IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 05TH DAY OF APRIL, 2024

R

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No. 20016 OF 2021 (GM-BWSSB)

C/W

WRIT PETITION No. 10020 OF 2020 (GM-BWSSB)

IN WRIT PETITION No. 20016 OF 2021:

BETWEEN:

M/S. SOBHA LIMITED
A COMPANY INCORPORATED
UNDER THE COMPANIES ACT, 1956
AND HAVING ITS OFFICE AT SARJAPUR
MARTHAHALLI OUTER RING ROAD (ORR)
DEVERABESANAHALLI, BELLANDUR POST
BENGALURU – 560 103.
REPRESENTED BY ITS AUTHORISED SIGNATORY
MR. PRASAD M. S.,

... PETITIONER

(BY SRI. VIKRAM HUILGOL, SENIOR ADVOCATE A/W.,
SRI. KEMPEGOWDA, ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA
REPRESENTED BY ITS
PRINCIPAL SECRETARY
DEPARTMENT OF LAW AND

PARLIAMENTARY AFFAIRS
VIDHANA SOUDHA
DR.B.R.AMBEDKAR VEEDHI
BENGALURU – 560 001.

2 . THE STATE OF KARNATAKA
REPRESENTED BY ITS
PRINCIPAL SECRETARY
URBAN DEVELOPMENT DEPARTMENT
4TH FLOOR, VIKASA SOUDHA
DR.B.R.AMBEDKAR VEEDHI
BENGALURU – 560 001.

3 . BANGALORE WATER SUPPLY AND
SEWERAGE BOARD
2ND FLOOR, CAUVERY BHAVAN
K.G.ROAD, BENGALURU – 560 009.
REPRESENTED BY ITS CHAIRMAN

4 . CHIEF ENGINEER (EAST)
BANGALORE WATER SUPPLY AND
SEWERAGE BOARD, 2ND FLOOR
CAUVERY BHAVAN, K.G.ROAD
BENGALURU – 560 009.

5 . BRUHATH BENGALURU MAHANAGARA PALIKE
HUDSON CIRCLE, BENGALURU – 560 001
REPRESENTED BY ITS COMMISSIONER.

... RESPONDENTS

(BY SRI DHYAN CHINNAPPA., AGA A/W.,
SRI M.VINOD KUMAR, AGA FOR R1 AND 2;
SRI M.N.SESHADRI, SENIOR ADVOCATE,
SRI RAVI. B.NAIK, SENIOR ADVOCATE A/W.,
SRI K.B.MONESH KUMAR, ADVOCATE FOR R3 AND R4
SRI A.JAGANATH, ADVOCATE FOR R5)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE ACT NO.32 OF 2010 AT ANNEXURE-A PASSED BY R1 AND R2 TO INSERT SECTION 89-A IN THE KARNATAKA WATER SUPPLY AND SEWERAGE ACT, 1964, WHICH DEEMED TO HAVE COME INTO FORCE RETROSPECTIVELY WITH EFFECT FROM 01.01.2003 AS UNCONSTITUTIONAL, ARBITRARY, ILLEGAL AND ULTRA VIRES AND ETC.,

IN WRIT PETITION No. 10020 OF 2020:

BETWEEN:

1 . SMT. N.SUREKHA
D/O LATE N.NAGARAJ
AGED ABOUT 67 YEARS
RESIDING AT NO.217, 7TH MAIN
HRBR LAYOUT, I BLOCK
KALYAN NAGAR
BENGALURU – 560 043.

2 . SRI. N.PRABHU KIRAN
S/O LATE N.NAGARAJ
AGED ABOUT 66 YEARS
RESIDING AT NO.307, 7TH 'A' MAIN
HRBR LAYOUT, I BLOCK
KALYAN NAGAR
BENGALURU – 560 043.

3 . SRI. N.LOKESH
S/O LATE N.NAGARAJ
AGED ABOUT 63 YEARS
RESIDING AT 'NAGRIK', NO.305
7TH MAIN, HRBR LAYOUT
II BLOCK, 80 FT. ROAD
KALYAN NAGAR, BENGALURU – 560 043.

4 . SRI. N.RAVI KIRAN ALIAS
RAVI KIRAN N.VEMULKAR
S/O LATE N.NAGARAJ
AGED ABOUT 61 YEARS
RESIDING AT NO.9, 1ST FLOOR
'AQUA FORTE', 12 KENSINGTON ROAD
BHARATHI NAGAR
BENGALURU – 560 042.

5 . SRI. N.KUMAR
S/O LATE N.NAGARAJ
AGED ABOUT 59 YEARS
RESIDING AT NO.9,
2ND FLOOR, 'AQUA FORTE'
12 KENSINGTON ROAD
BHARATHI NAGAR
BENGALURU – 560 042.

PETITIONER NOS.1 TO 5 ARE
REPRESENTED BY THEIR GPA HOLDER
M/S. BRIGADE ENTERPRISES LTD.,
A COMPANY, HAVING ITS
REGISTERED OFFICE AT
29 AND 30TH FLOOR
WORLD TRADE CENTER
2/1, BRIGADE GATEWAY
DR.RAJKUMAR ROAD
MALLESHWARAM - RAJAJINAGAR
BENGALURU – 560 055
REPRESENTED BY ITS
AUTHORIZED SIGNATORY
SRI. UDAYA KUMAR.

... PETITIONERS

(BY SRI. SAMMITH S., ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA
REPRESENTED BY
UNDER SECRETARY
URBAN DEVELOPMENT DEPARTMENT
VIDHANA SOUDHA
BENGALURU – 560 001.

2 . BANGALORE WATER SUPPLY AND
SEWERAGE BOARD
REPRESENTED BY ITS
ENGINEER-IN-CHIEF
2ND FLOOR, CAUVERY BHAVAN,
K.G.ROAD, BENGALURU – 560 009.

3 . THE CHIEF ENGINEER (EAST)
BANGALORE WATER SUPPLY AND
SEWERAGE BOARD
6TH FLOOR, CAUVERY BHAVAN
K.G ROAD, BENGALURU – 560 009.

4 . THE CHIEF ADMINISTRATIVE
OFFICER CUM SECRETARY
BANGALORE WATER SUPPLY AND
SEWERAGE BOARD
CAUVERY BUILDING
DISTRICT OFFICES ROAD
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI DHYAN CHINNAPPA, AGA A/W.,
SRI M.VINOD KUMAR, AGA FOR R1;
SRI M.N.SESHADRI, SR.ADVOCATE AND
SRI RAVI B.NAIK, SR.ADVOCATE A/W.,
SRI K.B.MONESH KUMAR, ADVOCATE FOR R2 TO R4)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE GO DATED 28.02.2005 ISSUED BY R-1 AS CONTAINED IN ANNEXURE-C; QUASH THE NOTIFICATION DATED 25.02.2016 ISSUED BY THE R-4 PUBLISHED IN KARNATAKA STATE GAZETTE PART IV-A DATED 26.02.2016 NO.325, AS CONTAINED IN ANNEXURE-D AND ETC.,

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

These petitions call in question the validity of imposition of impost/fee/charge by the Bangalore Water Supply and Sewerage Board ('the Board' for short) for the purpose of issuance of a 'No Objection Certificate' to a proposed residential building in terms of Bye-law 3.2.10 of the Bruhat Bengaluru Mahanagara Palike Building Bye-laws. The demand is made by the Board.

2. *Shorn* of unnecessary details, facts in brief, are as follows:-

Petitioner in Writ Petition No.20016 of 2021 is a Company incorporated under the Companies Act, 1956 and is engaged in the business of real estate development. The Company claims to be well known for the construction of apartment complexes. It is also

claimed that it has sphere headed the revolution of real estate in India. The petitioner purchases schedule property comprising of different survey numbers through a Joint Development Agreement for the development of the schedule property. All the documents of the properties after transfer are in the name of the petitioner. The issue in the *lis* does not concern the title of the property. Under Section 295 of the Karnataka Municipal Corporations Act, 1976 (for short 'the KMC' Act) certain building bye-laws are notified by the Corporation. Section 423 of the KMC Act empowers the Corporation to make bye-laws which it has notified in the year 2003 viz., Bangalore Mahanagara Palike Building Bye-laws, 2003 (hereinafter referred to as 'the Bye-laws' for short). The Bye-laws regulate buildings and other matters concerning those buildings as obtaining under those bye-laws.

3. The petitioner in order to develop the schedule property by construction of residential apartment buildings submits an application for building licence in terms of bye-law No.3.0 of the Bye-laws for construction of building. For the purpose of issuance of building licence with regard to high-rise building, a no objection

from respondents 3 and 4 i.e., the Board and other agencies like BESCOM, Fire Services Department etc. as mentioned in Bye-law 3.2.10 is a condition precedent.

4. In furtherance of securing a no objection from all the respondents, the petitioner submits an application to the BBMP only to be told that the petitioner has to pay a sum of Rs.54,48,000/- towards Beneficiary Capital contribution charges, a sum of Rs.49,85,548/- towards Advance Probable Pro rata charges and Rs.8,30,925/- towards Treated Water Charges for construction to the Board if it has to issue a NOC. Those charges in the case at hand run to Rs.1.10 crores, put together. This is said to be a pre-requisite for issuance of a NOC for the proposed residential project, in the schedule property. The petitioners being aggrieved by the said pre-requisite or condition precedent for issuance of NOC under the building Bye-laws of the BBMP, are before this Court calling in question imposition of those imposts.

5. Heard the learned senior counsel Sri Vikram Huilgol appearing for petitioner in Writ Petition No.20016 of 2021; learned

counsel Sri Sammith S., appearing for the petitioners in Writ Petition No.10020 of 2020; learned senior counsel Sri M.N. Seshadri and learned senior counsel Sri Ravi B Naik appearing along with learned counsel Sri K.B.Monesh Kumar for the Board; learned Additional Government Advocate Sri Dhyan Chinnappa representing the State and learned counsel Sri A.Jagannath appearing for the BBMP.

6. The learned senior Counsel Sri Vikram Huilgol appearing for the petitioners, sphere-heading the submissions in these cases would raise the following contentions –

(i) The impugned levies are unconstitutional, illegal for they are in violation of Article 265 of the Constitution of India.

(ii) The impugned levies are in the nature of fee/charge which cannot be imposed upon the applicants in the absence of any *quid pro quo*.

(iii) The Regulations which impose payment of several charges do not have the authority of law to impose those charges as a pre-requisite for grant of an NOC – both water and sewerage charges. Having no backing

> under the Constitution, the imposition of fee or charge is on the face of it, without authority of law.

He has placed reliance upon several judgments of the Apex court and that of this Court which would be considered at the appropriate stage in the course of the order *qua* its relevance.

