

**(2010) 4 BomCR 155 : (2010) 112 BOMLR 2465 : (2010) 101 SCL 291**

**Bombay High Court**

**Case No:** Writ Petition No. 1579 of 2007

Dravya Finance Pvt.  
Ltd. (formerly known as  
Bachraj Finance Pvt.  
Ltd.) and Hasmukh  
Rawal of Mumbai A  
Director and  
Shareholder of Dravya  
Finance Pvt. Ltd.

APPELLANT

Vs

Life Insurance  
Corporation of India  
and Insurance  
Regulatory  
Development Authority

RESPONDENT

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**Date of Decision:** May 19, 2010

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 19(1), 226, 265, 298
- Essential Commodities Act, 1955 - Section 3(2)
- Insurance Act, 1938 - Section 114, 114A, 30A, 38, 38(1)
- Insurance Regulatory and Development Authority Act, 1999 - Section 3(1)
- Life Insurance Corporation Act, 1956 - Section 26, 28, 43, 48, 48(2)
- Road Transport Corporations Act, 1950 - Section 18, 22, 3

**Citation:** (2010) 4 BomCR 155 : (2010) 112 BOMLR 2465 : (2010) 101 SCL 291

**Hon'ble Judges:** J.H. Bhatia, J; F.I. Rebello, J

**Bench:** Division Bench

**Advocate:** N.H. Seervai, Sharan Jagtiani and Dhaval Kenia, instructed by M and M Legal Ventures, for the Appellant; Snehal Paranjpe, O. Mohandas and Inder Tiwana, instructed by Little and Co., for the Respondent

**Final Decision:** Allowed

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J.H. Bhatia, J.

The petitioners have challenged Circular No. Mktg/CRM/558/23 dated 24.4.2006 which came into force with effect from 1.5.2007 (the impugned Circular). Petitioner No. 1 is a Non-Banking Finance Company of which the petitioner No. 2 is a Director. The petitioner No. 1 is engaged in the business of advancing loans against the assignment of life insurance policies. According to the petitioners, the respondent No. 1 " Life Insurance Corporation of India (LIC) by earlier two Circulars dated 22.12.2003 and 2.3.2005, had sought to prohibit the transfer of life insurance policies. The said circulars were challenged by the petitioner No. 1 in Writ Petition No. 3282 of 2004. Similar challenge was also posed in Writ Petition No. 2159 of 2004 (Insure Policy Plus Services Ltd. v. Life Insurance Corporation). The said petition, which was similar to the earlier petition of the petitioner, was allowed by this Court by the Judgment and Order dated 22.3.2007 and the said Circulars were declared to be illegal and null and void. Though the said Judgment has been challenged by the respondent No. 1 before the Supreme Court by Special Leave Petitions, no stay has been granted to the effect of the order of this Court. In this background, the respondent No. 1 implemented the impugned Circular dated 24.4.2006 with effect from May, 2007 and imposed a charge of Rs. 250/- per assignment in favour of "Finance Organizations". The petitioners are affected by the same. According to the petitioner, the effect of the impugned Circular is to make the assignment of life insurance policies in favour of Finance Organizations, such as the petitioner No. 1, so onerous that it operates to severely restrict, if not prohibit, such legal and valid assignments in favour of the petitioner No. 1.

2. According to the petitioners, the impugned Circular is liable to be struck down on the following grounds:

- (i) It is ultra vires Section 38 of the Insurance Act, 1938;
- (ii) it is generally without authority of law as the respondent has no power to issue the same;
- (iii) it is in violation of Article 265 of the Constitution of India as it levies a tax or fee without the authority of law;
- (iv) it is ultra vires Article 14 of the Constitution of India as it is ex facie discriminatory and violates the principle of equality;
- (v) it is ultra vires Article 14 of the Constitution of India as it is arbitrary, unreasonable and suffers from non-application of mind;
- (vi) it is ultra vires Article 19(1)(g) of the Constitution of India as in its effect and operation it is an unlawful restriction of petitioner No. 1's right to carry on business;
- (vii) it is ultra vires Article 300A of the Constitution of India as it deprives petitioner No. 1 of its property without the authority of law.

3. The respondent No. 1, on the other hand, justified the said Circular. It is denied that the purpose of the said Circular was to restrict or prohibit the business of the petitioners and to restrict the transfer or assignment of the policies in favour of the Financial Institutions like the petitioner No. 1. It is also denied that it is a kind of tax or fee amounting to tax imposed without any authority of law. It is contended that the respondent No. 1 has 19 crore policy holders whose policies are required to be serviced frequently. As per the data collected, from only 11 Divisions of the Western Zone comprising of the States of Maharashtra and Gujarat, the respondent No. 1 was required to record assignments in respect of about 77 ,000 transfers of policies in the year 2005-2006 alone. None of the policy holders have protested or raised any challenge to the said administrative charge of Rs. 250/-. However, the petitioners, who are in business of trading in life insurance policies, are seeking to raise baseless and vexatious challenge to the said administrative charge. It is contended that the respondent No. 1 is duty-bound by the LIC Act to distribute the surplus arising from the life insurance business carried on by it in the proportion of 95% to its policy holders and 5% to the Central Government. After the Manual No. 6 for Policy Servicing Department of the LIC dealing assignment was published on 31.12.1990, considerable advances have been made in the field of information and technology and some of these benefits have been passed on by the respondent No. 1 to its policy holders. Considerable financial cost and investment has been made in computerization of its Systems, installing a Fire Wall for prevention of hacking, training its employees to operate the same, to check whether all the essential conditions for assignment have been fulfilled, whether valid notices have been given, whether stamp duty has been paid and whether there are any other claims on the policy. Due to the huge increase in assignment of policies in the last few years, the whole system and the staff of the respondent No. 1 have come under severe stress. In view of the cumbersome administrative processes and tremendous manpower involved and consequent high cost of administration in servicing the voluminous assignments of policies, especially of the Financial Institutions like the petitioner who are doing lucrative business of assignments of life insurance policies, in the public interest, the respondent No. 1 has levied the nominal service fee of Rs. 250/- per assignment. It is contended that under the provisions of Section 6 of the LIC Act, 1956, a general duty has been cast on the respondent No. 1 to carry on life insurance business so as to secure that life insurance business is developed to the best advantage of the community and the law also enjoins respondent No. 1 to act as far as may be on business principles. The respondent No. 1 has acted on business principles in the matter of levy of administrative charges or the service charges as per the impugned Circular dated 24.4.2006. It is denied that by the impugned Circular, any restriction or any unreasonable restriction has been imposed on the business of the petitioners or that they are being deprived of their property. It is also denied that there has been any violation of the principles of equality before the law under Article 14 of the Constitution because the assignment in favour of the Government or its departments, in favour of LIC Housing Finance Limited and in favour of DSOP funds policies are exempted from payment of such service charges.

