that the said Rules are only restrictive in nature and do not completely oust the Petitioners from carrying on the business of advertisement. The Rules have been framed in due exercise of powers conferred upon the State Government u/s 540 read with Sections 550, 219 and 227 of the Act after considering the objections received.

11. Learned Judges of the Division Bench observed that a wholistic reading of the Act reveals that municipal corporations are empowered to impose taxes as provided u/s 172 of the Act and tax on advertisement (not being advertisement published in the newspaper) is one of them and that Section 192 of the Act provides that where such tax on advertisement is imposed, every person who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding or structure any advertisement or who displays any advertisement to public view in any place whether public or private, shall be liable to pay advertisement tax calculated at such rates and in such manner as may be prescribed under the Rules subject to exemptions provided therein and that the procedure of imposing such tax by corporations has been laid in Sections 199 to 206 of the Act. But the learned Judges did not address themselves on the question of legislative competence of the State Government to frame said Rules. The validity of the said rules was questioned only on the ground that they are ultra vires to Article 19(1)(g) and not with respect to Article 19(1)(a) or its restrictive Clause (2).

12. The first question which in fact was considered by the Division Bench at Allahabad is regarding the plea that the licence for advertising cannot be given by public auction. This plea has been rejected after applying the ratio of the case of Ram and Shyam Company Vs. State of Haryana and Others, as well as the case of Chenchu Rami Reddy and Another Vs. Government of Andhra Pradesh and Others, wherein it was held that public officer entrusted with the care of public properties is required to show exemplary vigilance, and public properties can only be disposed of by adopting the best method, that may be public auction and not private negotiation. Reliance was also placed on the case of Haryana Financial Corporation

and Another Vs. Jagdamba Oil Mills and Another,

13. The Division Bench proceeded with the assumption that the purpose of public auction is to fetch maximum revenue, as public interest is the paramount consideration. The Court held that awarding a contract of sale or leasing out property of a Government or a public authority for a consideration less than the highest competitive amount is not in public interest, therefore, obviously, the procedure provided under the Rules for granting permission for advertising through public auction or by inviting tenders cannot be said to be suffering from any vice of unreasonableness.

14. The aforesaid judgments of the Apex Court have been rendered in relation to the public properties and not private properties. For erection or exhibition of any advertisement in relation to any product of any company over the property of a private owner, over which the State Government or the Municipal Corporation has no control, it would be the sole discretion of the owner of such property either to allow such advertisement over the property or not. The owners of such private properties if allow any company to put their boards, hoardings or advertisement over their property, they may be charging some rent or premium from such companies but the Municipal Corporation neither can charge or levy any tax as per provisions of the Act for that matter from/on the owners of private properties, nor the site of the private property can be auctioned by the Municipal Corporation, it not being the owner of the property.

15. In our opinion, the Municipal Corporation cannot auction the site of a private property, nor can collect and utilise the auction money. We, thus, with respect cannot subscribe to the view taken by the Division Bench on this issue.

16. Rule 10 of the Rules of 2009 gives authority to the Municipal Commissioner to grant permission on the recommendation of the allotment committee to erect, exhibit, display, stick, paste, write, draw or hang an advertisement or hoarding by public auction or by inviting tenders. Selection of site for putting a hoarding over a private property can also be not given to the committee constituted under Rule 3. If any hoarding is found to be placed or is intended to be placed or fixed at a place which otherwise cannot be used for such purpose under the provisions of the Act, of course, the Municipal Commissioner can restrain the owner of such building or the company from putting a hoarding over there, but choosing a site for the purposes of fixing or placing a hoarding over the property of a private person cannot be within the domain of the Municipal Commissioner. Rule 3, however, says so. May be that there is a case where the private owner does not want to let out his property for the purposes of putting the hoardings, but the committee if decides that the same is a proper place where hoardings should be put or fixed, the owner cannot object to it.

17. After the selection of site, application is moved to the Municipal Commissioner and it is under Rule 10 that a public auction has to be held for giving the site to the highest bidder. The allotment of private property by public auction on the recommendation of allotment committee to the highest bidder cannot be recognized in law.