7. The learned counsel Sri Sammith S. appearing for the petitioner in Writ Petition No.10020 of 2020 which raises a challenge to the very same imposition of charges, would take this Court through the circulars and documents appended to the petition or produced seeking to demonstrate that water supply connection is also not a guarantee for payment of advance pro rata charges. The order itself indicates that in the event there is an available connection, connection to the applicant would be given. Therefore, there is neither *quid pro quo* nor there is any definite assurance of water supply being given despite demand of such huge amount. He would contend that the entire demand is contrary to law.

8. On the other hand, the learned senior counsel Sri M.N. Seshadri sphere-heading the submissions for the Board has contended that all the charges are the ones that are necessary to

be imposed. Power of imposition or otherwise is under the Act. The Act empowers demand of advance pro rata charges, treated water charges for construction and Greater Bangalore Water Supply and Sewerage project charges upon any person who would file an application seeking an NOC from the Board for construction of a project. He would submit that it is a great task for the Board to supply water to all the residents of the City and this supply should not be taken for granted by the residents of the City and not pay any charges for such supply of water. It is his contention that the Board is empowered to demand and receive expenses that may be incurred for water supply and sanitary charges. Further provisions of the Act are read through and taken through by the learned senior counsel.

9. The learned senior counsel has made his submissions on every levy. For pro rata charges he would contend that it is necessary to collect at the time of approval of plan, by the BBMP. This is collected towards the cost of improvement of water supply and sewerage system payable by the owner, occupier or developer to maintain and service the said system and to keep it in such

serviceable condition. The pro rata charges are leveled from time to time depending upon exigencies of development in order to mop up and generate funds for developmental purposes. Insofar as advance probable pro rata charges, the learned senior counsel would submit that what is demanded is 15% of the proposed built up area only for multistoried buildings. This is to augment resources and keep the system ready for supply of potable water and sanitation under respective building plans seeking NOC.

10. He would contend that advance pro rata charges are charged only for multistoried buildings and not to other persons. Insofar as Greater Bangalore Water and Sanitation project charges he would contend that multistoried buildings are coming up in the erstwhile 7 City Municipal Councils and one Town Municipal Council which got merged with the Bangalore Mahanagara Palike and, therefore 110 villages were added into the Corporation area for which water supply is to be done by the Board. Therefore, the aforesaid charges are appropriately imposed. He would justify contending that the levy has not been revised till date, from 2005 even after a lapse of 18 years. The same submission is made *qua*

beneficiary capital contribution charges and treated water charges for construction.

11. In all, his submission is that the Board has to keep the water ready for distribution. If they have to keep the water for distribution it is necessary for them to keep that water ready. Whether the developers who are constructing buildings want the water or not, it is ready to be taken. Once it is ready to be taken, charges will have to be paid. Usage is not the concern of the Board. Therefore, the petition be dismissed and all the impugned levies be upheld is his emphatic submission.

12. Learned senior counsel Sri Ravi B. Naik would toe the lines of the learned senior counsel Sri M.N. Seshadri to contend that all these imposts are in accordance with law and never contrary to law. He would contend that this Court in the case of ***MUNISWAMY AND OTHERS v. BANGALORE WATER SUPPLY AND SEWERAGE BOARD***[1] has upheld imposition of pro rata charges and, therefore,

[1] *W.A.No.3657 of 2000 & connected cases decided on 02-07-2004.*

the petitions be dismissed as the issue is already considered by this Court and the charge is upheld.

13. I have given my anxious consideration to the respective submissions made by the learned senior counsel appearing for the respective parties and have perused the material on record. In furtherance whereof, the issue that falls for consideration is:

"***Whether the impugned impost/fee/charge suffers from want of legal sanction?"***

14. To answer the said issue, it is germane to notice, a notice of demand issued upon these petitioners. It is as follows:

"BANGALORE WATER SUPPLY AND SEWERAGE BOARD

DEMAND NOTE FOR NO OBJECTION CERTIFICATE

TO

Smt. Gowramma D. K. Suresh and
M/S, Sobha Developers Limited
Sobha, No.51/5, Devarabeesanahalli Village
Sarjapur – Marathahalli Outer Ring Road ORR,
Bellandur Post,
Near SAKRA World Hospital
560 103.

Sir,

Sub: Issue of No Objection Certificate for the proposed Residential Building at Katha

No.989/sy.No.35/3, 35/4, 37/1, 37/2, 38/1, 38/2, 38/3, 38/4, 38/5, 79, 80/1, 801/2, 80/3, V Legacy Road, Hosakerehalli Village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore-560085 in f/o Smt. Gowramma D. K, Suresh and Sobha Developers Limited.

Ref: 1. Application number: BWSSB-NOC-2021-8-114-081610544691.
2. Date of Application: 2021-08-16.
3. Demand Note Generation Date:2021-10-16.

****

With reference to the above, you are requested to make the following payments for issue of "No Objection certificate" from BWSSB for the above said proposed project Residential Building at Katha No. 989/ sy.No.35/3, 35/4, 37/1, 37/2, 38/1, 38/2, 38/3, 38/4, 38/5, 79, 80/1, 801/2,and 80/3, V Legacy Road, Hosakerehalli Village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore – 560 085.

The proposed project is Residential Project consist of 2 BF+GF,FF,SF,TF (Parking level 1,2,3,4)+28 UF and Terrace floor for 363 flats. The sital area is 282181.68 sqft with a total build up area is 83092.46 Smt. The premises comes under CMC Area

1. NOC Fees

Sl.No.	*Proposed Building (Built Up Area in Smt)*	*Rate (in Rs. Per Smt) / minimum Rs.1,50,000 /-*	*Amount (in Rs.)*
1	*83092.46*	*Rs.25/-*	*Rs.20,77,312/-*
Total			*Rs.20,77,312/-*

1. Advance Portable Prorata Charges

Sl. No.	***Proposed Building***	***Built Up Area (Smt)***	***Amount (in Rs.)***

1.	***Advance Portable Prorata Charges @15% of Rs.400/- Residential Portion***	***83092.46***	***Rs.49,85,548/-***
Total			***Rs.49,85,548/-***

2. GBWASP/ BCC Charges

Sl.No	***Proposed Building***	***No of Flats/ Built up Area in Sft***	***Rate***	***Amount***
1	***Upto 600 Sqft***	***34***	***Rs.4,000/-***	***Rs.1,36,000/-***
2	***1201 Sft upto 2400 Sqft***	***323***	***Rs.16,000/-***	***Rs.51,68,000/-***
3	***Above 2401 Sqft***	***6***	***Rs.24,000/-***	***Rs.1,44,000/-***
Total				***Rs.54,48,000/-***

3. Treated Water Charges for Construction

Sl.No.	***Total Buildup Area Smt***	***Rate (in Rs. Per Smt)***	***Amount (in Rs.)***
1	***83092.46***	***Rs.10/-***	***Rs.8,30,925/-***
Total			***Rs.8,30,925/-***

The Grand Total Charges Towards this Demand Note for No Objection Certificate is Rs.1,33,41,785/- (Rupees One Crore Thirty-Three Lakh Forty-one Thousand Seven Hundred and Eighty - Five Only)

Further No Objection Certificate will be issued after the above said charges remitted to BWSSB."

(Emphasis added)

What is under challenge is what is demanded in the afore-quoted notice. Therefore, it is the imposition of those fee/charge that forms the ***fulcrum,*** of this *lis* and the ***kernel*** of the ***conundrum***. Thus, the challenge is to the following charges as found in the demand notice:

> ***(i) Advance probable pro rata charges (hereinafter referred to as 'pro rata');***
>
> ***(ii) Beneficiary Capital Contribution charges (hereinafter referred to as the 'BCC charges');***
>
> ***(iii) Greater Bangalore Water Sewerage Project charges (hereinafter referred to as the 'GBWSP charges') and***
>
> ***(iv) Treated Water Charges for construction (hereinafter referred to as the 'TWCC').***

Before embarking upon consideration of respective submissions *qua* the aforesaid charges, I deem it appropriate to notice the position in law with regard to imposition of impost/fee/charge, as enunciated by the Apex Court and various other High Courts.

15. The source of power for imposition of any impost is under Article 265 of the Constitution of India. Article 265 reads as follows:

> *"**265. Taxes not to be imposed save by authority of law**.—No tax shall be levied or collected except by authority of law."*

Article 265 mandates that no tax shall be levied or collected except by authority of law. Therefore, the State cannot collect tax except by authority of law authorized by any legislation. Article 265 in effect ensures that any extraction of money from the citizen of the country should only be on such express authorization by law. Tax or fee or even a charge has been the subject matter of interpretation by the Apex Court in plethora of judgments wherein the Apex Court has considered several imposts, imposed by respective authorities of the State. I deem it appropriate to notice a few.

16. The Apex Court in the case of ***COMMISSIONER, HINDU RELIGIOUS ENDOWMENTS, MADRAS v. SRI LAKSHMINDRA THIRTHA SWAMIAR OF SRI SHIRUR MUTT***[2] has held as follows:

> *"…. …. ….*
>
> *45. A neat definition of what "tax" means has been given by Latham, C.J. of the High Court of Australia in Matthews v. Chicory Marketing Board [60 CLR 263, 276] "A tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered". This definition brings out, in our opinion, the essential characteristics of a tax as*

[2] *AIR 1954 SC 282*

distinguished from other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law [Vide Lower Mainland Dairy v. Crystal Dairy Ltd., 1933 AC 168] . The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority [See Findlay Shirras on Science of Public Finance, Vol. I, p. 203] . Another feature of the taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

46. Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay [Vide Lutz on Public Finance, p. 215] . These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

47. As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If

a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. *This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees. It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all persons within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is the choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest [Vide Findlay Shirras on Science of Public Finance, Vol. I, p. 202] . Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental*

result of State action [Vide Seligman's Essays on Taxation, p. 408] ."

(Emphasis supplied)

The Apex Court further in the case of ***CORPORATION OF CALCUTTA v. LIBERTY CINEMA***[3] has held as follows:

"…. …. ….

20. *The conclusion to which we then arrive is that the levy under Section 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed.* ***The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licensee is not a service to him. No question here arises of correlating the amount of the levy to the costs of any service. The levy is a tax. It is not disputed, it may be stated, that if the levy is not a fee, it must be a tax."***

(Emphasis supplied)

In ***DELHI RACE CLUB LIMITED v. UNION OF INDIA***[4] the Apex Court has held as follows:

"…. …. ….