4. Heard the learned Counsel for the parties.

5. The impugned Circular reads as follows:

At present, assignment of policies is being registered without any charges. However, the cost of the transaction of assignment /re-assignment of a policy is considerable.

Therefore, it has now been decided to levy service charges of Rs. 250/- per transaction for effecting assignment under a policy, provided:

1. In case of Absolute/Conditional Assignment in favour of a family member for natural love and affection, the first assignment should be registered free and all further assignments should be charged.

2. Assignments in favour of LIC of India and LIC Housing Finance Limited are free of cost. 3. Assignment in favour of Government Bodies is free but assignment in favour of other Public Sector Entities, including Banks, co-operatives, Finance Organisations, etc are to be charged.

4. DSOP Fund policies are assigned at the proposal stage itself.

5. Assignment is charged, but re-assignment is not be charged.

6. After re-assignment, the policy holder is required to give fresh nomination. Such nomination consequent to assignment/re-assignment should be registered free of cost.

7. More than one policy is to be assigned, then Rs. 250/- will be charged per policy even if all the policies are on a single life and are assigned to a single assignee at a time.

The provisions of this Circular will come into effect from 1st May, 2006. all Offices under your jurisdiction be advised suitably.

6. The learned Senior Counsel for the petitioners contended that although the respondent No. 1 is a statutory Corporation established under the Life Insurance Corporation Act, 1956, the business of life insurance carried on by the respondent No. 1 is regulated by the provisions of the Insurance Act. The LIC Act deals with the establishment of the respondent No. 1 as a statutory body and regulates the functioning of the respondent No. 1 as a company, as opposed to regulating the business of life insurance, which is governed by the Insurance Act. Section 43 of the LIC Act makes the provisions of Section 38 of the Insurance Act expressly applicable to the respondent No. 1.

7. Section 38 of the Insurance Act provides for the assignment and transfer of Insurance policies. It reads as follows:

Assignment and transfer of Insurance policies

(1) A transfer or assignment of a policy of life insurance, whether with or without consideration, maybe made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but except where the transfer or assignment is in favour of the insurer shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, and right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment and either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorized agents have been delivered to the insurer:

Provided that where the insurer maintains one or more places of business in India, such notice shall be delivered only at the place in India mentioned in the policy for the purpose or at his principal place of business in India.

(3) ....

(4) Upon the receipt of the notice referred to in Sub-section (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice; and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) Subject to the terms and conditions of the transfer or assignment, the insurer shall, from the date of receipt of the notice referred to in Sub-section (2), recognize the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) ....

(7) ....

8. Section 38(2) provides that for the transfer and assignment to be complete as against the insurer the endorsement or instrument or a certified copy of either have to be delivered to the insurer. Section 38(4) mandates that if the insurer receives the notice as prescribed in Section 38(2), the insurer is bound to record the fact of such transfer or

assignment. The only authority to levy a fee by the insurer under this section is if the insurer issues a written acknowledgment for the receipt of a notice for recording the assignment or transfer of the policy. Even in this circumstance, by statutory mandate, the fee cannot exceed one rupee.

9. Section 39(4) of the Insurance Act provides that a transfer or assignment of a policy made in accordance with Section 38 shall automatically cancel a nomination. Thus, it is very clear that a transfer or assignment of policy if made after following the due procedure laid down in Section 38, is the mandate of the law. In *Insure Policy Plus Services Ltd. v. Life Insurance Corporation* Writ Petition No. 2159 of 2004 the Division Bench of this Court, after considering the rival arguments of the parties, observed as follows in paras 16 and 20:

16. We shall now examine the various Sub-sections of Section 38. Section 38(1) unequivocally provides the procedure by which assignment of a policy of life insurance can be done. The contract of insurance issued by the insurer is a contract between the insured and the insurance company. Sub-section (2), then sets out, that once a transfer or assignment is made in the manner prescribed by Section 38(1), the transfer or assignment is complete and effectual on the execution of the endorsement or by a separate instrument. However, such transfer or assignment is not binding as against the insurer until and unless intimation in writing of the transfer or assignment in the prescribed manner, has been delivered to the insurer. Sub-section (3) determines the priority of claims, on the insurance Policy by operation of law. Therefore, if the insured had effected the transfer or assignment and had given notice to the insurer, that would be determinative as to who is entitled to the moneys payable under the policy of insurance. Once the notice is received, by virtue of Sub-section (4), the insurer is bound to record the fact of transfer or assignment together with the date thereof and the name of the transferee and the assignee and on request, grant a written acknowledgment of the receipt of such notice which will be conclusive evidence that the insurer had received the notice. The only limitation evidenced by the said Section to transfer are the terms and conditions of the transfer and necessarily the terms of policy itself. By virtue of Sub-section (5) the Statute itself mandates that the insurer recognizes the transferee or assignee named in the notice as the only person entitled to the benefit under the policy and such person would be subject to all liabilities and equities. The latter part of this Sub-section makes it clear that once the notice is served and the company recognizes the transfer or assignment, it is the transferee or assignee who can institute any proceedings, without obtaining the consent of the transferor or assignor or making him a party to the proceedings. Sub-section (6) provides for some other contingencies. Section 39(4) is further indicative of the mandatory character of Section 38 when it provides that transfer or assignment of policy made in accordance with Section 38 shall automatically cancel the nomination. ... We are, therefore, of the considered opinion that once the insured transfers or assigns the policy in favour of the assignee the assignment is complete between them. The provisions of the Section leave no doubt that the insurer

has no choice but to accept the transfer or assignment as the case may be if the procedure required by Section 38 has been followed, subject to the terms of the policy. We have no hesitation in holding that Section 38 is substantive and not procedural. The position in law, therefore would be that the interest in the policy earlier held by the assignor is transferred to the assignee with all benefits attached thereto. The assignment becomes binding on the insurer recording the fact of such transfer or assignment. The submission, therefore, advanced on behalf of the respondent No. 1 herein that Section 38 is merely procedural is devoid of merit....

20. ...It is not open to respondent No. 1 to impose on the insured terms and conditions not provided in the contract or not permissible under the provisions of the Insurance Act, Section 30A of the Insurance Act makes it mandatory for the Corporation to carry on its business in terms of the Insurance Act. The effect of the policy would be clearly contrary to Section 38(4) of the Insurance Act. As we have held the Section to be mandatory, once the insured complies with the requirement of Section 38(2), the respondent No. 1 is bound in terms of Section 38(5) to recognise the transferee or assignees named in the notice by operation of law. It is not open to the respondent No. 1 to issue any policy decisions or directions which are contrary to Section 38. The Circulars to the extent that they seek not to register the policies even if they comply with the requirement of Section 38, would be contrary to the mandatory provisions of Section 38(4) of the Insurance Act and consequently the Circulars would have to be struck down.

10. The learned Senior Counsel for the petitioners vehemently contended that as observed by this Court in *Insure Policy Plus Services Ltd.*, it is not open to the respondent N.1 to issue policy decisions or directions which are contrary to Section 38. The learned Counsel vehemently contended that Section 38 only provides for imposition of fee of rupee one for the purpose of acknowledgment of receipt of notice on transfer or assignment of a policy, but Section 38 does not provide for charging of any fee for the purpose of registration of transfer or assignment of a policy. It is contended that even para 23 of the LIC Manual issued on 31.12.1990 makes it clear that no fee could be charged for registration of assignment or re-assignment. Para 23 reads as follows:

No fee to be charged for Registering Assignment/Reassignment and for acknowledging Notices. Assignments and Reassignments are registered and notices thereof acknowledged by the Corporation free of charge. No charge is, therefore, required to be paid to the Corporation in this behalf and if any amount is paid by a Policyholder as fee for registration etc. of an Assignment/Reassignment, the same should be refunded to him less remittance charges.

11. The learned Senior Counsel for the petitioners further contended that Section 114 of the Insurance Act empowers the Central Government to make rules in respect of certain matters and Section 114A of the Insurance Act empowers the Insurance Regulatory and Development Authority to make regulations. Such rules and regulations have to be notified in the official gazette. These powers are not vested in the respondent No. 1. The

learned Counsel also contended that u/s 48 of the LIC Act, the Central Government is empowered to make rules. Sub-section (k) of Section 48 expressly empowers the Central Government to make rules with respect to "the fees payable under the Act and the manner in which they are to be collected... The learned Counsel contended that the Central Government has not exercised its rule-making power to levy a fee or charge on registration of assignments. It is further contended that Section 49 of the LIC Act confers power to make regulations on the respondent No. 1 with previous approval of the Central Government and such regulations are to be notified. However such regulations cannot be inconsistent with the provisions of the LIC Act. There is no dispute that the impugned Circular is not issued under the regulation-making power u/s 49.

12. The learned Senior Counsel for the petitioners vehemently contended that no tax or a fee in the nature of tax can be imposed without any authority of law in view of Article 265 of the Constitution of India. This contention is supported by several authorities.

13. In [M. Chandru Vs. The Member Secretary, Chennai Metropolitan Development Authority and Another](#), Their Lordships considered several earlier authorities with reference to the tax, fee and administrative charges. In paras 25 and 26, Their Lordships observed as follows:

25. In *Krishna Das v. Town Area Committee, Chirgaon* this Court observed: (SCC p.652, paras 22-24)

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.

In [Jindal Stainless Ltd. and Another Vs. State of Haryana and Others](#), observed thus:

26. In Jindal Stainless Ltd. (2) v. State of Harayana a Constitution Bench of this Court stated: (SCC p.267, paras 40-41)

40. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the State's action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital, etc. but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden."

41. On the other hand, a fee is based on the "principle of equivalence". This principle is the converse of the "principle of ability" to pay. In the case of a fee or compensatory tax, the "principle of equivalence" applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the government action and even if such benefit results from the government action, the same is not measurable. Under the principle of equivalence, as applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable.