18. The next contention is regarding the requirement of undertaking of the owner of the premises or building where the advertisement is to be displayed, to the effect that in default on the part of the advertising company/firm to pay the tax, he himself would be liable for the same. The submission is that this is unfair and unreasonable as no person would be ready to give such an undertaking. This plea has also been considered by the Division Bench at Allahabad and it has been held that the purpose of the rule is to ensure recovery of tax dues and protect the revenue of the Corporation, therefore, cannot be said to be arbitrary.

19. Sub-rule (5) of Rule 5 of the Rules, which prescribes such a requirement, makes a provision which in fact fastens liability of payment of tax upon a person, who is not involved at all in advertisement and is not deriving any advantage from the advertisement made, regarding sale of product or for whatever purpose the advertisement has been made, though the tax has not been imposed upon him and it is a tax upon the advertisement so made, which is realisable from the advertising company.

20. No such liability can be imposed upon a person who has let out whole or part of his premises on agreed rent or under any such contract which is permissible under law. Strangely, the definition of ''Advertiser'' given in Rule 2(ii) includes the owner of the land and building, which in our opinion, cannot be included in the definition of ''Advertiser''. The advertisement so made is not to the benefit of the owner of the land or building.

21. We are, therefore, not in agreement with the findings, recorded to the contrary in the Taj Advertising case (supra).

22. On the plea that the procedure as prescribed under the Act has not been followed while framing the rules, the Division Bench at Allahabad has not given any reasons, but relying only on the provisions of Section 540 of the Act read Section 227 of the Act has observed that both the above provisions confer upon the State Government a right to frame Rules for the purposes of the Act specially with regard to collection of taxes and that the aforesaid Rules having not been framed by any individual corporation, the procedure prescribed under Sections 199 to 203 of the Act being the procedure to be followed by the corporation in imposing tax, as such is not applicable where the Rules are framed by the State Government.

23. Chapter IX of the Act deals with the taxes which can be imposed under the Act. Section 172(2)(h) says about a tax on advertisements, not being advertisements published in newspapers. Sub-section (1) of Section 172 says that for the purposes

of this Act and subject to the provisions thereof and of Article 285 of the Constitution of India, the Corporation shall impose taxes on property, etc. whereas Sub-section (2)(h) gives power to the Corporation to impose tax on advertisements.

24. Section 192 of the Act says that where a Corporation imposes a tax mentioned in Clause (h) of Sub-section (2) of Section 172, every person who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding or structure any advertisement or who displays any advertisement to public view in any manner whatsoever, in any place whether public or private, shall pay on every advertisement which is so erected, exhibited, fixed, retained or displayed to public view, a tax calculated at such rates and in such manner and subject to such exemptions as may be provided by the Act or rules made thereunder.

25. Proviso to this section gives the exceptions where no tax shall be levied on any advertisement or a notice, but no such exceptions have been given under the Rules impugned, which means that the Rules have been framed beyond the scope of this Section as the statutory exemptions granted under the Act to certain advertisements cannot be taken away by the Rules.

26. A bare perusal of the aforesaid provisions makes it clear that it is the Corporation which can impose such a tax, in its own area, upon the person who displays any advertisement to public view in any manner at any place whatsoever and who is obliged to pay tax on advertisement so erected, exhibited or fixed and the State Government cannot frame a general rule for all the Corporations. This means that the person who is displaying the advertisement, namely, the advertiser would be liable for payment of tax and not the owner of the building with whose consent the advertisement has been placed upon his building.

27. Under the Rules of 2009, no advertisements or hoardings can be placed at any place without the permission of the Municipal Commissioner and without the site being chosen by the committee constituted under the Rules and that too after leasing it out by auction, irrespective of the fact that the premises over which the advertisement is to be fixed belongs to a private person and that the advertisements so proposed to be placed do fall within the exceptions given under proviso to Section 192 of the Act.

28. Section 193 of the Act deals with the prohibition of advertisement without written permission of the Commissioner. Sub-section (2) mentions the conditions where the permission cannot be granted by the Municipal Commissioner for advertisements.

