(2011) 04 DEL CK 0327

Delhi High Court

Case No: Writ Petition (C) 13476, 13863, 14178 and 14199 of 2009 and 439, 2382, 3267, 3423 and 4084 of 2010

Cellular Operators Association of India and Others		APPELLANT
	Vs	
Municipal Corporation of Delhi etc. etc.		RESPONDENT

Date of Decision: April 29, 2011

Acts Referred:

- Constitution of India, 1950 - Article 14, 19(1), 21, 239AA(3), 243P
- Delhi Municipal Corporation Act, 1957 - Section 149, 150, 2(3), 243, 330A
- New Delhi Municipal Council Act, 1994 - Section 387
- Telegraph Act, 1885 - Section 10, 15, 3(1AA), 4, 7

Citation: (2011) 179 DLT 381

Hon'ble Judges: Rajiv Sahai Endlaw, J

Bench: Single Bench

Advocate: C.S. Vaidyanathan, Sandeep Sethi, Maninder Singh, Manjul Bajpai and Ashish Yadav, in W.P. C 3267/2010, Sandeep Sethi, Sonali Jaitley, Devika Chadha, Varun Arora, in W.P. C 3423/2010, Sudhir K. Makkar, Meenakshi Singh, in W.P. C 439/2010, Shailesh Kapoor and Shahnawaz Ahmed Malik, in W.P. C 13476, 13863, 14178, 14199 of 2009 and W.P. C 2382 and 4084 of 2010, for the Appellant; Parag P. Tripathi, ASG, Amey Nargolkar, Maninder Acharya for MCD in W.P. (C) 13476 and 13863 of 2009 and W.P. (C) 3267, 3423 and 4084 of 2010, Sudhindra Tripathi, for Peeyoosh Kalra, for R 2 in W.P. (C) 3423/2010, Asit Tiwari, for R 1, Ashutosh Lohia, for NDMC in W.P. (C) 439/2010 and Laliet Kumar, for UOI in W.P. (C) 4084/2010, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

These writ petitions impugn Office Order dated 20th November, 2003, Circular dated 7th February, 2008 and the Office Order dated 8th April, 2010 of the Respondent MCD levying fee and stipulating other conditions for grant of

permission for installation of temporary structures / towers on rooftops for providing Cellular Basic Mobile Phone services. The Office Order dated 20th November, 2003 levied "One Time Permission Charges" of Rs. 1 lac per site/tower and in case the site/tower was shared with other Cellular Phone Operator(s), an additional amount of Rs. 50,000/- per sharing; it also prescribed certain other conditions to be satisfied. However, the Lt. Governor, Delhi, in the light of certain reports that the said towers are a health hazard, vide order dated 13th September, 2007 directed the Municipality to keep fresh applications for permission for installation of towers in abeyance. Vide subsequent letter dated 10th January, 2008 the Lt. Governor permitted consideration of fresh applications for installation of towers on compliance of certain other conditions. The same resulted in the Circular dated 7th February, 2008 supra, impugned in these writ petitions. Vide Office Order dated 8th April, 2010, and which was / is "in supersession of all earlier orders on the subject", MCD laid down fresh terms and conditions for grant of permission for installation of the said towers and also required the existing towers to satisfy/comply with the conditions so laid down. The fee was also enhanced to Rs. 5 lacs per tower for a period of five years and Rs. 1 lac per service provider in case of sharing.

2. The challenge by the Petitioners is primarily to the fee prescribed for grant of permission. However, certain other terms and conditions imposed are also challenged. It is the contention of the Petitioners that imposition of fee and any other condition for installation of towers is beyond the purview of the jurisdiction of MCD. The writ petitions were accompanied with applications for interim relief.

3. Notice of the writ petitions and the applications for interim relief was issued. Vide order dated 31st May, 2010, the operation of the Office Order dated 8th April, 2010 was stayed till the decision of the writ petitions subject to payment of Rs. 2 lacs out of Rs. 5 lacs per tower and Rs. 50,000/- per service provider in case of sharing, in the name of Registrar General of this Court by FDR and on furnishing undertaking that the balance amount along with interest at the Bank rate payable on fixed deposit shall be paid in the event of the writ petitions being dismissed. A direction was also issued for constitution of a Committee of Technical and Medical Experts to examine the question of health hazard, if any from the said towers.

4. Intra Court Appeals were preferred by the Petitioners as well as the MCD against the said interim order. Vide interim order dated 4th June, 2010 in the said Appeals, out of Rs. 2 lacs directed to be deposited in this Court by way of FDR, Rs. 1 lac was directed to be paid directly to the MCD and Rs. 1 lac by way of FDR in favour of the MCD. The constitution of the Committee was also stayed. The Petitioners preferred Special Leave Petitions to the Supreme Court. Though the said SLPs were dismissed but it was directed that till the disposal of the appeals, MCD shall not encash the FDRs directed in its favour. The Division Bench of this Court vide judgment dated 8th July, 2010 disposed of the appeals in terms of the order dated 4th June, 2010 as

modified by the Supreme Court and with a further direction for expeditious decision of the writ petitions. The counsels for the parties have been heard.

5. First, the pleadings of the Petitioners (all counsels argued with reference to pleadings in W.P.(C) No. 3267/2010) may be noticed as under:

(i) That earlier the Central Government through the Department of Telecommunications worked telegraph throughout India.

(ii) National Telecom Policy, 1994 was framed with the objective of improving telecom services in the country including by association of the private sector.

(iii) National Telecom Policy, 1999 also had as its objective, the availability of affordable and effective communications for the citizens including the provision of telecommunication services to all areas which till then had remained uncovered, including the rural areas.

(iv) As part of the aforesaid Policies, licences were issued by the Central Government to the private players to provide telecom services including Cellular Mobile services in India and the private sector has invested more than Rs. 1,50,000 crores in setting up the infrastructure and has surpassed the targets set for coverage and teledensity and competitive tariffs, with the tariffs now prevailing being lowest in the world.

(v) Such telecom services provided by the private players have contributed tremendously to the socio economic development of India and has brought the rural areas of the country, till now un-connected to the rest of the country, into the mainstream.

(vi) The Cellular towers carry the Cellular signals and hand over the calls from one Cell to another and are essential for providing the Cellular Mobile services and for the Operators/licencees to achieve the coverage parameters prescribed in the licences and to maintain the quality of service also provided for in the telegraph licences given to the Operators. It is thus the contention that the said towers are the backbone of Cellular Mobile telephony and are critical for providing seamless Cellular services. It is further pleaded that therefore it is essential that Policies for installation of towers should not act as impediment to the growth of Cellular Mobile services but facilitate the growth of national telecom infrastructure.