These authorities were reiterated by Their Lordships in M. Chandru. Thus it is now settled position of law that when the fee is paid for performing a functions or rendering a particular service, it is not to be considered as a tax, but 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 co-relation to the value of the services, fee shall amount to a tax. Therefore, to find out whether a particular fee is charged as a fee for the service rendered or it is in the nature of tax, the Court has to see if there is any co-relation between the fee and the service rendered.

14. In [Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others](#), it was held that it is settled position that without the authority of law, no tax can be imposed and the fee, which is in the nature of tax, also cannot be levied and collected without the authority of law. Article 300A of the Constitution clearly lays down that no person shall be deprived of his property save by authority of law. If the fee in the nature of tax is levied without authority of law, that will violate not only Article 265, but also Article 300A as the fee /tax-payer is deprived of the property to that extent.

In the present case, it is not the claim of the respondent No. 1 that the Central Government has imposed any tax or that the respondent No. 1 has been empowered to impose a fee in the nature of tax. In fact, according to the respondent No. 1, it is not a tax but only a fee for the services rendered. However, at different places, they used different words like "service charges", "fee for services" and even "administrative charge".

15. The learned Counsel for the petitioners vehemently contended that the fee cannot be levied just to recover the administrative charges and he finds support for this contention from [A.P. Paper Mills Ltd. Vs. Government of A.P. and Another](#), . This judgment is also approved by the Supreme Court in M. Chandru. In [Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others](#), the Supreme Court considered the earlier authorities, including [Indian Mica Micanite Industries Vs. The State of Bihar and Others](#), and [Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd.](#), . In Indian Mica Mercantile Industries it was held that where the State is rendering no service to the consumer and is merely protecting its own rights and that when the State is in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licences, the costs or at any rate probable cost that may be said to have been incurred for rendering this service and the amount realised as fees, it has failed to do so, the levy appears to be tax and not fee. In Chhata Sugar Co. Ltd., it was held that administrative charges under the U.P. Act is a tax and not a fee. After referring to all the authorities, the Supreme Court in Gupta Modern Breweries, observed in para 28 as follows:

28. It is, thus, clear from the aforesaid decisions that imposition of administrative services (sic charges) is a tax and not a fee. Such imposition without backing of statutes is unreasonable and unfair.

16. We may also consider some of the observations in [Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others](#), which noted that the difference between "a fee" and "a tax" is on account of the source of power. Though the expression "police power" is not mentioned in the Constitution, it could be relied upon as a concept to bring out the difference between "a fee" and "a tax" The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the "taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on the class to defray the costs of providing benefit to such a class is "a fee".

The Court then quoted with approval several paragraphs from [Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd.](#), some of which are being reproduced:

17. These well-settled principles have been reiterated by this Court in the case of CCE v. Chhata Sugar Co. Ltd. in which it has been held (SCC pp. 483-86, paras 18-3)

18. The Constitution of India postulates either a tax or a fee. However, the use of the expression "tax" or "fee" in a statute is not decisive; as on a proper construction thereof and having regard to its scope and purport, "fee" may also be held to be a tax.

19. The definition of "tax" in terms of Clause (28) of Article 366 of the Constitution is wide in nature. The said definition may be for the purpose of the Constitution; but it must be borne in mind that the legislative competence conferred upon the State Legislature or Parliament to impose "tax" or "fee" having been enumerated in different entries in the three lists contained in the Seventh Schedule of the Constitution of India, the same meaning of the expression "tax" unless the context otherwise requires, should be assigned.

20. Having regard to the fact that different legislative entries have been made providing for imposition of "tax" and "fee" separately, indisputably, the said expressions do not carry the same meaning. Thus a distinction between a tax and fee exists and the same while interpreting a statute has to be borne in mind.

21. A distinction must furthermore be borne in mind as regards the sovereign power of the State as understood in India and the doctrine of police power as prevailing in the United States of America. In some jurisdictions a distinction may exist between a police power and a power to tax but as in the Constitution of India, the word "tax" is defined, it has to be interpreted accordingly.

22. The expression "regulatory fee" is not defined. Fee, therefore, may be held to be a tax if a service is rendered. While imposing a regulatory fee, although the element of quid pro quo, as understood in common parlance, may not exist but it is trite that regulatory fee may be in effect and substance a tax. (See *Corporation of Calcutta v. Liberty Cinema*).

17. In view of this legal position, if the amount of Rs. 250/- charged by the respondent No. 1 for registration of every assignment of a policy is in the nature of administrative charges for general services being rendered by the LIC to its policy holders or assignees, it would amount to tax. Similarly, if it is a fee, which has no co-relation with the service being rendered to the particular customer, it will also amount to a tax and cannot be charged without the authority of law. However, if it is a fee in the nature of charges for the services rendered to the particular customer and is not for recovery of general administrative expenses of the LIC, it may be treated as a fee or service charges. Therefore, the question arises as to whether the amount being charged by the respondent No. 1 is a fee in the nature of service charges or it is in the nature of recovery of administrative expenses akin to tax.