35. *In the light of the tests laid down in Hingir-Rampur [AIR 1961 SC 459 : (1961) 2 SCR 537] and followed in Kesoram Industries [(2004) 10 SCC 201] , it is manifest that the true test to determine the character of a levy, delineating "tax" from "fee", is the primary object of the levy and the essential purpose intended to be achieved. In the instant case, it is plain from the scheme of the Act that its sole aim is regulation, control and management of horse racing. Such a regulation is necessary in public*

---

[3] *AIR 1965 SC 1107*
[4] *(2012) 8 SCC 680*

interest to control the act of betting and wagering as well as to promote the sport in the Indian context. To achieve this purpose, licences are issued subject to compliance with the conditions laid down therein, which inter alia include maintenance of accounts and furnishing of periodical returns; amount of stakes which may be allotted for different kinds of horses; the measures to be taken for the training of the persons to become jockeys, to encourage Indian-bred horses and Indian jockeys; the inclusion and association of such persons as the Government may nominate as stewards or members in the conduct and management of the horse racing. The violation of the conditions of the licence or the Act is penalised under the Act besides a provision for cognizance by a court not inferior to a Metropolitan Magistrate. To ensure compliance with these conditions, the 1985 Rules empower the District Officer or an Entertainment Tax Officer to conduct inspection of the race club at reasonable times. Thus, the nature of the impost is not merely compulsory exaction of money to augment the revenue of the State but its true object is to regulate, control, manage and encourage the sport of horse racing as is distinctly spelled out in the Act and the 1985 Rules. ***For the purpose of enforcement, wide powers are conferred on various authorities to enable them to supervise, regulate and monitor the activities relating to the racecourse with a view to secure proper enforcement of the provisions. Therefore, by applying the principles laid down in the aforesaid decisions, it is clear that the said levy is a "fee" and not a "tax"."***

(Emphasis supplied)

In ***JINDAL STAINLESS LIMITED v. STATE OF HARYANA***[5] the Apex Court has held as follows:

"…. …. ….

67.2. *Secondly, because the concept of compensatory tax obliterates the distinction between a tax and a fee.* ***The***

[5] *(2017) 12 SCC 1*

> ***essential difference between a tax and a fee is that while a tax has no element of quid pro quo, a fee without that element cannot be validly levied. The difference between a tax and the fee has been examined and elaborated in a long line of decisions of this Court.*** *(See Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt [Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 : 1954 SCR 1005] , Jagannath Ramanuj Das v. State of Orissa [Jagannath Ramanuj Das v. State of Orissa, AIR 1954 SC 400] , Hingir-Rampur Coal Co. Ltd. v. State of Orissa [Hingir-Rampur Coal Co. Ltd. v. State of Orissa, AIR 1961 SC 459] , Corpn. of Calcutta v. Liberty Cinema [Corpn. of Calcutta v. Liberty Cinema, AIR 1965 SC 1107] , Kewal Krishan Puri v. State of Punjab [Kewal Krishan Puri v. State of Punjab, (1980) 1 SCC 416] , Krishi Upaj Mandi Samiti v. Orient Paper and Industries Ltd. [Krishi Upaj Mandi Samiti v. Orient Paper and Industries Ltd., (1995) 1 SCC 655] , State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal [State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal, (2004) 5 SCC 155] and State of W.B. v. Kesoram Industries Ltd. [State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 : AIR 2005 SC 1646])"*
>
> *(Emphasis supplied)*

The Nine Judge Bench of the Apex Court in the case of ***JINDAL STAINLESS LIMITED*** has carved out a difference between tax and a fee and has held that a fee can be imposed only when there is an element of *quid pro quo*. For any impost to be considered as fee or charge, the existence of *quid pro quo* is thus *sine qua non*.

***POWER TO DEMAND FEE*:**

17. The Apex Court in the case of ***AHMEDABAD URBAN DEVELOPMENT AUTHORITY v. SHARADKUMAR JAYANTIKUMAR PASAWALLA AND OTHERS***[6] has held as follows:

> *"…. …. ….*
>
> ***7.*** *After giving our anxious consideration to the contentions raised by Mr Goswami,* ***it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of District Council of Jowai are entirely different. The exercise of powers by the Autonomous Jaintia Hills Districts are controlled by the constitutional provisions and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied.*** *The said decision cannot be made applicable in the facts of this case or the same should not be held to have laid down any legal proposition that in matters of imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in Khargram Panchayat Samiti case [(1987) 3 SCC 82] also deals with the exercise*

[6] *(1992) 3 SCC 285*

of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee.

8. The High Court has referred to the decisions of this Court in Hingir case [AIR 1961 SC 459 : (1961) 2 SCR 537] and Jagannath Ramanuj case [AIR 1954 SC 400 : 1954 SCR 1046] and Delhi Municipal Corporation case [(1983) 3 SCC 229 : 1983 SCC (Tax) 154 : AIR 1983 SC 617]. ***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. We are, therefore, unable to accept the contention of Mr Goswami. Accordingly, there is no occasion to interfere with the impugned decision of the High Court. The appeal, therefore, fails and is dismissed with no order as to costs."***

(Emphasis supplied)

Later, the Apex Court in the case of ***M.CHANDRU v. MEMBER-SECRETARY, CHENNAI METROPOLITAN DEVELOPMENT AUTHROITY***[7] considering what is *quid pro quo* has held as follows:

"Quid pro quo

23. The State or the Board did not state as to on what basis the rate of Rs 64 per square metre was fixed. What was the amount to be spent towards services to be rendered to the multi-storeyed and special buildings had not been spelt out. What had merely been stated was that the amount was necessary to be spent for overall development of the water supply and sewerage system.

[7] *(2009) 4 SCC 72*

24. It is not contended before us that IDC is not a fee but a tax. <u>If it is a fee</u>, the principle of quid pro quo shall apply. Like a State, all other authorities which are statutorily empowered to levy the same must spell out as to on what basis the same is charged. *The State has not placed any material before the High Court. The High Court has also not addressed itself properly on the same issue. It failed to pose unto itself a relevant question. It proceeded on the basis as if overall development charges by itself is sufficient to levy a fee without spelling out how the services rendered will satisfy the equivalence doctrine for the purpose of levy and collection of fees.*

25. *In Krishna Das v. Town Area Committee, Chirgaon [(1990) 3 SCC 645: 1990 SCC (Tax) 374] 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.

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."

26. *In Jindal Stainless Ltd. (2) v. State of Haryana [(2006) 7 SCC 241] 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."

27. *In Mumbai Agricultural Produce Market Committee v. Hindustan Lever Ltd. [(2008) 5 SCC 575] this Court observed: (SCC p. 579, para 14)*

> *"14. The quantum of 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."*

It was further stated: (Hindustan Lever case% [(2008) 5 SCC 575] , SCC p. 580, para 18)

"18. Cost of supervision, if borne by the State has to be recovered by it. The burden was, therefore, on the State to justify the levy. Even the general or special order, if any, purported to have been issued by the State has not been brought on record. On what basis, the supervision charges were being calculated is not known. The premise for levy or recovery

of the amount of supervisory charges is not founded on any factual matrix. Only the source of the power has been stated but the basis for exercise of the power has not been disclosed."

28. *Recently, in Mohan Meakin Ltd. v. State of H.P. [(2009) 3 SCC 157: (2009) 1 Scale 510] this Court opined that the jurisdiction of the State to impose such a levy is limited. When a fee is levied, the question as regards "aspects of power to levy fee vis-à-vis tax" must be borne in mind.*

29. *Furthermore, it was held in A.P. Paper Mills Ltd. v. Govt. of A.P. [(2000) 8 SCC 167: 2000 SCC (L&S) 1077] that even if a fee is levied for issuance of permit, it was only for the purpose of recovering the administrative charges. (See also Ashok Lanka v. Rishi Dixit [(2005) 5 SCC 598].)*

30. *This Court in Kerala Samsthana Chethu Thozhilali Union v. State of Kerala [(2006) 4 SCC 327: 2006 SCC (L&S) 796] , upon noticing State of Kerala v. Maharashtra Distilleries Ltd. [(2005) 11 SCC 1] opined: (Kerala Samsthana case% [(2006) 4 SCC 327: 2006 SCC (L&S) 796] , SCC p. 343, para 39)*

> *"39. In State of Kerala v. Maharashtra Distilleries Ltd.% [(2005) 11 SCC 1] this Court took notice of the provisions of Section 18-A of the Act. It was held that the State had no jurisdiction to realise the turnover tax from the manufacturers in the garb of exercising its monopoly power. It was held that turnover tax cannot be directed to be paid either by way of excise duty or as a price of privilege."*

31. Even while levying a fee, a quantum jump is deprecated.

32. In Indian Mica Micanite Industries v. State of Bihar [(1971) 2 SCC 236] it has been held: (SCC pp. 242-43, para 17)

> ***"17. … There cannot be a double levy in that regard. In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various***

persons such as wholesale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into palatable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realised as fees has failed to do so. On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The co-relationship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the co-relationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned rule cannot be justified."

33. In this case, the State in fact has not produced any material whatsoever before the High Court, which it was required for meeting the challenge on imposition of fee by it. As in Mohan Meakin Ltd.% [(2009) 3 SCC 157 : (2009) 1 Scale 510] , in this case also no justification for levy of fee has been placed before the High Court, we are of the opinion that the matter should be remitted to the High Court for consideration of the matter afresh."

(Emphasis supplied)

18. On a coalesce of the afore-quoted judgments of the Apex Court and Article 265 of the Constitution of India, what would unmistakably emerge, is that a tax can be imposed upon a citizen and the citizen is bound to pay whether there is any benefit derived out of it, to the citizen or not. But, when it comes to a fee the element of ***quid pro quo*** becomes ***sine qua non***. Unless there is a benefit to the citizen, a fee cannot be charged, in thin air. It now becomes germane, in the journey of the order, to notice each of the charges that are imposed upon the petitioners and the like on beginning to notice the functions of the Board.