(vii) Erection/installation of a tower at any location requires clearance/approval from Standing Advisory Committee on Frequency Allocation (SACFA) which also clears the height of the tower from the point of civil aviation; numerous governmental agencies are part of SACFA; recognizing the importance of towers, SACFA also has simplified the procedure for granting clearances/approvals/permissions.

(viii) Telegraph, telephone, wireless and other forms of communications are Central subject covered by Entry 31 of List-I in the Seventh Schedule to the Constitution of India and under Entry 96 of the said List, "fees in respect of any of the matters" in

List-I is the domain of the Central Government and not of the State Government. It is thus pleaded that telecommunication is a Central subject and Central Government is exclusively empowered to legislate thereon.

(ix) The approvals/permissions for telegraph, under the Indian Telegraph Act, 1885 (Telegraph Act) are to be granted by the Central Government only.

(x) The Central Government has issued Notifications dated 24th May, 1999 and 4th February, 2002 empowering the private service providers as the Telegraph Authority to carry out certain acts under Part III of the Telegraph Act. It is pleaded that under the Telegraph Act, the question for obtaining permission from Local Authority, as the Respondent MCD is, arises only when any telegraph equipment as a tower, is required to be installed/erected on a property of the Local Authority and not when the same is to be installed/erected on property of any other person even if within the jurisdiction of the said Local Authority. It is thus pleaded that MCD has no right or locus to require any permission to be obtained from it for installation/erection of the towers or demand any fee therefor. The actions of MCD impugned in these writ petitions are pleaded to be ultra vires the Delhi Municipal Corporation Act, 1957 (DMC Act), unfair, unjust, unreasonable, ad hoc, arbitrary, without power and jurisdiction, unconstitutional and violative of the Petitioners'' rights under Articles 14, 19(1)(g) and 21 of the Constitution of India.

6. MCD was vide order dated 19th May, 2010 directed to file an affidavit explaining the rationale for enhancing the fee from earlier existing ''One Time'' (for 20 years) of Rs. 1 lac to Rs. 5 lacs for a period of 5 years. In response thereto an affidavit dated 22nd May, 2010 was filed stating that the amount charged was a regulatory fee and for which existence of quid pro quo was not necessary. It was further stated that MCD under the DMC Act was required to promote public safety, health, convenience, general welfare, secure removal of dangerous buildings and places, take action against the unauthorized constructions, remove nuisance etc. and as such it was not necessary for it to explain as to for which service to the licencees/operators, the said fee was being charged; that in the performance of its functions, it had to ensure that the building on which the tower is installed is structurally stable, the citizens are not exposed to harmful radiations emanating from the said towers; that the requisite distance is maintained; that the requisite precautions to protect the citizens from the harmful effects of radiation are taken. It was further pleaded that all these issues are intricately related to the issues of public health, public safety etc. and which MCD is bound to maintain. It is pleaded that the enhancement of fee was with the approval of the Standing Committee of the MCD and the expenses of the MCD were mounting and thus it was justified in enhancing the fee.

7. The Petitioners have filed a rejoinder reiterating that MCD had no jurisdiction in the matter and also controverting that for regulatory fee quid pro quo was not necessary. 8. Mr. C.S. Vaidyanathan, senior counsel for the Petitioners has argued:

(i) Cellular telephony is in the public interest inasmuch as it avoids digging of roads.

(ii) There are approximately 11000 towers in Delhi of which 5500 are in MCD area and the financial impact on the licencees/operators is thus of Rs. 250 crores.

(iii) That though MCD did not have the locus or jurisdiction to charge the ''One Time'' fee of Rs. 1 lac also but the licencees/operators paid the same to avoid litigation.

(iv) The affidavit of MCD, inspite of specific direction in the order dated 19th May, 2010 has failed to justify the said fee.

(v) MCD has also been unable to cite any provision of law under which it is empowered/entitled to levy the said fee.

(vi) Under Article 243P(e) of the Constitution of India, MCD is an institution of self government and under Article 243X, MCD is entitled to levy only such fee which it is authorized by the State Legislature to collect.

(vii) That under Entry 5 read with Entry 66 of List-II also, the power in any Municipality to levy any fee has to be conferred by the Legislature and the Municipality thus is not empowered to levy such fee.

(viii) The pith and substance relates to telecom and thus Entry 31 of List-I would prevail and the subject matter would not be referable to Entry 5 of List-II.

(ix) The licences granted to the Petitioners are under the proviso to Section 4 of the Telegraph Act; that u/s 3(1AA), the towers are "telegraph"; that u/s 7, the power to make rules with respect to the "telegraph" is in the Central Government only including for residuary matters u/s 7(2)(k).

(x) That the Operators/licencees as well as the tower owning companies (who have also filed some of these writ petitions) have been conferred powers of the Telegraph Authority.

(xi) u/s 10 of the Telegraph Act, the Operators/licencees as well as the tower owning companies have been empowered to erect and install telegraph line which includes towers upon any immovable property and require the sanction of the Local Authority i.e. the Municipality only if desire to erect/install any tower on any property of the said Local Authority.

(xii) It is thus contended that the entire field in relation to the said towers is occupied by the Telegraph Act and even if MCD under any of the provisions of the DMC Act were to be held entitled to impose any condition, the field being occupied, MCD would not be so entitled.

(xiii) Attention is invited to Section 15 of the Telegraph Act providing for resolution of disputes between the Telegraph Authority and the Local Authority by an Officer of the Central Government.

(xiv) It is contended that the Telegraph Act having made separate provisions for installation of towers on properties of Local Authorities and properties of other private persons within the jurisdiction of Local Authority, MCD has no power to make any provision with respect to the installation of towers on the properties of private persons.

(xv) Per contra, the DMC Act has no provision regarding such towers. Section 113 provides for the taxes which MCD is entitled to levy and has no provision for levying of tax on such towers unless refuge is taken u/s 113(1)(f) by treating the towers as "building".

(xvi) But in which case also the tax has to be as provided in Section 149 and not as levied under the Circulars impugned in these writ petitions.