29. Sections 199 to 203 lay down the procedure for imposition of taxes by the Corporation. Section 199 provides that when a Corporation desires to impose a tax specified in Sub-section (2) of Section 172, it shall by resolution direct the Executive Committee to frame proposals specifying:

(a) the tax, being one of the taxes described in Sub-section (2) of Section 172 which it desires to impose;

(b) the persons or class of persons to be made liable, and the description of property or other taxable thing or circumstances in respect of which they are to be made liable, except where and in so far as any class or description is already sufficiently defined under Clause (a) or by this Act;

(c) the amount or rate leviable from each such person or class of persons;

(d) any other matter referred to in Section 219 which the State Government requires by rule to be specified.

30. Sub-section (2) of Section 199 says that upon a resolution being passed under Sub-section (1) the Executive Committee shall frame the proposals and also prepare a draft of the rules which it desires the State Government to make in respect of the matters referred to in Section.

31. Sub-section (3) of Section 199 says that the Executive Committee shall, thereafter, publish in the manner prescribed by rule the proposals framed under Sub-section (1) and the draft rules framed under Sub-section (2) alongwith a notice in the form to be prescribed by rule.

32. u/s 200(1) of the Act, the inhabitants of the city are given time to file objection in writing to all or any of the proposals framed u/s 199, and the Corporation has to take any objection so submitted into consideration and pass orders thereon by special resolution.

33. Sub-section (2) of Section 200 says that if the Corporation decides to modify the proposals of the Executive Committee, or any of them, the Municipal Commissioner shall publish the modified proposals and, if necessary, revised draft rules alongwith a notice indicating that the proposals and rules if any are in modification of proposals and rules previously published for objection.

34. The State Government, u/s 201 of the Act, upon receipt of the proposals and objection, may either refuse to sanction the proposals or return them to the Corporation for further consideration or sanction them without modification or with such modification not involving an increase of the amount to be imposed, as it seems fit.

35. Section 202 of the Act takes into account resolution of corporation directing imposition of taxes. It says that when the proposals have been sanctioned by the State Government, the State Government, after taking into consideration the draft rules submitted by the Corporation, shall proceed forthwith to make such rules in respect of the tax as for the time being it considers necessary. Sub-section (2) of Section 202 says that when the rules have been made, the order of sanction and a copy of the rules shall be sent to the Corporation, and thereupon the Corporation

shall by special resolution direct the imposition of the tax with effect from a date to be specified in the resolution.

Section 203 of the Act reads as under:

203. Imposition.-(1) A copy of the resolution passed u/s 202 shall be submitted to the State Government.

(2) Upon receipt of the copy of the resolution the State Government shall notify in the official Gazette, the imposition of the tax from the appointed date, and the imposition of tax shall in all cases be subject to the condition that it has been so notified.

(3) A notification of the imposition of tax under Sub-section (2) shall be conclusive proof that the tax has been imposed in accordance with the provisions of this Act.

36. Section 204 deals with the procedure for altering taxes; it again prescribes the same procedure as is prescribed by Sections 199 to 202 for the imposition of a tax as far as applicable.

37. The scheme of Sections 199 to 202 of the Act which is regarding imposition of a tax, makes it clear that the Corporation has to draw a resolution and then a special resolution in case it desires to impose a tax specified in Sub-section (2) of Section 172 (under which provision the advertisement tax is) and after undertaking the process of inviting objections etc, the resolution is to be sent to the State Government, who may approve it and notify the tax.

38. In the instant case, no tax has been imposed by the Corporation nor any such resolution has been passed and straightaway the impugned Rules have been framed by the State Government imposing the tax, though the argument of the learned State counsel is that it is only the regulatory procedure which has been prescribed by the Rules and taxes have not been imposed.

39. Rule 26 of the impugned Rules, which has the heading "Mode of payment of tax", in fact fixes the rate of tax, namely, the tax which is imposed on a hoarding and which has to be paid by the advertiser. It says that the annual tax specified in Schedule-2 shall be payable in single installment. No hoarding or advertisement shall be erected until full amount is paid.

40. It appears that the defence of the State that they have not framed rules in respect of the imposition of tax, does not stand corroborated from the language of the rules and in particular, Rule 26 aforesaid.