THE BOARD:

19. The fee or impost is imposed by the Bangalore Water Supply and Sewerage Board ('the Board' for short). The genesis of the Board is germane to be noticed. Article 242 of the Constitution of India places water resources in the State list. Several legislations have emerged on water quality and treating water as an environmental resource, be it water pollution or distribution of water. The water resource in different States are managed under different heads, as it was prior to independence. In furtherance of

the water resource management and its distribution it was thought of to bring in an enactment for the task of providing water supply in the city, it is then the Bangalore Water and Sewerage Sanitary Act, BW & SS Act of 1964 (hereinafter referred to as the 'Act' for short) came to be enacted. Under the Act the Bangalore Water Supply and Sewerage Board was constituted on 10-09-1964. Water supply to the places coming with the precincts of Bengaluru Mahanagara Palike which includes 7 City Municipal Councils and 1 Town Municipal Council and 110 villages, has become the task of the Board, to regulate and distribute potable water. The Board acts within the power prescribed under the Act. Therefore, the Board has the following functions:

- *Supply of water and providing sewerage system to the existing and newly developing areas of Bruhat Bangalore and facilitating adequate infrastructure facilities for the disposal of waste water.*
- *Preparation and implementation of new water supply schemes and programmes to meet the growing demand for water in Bangalore city and mobilizing the finances needed for the same.*

- *Preparation and implementation of schemes and programmes for providing infrastructure facilities to facilitate systematic supply of water to Bruhat Bangalore and disposal of wastewater.*
- *Remodeling the distribution system to supply the available water equitably.*
- *Improvement to the existing sewerage system.*
- *Revenue collections for the water supply, sewerage and wastewater disposal system.*
- *Levy and collection of water charges on 'no loss no profit' basis.*

Its functions are, *inter alia*, levy and collection of water charges on a no loss no profit basis. Therefore, I deem it appropriate to consider the issue, **charge by charge**.

ADVANCE PROBABLE PRO RATA CHARGES:

20. The first charge, which is the bone of contention is the advance probable pro rata charges. To consider its legality, certain provisions of the Bangalore Water Supply and Sewerage Act, 1964

(hereinafter referred to as 'the Act' for short) are necessary to be noticed. The Act was promulgated in the year 1964 to make provisions, for water supply, sewerage and sewage disposal, in the Bangalore metropolitan area and all other matters connected therewith. Sub-section (17a) of Section 2 defines 'Pro rata charges' and reads as follows:

> ***"(17a) "Pro rata charges" means proportionate charges towards cost of improvement of water supply and sewerage systems levied by the Board from time to time payable by owner or occupier or developer of any building."***
>
> *(Emphasis supplied)*

Sub-section (17a) comes about, on an amendment to the Act, by insertion with effect from 16-04-2010. Pro rata charges would mean proportionate charges towards cost of improvement of water supply and sewerage system levied by the Board from time to time payable by the owner/occupier/developer of any building. Section 15 of the Act deals with general duties of the Board. It reads as follows:

> *"**15. General duties of the Board.—(1) The Board shall be charged with the general duty of providing a supply and improving the existing supply of water in the Bangalore Metropolitan Area and of making adequate provision for the sewerage and the disposal of the sewage in the Bangalore Metropolitan Area and for the***

efficient discharge of such duty the Board shall exercise such powers and perform such functions as are conferred or imposed by or under this Act.

(2) Without prejudice to the provisions of sub-section (1), it shall be the duty of the Board to take steps from time to time,—

(a) for ascertaining the sufficiency and wholesomeness of water supplies within the Bangalore Metropolitan Area;

(b) for preparing and carrying out schemes for the supply of wholesome water for domestic purposes within the Bangalore Metropolitan Area;

(c) for preparing and carrying out schemes for the proper sewerage of, and the disposal of the sewage of, the Bangalore Metropolitan Area.

Provided that no scheme under clause (b) or (c) estimated to the cost as specified in column (2) of the Table below shall be carried out by the Board without approval of the Authority specified in column (3) thereof, namely, -

TABLE

Sl. No	*Scheme*	*Approving Authority*
(1)	*A scheme costing more than rupees ten crores irrespective of source of funding*	*Government Cabinet Level*
(2)	*A scheme costing less than rupees ten crores with Government grant or loan as source of funds*	*Government (Administrative Department)*

(3) A scheme under clause (b) of sub-section (2) shall inter alia make provision,—

(a) for a supply of wholesome water in pipes to every part of the Bangalore Metropolitan Area in which there are houses, for the domestic purposes of the occupants thereof, and for taking the pipes

affording that supply to such point or points as will enable the houses to be connected thereto at a reasonable cost, so however, that this clause shall not require the Board to do anything which is not practicable at a reasonable cost or to provide such a supply to any part of the Bangalore Metropolitan Area where such a supply is already available at such point or points aforesaid;

(b) for a supply, as far as possible, of wholesome water otherwise than in pipes in every part of the Bangalore Metropolitan Area in which there are houses, for the domestic purposes of the occupants thereof, and to which it is not practicable to provide a supply in pipes at a reasonable cost, and in which danger to health arises from the insufficiency or unwholesomeness of the existing supply and a public supply is required and can be provided at a reasonable cost, and for securing that such supply is available within a reasonable distance of every house in that part.

(4) If any question arises under clause (a) of sub-section (3) as to whether anything is or is not practicable at a reasonable cost or as to the point or points to which pipes must be taken in order to enable houses to be connected to them at reasonable cost, or under clause (b) of the said sub-section, as to whether a public supply can be provided at a reasonable cost, the State Government shall determine that question and thereupon the Board shall give effect to that determination.

(5) Without prejudice to the provisions of sub-sections (1), (2) and (3), the Board shall, for the purposes of securing, as far as is reasonably practicable, that every house has a sufficient supply of wholesome water for domestic purposes, exercise its powers under this Act of requiring the owners of houses to provide a supply of water thereto."

(Emphasis supplied)

Section 15 depicts that the Board shall be charged with the general duty of providing a supply and improving the existing supply of

water in Bangalore Metropolitan Area by preparing and carrying out schemes for supply of lumpsum water and proper sewage.

21. Chapter III of the Act deals with Board's Finance, Accounts and Audit. Section 16 reads as follows:

> ***"16. General principles for Board's finance.—(1) For carrying on its operations under this Act, the Board shall levy rates, fees, rentals and other charges, and shall vary such rates, fees, rentals and other charges from time to time in order to provide sufficient revenue,—***
>
> *(a) to cover operating expenses, taxes and interest payments and to provide for adequate maintenance and depreciation;*
> *(b) to meet repayments of loans and other borrowings;*
> *(c) to finance normal year to year improvements; and*
> *(d) to provide for such other purposes beneficial be the promotion of water supply and disposal of sewage in the Bangalore Metropolitan Area as the Board may determine.*
>
> *(2) No part of the revenues of the Board, after meeting the expenses referred to in clauses (a), (b) and (c) of sub-section (1) shall be used to augment the reserves of the Board other than the reserves referred to in sections 24 and 24-A or for the general purposes of the Board including expenses in connection with capital works, other than improvement works."*

For carrying out operations under the Act, the Board is empowered to levy rates, fees, rentals, other charges, deposits etc. to cover operating expenses, taxes, interest payments and providing for adequate maintenance of all the above.

22. Chapter IV deals with water supply. Section 31 reads as follows:

> *"**31. Payment to be made for water supplied**.— Notwithstanding anything contained in section 127 or any law, contract or other instrument, for all water supplied under this Act, payment shall be made at such rates, at such times and under such conditions as may be specified by regulations, and different rates may be prescribed for supply of water for different purposes.*
>
> *Provided that where an arrangement has been entered into with the corporation under the provisions of Karnataka Municipal Corporations Act, 1976, water shall be supplied by the Board in accordance with such arrangement to the inhabitants of the City."*

Section 31 mandates payment to be made for water supply. The provision mandates, notwithstanding anything contained in Section 127 or any other law for all water supplied under the Act payment shall be made at such rates, at such times and under such conditions that may be specified by the Regulations. Section 61 empowers the Board to make Regulations to carry out the purposes of the Act. Section 61 reads as follows:

> *"**61. Regulations regarding water supply**.—(1) **The Board may, with the previous approval of the State Government, make regulations to carry out the purposes of this Chapter.***
>
> ***(2) In particular and without prejudice to the generality of the foregoing provisions, such regulations may provide for,—***

(a) the power of the Board,—

(i) to stop the supply of water, whether for domestic purpose, or not, or for gratuitous use; and

(ii) to prohibit the sale and use of water for the purpose of business;

(iii) to insist on rain water harvesting system for conservation of water.

(b) the power of the Board to take charge of private connections;

(c) the prohibition of fraudulent and unauthorised use of water and the prohibition of tampering with meters;

(d) the licensing of plumbers and fitters, and for the compulsory employment of licensed plumbers and fitters.

(3) In making any regulation under this section, the Board may provide that a breach thereof shall be punishable with fine which may extend to one hundred rupees and in case of continuing breach with an additional fine which may extend to ten rupees for every day during which the breach continues after the receipt of a notice from the Board to discontinue such breach."

(Emphasis supplied)

While Section 61 deals with power of Board to notify Regulations regarding water supply, Section 84 empowers the Board with the previous approval of the State Government to make Regulations *qua* sewerage. Section 84 reads as follows:

> *"**84. Regulations regarding sewerage**.—(1) The Board may with the previous approval of the State Government may, make regulations to carry out the purposes of this Chapter.*
>
> ***(2) In particulars and without prejudice to the foregoing provision, such regulations may provide for the charges to be paid to the Board by occupiers of trade premises for the reception of trade effluent into Board sewers and disposal thereof.***
>
> *(3) In making any regulation under this section, the Board may provide that a breach thereof shall be punishable with fine which may extend to one hundred rupees and in case of continuing breach with an additional fine which may extend to ten rupees for every day during which the breach continues after receipt of a notice from the Board to discontinue such breach."*
>
> *(Emphasis supplied)*

Section 89-A deals with collection of capital contribution from the beneficiary of any project and it reads as follows:

> *"89-A. **Collection of capital contribution from the beneficiary or borrowing loan, etc., in respect of any project.** – In furtherance of implementation of any water supply and sanitation projects, **the State Government may issue directions to the Board for making funding arrangements, to collect capital contribution from the beneficiaries of the project through any Local Authority or to borrow loans from funding agencies or to borrow from the market as per requirements of the projects."***
>
> *(Emphasis supplied)*

Section 89-A comes into effect by way of an amendment on 16-04-2010 with retrospective effect from 01-01-2003. Section 90 deals with licenses and written permissions.

23. In furtherance of the above, the Board has framed Regulations viz., the Bangalore Water Supply Regulations, 1965. The Water Supply Regulations are framed under the powers conferred upon the Board under Sections 31, 61 and 88 of the Act for the purpose of regulating water and sewerage in Bangalore Metropolitan Area. Certain Regulations are germane to be noticed. Regulation 5.1 deals with applications for house connections. The owner, lessee or occupier whoever desires to have supply of water should make an application. Regulation 5.3 mandates that any owner, lessee or occupier desires to have water supply connection shall pay to the Board pro rata charges in terms of Section 16 of the Act at the rates specified in the table. Regulation 5.3 reads as follows:

> ***"5.3. The owner, lessee or occupier, who desires to have a water supply connection shall pay to the Board, the pro rata charges, as per Section 16 of the Act, at the rates specified in the table below subject to other conditions specified in this clause.-***
>
> …. …. ….
>
> ***"Provided that this clause shall not apply to an owner or occupier or lessee who has already paid pro rata charges under Regulation 2(d) of the Bangalore Sewerage Regulations, 1974.***
>
> ***(a) In case of water supply connections for multistoried residential buildings of ground + two floors and***

above pro rata charges at the rates prescribed by the Board from time to time on the total built up area of each floor of the building constructed.