(xvii) Attention is invited to Section 330A of the DMC Act making the exercise of powers by the Commissioner, MCD under Chapter XVI "Building Regulations" of the DMC Act under the general superintendence, direction and control of the Central Government. It is contended that the power to make Bye-Laws under the DMC Act has also been vested in the Central Government u/s 349A of the DMC Act.

(xviii) Though Section 430 of the DMC Act enables the MCD to levy a fee for granting any permission but only if there is a provision therefor under the Act or the Bye-Laws. It is contended that there is no provision under any of the Bye-Laws of the MCD for levying the impugned fee.

(xix) That though u/s 481 of the DMC Act, MCD is entitled to make Bye-Laws but u/s 349A (supra), the said power vis-�-vis Building Bye-Laws has been vested in the Central Government.

(xx) Attention is invited to the impugned Orders/Circulars to show that they do not refer to any statute or authority under which the same have been issued.

(xxi) On enquiry, as to whether under the licences issued, any amount as being levied by the MCD has been levied, the copies of the licences were handed over. A perusal thereof does not show that the same provide for any such levy or with respect to the clearance, if any required of the Local Authority/Municipality.

(xxii) On enquiry, it was further informed that Municipalities are not a part of SACFA.

(xxiii) On further enquiry as to in whom, the air waves vest, it was argued that the same vest in Central Government and not in any Local Authority.

(xxiv) Reliance is placed on:

(a) Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, on difference between tax, fee and a compensatory fee and the difference between taxing and regulatory power.

(b) M. Chandru Vs. The Member Secretary, Chennai Metropolitan Development Authority and Another, laying down that in the case of fee, the principle of quid pro quo applies.

(c) Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, laying down that taxes, excise duties and fee must be authorized by Parliament and a tax can only be imposed by way of legislation and cannot be imposed by way of Bye-Laws and Rules.

(d Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, laying down that the power of imposition of tax or fee by delegatee must be very specific and there is no scope of implied authority for imposition of such tax or fee.

(e) The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd., also laying down that there should be an element of quid pro quo in the imposition of a fee.

(f) Judgment dated 22nd April, 2010 of a Division Bench of the Gujarat High Court in Special Civil Application No. 799/2009 titled Indus Towers Ltd. v. State of Gujarat on the same facts as before this Court and holding that the Municipality had no power to levy any fee with respect to the towers.

9. Mr. Sandeep Sethi, Sr. Advocate also appearing for the Petitioners has supplemented the arguments by contending:

(i) That u/s 99 of the DMC Act, Municipal Fund is to comprise only of monies received under the provisions of the DMC Act and thus MCD is not entitled to charge what the Act does not permit it to charge.

(ii) Section 150 of the DMC Act also empowers the House of the MCD to pass a Resolution only with respect to the taxes provided under the Act and which would relate to the taxes provided u/s 113 and not any other taxes.

(iii) Section 430 of the DMC Act is not a charging section and can be attracted only when the Act or any Bye-Laws provide for grant of any licence or permission; if there is no provision in the Act or in any Bye-Laws for seeking any such permission, the claim cannot be made u/s 430.

(iv) With reference to the Property Tax Bye-Laws, it is shown that the towers have been made a unit for assessment under the ''Unit Area Method''. It is contended that without there being any Bye-Laws requiring permission for installation/erection of the towers, no such permission or fee therefor can be insisted upon.

(v) Attention is invited to:

(a) Ramesh Chandra v. MCD AIR 2009 Del 58 holding that in the absence of the power to frame Bye-Laws extending to making Bye-Laws to recover fee for parking

or levy any tax in that regard, MCD to augment its finances could not have levied such parking fee and quashing the same (I may however add that the Intra Court Appeal against the said judgment is pending before the Division Bench of this Court).

(b) Jaipur Golden Transport Company (P) Ltd. v. MCD 124 (2005) DLT 393 quashing the levy of fee on storage of goods in transit for want of quid pro quo.

(c) Mohd. Yasin v. MCD ILR (1970) I Del 612 quashing the fee for slaughtering on the ground of the same not answering the description of a fee.

(d) Puran Chand v. The Commissioner MCD ILR (1980) II Del 1321 quashing the storage fee levy for want of quid pro quo.

(vi) That there is no provision in the DMC Act or in any of the Bye-Laws requiring permission for installation/erection of the towers.

(vii) That the other conditions imposed are also arbitrary; MCD cannot insist that in the matter of installation of towers priority should be given to certain buildings over others inasmuch as the location of the towers is dependent upon the SACFA clearance; that MCD cannot appropriate to itself right to demolish a building on which the tower was installed without notice to the licencee/operator, it will obstruct the entire service; that the same will lead to a situation where in certain areas no towers can be installed, severely affecting the telephony services in those areas; that since the Central Government is satisfied regarding compliance of health standards and has made provision therefor in the licences issued, there is no need for satisfying the MCD with respect thereto.

(viii) That the increase in fee is of 2000% and without disclosing any basis therefor.

10. Mr. Shailesh Kapoor, counsel for some of the Petitioners has contended:

(i) That though MCD has failed to disclose that in exercise of which powers, the Orders/Circulars impugned in these writ petitions have been issued but from the notices issued of sealing of the towers, it appears that the towers are being treated as a "building". However since the towers are "telegraph" under the Telegraph Act, they cannot be "building". It is also contended that MCD has in the past never treated the towers of the Department of Telecommunication of the Government of India as "building".

(ii) Without prejudice, it is contended that for anything to be "building", it has to be habitable while a tower can never be habitable. A tower is plant & machinery and is not a building. If the tower is not a building, it cannot be within the jurisdiction of the Municipality.

(iii) The only ground taken in the affidavit of the MCD is qua health reasons; however List-III in the Seventh Schedule does not have any Entry providing for taxation for public health.

(iv) Article 243W of the Constitution read with the Twelfth Schedule does not show any mention of telegraph; therefore municipalities are not concerned with telegraph; telegraph is a special Entry and special overrides the general.

(v) Once telegraphs have been excluded from the said List, the telegraph cannot be included in land and building so as to extend the law making power of the State to telegraph.

(vi) That the health concerns due to emissions from the towers are incidental to the telegraph law and cannot be made the subject matter of the State list. Reference is made to:

(a) New Manek Chowk Spinning and Weaving Mills Co. Ltd. and Others Vs. Municipal Corporation of The City of Ahmedabad and Others, to contend that plant & machinery even though for use of the building, cannot be made subject matter of the State list.

(b) Three volumes of judgments relied upon are handed over but it is not deemed expedient to burden this judgment with details thereof.