41. Attention has also been drawn to the provisions of Sections 205 of the Act which gives power to the State Government to abolish any tax whenever it appears to it that the same is contrary to the public interest or it is unfair in its incidence, but it does not give power to the State Government to frame rules for imposing a tax.

42. Section 206 deals with the power of the State Government to require the Corporation to impose taxes. This rule authorises the State Government to direct a municipal corporation to impose any tax mentioned in Sub-section (2) of Section 172 not already imposed, by issuing general or special order at such rate and within such period as may be specified in the notification. Once such a direction is issued by the State Government, the Corporation has to act upon it.

43. The State Government can also require a corporation to increase, modify or vary the rate of any tax already imposed and on issuing such a direction, the Corporation shall have to act accordingly. Sub-section (3) of Section 206 says that if the Corporation fails to carry out the order passed under Sub-section (1) or (2), the State Government may pass suitable order imposing, increasing, modifying or varying the tax and thereupon the order of the State Government shall operate as if it had been a resolution duly passed by the Corporation.

44. The scheme of Section 206 of the Act is clear. It does not permit the State Government to impose tax under Sub-section (2) of Section 172 straightaway, but it can direct the Corporation to impose any tax mentioned therein and if, upon the directives issued, the Corporation does not carry out the order, the State Government shall have the power to pass suitable order imposing, increasing, modifying or varying the tax and thereupon the order of the State Government shall operate as if it had been a resolution duly passed by the Corporation. No such exercise was done in the instant case, as it is no case of the State Government that they had directed any municipal corporation to impose any such tax and it had failed to do so compelling the State Government to notify the impugned Rules.

45. In the case of Municipal Board, Hapur v. Raghuvendra Kripal and Ors. (1966) 1 SCR 950 : Municipal Board, Hapur Vs. Raghuvendra Kripal and Others, while considering the power of the Municipal Board to impose tax u/s 128 of the U.P. Municipalities Act, 1916, wherein also resolution was to be passed by the municipality to impose a tax subject to any general rules or special orders of the State Government, the Apex Court observed as under:

It is thus that we find an elaborate procedure prescribed by all the Municipal Acts. In the U.P. Municipalities Act also, as we have seen, a Board must first pass a special Resolution framing a proposal and the draft rules, invite objections, consider them, and then get them approved by Government. After this approval there must be a final special resolution imposing the tax from a particular date and the Government then notifies the imposition of the tax. It is the duty of Government to see that the various steps laid down for the imposition of the tax are followed. Before it notifies the resolution, Government satisfies itself about the requirements. The notification is made conclusive proof that the tax is imposed in accordance with the provisions of the Act. The question arises: Is this rule of conclusive evidence such as to shut out all enquiry by Courts? We have no hesitation in answering the question in the negative. There are certain matters which, of course, cannot be established

conclusively by a notification u/s 135(3). For example, no notification can issue unless there is a special resolution. The special resolution is the sine qua non of the notification. The State Government cannot impose a tax all by itself by notifying the imposition of the tax, without a resolution by the Board. Again, the notification cannot authorise the imposition of a tax not included in Section 128 of the Municipalities Act.

46. Section 219 of the Act is not relevant for finding out the power of the State Government to frame rules regarding imposition of tax as the matters specified therein have to be regulated and governed by rules except in so far as provisions therefore is made by the Act itself. The aforesaid regulatory measures do not talk about imposition of tax, but rather of assessment, collection, composition of taxes and other matters.

47. The State places reliance on Section 227 of the Act also which gives power to the State Government to make rules. Sub-section (1) of Section 227 says that the State Government may make rules for the purpose of carrying into effect the provisions of this Chapter, and thereafter Sub-section (2) enumerates the heads under which the power aforesaid can be exercised. This Sub-section (2) does not take into its ambit the tax which can be imposed under Sub-section (1) of Section 172 nor can it be taken to mean that it confers the power on the State Government to make the rules for imposing any tax.

48. In the scheme of the aforesaid Sections, it is to be noted that the State Government apparently cannot make rules imposing any tax on advertisement straightaway. There has to be a resolution by the Corporation itself which would seek the approval of the State Government and thereafter the rules would be notified making it conclusive that the tax has been imposed by the State Government. Such a tax primarily has to be imposed by the individual corporation for its own area, or can be imposed by the State Government only in accordance with the provisions of Section 206.