18. Before dealing with the main question the objection of the respondent No. 1 to tenability of the petition may be dealt with. It is contended on behalf of the respondent No. 1 that alternative and efficacious remedy is available to the petitioners before the authority under the Insurance Regulatory and Development Authority Act, 1999. Besides

this, no bill was served on the petitioners in respect of the said amount and therefore, no cause of action has arisen. It may be noted that earlier the respondent No. 1 had issued circulars refusing registration of the assignments in favour of the Financial Institutions like the petitioners, but those circulars have been set aside in the earlier litigation in Insure Policy Plus Services Ltd. Though that judgment has been assailed before the Supreme Court by filing Special Leave Petition, it is still pending and no stay has been granted except that certain restrictions were imposed on the petitioners pending the Special Leave Petition. It is already noted that in view of the provisions of Section 38 and 39(4) of the Insurance Act, the respondent No. 1 is bound to register the assignments of the policy if all other conditions are specified. By the impugned Circular, a fee or charge of Rs. 250/- per assignment in favour of the banks and financial institutions has been imposed. That requires the petitioners to pay the said charges for registration of assignment of any policy. The petitioners seek to challenge the constitutional legal and validity of the impugned Circular on various grounds under Articles 14, 19(1)(g), 365 and 300A. The constitutional and legal validity of the circular could not be challenged before the authority under the Insurance Regulatory and Development Authority Act. In view of this, it cannot be said that alternative efficacious remedy is available to the petitioners. Assuming such a remedy is available, still the extraordinary jurisdiction of the High Court under Article 226 of the Constitution to issue any such writ or order cannot be taken away. When alternative efficacious alternative remedy is available, this Court may refrain from exercising extraordinary jurisdiction but to refrain from exercising jurisdiction under Article 226 is different from saying that it has no jurisdiction. Therefore, we are not satisfied with the contention that the Writ Petition is not tenable.

19. The respondent No. 1 has tried to justify the imposition of the charge of Rs. 250/- by giving some data. It is contended that there are about 19 crore policy holders with the respondent No. 1 and the respondent No. 1 is required to provide services to such policy holders frequently. With a network of 2048 branches all over India, large number of requests to record and register assignments are made. For the whole of India, the data reveals that in the Western Zone comprising the States of Maharashtra & Gujarat, only the respondent No. 1 was required to record the assignments in respect of about 77,000 policies in one financial year i.e. 2005-06 alone. The total charges distributed amongst the 2048 branches worked out to Rs. 9399.41 per branch which is a moderate figure. It is also pointed out that the cumbersome administrative processes involves, inter alia, scrutiny, verification, confirmation of the factum of the assignment by the existing policy holders in favour of the purported assignees, carrying out verification of the signatures of the existing policy holders after discarding fraudulent and illegible signatures or those which do not tally with the records of the 1st Respondent as maintained in its systems, then sending requisite notices to the existing policy holders for confirmation of said assignment in terms of the said assignment document, after receipt thereof from its registered policy holder confirming their assignment in favour of the assignee. The 1st Respondent is then required to once again enter the names of the new assignees in its books/registers, after effecting deletion of the previous policy holders, and entering their

respective names, addresses and signatures and value thereof in computer systems which is accessible all over India, and such information is protected and guarded by the 1st Respondent to prevent any hacking into the policy docket available electronically, for which purposes the 1st Respondent has invested massive sums of money towards protection and maintaining effective fire walls, and constantly monitoring the same in the interest of about 19 crore policy holders all over India. It is further contended that in view of the cumbersome administrative processes and tremendous manpower involved and the consequent high costs of administration in servicing the voluminous assignments of policies, especially in respect of persons like the Petitioners, who are doing lucrative business in life insurance policies issued by the 1st Respondent, and therefore in public interest the 1st Respondent is justified in levying a nominal service fee of Rs. 250/- per assignment.

20. It is true that Section 38 of the Insurance Act makes provision for imposition of fee of rupee one for acknowledgment of notice of assignment. It is an admitted fact that under Para 23 of the Manual No. 6 issued on 31.12.1990, it was provided that assignments and re-assignments are registered and notices thereof acknowledged free of charge and therefore, no charge is required to be paid to the Corporation in this behalf. However, according to the respondent No. 1, for the reasons given above, vital changes have taken place since the year 1990 when the said Manual was issued. Besides this, during the last few years, tremendous pressure of work has increased due to the large number of requests for assignment and it is mainly because some financial institutions and banks are in the trade of the insurance policies. Naturally, such financial institutions purchase the policies at the discounted price from the original policy holders and then get the policies assigned or transferred to them to gain huge profits in future. It cannot be forgotten that during the last few years, due to the globalisation and liberal economic policies, fast financial development has taken place in the country resulting in the higher salaries of the staff, high cost of stationery, computers and network systems. The cost of correspondence by post or the courier has also substantially increased. As the workload has increased due to large number of requests for registration of assignments, the respondent No. 1 will be compelled to have extra work force and staff to meet the requirements.

21. Section 6 of the LIC Act provides for functions of the Life Insurance Corporation of India. Sub-section (3) provides that in the discharge of any of its functions, the Corporation shall act, so far as may be, on business principles. Therefore, it is submitted on behalf of the respondents that the respondents have powers to act and in fact have acted on the business principles in the matter of levying such charges as per the impugned Circular. The learned Counsel for the Respondent contended that when the functions of the Corporation are to be performed on business principles, naturally, the Corporation is entitled to make reasonable profit for the benefit of the policy holders and the Corporation cannot be run on the no profit no loss basis nor it can be expected to run on losses. In support of this contention, the learned Counsel for the respondents placed

reliance upon [Ashoka Smokeless Coal Ind. P. Ltd. and Others Vs. Union of India \(UOI\) and Others](#), wherein the Supreme Court observed as follows:

92. "Business" is a word of wide import. It, in the context of application of a statute governing a monopoly concern and also with an essential commodity, would indisputably stand on a different footing from other business concern or a private person. The Central Government as also the coal companies having regard to the provisions of the Nationalization Acts must be visualised not as profit earning concerns but as an extended arm of a welfare State. They are expected to harmonise the business potential of a country to benefit the common man. The power of the Central Government to carry on trade or business activities emanates from the constitutional provisions contained in Article 298 of the Constitution of India. The coal companies, therefore, were under a constitutional obligation to fix a reasonable price. They must differentiate themselves from the private sectors which thrive only on a profit motive. As public sector undertakings, the coal companies, thus, would have a duty to fix the price of an essential commodity in such a manner so as to subserve the common good. Although the provisions of Section 3(2)(c) of the Essential Commodities Act are not attracted in relation to coal in view of the deregulation of price by the Central Government under the 2000 Order, the reasonable attributes for the purpose of fixing the price of coal should be borne in mind.