11. Mr. Sudhir K. Makkar, counsel for the Petitioner in W.P.(C) No. 439/2010 while adopting the arguments of the other counsels has added that the terms and conditions of the licences issued by the Central Government deal with the subject of radiation hazard if any from the towers and has also handed over a report of the Committee constituted on health hazards to contend that there is no such health hazard.

12. The Additional Solicitor General (ASG) appearing for MCD has at the outset cited M. Nagaraj and Others Vs. Union of India (UOI) and Others, laying down that Constitutional adjudication is like no other decision making; there is a moral dimension to every major Constitutional case; the language of the text is not necessarily a controlling factor; that our Constitution works because of generalities and because of the good sense of the Judges when interpreting it; it is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance. He has contended that the question as to the jurisdiction and locus of the MCD in the matter of installation of the cellular towers is to be decided in the light of the said principles.

13. The learned ASG has further contended:

(i) That the doctrine of occupied field has no applicability qua competing Entries in List-I and List-II of the Seventh Schedule-the said doctrine is relevant only for List-III i.e. the Concurrent List.

(ii) Even if it is to apply, it is first to be seen whether the matter falls in any of the Entries in List-II; that in a Federal Structure, List-II has the greatest play and the question of looking into List-I arises only if there is no Entry in List-II. It is for this

reason only that several Entries in List-I have been made subject to List-II. Thus List-II is to be seen first.

(iii) The judgment of the Apex Court in Jindal Stainless Ltd. (supra) is not to be read as a statute-that case was concerned with compensatory tax and it was in that context that the observations relied upon by the Petitioners came to be made.

(iv) Reliance is also placed on:

(a) State of Rajasthan and Others Vs. Vatan Medical and General Store and Others etc. etc., laying down that if an enactment is within the four corners of the Entries in List-II, no Central law, whether made with reference to an Entry in List-I or with reference to an Entry in List-III can affect the validity of such State enactment and that the argument of occupied field is totally out of place in such a context.

(b) South Indian Film Chamber of Commerce, Madras and Others Vs. Entertaining Enterprises, Madras and Others, laying down that once the subject of regulation is found within the pith and substance of the concerned legislature''s competence, it cannot be said that requiring a person to obtain a licence for doing the business concerned, is not within the competence of the legislature. It is contended that it is List-I which has the residuary powers.

(c) I.T.C. Limited Vs. The Agricultural Produce Market Committee and Others, also in support of the contention of List-II having precedence.

(d) State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., also in support of the same proposition.

(v) Attention is invited to Entries 5 & 6 in List-II regarding local self government and providing fee therefor. It is contended that local self government includes Building Bye-Laws etc.

(vi) The State of Rajasthan Vs. G. Chawla and Dr. Pohumal, where the Ajmer (Sound Amplifiers Control) Act, 1952 was impugned on the ground of being in excess of the powers conferred on the State Legislature. The said Act inter alia prohibited use of any sound amplifier, save with the permission of the prescribed authority. The challenge to the Act was on the ground that the amplifier was a telegraph and no legislation with respect thereto could be made by the State Government. The Apex Court held that though the amplifier was an instrument of broadcasting and communication and thus fell within Entry 31 of the Union List but the control and use of such apparatus though legitimately owned and possessed, to the detriment of tranquility, health and comfort of others was distinct from its manufacture or licencing. It was held that the power to legislate in relation to public health included the power to regulate the use of amplifiers to the detriment of tranquility of others. The legislation was therefore upheld.

(vii) That the fee imposed under the Orders/Circulars impugned in these writ petitions is a regulatory fee and is not required to satisfy the criterion of quid pro quo. Reference is further made to:

(a) State of West Bengal v. Kesoram Industries Ltd. AIR 2005 SC 1646 on the proposition that levy/impost which is regulatory, is a sovereign or Police function.

(b) B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc., observing that there has been a sea change in judicial thinking as to the difference between a tax and a fee and that even if the State is found to have ultimately benefited indirectly from a levy, the same is of no consequence and that there is no generic difference between a tax and fee and both are compulsory exactions of money by public authorities.

(viii) With respect to the judgment in Jindal Stainless Ltd. though it is informed that the matter has been referred to a larger Bench but it is reiterated that observations therein are only with respect to compensatory tax and not with reference to regulatory fee. It is also contended that Jindal Stainless Ltd. is not relevant to the present controversy.

(ix) Attention is also invited to State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another, reiterating the well established legal statutory and operational distinction demarcating and dealing separately with several distinct activities in relation to liquor, namely, manufacture, possession, sale, transport, import, export, consumption etc. and holding that statutory provisions qua each of the said functions must be interpreted and read broadly and not narrowly.

(x) It is contended that u/s 2(3) of the DMC Act "building" includes a metal structure and thus has nothing to do with habitability and the DMC Act has to be read robustly.

(xi) It is further argued that at the time of enactment in the year 1957 of the DMC Act, telecom was at a nascent stage, has to be interpreted in the present context.

(xii) It is argued that just like higher levies are imposed on liquor to cut down its consumption, the fee on the towers have also been enhanced to encourage reduction in the number of towers by use of more sophisticated instruments by the Operators/licencees.

(xiii) During the course of hearing, approval of the House of the MCD to the order of the Commissioner enhancing the licence fee was handed over.

(xiv) It is argued that the Petitioners having earlier paid the fee of Rs. 1 lac without any demur are estopped from now challenging the power of MCD.

(xv) It is argued that it cannot be denied that the towers do create an electromagnetic field which can be harmful.

14. The counsel for the Union of India has contended that the MCD needs to justify the fee demanded with respect to the towers. The counsel for the Union of India has also handed over the Circular dated 8th April, 2010 of the Department of Telecommunication prescribing the radiation norms to be adhered to with respect to the towers and the penalty for exceeding the same.