49. Section 540 is an enabling provision in addition to powers conferred upon the State Government under the Act elsewhere to make rules to carry out the purpose of the Act. The State Government can also make model rules for the guidance of a Corporation in any matter connected with the carrying out of the provisions of the Act or any other enactment.

50. Petitioners place reliance upon the observations made in the case of Global Energy Limited and Anr. v. Central Electricity Regulatory Commission (2009) 15 SCCC 570, wherein it has been observed that it is now a well-settled principle of law that the rule-making power "for carrying out the purpose of the Act" is a general delegation. Such a general delegation may not be held to be laying down any guidelines. Thus, by reason of such a provision alone, the regulation-making power cannot be exercised so as to bring into existence substantive rights or obligations or

disabilities which are not contemplated in terms of the provisions of the said Act.

51. For the aforesaid proposition, reliance has also been placed upon the case of Izhar Ahmad Khan and Ors. v. Union of India and Ors. 1962 Supp. (3) SCR 235 : Izhar Ahmad Khan Vs. Union of India (UOI), wherein it has been held as under:

...It is true that Section 18(1) confers on the Central Government power to make rules to carry out the purposes of the said Act, but this general power to make rules will not take within its scope the power to make a rule of substantive law and so if the impugned rule is a rule of substantive law and if the expression "rules of evidence" in Section 9(2) does not include such a rule, then clearly the challenge to the validity of the rule will have to be upheld.

The Apex Court further observed:

...The division of law into two broad categories of substantive law and procedural law is well known. Broadly stated, whereas substantive law defines and provides for rights, duties and liabilities, it is the function of the procedural law to deal with the application of substantive law to particular cases and it goes without saying that the law of evidence is a part of the law of procedure.

52. In the case of Kunj Behari Lal Butail and Others Vs. State of H.P. and Others, their lordships of the Supreme Court reiterated the same principle and observed as under:

We are also of the opinion that a delegated power to legislate by making rules "for carrying out the purposes of the Act" is a general delegation without laying down any guidelines; it cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

53. The Division Bench judgment at Allahabad does not take into consideration the aforesaid Sections of the Act in their true meaning and import, and simply because Section 540 permits the State Government to make rules, said that Section 540 read with Section 227 of the Act authorises the State Government to make model rules, therefore, the State Government was competent to make the rules.

54. Drawing attention to the Rules of 2009, it has also been urged that the said rules confer and vest all powers, relating to all matters connected with the display of hoardings/advertisements etc. on a private property, in the Municipal Commissioner. The Municipal Commissioner has been entrusted with the power of choosing the site through a committee (headed by him as Chairman). He has also been vested with the power to co-opt any member in the said committee, as he may think proper or change the committee himself, as provided under Rule 3, Sub-rule (2), Rule 3, Sub-rule (3) permits inviting applications by the Municipal Commissioner for granting permission on the sites identified by the committee by way of publication in atleast two daily newspapers of repute, which again requires the

minimum premium to be fixed for the purpose by the Municipal Commissioner.

55. The Rule aforesaid does not indicate how the sites would be identified, nor there is any requirement of having a representative or owner of any such property while selecting a site, which is likely to be identified as a suitable site; meaning thereby that the site from amongst the private properties would be decided by the committee headed by the Municipal Commissioner and that too, without any knowledge, information or may be, willingness of owner of such property. This apparently cannot be done. Unless there is a provision which permits the willing property owner to have a hoarding on his premises, there would hardly arise any occasion for the Municipal Commissioner or a committee constituted for the purpose to consider such property for choosing as a suitable site for putting the hoardings/advertisements.

56. Schedule-I gives the proforma of application, on which the applicant advertiser has to apply for permission to install advertising sign. It shows that where it is a private land or building, the written permission from the owner of such land or building has to be furnished. This fortifies the plea of the Petitioners that the owners have not been given any role to play in the matter of choosing the sites, whereas under Rule 4, there is a clear embargo placed in respect of putting all hoardings and advertisements, etc. without written permission from the Municipal Commissioner. It is a different matter that before allotting the site of private owner to an advertiser, the permission of the owner may be required.