(b) In case of premises built for commercial purposes pro rata charges, at the rate prescribed by the Board from time to time for the total built up area of each floor of the building constructed.

(c) In case of service connections of 100 mm dia and above, in accordance with Regulation 5.3(a) or 5.3(d) as the case may be the actual cost involved for the work executed from branch point upto meter point shall also be paid as per the estimate prepared for the purpose.

(d) In case of residential buildings having sital area of 108 sq. mtrs. and above with sanctioned plan for Ground + Two floors, where only staircase room with small passage is provided in the second floor pro rata charges shall not be collected. However, if any living accommodation is provided in the second floor pro rata charges shall be collected for the same building.

(e) In case of buildings with sanctioned plan for three or more floors, constructed partly pro rata charges shall be collected for the constructed portion only and an undertaking to the effect that the additional pro rata charges shall be paid when an additional construction is taken up shall be taken from the owner, lessee or occupier.

(f) In case of Commercial buildings, if the construction is taken partly against the sanctioned plan, then pro rata charges shall be collected for the constructed area only and an undertaking shall be obtained from the owner, lessee or occupier to the effect that the additional pro rata charges shall be paid by the owner, lessee or occupier when additional connection is taken up.

(g) In case of additional constructions over the existing buildings, pro rata charges shall be collected only for the additional constructed area.

> *(h) In case of existing multistoried buildings/residential buildings having 15 mm or 20 mm water supply connection(s), if higher size connections are requested for, pro rata charges shall be collected for the entire building, if not already collected earlier.*
>
> *(i) In case of existing buildings with non-domestic connections, if additional area is constructed, pro rata charges shall be collected only for the additional constructed area.*
>
> *(j) In case of three and more houses are constructed on a site measuring 108 sq.mts. and above the entire building attracts pro rata charges at the rates applicable to Multistoried residential apartments."*
>
> *(Emphasis supplied)*

The proviso mandates that clause 5.3 will not be applicable if pro rata charges are already paid for the sewerage connection. Therefore, pro rata if paid for water supply, need not be paid for sewerage; and if paid for sewerage, need not paid for water. Regulation 5.4 deals with production of occupancy certificate for all connections.

24. The afore-quoted are the entire spectrum of the provisions of the Act which deal with the power of the Board to levy rates, fees, rentals and others charges. Section 16 *supra* empowers

the Board to collect fees and other charges from time to time in order to augment sufficient revenue. For what purpose is also enumerated in clauses (a) to (d) of Section 16. Section 31 deals with payment to be made for water supplied. Therefore, it is a specific provision where payment is demanded by the Board for supply of water. Section 31 mandates notwithstanding anything contained in any law payment shall be made at such rates under such conditions as may be specified by the Regulations at different rates which may be prescribed for supply of water for different purposes. Therefore, Section 31 is clearly the charging section insofar as water supply is concerned. Section 16 though permits the Board to levy charges for carrying out the operation under the Act, those are general powers and power to charge water supplied is under Section 31. Section 61 of the Act empowers the Board to make Regulations for water supply. The Regulations for water supply deal with the manner in which the water should be supplied to the residents. Likewise Section 84 empowers the Board to make Regulations regarding sewerage. Therefore, the Act itself demarcates the functions of water supply and the procedure for sewerage.

25. It now becomes germane to notice a Division Bench judgment of this Court, which considers and interprets the power of the Board to levy fees under Section 16 of the Act. The issue before the Division Bench in the case of ***MUNISWAMY*** *(supra)* was concerning demand of pro rata charges. The judgment was rendered at a point in time when pro rata charges was not even found in the statute as pro rata charges, springs in, is on an amended by insertion in the year 2010 by bringing in sub-section (17a) to Section 2 of the Act. Therefore, it becomes necessary to notice the judgment in the case of ***MUNISWAMY*** upon which the Board has placed much reliance. A learned single Judge in a batch of petitions had rejected the claim of the petitioners therein *qua* challenge to the pro rata charges being levied upon them by the Board. This was called in question by those petitioners before the Division Bench. Certain observations, in certain paragraphs, which are germane to be noticed, read as follows:

> ***"1. Section 16 is a specific provision, which confers power upon the Board to levy rates, fees, rentals and other charges and also to vary such rates, fees etc., from time to time. The word, 'pro rata charges" is more in the nature of a mode or***

> ***method for collection of the fee from the consumer and by whatever name it is called, it is in the nature of rendering services to the consumers and hence it partakes the character of fee."***

The Court observes that Section 16 is a specific provision which confers power on the Board to levy rates, fees, rentals and other charges from time to time. According to the Division Bench the phrase 'pro rata charges' is more in the nature of a mode or method for collection of fee from the consumer by whatever name it is called. It is in the nature of rendering service to the consumer and hence partakes the character of fee. Further, the Division Bench holds as follows:

> *"…. …. ….*
>
> *9. The object of the Act as could be seen from its preamble is that it was brought into force to make provision for water supply, sewerage and sewage disposal in Bangalore Metropolitan area and for matters connected therewith. Under Section 15 of the Act, the Board is charged with the general duty of providing a supply and improving the existing supply of water in the Bangalore Metropolitan area and of making adequate provision for the sewerage and the disposal of the sewage in the Bangalore Metropolitan area and for the efficient discharge of such duty, the Board shall exercise such powers and perform such functions as are conferred or imposed by or under the Act. It shall also be the duty of the Board to take steps from time to time for ascertaining the sufficiency and wholesomeness of water supplies within the Bangalore*

Metropolitan area for preparing and carrying out schemes for the supply of wholesome water for domestic purposes and for preparing and carrying out schemes for the proper sewerage of and the disposal of the sewage of the Bangalore Metropolitan area. By section 26 of the Act, all public reservoirs etc., shall vest in the Board and be subject to its control. Consequent thereupon, it is for the Board under section 27 of the Act to construct, lay or erect filtration plants, reservoirs, machinery conduits etc., for supplying the Bangalore Metropolitan Area with water and may provide tanks etc., within the said area for the use of the inhabitants. Likewise, by section 63 of the Act, all public sewers and all sewers within the Bangalore Metropolitan area and all sewage disposal works shall vest in the Board and consequent thereupon all such works shall be under the control of the Board and the Board shall maintain and keep in repair all Board sewers and sewage disposal works and shall construct as many new drains and sewage disposal works as may from time to time be necessary for sewerage and sewage disposal of the Bangalore Metropolitan area. In this context, it is to be seen that section 16 of the Act which deals with general principles for the finance of the Board states that for carrying on its operations under this Act, the Board shall levy rates, fees, rentals and other charges and shall vary such rates, fees, rentals and other charges from time to time in order to provide sufficient revenue to cover operating expenses, taxes and interest payments and to provide for adequate maintenance and depreciation and to meet repayments of loans and other borrowings and to finance normal year to year improvements and to provide for such other purposes beneficial to the promotion of water supply and disposal of sewage in the Bangalore metropolitan area as the Board may determine. There is some in built safeguard provided under section 16 by means of sub-section-2 which says that no part of the revenues of the Board after meeting the expenses referred to in sub section (1) shall be used to augment the reserves of the Board other than the reserves referred to in sections 24 and 24-A or for the general purposes of the Board including expenses in connection with capital works other than improvement works. It is to be seen therefore that section 16 of the Act clearly empowers or authorizes the

Board to levy rates etc., for the purpose of improvement of works specified therein. Therefore it cannot be said that the Board has no power to levy any such charges for the purpose of improvements specified in section 16 of the Act. No doubt the word, "pro-rata charges" does not appear any where in the Act. But merely because such a word has been used by the Board in making a demand, that by itself will not take away the power of the Board to levy such rates so long as the said amount collected or levied is being utilized for the improvement of the works as specified under sub-section 1 of section 16. The word, 'pro-reta' means, proportionality; in accordance with some determined standard. That is to say, it must have some basis to raise the demand. In the instant case, in order to generate funds for its improvements, the Board by demanding such levy, has determined some standard depending upon the nature of the building etc., Thus it is only a standard determined by the Board for the purpose of demanding such charges. It is equally true that section 16 of the Act, to which the power is traced to demand such levy, does not employ the words, "pro- rata charges" in the matter of demand and levy made thereunder. But the omission of such words under section 16 of the Act will be of no consequence as long as long as the pro rata charges are according to the Board nothing but a fee or the other charges for rendering service in the form of supply of water and adequate provision for disposal of the sewage."

A parting observation made by the Division Bench assumes significance which reads as follows:

"…. …. …

22. Before parting, we however add that having regard to the fact that the respondent/Board has now made certain regulations in the matter of levy and demand of pro rata charges obviously because the Board found it expedient and necessary to frame such regulations under section 88 and the other relevant provisions of the Act, which will have

> ***some sort of transparency in the matter and also gives sanctity to their functioning under the Act, it will do well if the respondent/Board is to consider the representations made if any by any of these individual appellants/petitioners making any grievance in the matter of demand made by the respondent/board from them on the ground of the same being in any way unreasonable, exhorbitant or arbitrary on the factual materials to ensure that there has been no such unreasonable exhorbitant demand made by the respondent/Board even in the absence of any such regulations at the relevant time. We therefore find it necessary to observe that if any individual representations are made by any of these appellants/petitioners putting forth any grievance in the matter of levy and demand made from them, the same may be reasonably considered by the respondent/Board to ensure that there has been no arbitrary or unreasonable or exhorbitant demand made by the respondent/Board from them. We are persuaded to make such observations in view of the fact that the resolution passed by the Board to exercise the powers conferred under section 16 of the Act is a decision taken by the Board as to what should be the criteria for the levy of prorata charges, but the decision needs to be implemented and the implementation could be by raising demand and for raising such demand, it is needless to point out that certain formalities have to be gone through. respondent/Board which is fully aware of this fact has now sought to implement its decision by making suitable and appropriate regulations in this regard."***
>
> *(Emphasis supplied)*

After observing that the Board was empowered to demand pro rata charges, the Court considers that the Board has now made certain

Regulations in the matter of levy and demand of pro rata charges. Obviously the Board found it expedient and necessary to frame such Regulations under Section 88 which will have some sort of transparency in the matter. Therefore, the Division Bench notices that pro rata charges were levied in terms of the Regulations by the time the matter could be decided.