93. While fixing such price, ordinarily the State acts in the same manner as a public utility would conduct itself in this regard. This Court in *ONGC v. Assn. of Natural Gas Consuming Industries of Gujarat* opined that the price fixed should be the minimum possible as the customer or consumer must have the commodity for his survival and cannot afford more than the minimum. Therein this Court further noticed: (SC C p. 430, para 34)

34. In another article on "The Public Sector in India", quoted in *Issues in Public Enterprise* by Shri K.R. Gupta, Dr. Rao is quoted as saying (at p.84):

...the pricing policy should be such as to promote the growth of national income and the rate of this growth... public enterprises must make profits and the larger the share of public enterprises in all enterprises, the greater is their need for making profits. Profits constitute the surplus available for savings and investment on the one hand and contribution to national social welfare programme on the other; and if public enterprises do not make profits the national surplus available for stepping up the rate of investment and the increase of social welfare will suffer a corresponding reduction;.... Hence the need for giving up the irrational belief that public enterprise should, by definition, be run on a non-profit basis

22. Again in [Commissioner of Income Tax, Andhra Pradesh, Hyderabad Vs. Andhra Pradesh State Road Transport Corporation, Hyderabad](#), the Supreme Court observed as follows:

10. The submission founded upon Section 22 is based upon a misunderstanding of what that section provides. A Road Transport Corporation cannot be expected or be required to run at a loss. It is not established for the purpose of subsidizing the public in matters of transportation of passengers and goods. The objects for establishing a Road Transport Corporation are those set out in Section 3 of the RTC Act which we have already reproduced above. Section 18 shows that it is the duty of a Road Transport Corporation to provide, secure and promote the provision of an efficient, adequate, economical and properly co-ordinated system of road transport services in the State. No activity can be carried on efficiently, properly, adequately or economically unless it is carried on business principles. If an activity is carried on business principles, it would usually result in profit, but as pointed out by this Court in the Surat Art Silk Cloth Manufacturers' Association case it is not possible so to carry on a charitable activity that the expenditure balances the income and there is no resultant profit, for to achieve this would not only be difficult of practical realization but would reflect unsound principles of management. Section 22, therefore, does when it states that it shall be the general principle of a Road Transport Corporation that in carrying on its undertakings it shall act on business principles is to emphasize the objects set out in Section 3 for which a Road Transport Corporation is established and to prescribe the manner in which the general duty of the Corporation set out in Section 18 is to be performed. It is now firmly established by decisions of this Court in the Surat Art Silk Cloth Manufacturers' Association case and the Bar Council of the activity " whether it is to carry out a charitable purpose or to earn profit ? If the predominant object is to carry out a charitable purpose and not to earn profit, the purpose would not lose its charitable character merely because some profit arises from the activity.

23. In [Kerala State Electricity Board Vs. S.N. Govinda Prabhu and Bros. and Others](#), Supreme Court observed thus:

5. Now, a State Electricity Board created under the provisions of the Electricity Supply Act is an instrumentality of the State subject to the same constitutional and public law limitations as are applicable to the government including the principle of law which inhibits arbitrary action by the government. (See Rohtas Industries v. Bihar State Electricity Board). It is a public utility monopoly undertaking which may not be driven by pure profit motive " not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit; even as a private corporate body may be inspired to earn huge profits with a view to paying large dividends to its shareholders.

In view of this settled legal position, it is clear that the respondent LIC is expected to manage its affairs on sound economic and business principles which are as essential to public service undertakings as to the commercial ventures.

24. Section 28 of the LIC Act reads as follows:

28. Surplus from life insurance business how to be utilized " If as a result of any investigation undertaken by the Corporation u/s 26 any surplus emerges, ninety-five per cent of such surplus or such higher percentage thereof as the Central Government may approve shall be allocated to or reserved for the life insurance policy-holders of the Corporation and after meeting the liabilities of the Corporation, if any, which may arise u/s 9, the remainder shall be paid to the Central Government or, if that Government so directs, be utilized for such purposes and in such manner as that Government may determine.

From this, it has been submitted that it is clear that if after meeting all the expenses, there emerges surplus i.e. the profit, at least 95% on such surplus shall be allocated to or reserved for the policy holders and after meeting all the liabilities of the Corporation, if any, remainder shall be paid to the Central Government or it may be utilised for such other purposes as may be determined by the Central Government. The ordinary policy holders are not affected by the impugned circular because of love and affection or because of certain family reasons a policy is required to be assigned. The huge burden of registration of assignments have been noticed during the last few years because of the trade in the insurance policies by certain non-banking financial institutions as well as banks and naturally, such trade is taken up for their own profit. If no charges are taken for the services to be rendered to them, in respect of the registration of assignments, the burden will have to be borne by all the policy holders because that additional expenditure will reduce the surplus or profit to be shared by the policy holders and the Central Government. There is no justification that the ordinary policy holders should be required to bear the burden of such additional expenditure put on the respondent No. 1 because of the trade in insurance policies by certain financial institutions like the petitioners.