57. We do not intend to repeat each and every rule, but broadly say that they require the Municipal Commissioner to do everything right, from the stage of choosing the site upto the grant of permission and thereafter also for collection of tax etc. including the choosing of colours which can be used on such hoardings, besides their size and other things, required for the purpose. Submission of learned Counsel for the Petitioners is that by conferring all such powers on the Municipal Commissioner, he has been made numero uno in matters of putting advertisements etc. and his verdict is final in respect of all matters concerning display of hoardings or advertisements on private properties, to which decision no appeal or revision has been provided to any superior forum.

58. Wide and unguided powers have also been given to the Municipal Commissioner vide Rule 20 under which permission can be granted to display special advertisements on payment of tax on such rates as he thinks proper; meaning thereby that the rates as specified in the Schedule would not be applicable for such advertisements and whatever amount of tax the Municipal Commissioner decides to be fixed as per his own discretion, that would be imposed and realised. This again is wholly unguided power of taxation given to the Municipal Commissioner, which could not have been delegated to him, nor there is any provision of appeal or revision to any higher forum, against such determination of tax.

59. Likewise, though Sub-rule (2) of Rule 20 postulates that such permission be granted for a period of one month, but after expiry of the said period, the permission may be extended for a further period of one month by the Municipal Commissioner, and thereafter further permission may be granted for unlimited period though for that purpose, a proposal for sanction has to be put up before the Municipal Commissioner. This means that the Municipal Commissioner, even in areas where the hoardings/advertisements cannot be put, may grant permission for special hoardings/advertisements, irrespective of the fact of what size they are and for any period whatsoever, and that too, on payment of tax at a rate which is to be fixed by him. This on the face of it is contrary to the nature and scheme of the Rules and the Act itself.

60. Under Rule 21, areas of special control have been shown. The Municipal Commissioner has been empowered to proclaim an area of special control whenever in his opinion it is likely that any advertising device otherwise permitted in terms of the rules may affect injuriously or disfigure any particular area within the jurisdiction of the Corporation. This provision relating to areas of special control has been made applicable to parks and land for public use also. Sub-rule (2) of Rule 21 again leaves it to the discretion of the Municipal Commissioner to prohibit or restrict in any manner the erection and display of any advertising sign in such areas, but if any owner of the property within such area feels aggrieved from prohibition or restriction so made in the newspapers, he can file an appeal to the Municipal Commissioner, whose decision shall be final.

61. Appeal itself presupposes a decision by higher authority as against the original order passed by any authority. Here, the Municipal Commissioner is declaring the special area, of course he would in all probability do it after exercising full diligence and ensuring that such a declaration is needed, but the aggrieved person has been required to go in appeal again to the same very authority who has taken such a decision. This is absolutely a farce. The appeal to the same authority has no meaning and again, the decision of the Municipal Commissioner is final and he can choose any area as special area.

62. Rule 22 confers power upon the Corporation, the State Government and the Central Government to declare any area or areas prohibited for erecting, exhibiting, displaying, sticking, pasting, writing, drawing or hanging the advertisements or hoardings. Under the Rules, the aforesaid power has been delegated not only to the Corporation but also to the Central Government. This is extremely doubtful that any such delegation can be made under the Rules framed by the State Government to the Central Government.

63. Rule 21(2) is being termed as a provision for declaring ''no hoarding zone''. Learned Counsel for the Petitioners have submitted that apart from declaring any area as ''no hoarding zone'', may be on the whims of the Municipal Commissioner, neither there is any provision for challenging his decision in any superior forum nor

can it be validly questioned before any authority, and that over and above, in exercise of power under Rule 20, any hoarding of whatever size can be allowed to be fixed in ''no hoarding zone'' if the Municipal Commissioner finds it of public interest, which obviously would defeat the purpose of declaring any area as ''no hoarding zone''. Submission further is that no area can be declared as ''no hoarding zone'' only for private parties or advertisers who are engaged in the business of advertising products of different companies in that very ''no hoarding zone''. This apart from creating discrimination between the advertisements is also against the policy of declaring the areas as ''no hoarding zones''. If any area is declared as ''no hoarding zone'' for any reason whatsoever, allowing any hoarding in that zone would be contrary to the scheme itself.