26. After the aforesaid judgment of the Division Bench A co-ordinate Bench of this Court in terms of its order in ***IBC KNOWLEDGE PARK PRIVATE LIMITED v. BANGALORE WATER SUPPLY AND SEWERAGE BOARD AND OTHERS***[8] considers this aspect and holds as follows:

> *"…. …. ….*
>
> *7.Learned Senior counsel for the respondent on the other hand has relied on the decision of the Hon'ble Division Bench of this Court in the case of Muniswamy vs. BWSSB (W.A. No.3657/2000 and connected appeals disposed of on 02.07.2004) to contend that the power relating to collection of prorata charges has already been considered and upheld. In that regard, it is seen in the said appeals, the issue which arose for consideration is also relating to the validity or otherwise of the collection of prorata charges by respondents No.1 to 3 herein, The Hon'ble Division Bench with reference to the pre-amended Section 16 of the Act itself has categorically arrived at*

[8] ***Writ Petition No. 9251 of 2009 & connected case decided on 29-06-2017***

the conclusion that the said provision empowers the Board not only to levy fees but other charges and in that light has held that the collection of the prorata charges for carrying out the improvement would be justified. ***It has been further held that merely because no regulations are made, it will not denude the power of the Board under Section 16 of the Act to levy and demand such fee or other charges. Therefore, insofar as the power to collect the prorata charges, the Hon'ble Division Bench has also held that the collection of prorata charges is for the expenses incurred or likely to be incurred by the Board in rendering any actual or intended service to the residents of the metropolitan area.*** *Hence, it is held that the levy of prorata charges which is in the nature of a fee, in the background of the power available under Section 16 of the Act, 1964 would be justified.*

8. If that be the position, when the Hon'ble Division Bench of this Court had adverted to that aspect of the matter and has made a detailed consideration on that aspect, the issue is no more res integra for the purpose of raising a challenge in the instant petition. It is no doubt true that learned counsel for the petitioner has contended that the provision as incorporated and the definition relating to prorata charges has been incorporated subsequently. Even if that be the position, when in the absence of the said provision itself the Hon'ble Division Bench of this Court has arrived at the conclusion that the same could be charged and collected, the amendment which has been made subsequently can only be considered as a further clarification introduced into the Act to make it specific and to remove the ambiguity, if any, and also to avoid. the challenge being raised in that regard.

9. Therefore, in that circumstance, when the Hon'ble Division Bench has interpreted the existing provision in the Act prior to amendment and the

> *demand raised in the instant case is based on the provision that was existing as on the date of demand, the decision relied on by the learned counsel for the petitioner in the case of* ***Central Excise*** *(supra) to contend that the amendment as made should not be applied retrospectively would also not be of any assistance. That apart, the decision in the case of* ***Common Cause Vs. Union of India and others (2008)5 Scc 511)*** *relied on by the learned counsel for the petitioner to contend that the Court cannot legislate and it is for the Legislature to do so also would not be relevant in the instant case. I am of the said opinion for the reason that the Hon'ble Division Bench of this Court has not legislated nor introduced any provision into the Act, but while taking note of the existing provision in the Act and interpreting the power available under such provision has arrived at the conclusion that the provision as contained would also provide for imposition and demand of prorata charges. Hence, if all these aspects of the matter are kept in view, the demand for prorata charges which in any event has already been paid by the petitioner cannot be sustained in these petitions. Accordingly, the challenge to the demand impugned insofar as the prorata charges would not call for interference."*
>
> *(Emphasis supplied)*

The co-ordinate Bench observes that demand of pro rata charges is upheld by the Division Bench in the absence of provision itself. In the presence of the provision no fault could found with the demand of pro rata charges on the ground that water was not being supplied to two out of four blocks of the building. What could be gathered from a conjoint reading of the provisions of the Act, the

judgment rendered by the Division Bench and the co-ordinate Bench is that power under Section 16 of the Act can be used to augment resources of the Board. Pro rata was one of such resource that was sought to be asked to augment the resources of the Board as considered in the case of ***MUNISWAMY*** *(supra).* This was at a time when the Regulations were not even amended. The issue therein was with regard to water supply granted to those buildings that were charged pro rata.

27. The learned senior counsel for the Board taking cue from the afore-quoted observations of the Division Bench and that of the learned single Judge contends that the Division Bench has clearly held under whatever method the demand is made for the supply of water it should be fulfilled by the residents of the City whether they are drawing water or otherwise. If the system is kept ready, they should keep the money ready to be paid. He would emphasise on the fact that the difference between tax and fee is completely obliterated as the Apex Court in the subsequent judgments, wherein the Apex Court has clearly held that there is no difference between tax and fee when it comes to services. The element of *quid*

pro quo is completely depleted. The learned senior counsel's sheet anchor is an elucidation by the Apex Court. A three Judge Bench judgment of the Apex Court in the case of ***JALKAL VIBHAG NAGAR NIGAM AND OTHERS v. PRADESHIYA INDUSTRIAL AND INVESTMENT CORPORATION AND ANOTHER***[9] to contend that difference between tax and fee and the element of *quid pro quo* is now not necessary for demand. To consider this submission *qua* the said judgment, it is germane to notice the issue before the Apex Court in the said judgment. At paragraph 5 the Apex Court draws up issues for consideration reading –

> *"…. …. ….*
>
> ***5. Principally, two issues arise in these proceedings:—***
>
> ***(i) Whether the demand of water tax and sewerage tax is sustainable with reference to the provisions of the UP Water Supply and Sewerage Act; and***
>
> ***(ii) Whether the State Legislature has the legislative competence to levy the tax under the provisions of Section 52(1)(a)."***
>
> *(Emphasis supplied)*

[9] *2021 SCC OnLine SC 960*

The issue that fell for consideration before the Apex Court was whether water tax and sewerage tax with reference to the provisions of the UP Water Supply and Sewerage Act was sustainable and whether the State legislature had the legislative competence to levy the tax under the provisions of Section 52(1)(a) of the UP Water Supply and Sewerage Act. Answering the issue the Apex Court has held as follows:

> *"…. …. ….*
>
> ***17.*** *The finance and property of the Jal Sansthan are dealt with in Chapter V of the Act. Section 41 envisages that every Jal Sansthan shall have its own fund which shall be deemed to be a local fund to which shall be credited all monies received by or on behalf of the Jal Sansthan. Section 44 provides for the general principles governing the finance of the Jal Sansthan in the following terms:*
>
> *"44. General principles for Jal Sansthan's Finance.- A Jal Sansthan shall from time to time so fix and adjust its rates of taxes and charges under this Act as to enable it to meet, as soon as feasible, the cost of its operations, maintenance and debt service and where practicable to achieve an economic return on its fixed assets."*
>
> *... … …*
>
> ***22. As distinct from the levy of taxes, Section 59 enables the Jal Sansthan to fix the cost of water to be supplied by it according to the minimum cost to be charged in respect of each connection. In lieu of charging the cost of water according to volume, the Jal Sansthan is empowered to accept a fixed sum for a specified period on the expected consumption of water during the period. Section 59 provides as follows:***

> *"59. Cost of water.- (1) A Jal Sansthan shall, by notification in the Gazette, fix the cost of water to be supplied by it according to its volume, and also the minimum cost to be charged in respect of each connection.*
>
> *(2) A Jal Sansthan may, in lieu of charging the cost of water according to volume, accept a fixed sum for a specified period on the basis of expected consumption of water during that period."*

23. Section 60 provides for the fixation of the cost of disposal of waste water by the Jal Sansthan. Section 61 provides for the provision of water meters and the recovery of charges for the rent of the meters according to the bye-laws. Section 62 is a provision enabling the Jal Sansthan to demand security from the consumer in connection with the supply of a meter or for the sewer connection as provided in the bye-laws. Section 63 deals with the levy of fees in the following terms:

> *"63. Fees.- A Jal Sansthan may charge such fees, for connection, disconnection, reconnection of any water supply or sewer or testing or supervision or for any other service rendered or work executed or supervised as may be provided by bye-laws."*
>
> … … …

D.2 Nature of levy under Section 52 of the UP Water Supply and Sewerage Act

28. *A legislative enactment which provides for the imposition of a tax may make provisions for*

(i) The levy of the tax on the basis of a taxable event;
(ii) The measure of the tax;
(iii) The rate at which the tax will be imposed;
(iv) The incidence of the tax; and
(v) Assessment, collection, recovery and other incidental provisions.

29. *This characterization of the components of a tax has been described repeatedly in the decisions of this Court. The locus classicus on this point was a two judge Bench decision*

in Govind Saran Ganga Saran v. CST. Justice RS Pathak (as the learned Chief Justice then was) held:

> *"6.* ***The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability.*** *If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."*
>
> (***emphasis supplied***)
>
> *... … …*
>
> ***52.*** *The interpretation of the scheme of the entries laid down in Sundararamier (supra) has been followed by this Court in Goodricke (supra), Corporation of Calcutta v. Liberty Cinema; Jindal Stainless Ltd. v. State of Haryana and other decisions.*
>
> ***53.*** *As explained above, the levy under Section 52 falls squarely under the ambit of Entry 49 of List II as it is in the nature of a tax and not a fee. Thus, the applicability of Entry 17, which is a non-taxing entry, does not arise in this case.*
>
> *... … …*
>
> ***55. The distinction between a tax and fee has substantially been effaced in the development of our constitutional jurisprudence. At one time, it was possible for courts to assume that there is a distinction between a tax and a fee: a tax being in the nature of a compulsory exaction while a fee is for a service rendered. This differentiation, based on the element of a quid pro quo in the case of a fee and its absence in the case of a tax, has gradually, yet steadily, been obliterated to the point where it lacks any practical or constitutional significance. For one thing, the payment of a charge or a fee may not be truly voluntary and the charge may be imposed simply***

on a class to whom the service is made available. For another, the service may not be provided directly to a person as distinguished from a general service which is provided to the members of a group or class of which that person is a part. Moreover, as the law has progressed, it has come to be recognized that there need not be any exact correlation between the expenditure which is incurred in providing a service and the amount which is realized by the State. The distinction that while a tax is a compulsory exaction, a fee constitutes a voluntary payment for services rendered does not hold good. As in the case of a tax, so also in the case of a fee, the exaction may not be truly of a voluntary nature. Similarly, the element of a service may not be totally absent in a given case in the context of a provision which imposes a tax.

... ...