15. Mr. Sandeep Sethi, senior counsel for the Petitioners in rejoinder has contended that if MCD is treating the towers as building then it cannot charge fee therefor at rates more than that being charged for sanctioning construction of buildings and which is informed to be at the rate of Rs. 1 per sq. ft. of the covered area. It is contended that on the said basis, the fee would be much less than Rs. 5 lacs demanded and would be a ''One Time'' fee only and not recurring fee as imposed in case of towers. It is contended that the Office Orders and Circulars also do not treat the towers as a building and the said argument has been raised by the learned ASG as an afterthought. It is contended that there are no residuary functions of the MCD other than those prescribed in Sections 41 to 43 under Chapter III of the DMC Act and there is no allegation of the installation of towers being per se offensive as is the case with liquor and cigarettes. It is contended that telecommunications has in Delhi Science Forum and others Vs. Union of India and another, been recognized as of public importance. Attention is also invited to the opinion obtained by the MCD itself from World Health Organization (WHO) regarding the health hazard if any from the use of mobiles/telephones. It is contended that though MCD has sought to justify the levy as regulatory but has not disclosed as to what regulatory functions it is going to perform as was the case in BSE Brokers'' Forum (supra) case. It is further argued that in the judgments cited by the learned ASG either there was a specific power to levy fee concerned or the manner in which the fee was used was shown; on the contrary, MCD inspite of having collected fee for towers for the last over 10 years has been unable to show as to how the same has been spent. It is contended that the case is otherwise fully covered by the judgments in Ramesh Chandra, Puran Chand and Mohd. Yasin (supra).

16. Mr. C.S. Vaidyanathan, Sr. Advocate in rejoinder has contended that:

(i) Section 243 of the DMC Act requires the legislature to authorize the Municipality to levy tax and has not left it to the discretion of the Municipality.

(ii) Section 149 of the DMC Act (as it stood before 17th December, 2004) r/w Sixth Schedule thereto nowhere mentions a Cellular tower, for MCD to be authorized to demand and collect any fee or tax for sanctioning the installation/erection of a Cellular tower; same is the position after amendment.

(iii) There is thus no question of MCD being authorized to make a demand with respect to towers as with respect to a building.

(iv) Wherever the legislature deemed it appropriate to empower MCD to grant licence or give permission, provision therefor has been made. Attention in this

regard is invited to Sections 407, 416, 420, 425 & 422 of the DMC Act. However no provision whatsoever has been made for the towers in question.

(v) The Standing Committee of the MCD is no where in picture in the matter of Building Bye-Laws, owing to Section 349A of the DMC Act.

(vi) The Resolution of the House of the MCD approving the order of the Commissioner also does not treat the levy as a regulatory fee; there is no application of mind; that the argument of regulatory fee has been taken for the first time during the course of hearing.

(vii) That if the towers are a health hazard there is no question of increasing the fee and other steps with respect thereto need to be taken.

(viii) That it is only law which can justify any compulsory extraction; more towers are needed for improving the standards of connectivity as required under the licences - merely because a high fee is charged, would not lead to fewer towers.

(ix) The judgment in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, s cited to contend that the impugned order cannot be justified for reasons not considered at the time of making of the order.

(x) The argument of the learned ASG that the doctrine of occupied field is applicable for interpretation of List III only is controverted. It is argued that the same has been applied at times to interpretation of Lists I & II also.

(xi) Qua health also the appropriate authority is the Union of India and cannot be the Municipality.

(xii) Example of Environmental Laws is cited to contend that the powers with respect thereto are also with the Central Government and not with the Municipality.

(xiii) Reliance is placed on In Re: Noise Pollution - Implementation of the Laws for restricting use of loudspeakers and high volume producing sound systems, to contend that the old judgment in State of Rajasthan v. G. Chawla (supra) is no longer good law. It is argued that once the Telegraph Act occupies the field, Municipality has no role. Attention in this regard is also invited to State of M.P. v. Kedia Leather and Liquor Ltd., (2002) 10 SCC 382.

(xiv) Attention is invited to A.P. Bankers and Pawn Brokers Association Vs. Municipal Corporation of Hyderabad, where the powers of the Municipality were held to be restricted owing to other legislations dealing with the subject.

(xv) That the entire regulation with respect to the telegraph is with the Central Government, MCD has no role.

(xvi) That a special Act would override a general Act; here the Telegraph Act is the special Act.

17. It is contended that the Department of Telecommunications is already taking care of the apprehensions of health hazards from the use of cellular phones and equipment therefor and MCD is not required to regulate the same.

18. Mr. Shailesh Kapoor, Advocate in rejoinder has controverted the contentions of the learned ASG of List II having precedence. It is contended that the entry relating to Telegraph is a special entry and the entire power in relation to telegraph is with the Parliament. Reliance is placed on Welfare Assocn. A.R.P., Maharashtra and Another Vs. Ranjit P. Gohil and Others, to contend that the fountain source of legislative power is not Seventh Schedule but Article 246 and the function of the three lists in the Seventh Schedule is merely to demarcate legislative fields between Parliament and States and not to confer any legislative power; it was further held that express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective. It is contended that there are no known health hazards from towers and similar radiations are emanated from Radios, Televisions and other similar equipment. It is contended that the radiation emanating from the Cell phone are much more than those from the tower. It is rather submitted that increasing the number of towers would reduce the hazards. It is contended that the DMC Act treats bridges and structures on the streets separately from buildings and if those structures are not building, the towers cannot also be treated as building.

19. Mr. Sudhir K. Makkar, Advocate in rejoinder has referred to Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others, to contend that there is no ancillary power of taxation.

20. The ASG was given a further opportunity owing to new judgments having been cited in rejoinder. He has contended that the said judgments have no applicability to the matter in controversy.

21. The counsel for the NDMC which is also a Respondent in W.P.(C) No. 439/2010 has invited attention to Section 387 of the New Delhi Municipal Council Act, 1994 which empowers the Central Government to make any regulation which under the Act the NDMC is entitled to make. It is further contended that NDMC has the power to make the Building Bye-Laws. Attention is also invited to the charges fixed by the NDMC with respect to the towers. Attention is also invited to Article 239AA(3)(a) whereunder the Legislative Assembly has been empowered to make laws for the National Capital Territory of Delhi in some matters. He has also handed over photocopies of reports of effect of Cellular telephony on health.

22. I am unable to accept the proposition as sought to be urged, that owing to the towers aforesaid being "telegraph" within the meaning of the Telegraph Act, and being a Central subject, the State or other authorities are to adopt a hands off approach with respect thereto. A "thing" or an "activity" may and necessarily has several facets. Merely because a particular law regulates one facet, does not and

cannot mean that other laws, even if concerning/applicable to other facets would not apply. Article 246(1) r/w Entry 31 in List I of the Seventh Schedule confers exclusive power in the Centre to make laws with respect to Post & Telegraph; what has to be seen is whether the Circulars / Orders impugned in these petitions are seeking to affect the arena of post and telegraph; if they are, notwithstanding any other arguments, they cannot; however if they are not affecting the functioning as post and telegraph, but controlling / regulating some other facet, then need will arise to go into the power of MCD to do so, but the same cannot be quashed for the reason of impinging on the centre''s powers. Section 4 of the Telegraph Act also provides for exclusive privilege of Central Government for granting licence for establishing, maintaining and working telegraphs and does not as in fact it cannot, bar applicability of any other law qua any other facet of establishment, maintenance or working of telegraphs.