25. It is vehemently contended on behalf of the petitioners that no data has been placed before this Court about the actual expenditure incurred by the respondent No. 1 on the registration of such assignment and therefore, no correlation between the charges imposed by the impugned circular and the services rendered is not established. This contention is strongly refuted by the learned Counsel for respondent No. 1.

26. In [Sri Krishna Das Vs. Town Area Committee, Chirgaon](#), the Supreme Court observed as follows:

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 taxpayers. 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 taxpayer 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.

27. In *Mumbai Agricultural Produce Market Committee v. Hindustan Lever Ltd.* this Court observed (SCC p.579, para 14)

14. The quantum for recovery, however, need not be based on mathematical exactitude as such cost is levied having regard to the liability of all the licensees or a section of them. It would, however, require some calculation.

28. From this , it is clear that while co-relation between the fee collected and the services to be rendered has to be established, the correlation need not be understood in the since of mathematical equivalence. Only a broad co-relation is necessary. This observation was quoted with approval by the Supreme Court in *M. Chandra (supra)*.

29. In the present case, the respondent No. 1 has given sufficient data to show that there has been tremendous increase in the load of work because of huge number of requests by the financial institutions for registration of assignment of policies. Naturally, this must add to the expenses on the stationery, computer systems, correspondence, etc. Naturally, it also requires additional staff to meet the requirements. It may not be possible for the insurance company to specifically point out how much expenditure has been made to record a particular assignment and it is not possible to have mathematical equivalence in the expenditure on individual case and the amount being charged by the insurance company for this purpose. Therefore, in our considered opinion, data and the material placed before us by the respondent is sufficient to show that what is being charged is only a service charge or a fee for the service being rendered to the persons making requests for registration of assignment and therefore it is neither a tax nor general administrative expenditure in running the offices of the respondent No. 1.

30. The learned Counsel for the petitioners contended that the respondent No. 1 is not clear whether they are claiming a charge or a fee or service fee or service charges or administrative charges because these different terms have been used in the affidavits and the written submissions on behalf of the respondent No. 1. It is true that different terms have been used at different places, however, merely because of the use of different words, the contention of the respondent No. 1 cannot be thrown away. To appreciate the stand of the respondent No. 1, it will be appropriate to look to the language of the impugned Circular itself. The opening para of the impugned Circular reads as follows:

At present, assignment of policies is being registered without any charges. However, the cost of the transaction of assignment / re-assignment of a policy is considerable. Therefore, it has now been decided to levy service charges of Rs. 250/- per transaction for effecting assignment under a policy provided:

From this, it is clear that the cost of transaction of assignment of policies has considerably increased and therefore the Corporation has decided to levy service charges. As noted by the Supreme Court in *Sri Krishna Das v. Town Area Committee* (supra) and *M. Chandru* (supra) a fee is paid for performing a function and fee is not ordinarily considered to be a tax. If the fee is levied merely to compensate an authority for the services rendered, it cannot be called a tax. Taking into consideration the legal position and the explanation given by the respondent No. 1 for levying service charges, we have no doubt that by the impugned Circular, the respondent No. 1 has levied service charge or a fee for the services to be rendered to the person requesting for registration of assignment and therefore the said charges cannot be treated as tax.

31. We may first deal with the contention as raised on behalf of the respondents that considering Section 6 of the LIC Act, they have to run the Corporation on business principles and the power to charge the amount flows from that power. We have noted the Judgments and referred to them. Section 6, at the highest, if read in its proper perspective, would confer on the Corporation a power to price their products. It is not a power to charge a tax or a fee or any other charge. The argument therefore advanced on behalf of the respondents that the validity of the service charge can be supported by Section 6(3) has to be rejected.

32. Having arrived at a conclusion that what is being charged is a service charge or a fee, the next question that we have to answer is whether the recovery of service charge/fee under the circular is supported by any provision of law, either primary or subordinate. For that purpose, let us consider the law on the subject. Section 48(2)(k) of the LIC Act confers power on the Central Government to make rules for charging fees payable under the Act and the manner in which they are to be collected. Similarly, Section 49 of the LIC Act gives power to make regulations. Under the Insurance Act, 1938, there is power conferred on the Central Government to make rules and Section 114A gives power to make regulations.

With that background, we may now address the issue which is; can the respondents by the impugned circular, levy a service charge/fee ?

33. In *Sri Krishna Das v. Town Area Committee*, Cirgaon (supra), the Supreme Court posed the question as under:

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.

The Court then noted that the power of the State under the Constitution to levy a fee is not identical with its power to levy a tax. The power to levy fees is co-extensive with the power to legislate with respect to substantive matters and it may levy a fee with reference to the services that will be rendered by the State under such law. The State may delegate such a power to a local authority.

34. From Ahmedabad Urban Development Authority v. Sharadkumar J. Pasawalla and Ors. (supra), we may refer the following extracts from paras 7 & 8 which read 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 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.

8. ...It has been consistently held by this Court that whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to be implied and one should look fairly to the language used.

35. In Gupta Modern Breweries v. State of J & K (supra), the Supreme Court observed as under:

It is now well settled principle of law that the regulatory powers are generally to be widely construed. However, empowering the State Government to impose taxes, fees or duties and such demands must be authorised by the Statute and must contain sufficient guidelines.