60. In view of this consistent line of authority, it emerges that the practical and even constitutional, distinction between a tax and fee has been weathered down. As in the case of a tax, a fee may also involve a compulsory exaction. A fee may involve an element of compulsion and its proceeds may form a part of the Consolidated Fund. Similarly, the element of a quid pro quo is not necessarily absent in the case of every tax. In the present case, the tax has been imposed by the legislature in Section 52 on premises situated within the area of the Jal Sansthan. The proceeds of the tax are intended to constitute revenue available to the Jal Sansthan to carry out its mandatory obligations and functions under the statute of making water and sewerage facilities available in the area under its jurisdiction. The levy is imposed by virtue of the presence of the premises within the area of the jurisdiction of the Jal Sansthan. The water tax is levied so long as the Jal Sansthan has provided a stand post or waterworks within a stipulated radius of the premises through which water has been made available to the public by the Jal Sansthan. The levy of the tax does not depend upon the actual consumption of water by the owner or occupier upon whom the tax is levied. Unlike the charge under Section 59 which is towards the cost of water to be supplied by the Jal Sansthan according to its volume or,

> ***in lieu thereof on a fixed sum, the tax under Section 52 is a compulsory exaction. Where the premises are connected with water supply, the tax is levied on the occupier of the premises. On the other hand, where the premises are not so connected, it is the owner of the premises who bears the tax. The levy under Section 52(1) is hence a tax and not a fee. Moreover, for the reasons that we have indicated above, it is a tax on lands and buildings within the meaning of Entry 49 of List II."***
>
> *(Emphasis supplied)*

The Apex Court considers the issue therein and imposition of water tax upon the residents. The emphasis is on water tax. The UP Act had declared payment of money towards usage of water as water tax. The Apex Court at paragraph 53 holds that the levy under Section 52 of the UP Act squarely comes under the ambit of Entry 49 of List-II as it is in the nature of tax and not a fee. Thus, the applicability of Entry-17 of List-II of Schedule-VII which is a non-taxing entry did not arise therein. Therefore, what fell for consideration was that it was a ***tax*** and ***not a fee***. While saying so, the Apex Court observes that a distinction between tax and fee has substantially been effaced, in the development of our constitutional jurisprudence. At one time, it was possible for courts to assume that there is a distinction between a tax and a fee: a tax being in the nature of a compulsory exaction, while a fee is for a service

rendered and clearly holds that the difference between the two has waned away by passage of time. At paragraph 60 what the Apex Court finally observes is that distinction between tax and fee has been weathered down as in the case of tax a fee may also involve a compulsory exaction. A fee may involve an element of compulsion and its proceeds may form a part of the consolidated fund. Similarly, an element of *quid pro quo* is not necessarily absent in the case of a tax.

28. If the law laid down by the Apex Court is pitted to the facts of the case at hand *qua* the Advance pro rata charge, what needs to be noticed is, on whom the advance pro rata charge sought to be made cannot make a hue and cry that it is contrary to law. It is imposed only to multi-storied buildings. The reason behind such prescription is explained by the learned senior counsel Sri M.N.Seshadri appearing for the Board, it is to augment the resources of the Board, the resources are for the purpose of supply, continuous supply, uninterrupted supply of water to the residents of the Bangalore Metropolitan Area and other areas that would come within the precincts of the Board. It should not be mistaken that

water through the Board is supplied beyond the metropolitan area of the city. BWSSB concerns only the city and its limits, as observed hereinabove. Water to the entire State is managed by the Karnataka Urban Water Supply and Sewerage Board (KUWS & SB). The demand of charge as advanced pro rata charges cannot be found fault with, as pro rata charges even before the amendment to the Act is upheld by the Division Bench of this Court, which has become final. Pro rata charges are not the ones that is levied upon the residents of the city now, it has been in the nature of a charge or a fee right from 1988 by way of circulars being issued from time to time. A circular dated 06-04-1988 laid down procedure for imposition of pro rata charges. The circular, is in fact, revision of earlier pro rata charges. The circular reads as follows:

"No.BWSSB/CE-1/TA-5/DM-1/99/88-89 Dated:06.04.1988

CIRCULAR

Sub: Charging of prorata charges for sanction of water supply and sanitary connection in respect of Multi-Storeyed and Commercial buildings.

****

The procedure of charging prorata charges hither-to has now been revised according to the approval of the Board during its meeting held 14.03.1988. The same may please be followed while sanctioning of the water supply and sanitary

connections in respect of Multi-Storyed buildings and Commercial buildings in future.

The resolution of the Board is reproduced below for necessary action.

Charge the actual expenditure for laying of separate mains on sub mains or a minimum prorata charges as indicated below:

1) Water Supply:

i) Single bed room flat	*-*	*Rs.750/- per flat*
ii) Double bed room flat	*-*	*Rs.1000/- per flat*
iii) 3 bed rooms flat	*-*	*Rs.1200/- per flat*
iv) Above 3 bed rooms	*-*	*Rs.1500/- per flat*

For domestic connections:
Rs.1.50 per sft of plinth area

2) Sanitary connections:

i) Single bed room flat	*-*	*Rs.750/- per flat*
ii) Double bed room flat	*-*	*Rs.1000/- per flat*
iii) 3 bed room flat	*-*	*Rs.1200/- per flat*
iv) Above 3 bed rooms	*-*	*Rs.1500/- per flat*

For Non-domestic connections:
Rs.1.50 per sft of plinth area

Sd/-
Chief Engineer-1
BWSSB"

Subsequently, another circular comes to be issued on 30-07-1992.

It reads as follows:

"No.BWSSB/CE-1/TA-6/2296/92-93 Dated: 30.07.1992

CIRCULAR

Sub: Levy of Prorata Charges for the sanction of Water Supply and Sanitary Connections in respect of Residential, Commercial and Multistoried Buildings/Flats.

******

The Board in its meeting held on 29.7.1992 has accorded approval to levy fees for sanction of Water Supply and Sanitary connection in respect of Residential, Commercial and Multistoried Buildings/Flats, as follows:

(i) Levy of Rs.4/- per sft for Water Supply and UGD connections for Residential Buildings having beyond Ground + First Floor.

(ii) Levy of Rs.6/- per sft for Commercial Buildings for Water Supply connections and Rs.6/- per sft for Commercial Buildings for UGD connections.

&

(iii) To charge the actual cost involved for the work executed by BWSSB, wherever service connections of 4" and above are to be given for water supply by a branch ie., from the branch point upto the meter point in addition to the charges of Rs.4/- per sft for Residential Buildings and Rs.6/- per sft for Commercial Buildings pertaining to Water Supply.

The above circular supersedes the circular issued ie., T.O. Circular No.BWSSB/ CE-I/TA-5/310/90-91 dt: 25.4.90.

This will come into force with immediate effect.

Sd/-
Chief Engineer-1
BWSSB"

(Emphasis added)

Again, on 31-12-1999, the Board issues the following circular:

"No.BWSSB/CE(M)/TA-9/5775/99-2000 Dated: 31.12.1999

CIRCULAR

Sub: Enhancement of prorata charges.

******

The Board in its meeting held on 23.12.1999 has accorded approval to enhance the prorata charges from Rs.50/- to Rs.70/- per sq.mtr. each for Water Supply and Sanitary in respect of Residential Buildings and from Rs.50/- to Rs.80/- per sq.mtr in respect of Apartment Buildings.

Regarding Commercial Buildings, the Board has accorded approval to enhance the Prorata charges from Rs.80/- to Rs.120/- per sq.mtr each for Water Supply and Sanitary. The sanitary point charges has also been enhanced from Rs.80/- to Rs.120/- per point.

All the AEEs and EEs are instructed to implement the above enhancement of Prorata charges in respect of all files received from 29.12.1999 onwards.

Sd/-
Chief Engineer(M)
BWSSB"

(Emphasis added)

By the aforesaid circular the Board enhances the pro rata charges.

A subsequent circular dated 13-02-2008 imposed the levy of pro

rata charges upon multi-storied, commercial and residential buildings. It reads as follows:

"No.BWSSB/CE(M)/ACE(M)-I & II/TA-9/6942/2007-08

Dated:13.02.2008

CIRCULAR

Sub: Levy of prorata charges for Multistoried Commercial and Residential Buildings

Ref: 1) Proceedings of the Board meeting held on 28.1.2008

2) No.BWSSB/CE(M)/6460/dt:31.1.2008.

3) No.BWSSB/CAO-S/4918/dt:8.2.2008.

******

The Board in its meeting held on 28.1.2008 accorded approval to

a) Levy unique Prorata charges clubbing Water Supply and Sanitary as against levying separately being done hitherto.

b) Levy of new Prorata charges for Multistoried Commercial and Residential buildings w.e.f. 1.2.2008 as follows;

a)	*Residential building*	*Rs.150/- per sqmt on total built up area*
b)	*Multistoried Residential Apartments*	*Rs.200/- per sqmt on total built up area*
c)	*Buildings fully owned by State Government and Central*	*Rs.240/- per sqmt on total*

	Government (Not applicable to Govt. undertaking organizations own buildings)	*built up area*
d)	*Commercial buildings*	*Rs.300/- per sqmt on total built up area*

As such, all the EE's AEE's of Maintenance Zone are hereby directed to implement the above new Prorata charges for all the files received from 1.2.2008 onwards.

Sd/-
Chief Engineer(M)
BWSSB"

(Emphasis added)

The levy of pro rata charges has been demanded and complied with by the citizens by way of circulars. It is one such circular that becomes the subject matter before the Division Bench in the case of ***MUNISWAMY*** *(supra)* and followed by a subsequent judgment by the co-ordinate Bench in ***IDC PARK***. What now becomes the fly in the ointment is, it being collected in advance, not on fixed terms, but on probable terms. Nonetheless, it is pro rata charges. It is now advance probable pro rata charges. As observed hereinabove, demand of pro rata charges has now statutory foundation and the division bench *supra* holds it to be service and a chargeable,

charge. If the demand were to be made in the absence of any pro rata charges, it would have been a circumstance altogether different and falling foul of plethora of judgments rendered by the Apex Court. The pro rata, if it is construed to be a charge or a fee, there is a provision and *quid pro quo,* to charge pro rata charges as it is already held by this Court in the cases referred to *supra*. It is being charged in advance to particular buildings to augment revenue to keep the building ready for water supply and sewerage. Therefore, finding statutory foundation for imposition of advanced probable pro rata charges, I decline to interfere with the said component of the challenge in these petitions.

BENEFICIARY CAPITAL CONTRIBUTION CHARGES:

29. The said levy is beneficiary capital contribution charges ('BCC' for short). The genesis of this charge dates back to the action of the State in making Bengaluru Mahanagara Palike to Bruhath Bengaluru Mahanagara Palike. 7 adjoining City Municipal Councils, 1 Town Municipal Council and 110 villages were added into Bengaluru Mahanagara Palike to make it a greater corporation.