23. What has to be first seen is whether the impugned Circulars/Orders are in any way seeking to do what is in the exclusive domain of Centre.

24. A reading of the Office Order dated 8th April, 2010 now in vogue and in supersession of other two Circular/Order impugned in this petition shows that MCD is -

i. requiring its permission to be taken for installation of Towers.

ii. for granting such permission, requiring (a) prior permission of Airports Authority of India, DUAC, Chief Fire Officer, ASI and DMRC (wherever applicable), (b) Structural Stability Certificate from specified authorities.

iii. making provision with respect to towers on unauthorized buildings.

iv. insisting upon sharing of towers.

v. laying down priority to be followed in selection of buildings for installation of towers.

vi. prescribing fees.

vii. providing for damages owing to such towers and requiring Undertaking qua health hazards.

viii. making provisions with respect to generators accompanying the towers, including as to noise emanating therefrom.

ix. laying down criteria with respect to buildings on which towers shall be permitted.

x. providing for warnings to be displayed.

25. Not finding the Telegraph Act to be providing for any of the above, it was enquired from counsels for the Petitioners whether the licences issued, deal with any of the above. Though copies of licences were handed over, they do not show

that any of the above is in conflict with the powers exercised by the Centre or terms and conditions thereof. Nor do I find any of the aforesaid to, MCD appropriating to itself any power qua establishment, maintenance or working of telegraphs.

26. I had during the hearing repeatedly asked from the counsels as to who is responsible for maintaining the skyline of the city of Delhi. It was asked, whether the same would not fall in municipal governance of Delhi and for which purpose the DMC Act was enacted. I refuse to hold or accept that there is no occasion for maintaining or regulating the skyline of a city. Example was also cited during the hearing, of the tower recently erected by the Delhi Police as a Memorial in the heart of Delhi and with respect whereto hue and cry was raised and which compelled the Delhi Police to dismantle the same. The objection to the said tower was also on the ground of the same spoiling the skyline of the Lutyens Bungalow Zone. The towers in question in the present case are the same as the said Delhi Police tower which under public pressure had to be dismantled.

27. None of the counsels for the Petitioners has shown or cited any provision whereunder the Department of Telecommunications or any other Central Government authority which has granted the telecom licences is required to satisfy itself as to whether the erection/installation of a tower at a particular location is feasible or not. SACFA is only concerned with location from the point of view of adjusting various radio frequencies. Otherwise none of the myriad authorities which are members of SACFA are required to look into the matter from the point of view of the skyline.

28. Municipal governance today also extends to ensure heritage of the city and for maintaining the aesthetics. Restrictions on maximum height of buildings in various areas/localities are also imposed inter alia for the purpose of maintaining skyline of the city. If anyone is permitted to build/erect any building anywhere, it would lead to slum like situations and the city would soon be reduced to unlivable standards. The law and the Courts cannot turn a blind eye thereto. Neither is the Telegraph Authority competent in this regard nor has any other authority concerned with grant of licence to the Petitioner been shown to have applied itself to the said factors. Rather the safety aspect has also not been ensured. Once SACFA has given the clearance for a site, it is not concerned whether the tower erected/installed at the site complies with safety standards or not.

29. I have wondered as to which authority would be expected to regulate the same. The answer cannot be any other except the municipal authority.

30. The Division Bench of this Court as far back as in United Taxi Operators (Urban) Thrift & Credit Society Ltd. v. MCD 2 (1996) DLT 281 held that the object of the DMC Act is to regulate the matters of public convenience and compel public to conform to certain rules, the non-compliance whereof will result in dislocation of normal comforts which such statutes are intended to assure. It was held that the sense of

orderly living in cities and the aesthetic sense of modern man will be shocked if such like structures (in that case underground petrol tank) are allowed to come up unregulated. It was further held that such statutes as the DMC Act must be construed in such a manner as will best effectuate its purpose and protect its intended beneficiaries; one has to see whether or not a particular structure was intended to be covered by the statute.

31. It is all very well for the Petitioners to argue that there is no mention of such Cellular towers in the DMC Act or in the Bye-Laws. The learned ASG is correct in contending that at the time when the said laws were enacted, such towers could not even have been in the realm of the lawmakers. The courts cannot be silent spectators in such a situation and allow an activity unabated for which control is deemed necessary. The Supreme Court in The State of Maharashtra and P.C. Singh Vs. Dr. Praful B. Desai and Another, on the principle of interpretation of an ongoing statute (in that case Code of Criminal Procedure) relied on the commentary titled "Statutory Interpretation", 2nd Edition of Francis Bennion laying down:

It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act''s passing, in law, in social conditions, technology, the meaning of words and other matters..... That today''s construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

32. Similarly in Suresh Jindal Vs. BSES Rajdhani Power Limited and Others, it was held that creative interpretation of the provisions of the statute demands that with the advance in science and technology, the Court should read the provisions of a statute in such a manner so as to give effect thereto.

33. There is no question that we now live in an era of steadily accelerating technological progress and advances. The proliferation of wireless devices and facilities necessitates a giant infrastructure comprising of antennae, power sources, towers, cabling and wiring, and all the ancillary equipment needed to transmit and receive signals. All this equipment has to be located somewhere, on someone''s property, in someone''s view, occluding someone''s light, and, perhaps, generating a great deal of radio frequency emissions. The problem which has arisen here is not unique. The United States Circuit Court of Appeals for the Ninth Circuit in Metro PCS, Inc. v. City and County of San Francisco 400 F.3d 715 (9th Cir. 2005) also noticed the struggle in this context between the federal regulatory power and local administrative prerogative and the need to strike the balance of power between the national and the local. This issue came to a head in a stunning Ninth Circuit Court of Appeals decision handed down in January of 2006, Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge 435 F.3d 993 (9th Cir. 2006). The Los Angeles Times first reported on the case on January 18, 2006, in their Business Section, on its front page:

Cell phone towers may be ugly, but that''s not reason enough for cities to block their construction, a federal appeals court ruled Tuesday. In the nation''s first appellate ruling on an increasing contentious local issue, the US Ninth Circuit Court of Appeals struck down parts of a La Canada Flintridge law that had allowed the city to withhold building permits on public rights of way for purely aesthetic reasons.