36. It would, thus, be clear that there must be a specific provision conferred by the Act on the delegate to levy a fee. We do not find that the power to make rules under the LIC Act as also the Insurance Act, 1938 is conferred on the Respondent-Corporation. Under the LIC Act, the power to make rules is conferred on the Central Government while the power to make regulations is conferred on the Corporation with the previous approval of the Central Government. The power to charge fee is specifically conferred on the Central Government by making rules. Under the Insurance Act, the power to make rules is conferred on the Central Government and u/s 114A, the power to make regulations is conferred on the authority. "Authority" has been defined to mean "the Insurance Regulatory and Development Authority" established under Sub-section (1) of Section 3 of the Insurance Regulatory and Development authority Act. The impugned circular therefore issued by the Corporation is neither based on the provisions of the LIC Act nor the Insurance Act. As consistently observed by the Supreme Court, it is not possible to read the concept of incidental and ancillary power in the matter of exercise of fiscal power. There is no scope of implied authority for imposition of a fee. The fee must be authorised by the statute and the exercise of the power must be governed by sufficient guidelines. In the instant case, we do not find that the impugned circular has been issued pursuant to the express power conferred on the Corporation. We have already explained Section 6 of the Insurance Act. In that context, the impugned circular would clearly be

violative of both the provisions of the Insurance Act as also the LIC Act. The service charge/fee is ultra vires both the abovementioned Acts.

37. Once a service charge/fee is imposed without the authority of law, it affects the petitioners' right to carry on business under Article 19(1)(g) of the Constitution of India. It may be possible to contend that the respondents are entitled to defray expenses required to meet the cost of the service to be rendered, but such recovery could be made only if it was authorised by law. We are, therefore, of the opinion that the service charge/fee is not authorised by law. The demand is in contravention of the petitioners' fundamental right to carry on trade and business and therefore violative of Article 19(1)(g) of the Constitution of India. Consequently, as the demand is without authority of law, it infringes also Article 300A of the Constitution of India.

38. The impugned Circular is also challenged on the ground of violation of the principles of equality enshrined in Article 14 of the Constitution. It is contended that while the assignment in favour of family members, LIC of India & LIC Housing Finance Ltd. and in favour of the Government bodies, are exempt from payment of such service charges, the assignments in favour of other public sector entities, including banks, co-operatives, financial organizations are to be charged. It is contended that non-banking financial institutions like the petitioners, banks, public sector entities form a homogeneous group with the LIC of India, LIC Housing Finance Ltd. and the Government bodies and therefore, there can be no justification to make a difference between them. It is contended that the classification and differential apparent from the circular renders it unconstitutional. It is contended that it makes an artificial classification of what is essentially one homogeneous class, which is not permissible under the law. In support of this contention, the learned Counsel placed reliance upon [State of Rajasthan Vs. Mukanchand and Others](#), wherein the Constitution Bench of the Supreme Court discussed the principles of Article 14 of the Constitution and observed as follows:

... It is now well settled that in order to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question....

39. The learned Counsel for the respondents pointed out that not only there is an intelligible differentia, but there is also rational relationship to the object sought to be achieved by the impugned Circular. One of the main functions of the respondent No. 1 is to provide insurance service to its policy holders and as noted in Section 28 of the LIC Act. At least 95% of the surplus or profit has to be allocated or to be reserved for allocation to the policy holders and the balance may be allocated to the Central Government or may be utilized as per the directions of the Central Government. The exemption given to the family members is for assignment in favour of a family member for natural love and affection and therefore only the first assignment is to be registered free

of charges. However, if in respect of a policy, there are frequent assignments, may be within the family members, for second and subsequent assignments, the respondent No. 1 shall impose charges as per the circular. LIC Housing Finance Ltd. is only a subsidiary and sister concern of the LIC of India. If the policies taken from the LIC are assigned in favour of LIC itself or in favour of its subsidiary or sister concern i.e. LIC Housing Finance Ltd., practically the beneficiary of the same is the LIC itself and therefore it cannot claim service charges from itself. The Government bodies are also exempted because the Government itself is a stake holder in the surplus and profits of the respondent No. 1. Other public sector entities including banks, co-operatives or financial organizations or non-banking financial organizations like the petitioners have no stake in running business of the respondent No. 1 or in its profits or surplus. They are just like other customers. Therefore, they may form homogeneous group among themselves, but they do not form homogeneous group along with the LIC of India or LIC Housing Finance Ltd. or the other Government bodies or the family members of the policy holders. Therefore, there appears intelligible differentia and the object was to recover the service charges from the banks and other financial institutions, who put huge burden on the respondent No. 1 by making large number of requests for assignments. These are the profit-making commercial entities and they earn profit from the trade in the insurance policies. Therefore, the object of recovery of the service charges from them would be achieved if the service charges are imposed and collected from them. At the same time, for the valid reasons, the circular seeks to exempt the first assignment between the family members and the assignments in favour of LIC of India and LIC Housing Finance Ltd. or the Government bodies. It is material to note that while the assignment is charged, re-assignment is not charged with such service charges because by re-assignment, original policy holder will be entitled to all the benefits of the insurance policy and will also be entitled to share in the profits or surplus of the respondent No. 1. Therefore, in our considered opinion, not only there has been intelligible differentia, but also there is a rational relationship with the object to be achieved by the impugned circular.

40. In view of the aforesaid discussion, as we have found that the impugned circular charges a service charge/fee, without there being a power to charge a fee, the impugned circular on that count has to be held illegal and unconstitutional as it violates Article 19(1)(g) and 300A and to that extent, the Petition has to be allowed.

Rule made absolute as above. In the circumstances of the case, there shall be no order as to costs.

41. On behalf of the respondents, the learned Counsel prays for stay. Considering that we have held that the fee is ultra vires the Act, it is not possible to grant stay. Hence, the stay is rejected.