64. In terms of Rule 22, power has also been given to the State Government as well as the Central Government to declare an area as ''no hoarding zone'', but curiously enough, despite such declaration either by the State Government or the Central Commissioner, the Municipal Commissioner only would be competent to grant permission for putting any hoarding/special advertisement in terms of the Rules. This means that the Municipal Commissioner has been given powers superior to the powers of the State Government and the Central Government.

65. The judgment passed in the case of Taj Advertising does not address itself on any of the points referred to above but for the points indicated in earlier part of this judgment and we with great respect are unable to agree with the findings recorded by the Division Bench.

66. Keeping in mind the judicial propriety, it would be appropriate that a reference is made for constitution of a larger Bench to decide the legal issues involved in the present petitions.

67. We would, therefore, like to refer inter alia the following questions to be considered and answered by the larger Bench:

(1) Whether the State Government had legislative competence to frame the Rules, 2009?

(2) Whether the State Government in any case could have framed ''Rules'' in general for all the municipal corporations, that too without taking recourse to Section 206 of the Act?

(3) Whether delegation of power could be made under the Rules framed by the State Government to the Central Government?

(4) Whether the licence for putting hoardings/advertisements on public properties, owned by private owners, can be given by public auction?

(5) Whether the impugned rules are ultra vires to the provisions of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution of India?

(6) Whether the Rules, 2009 are invalid, they having been framed without following the provisions of Sections 199 to 203 of the Act?

(7) Whether the provisions of the Rules, 2009, such as- requiring the owner of the building, where the advertisement is to be set up, to give an undertaking that in the event of default by the advertising company/firm to pay the tax, the owner of the building concerned would pay the tax, etc. can be said to be unreasonable and unfair to be adhered to and are liable to be struck down?

(8) Whether vesting of all the powers (as discussed in this order in relation to putting of hoardings and as given under the Rules, 2009) on private properties, in special areas etc. and in ''no hoarding zones'' into the sole authority of the Municipal Commissioner, that too with no guidelines and without providing any superior forum of appeal/revision against his decision, suffers from the vice of excessive delegation and in any case absolutely arbitrary and unreasonable?

Normally, reference of the issues, on which there is a difference of opinion in two Benches of the co-ordinate jurisdiction, is made to the larger Bench, but since several other points raised before us, had not been raised or if raised, have not been considered, by the Court at Allahabad, it would be expedient that these writ petition themselves be referred to larger Bench for deciding the aforesaid questions and also the writ petitions

68. Let the records of these petitions be placed before Hon''ble the Chief Justice for constituting a larger Bench.

69. Sri S.K. Kalia, learned Senior Advocate lastly submitted that though there was an interim order passed in all these cases in respect to Lucknow, but the same was modified by a Division Bench of this Court on 4.8.2010 saying that if any area is declared as "no hoarding zone" or the buildings which are in dilapidated condition or creating obstruction in public way, then the interim order aforesaid would be of no assistance; the grievance is that after passing of the order dated 4.8.2010, two more areas i.e. one from Napier Triangle to Dayanidhan Park, Lalbagh and area around the park including Trilokinath Road to BJ.P. Office and Parivartan chowk to Hazratganj crossing, and the other from Allahabad crossing to Civil Hospital and Hazratganj crossing to Charan Hotel, Vidhan Sabha Marg, have been declared as "no hoarding zones" on 10.8.2010 and 5.10.2010. The prayer is that the Lucknow Nagar Nigam be restrained from declaring any further area as "no hoarding zone".

70. Sri Shailendra Singh Chauhan and Sri Shashi Prakash Singh, appearing for the Lucknow Nagar Nigam were required to seek instructions as to whether any further areas are likely to be declared as "no hoarding zones" and they on instructions have stated that there is no further proposal for declaring any further area "as no hoarding zone".

71. That being so, in view of the controversy involved in these petitions and the orders passed at Allahabad and also by us, we expect that no further area would be declared as "no hoarding zone" by the Lucknow Nagar Nigam till the matter is considered by the larger Bench. It would also be open for the parties to move any further application for modification of the order or for further interim relief, as may be advised, before the larger Bench.