34. Similar Ordinances in cities across California and the United States have slowed efforts by wireless companies to offer better coverage and advanced services. The municipal officials in the US also countered contending that they had a responsibility to protect their residences from a proliferation of unsightly infrastructure. Unlike telephone or cable lines, cell phone transmitters cannot be buried underground and need to be high enough to relay signals without obstruction. On the other hand, the same significantly damage the existing character of the neighbourhood and result in a negative aesthetic impact on the Right of Way.

35. The Telecommunications Act, 1996 of the United States of America recognizes the right of the City / Municipality to deny such installation for substantial evidence; while preserving the local authority''s power to regulate the placement of Cellular towers, it places some federal restrictions on the same and also provides a dispute resolution mechanism. Such restrictions have prompted some of the providers to dress up their gear as giant trees or hide them to pass visual muster. Unfortunately, our country has not made any law in this regard and which is the need of the hour. The Union of India instead of rising to the situation has decided to adopt a hands-off attitude. Unfortunately, the Telecom Policy here while permitting private players in the telecommunication sector failed to make a provision therefor.

36. The Courts in US have acknowledged that community and neighbourhood visual concerns should be considered paramount in the consideration of and selection of

sites. Provisions have been made for careful design siting, landscape screening and innovative camouflaging technique and for maximizing the use of existing and new support structures so as to minimize the need to construct newer, additional facilities. Attempts have been made to preserve the architectural integrity of designated areas within the city and the scenic quality of protected national habitats. The growth of Cellular technology has thus not been allowed to outpace the Zoning Codes which have been amended suitably. Alas! It has not happened over here. Unless the legislature reacts immediately to resolve the problem, the pace of construction of the towers may outstrip the Government''s ability to react to and resolve the problem. Once a Cell tower is built, and a lease is entered into, it is unlikely that it will be demolished or removed. If the legislative system cannot catch up, the issue will become moot.

37. The United States Circuit Court of Appeals for the Ninth Circuit in Sprint Telephony PCS, L.P. v. County of San Diego 543 F.3d 571 (9th Cir. 2008) has also held that the local government can regulate wireless towers and poles as long as they do not actually prohibit wireless service within their borders or create a significant gap in service coverage. Thus, the Cities and Counties were given the ability to even-handedly control the environment in their neighbourhood.

38. The next question to be determined is as to the nature of the said towers i.e. whether they are merely apparatus/equipment or their installations and functioning falls in the domain of the MCD. The ASG has sought to justify installation and operation of the said towers as an activity which can be licenced by the MCD. However MCD can insist upon such licence/permission only if empowered in this regard. The DMC Act does not permit the MCD to require licence for any and everything done within its jurisdiction. The activities/purposes which cannot be carried out without licence are specified in Section 417 of the Act. No specific reference to any provision of the MCD Act prohibiting installation of an antenna without a licence has been pointed out, nor is found. Section 417 is also not omnibus. Licence is required for use of premises for the purposes specified in Part-I of the Eleventh Schedule to the DMC Act or for any purpose which in the opinion of the Commissioner is/are dangerous to life, health and property or likely to create nuisance or for keeping horses, cattle or any animals or birds or for storing articles specified in Part-II of the Eleventh Schedule. I have gone through the Eleventh Schedule carefully; even by extending any entry therein, it is not possible to include such installation of towers therein. As far as requiring licence for the towers for the reason of the Commissioner forming an opinion of the same being dangerous to life, health or property or likely to create nuisance is concerned, neither is there any opinion in this regard nor can it be at this stage said that such installation will fall in the said category. The reliance on Section 430 is misconceived without showing that licence or written permission is needed for such licence. I am thus unable to hold that the Commissioner under the Act is empowered to prevent installation of such towers without a licence.

39. Though merit is found in the contention of the ASG that at the time of promulgation of the DMC Act such towers could never have been in contemplation and the Courts must interpret the laws to suit the need of the times but the Courts can for this reason not take over the legislative function. A perusal of Section 417 and particularly Eleventh Schedule shows that the purport was to empower the municipality to regulate anything or any activity likely to affect others. Installation of a tower certainly affects the character of the neighbourhood and results in a negative aesthetic impact. Going by the spirit of the DMC Act, the towers would be required to be licenced particularly when no provision with respect thereto has been made therefor under the Building Regulations also; however, the Legislature having not left any window for such interpretation, this Court, inspite of dicta noticed above in Dr. Praful B Desai and Suresh Jindal (supra), can but make a strong suggestion for amendment to the DMC Act for permitting municipalities to regulate the installation and functioning of such towers.

40. I am however firmly of the view that the said towers definitely fall within the definition of "building" which includes within its ambit a structure of metal or other materials. What else is a tower but a metallic structure. The contention of the senior counsels for the Petitioners that a building has to be necessarily a house/habitable cannot be accepted.

41. Lord Parker CJ in Cheshire County Council v. Woodward (1962) 1 All ER 517 said

it seems to me that when the Act defines a building as including ''any structure or erection and any part of a building so defined'', the Act is referring to any structure or erection which can be said to form part of the realty, and to change the physical character of the land.

42. The Queen''s Bench Division as far back as in The Uckfield Rural District Council v. The Crowborough District Water Company (1899) 2 Q.B. 664 was faced with the question whether a water tower could be built without submitting plans and sections to the District Council as required to be submitted for construction of a building. It was held that the water tower being a permanent erection was a building and the bye-laws made by the District Council applied to it.

43. I fail to see as to why the said tower cannot be a "building" within the meaning of Section 2(3) of the DMC Act. The lawmakers then also were careful in including within the meaning of "building", a structure whether of masonry, brick, wood, metal or other material. The Full Bench of this Court in MCD v. Pradeep Oil Mills P. Ltd AIR 2010 Del 119 has held underground storage tank which can by no stretch of imagination be said to be habitable as building, and upheld the levy of property tax thereon. The same was the position in United Taxi Operators (supra) where the contention as raised before this Court that to be a "building", it must be habitable was expressly negated. Putting together sheets of steel to install an underground cellar was held to be a "building". I may notice that the Apex Court in judgment

reported in Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another, has upheld the Full Bench judgment of this Court in Pradeep Oil Mills P. Ltd. (supra).

44. Once it is held that the tower will fall within the definition of building, the regulation thereof will fall within the jurisdiction of MCD and MCD would be entitled to not only prohibit installation/erection of such towers without its permission.

45. However, that is not the end of the matter. The towers even though a building and as such requiring sanction/approval before construction but neither in the DMC Act nor in the Building Bye-Laws is there any provision with respect thereto. The question would thus arise that on what parameters, future requests for installation of towers are to be allowed or disallowed. There is a danger of MCD sitting over all applications in this regard.

46. Once, it is held that MCD is not empowered to insist upon a licence for installation of the towers, the question of MCD levying any fee therefor does not arise. There is thus no justification whatsoever for the fee so demanded by the MCD and the same is set aside/quashed. MCD can charge only the fee for processing the plan for installation of a tower as a building processing fee and charge a building fee as provided therein. Need is also felt for the Act and the Building Bye Laws to be amended to also provide for the fee, tax etc. on buildings of the said nature which do not appear to have been in contemplation at the time of fixing the rates therefor.

47. No merit is found in the contention of the Petitioners of the MCD being not entitled to intervene for the reason of the Petitioners having been conferred the powers of the Telegraph Authority as contended. A perusal of the Notification dated 24th May, 1999 in this regard shows that the licencees have only been permitted to seek way-leave from any person including any public authority, State Government etc. to place and maintain posts etc; in fact the same is also subject to the licencees complying with any other law for the time being in force. The said Notification also thus recognizes the applicability of other laws in the licencees taking steps for seeking way-leave and which other laws would include the municipal laws. There is nothing in Section 10 of the Telegraph Act empowering the Telegraph Authority to place and maintain telegraph upon any immovable property, to suggest that in so placing the telegraph over any immovable property, the other laws concerned with placing such telegraphs are not required to be complied with. There is no non obstante clause in Section 10.

48. I am also unable to find that allowing the municipality to ensure that the towers comply with safety, aesthetic and other similar aspects amounts to the municipality exercising powers under Entry 31 of List I of the Seventh Schedule to the Constitution. The municipality, as long as it does not prohibit wireless services within its jurisdiction, is entitled to regulate it.

49. Besides in Gujarat, I find a similar question to have arisen before the High Court of Bombay also in Bharti Tele-Ventures Limited and Mr. Sunil Bharti Mittal Vs. State

of Maharashtra, Urban Development Department and Pune Municipal Corporation,
The challenge was to the Notification under the Maharashtra Regional and Town Planning Act, 1966 authorizing and/or requiring the various Municipal Corporations in the State to charge retrospectively premium at the rate of land value for the area occupied by the cabin, the tower height premium etc. for granting permission for installation of semi-permanent structures, cabins on top of the buildings for housing Base Station / Telephone Connector to set up Cellular Mobile Telecommunication system in pursuance to the licences granted under the Telegraph Act. The contention of the Petitioner therein also was that the Telegraph Act did not require permission of the Municipal Corporation for erecting such systems and the municipality had no power to levy any premium for grant of permissions. The Division Bench of the Bombay High Court upon perusal of the Notification dated 24th May, 1999 referred to hereinabove also held that the same no where delegates the powers of the Telegraph Authority under the Telegraph Act to the licencees; on the contrary, the delegation was limited to the extent of seeking way-leave from private owners to place and maintain telephone lines and to enter such properties for that purpose. It was further held that the said Notification clearly required the licencee to comply with the provisions not only of the Telegraph Act, but also of any other law for the time being in force. The Division Bench further held such installations to be a building. The definition of "building" under the Maharashtra Act (Bombay Provincial Municipal Corporations Act, 1949) is found to be the same as in the Delhi Act.

50. Coming now to the other conditions imposed by the Respondent MCD, till the Building Regulations are suitably amended, need is felt to allow such of the conditions contained therein which pertain to the matter of buildings. Thus nothing wrong can be found in:

(i) Avoiding installation in narrow lanes.

(ii) Requiring a warning sign to be placed.

(iii) Providing for training the operating and maintenance personnel.

(iv) Requirement of a Structural Safety Certificate.

(v) Prohibiting installations on heritage buildings.

(vi) Prohibiting installation on unauthorized buildings.

(vii) Requiring the antenna and D.G. Sets to conform to the prescribed standards.

51. However, the following conditions cannot be sustained and neither have anything to do with Building Regulations/Safety norms, nor is the MCD entitled to insist on installations on its own buildings. Similarly, once the NOC of the Residents Welfare Association (RWA) is not required for raising a building, no such NOC can be insisted upon for installation of an antenna. Thus the following conditions are struck

down:

(i) Clause 5 regarding "Priority of selection of site".

(ii) Clause 6 regarding "Fees".

52. After the closure of hearing, applications further seeking interim relief/directions were filed. It was the contention of the senior counsels of the Petitioners that MCD was not de-sealing the towers in terms of the interim orders. Per contra, it was the contention of the counsel for the Respondent MCD that the Petitioners were not complying with the conditions under the old Policy and with respect whereto there was no stay. Need is not now felt to deal with the same inasmuch the said applications are to be now dealt with in accordance with this judgment.

53. The writ petitions are accordingly partly allowed as under:

A. It is held that the temporary structures / towers on rooftops for providing Cellular Basic Mobile Phone services are "building" within the meaning of the Municipal Acts and hence cannot be erected / installed without obtaining the permission of the Municipality.

B. In the grant of the said permission, all provisions of the Municipal Act and the Bye-Laws apply.

C. Strong recommendation is made to the Central Government and the Municipalities to make appropriate changes in the Building Bye-Laws to make specific provisions deemed necessary, of specific application to such installations / structures / towers.

D. Recommendation is further made for making suitable changes to the Telegraph Act, as noticed above in the Telecommunications Act, 1996 of the United States of America with respect to the extent of intervention by the State Government / Municipalities in the matter of installation / erection of such equipment which fall within the definition of "telegraph".

E. Till the aforesaid is done, it is deemed expedient for this Court to step in and as such the Office Order dated 8th April, 2010 is dealt with as under:

(i) Clause 5 (providing for Priority of selection of site) and Clause 6 (providing for Fee) are struck down as illegal and beyond the competence of MCD.

(ii) The other Clauses of the Office Order insofar as they are not inconsistent with the Building Bye-Laws to continue to apply till Building Bye-Laws expressly applicable to such installations / towers or amendments as suggested to the Telegraph Act are promulgated.

The writ petitions are disposed of. No order as to costs.