The subject charges are not demanded from the citizens who came under the Bengaluru Mahanagara Palike, but only for those constructions which are coming up in the newly added 110 villages and only to construction of multi-storied buildings, as a one time levy. The said levy is adjusted at the time of sanction of water supply and sewerage to the respective buildings. The submission of the learned senior counsel for the Board is that the said revenue could cover some part of the enormous cost of providing water supply and other infrastructure in the 110 villages which works out to 2500 crores. It is the contention that the subject levy is calculated in the most scientific manner and what is demanded is only a meagre amount and only to commercial ventures that are put up by the developers like the petitioners in the cases at hand and not to individuals putting up dwelling houses, as the number of floors minimum necessary for the charge is between 4 to 30. Whether the aforesaid charge is not backed by the statute is what is contended by the petitioners.

30. Section 16 *supra* empowers the Board to levy fees, rates, rentals, pro rata charges, deposits, taxes and other charges and

also permits the Board to vary rates, fees, rentals and pro rata charges. Section 16 is a general provision to augment revenue to the Board, as the provision permits the Board to levy the aforesaid charges to carry on its operations. Pro rata charges are also found in Section 16. It comes into the statutory provision only on 16-04-2010 when clause 17(a) was introduced to Section 2 defining what would be pro rata charges. Therefore, the general provision which permits augmentation of revenue by levy of various imposts cannot mean that, it can be used to impose all and sundry charges. The word 'other charges' that is found in Section 16 cannot clothe the Board with the power to charge BCC at any rate it deems fit. Specific provision defining what is BCC and the manner in which it can be imposed is conspicuously absent in the entire statute. If the statute does not permit imposition of any impost, be in the name of tax or a fee or even a charge, it can hardly be justified for its imposition. Therefore, the judgments rendered by the Apex Court from time to time that unless there is *quid pro quo,* a fee cannot be imposed. Fee, in the case at hand, is in the name of a charge, the charge is BCC. I deem it appropriate to re-extract Regulation 89-A. It runs as follows:

> *"89-A.* ***Collection of capital contribution from the beneficiary or borrowing loan, etc., in respect of any project.*** *– In furtherance of implementation of any water supply and sanitation projects,* ***the State Government may issue directions to the Board for making funding arrangements, to collect capital contribution from the beneficiaries of the project through any Local Authority or to borrow loans from funding agencies or to borrow from the market as per requirements of the projects."***
>
> *(Emphasis supplied)*

In terms of Regulation 89-A, capital contribution is permitted to be collected from the beneficiary in respect of any project. It directs that in furtherance of implementation of any water supply and sanitation projects, the State Government may issue directions to the Board for making funding arrangements to collect capital contribution from the beneficiaries of the project or through any local authority or to borrow loans as required for the project. What is discernible from the afore-quoted regulation is, that there should be a project notified and for implementation of that water supply or sanitation project, the State Government to issue directions to the Board to make arrangements of funding by way of collection of capital contribution of the project. It is collection of capital contribution from the beneficiary. The noticees in all these cases

are yet to become beneficiaries of any project, projected. The capital contribution is demanded at the time of issuance of a no objection certificate. The stage at which it is sought for is what cannot be accepted by this Court.

31. The justification by the Board is, that it has a general duty of providing supply and improving existing supply of water in the Bangalore Metropolitan area and every charge is necessary to be imposed for sufficient revenue to be in the Board to be ready for supply of water. The submission of the learned senior counsel for the respondents is *sans countenance*. It is an admitted fact that there is no specific provision under the Act to impose the impost – the fee/charge, as BCC. It becomes apposite to refer to the judgment of the Apex Court in the case of ***NAGAR MAHAPALIKA v. DURGA DAS BHATTACHARYA***[10]***.*** The Apex Court holds as follows:

> *"…. …. ….*
>
> ***10.*** *We pass on to consider the next question raised in this appeal, namely, whether there was a quid pro quo for the licence fees realised by the appellant and whether the*

[10] *(1968) 3 SCR 374*

impost was a fee in the strict sense as contemplated by Section 294 of the Act. A finding has been recorded in the present case by the trial court that a sum of Rs 1,43,741/7/0 was spent by the Municipal Board for providing facilities and amenities to owners and drivers of rickshaws. This sum of Rs 1,43,741/7/0 is made up of the following items:

> *"Rs 68,000 spent over the paving of bye-lanes, in these the only conveyance that can operate is a rickshaw.*
>
> *Rs 20,000 spent as expenses for lighting of streets and lanes.*
>
> *Rs 47,741/7/0 spent in making provision for parking grounds.*
>
> *Rs 8000 spent on payment of salary to the staff maintained for issuing licences and inspecting rickshaws".*

The High Court was of the opinion that the amount of Rs 68,000 spent for paving of bye-lanes and Rs 20,000 for lighting of streets and lanes cannot be considered to have been spent in rendering services to the rickshaw owners and rickshaw drivers. ***The reason was that under Section 7(a) of the Act it was the statutory duty of the Municipal Board to light public streets and places and under clause (h) of the same section to construct and maintain public streets, culverts etc. The expenditure under these two items was incurred by the Municipal Board in the discharge of its statutory duty and it is manifest that the licence fee cannot be imposed for reimbursing the cost of ordinary municipal services which the Municipal Board was bound under the statute to provide to the general public (See the decision of the Madras High Court in India Sugar and Refineries Ltd. v. Municipal Council Hospet) [ILR (1943) Mad 521] . If these two items are excluded from consideration the balance of expenditure incurred by the Municipal Board for the benefit of the licensees is Rs 55,741/7/0. In other words, the***

> ***expenditure constituted about 44% of the total income of the Municipal Board from the licensees. In our opinion, there is no sufficient quid pro quo established in the circumstances of this case and the High Court was therefore right in holding that the imposition of the licence fees at the rate of Rs 30 on each rickshaw owner and Rs 5 on each rickshaw driver was ultra vires and illegal."***
>
> *(Emphasis supplied)*

The Apex Court, in the aforesaid judgment holds that if there is no sufficient *quid pro quo* is established, imposition of fees would become illegal. The justification for imposition of the subject impost is that, it is necessary to augment revenue for the general services the Board undertakes. This is exactly what the Apex Court holds that fees cannot be collected to defray costs of general municipal services of which the supply of water is certainly one. If the words 'general municipal services' in the judgment is paraphrased to the general functions of the Board, the judgment would in all fours become applicable to the facts of the case. What the Board is seeking to project is that they are wanting costs towards laying of pipelines for supply of water to bring water to every residents house within the precincts of the Board. This is the general duty of the Board, as the Board is established with manifold

functions, one such function is, laying of pipelines *inter alia*. The general duties of the Board cannot be projected to be a subject matter of such fee, without there being any service rendered for imposition of such fee. Therefore, the element of *quid pro quo* being absent, collection of the charges at the time of issuance of NOC for approving a plan becomes contrary to law, as there is no such charging section or no such provision in the Act or the Regulations to define what would be BCC and the manner of its imposition. Therefore, the subject impost – BCC is *sans* authority of law. The charge thus tumbles.

GREATER BANGALORE WATER SEWERAGE PROJECT CHARGES:

32. For the reasons indicated to hold BCC charges to be illegal and the defence/justification of the Board being the same as projected for imposition of the BCC charges, the Greater Water Sewerage project charges are also held to be illegal.

TREATED WATER CHARGES FOR CONSTRUCTION:

33. The Treated Water Charges would draw its foundation from the statute itself. Regulation 36 reads as follows:

> ***"36. Rates for Water Supply*** *:- The following are the rates at which payment in respect of water supplied for various purposes shall be made by the consumers.*
>
> ***I. Water Supplied.-***
>
> *(a) to premises used solely for residential purposes;*
>
> *(b) xxxxx*
>
> *(c) to premises used as Hostels for Students runs by Educational Institutions including Hostels run on Co-operative basis;*
>
> *(d) to premises belonging to the statutory bodies established by the Central Government or State Government and used solely for residential purposes;*
>
> *(e) to premises used for residential purposes and having attached kitchen or domestic gardens provided the extent occupied by the garden is not more than 40 per cent of the total area covered by structures and provided further that the produce of such garden is not for sale;*
>
> *(f) premises used for religious purposes and places of worship;*
>
> *(g) to premises belonging to Central and State Governments and used solely as residential quarters for Government employees;*

(h) to premises used for charitable purposes, Dharmashalas and Musafirkhanas used for housing the poor to whom no fees are charged, or where fees are charged but no profit is made for the occupation, when managed by a Registered Trust;

(i) to charitable hospitals, dispensaries, sanitorial asylums provided they are registered under the Public Trust Act or to hospitals, dispensaries, sanitorial Asylums maintained by the State Government or Central Government and Bhruhat Bengaluru Mahanagara Palike;

(j) to premises used as/or immediately connected, with pinjrapoles, orphanages, foundling homes, widows' homes, almshouses, friends' society homes, homes for the poor, Seva Sadans and Rescue Homes for Women, Libraries where no fee is charged, premises occupied as Schools for the Blind and Handicapped, Ambulance Bridge and appurtenant structures used for keeping ambulance vans.

… … …

***IX. Re-cycled Water**. – Where Re-cycled water is supplied from the treatment plants of Board, water charges shall be levied at the rates. The prevailing rates are as under:*

*(i) **Secondary treated water. –** (1) Rs.10/- per KL for supply at the plant premises through lorry tankers (2) Rs.15/- per KL for supply through pipeline subject to entire cost of the pipeline being borne by the beneficiaries.*

*(ii) **Tertiary Treated Water.-** (1) Rs.15/- per KL for supply at the plant premises through lorry tankers.*

(iii) Rs.20/- per Kilo Litres for supply of tertiary treated water to Government Department and Government undertakings.

(2) Rs.25/- per KL for supply through pipeline subject to entire cost of the pipeline being borne by the beneficiaries."

The rates at which the water is supplied is determined. The purposes for supply is borne in the provision. Clause IX of the Regulation 36 deals with re-cycled water supplied from the treatment plants of the Board. They could be secondary treated water or tertiary treated water. The rates at which the treated water would be supplied is also indicated in the afore-quoted regulation. Every trait of power to impose a charge is found in the aforesaid provision. Therefore, it cannot be said that the impugned impost is *de hors* law, it is in consonance with law and is charged pursuant to a law. The submission of the learned senior counsel as noticed hereinabove that the judgment of the Apex Court in the case of ***JALKAL*** *supra* covers the entire issue, as it depletes the difference between tax and a fee, as analyzed hereinabove, would not be an answer to all the imposts challenged in the case at hand, as the very judgment in the case of ***JALKAL*** fell for consideration, yet again before the Apex Court in a subsequent judgment in the case of ***KERALA STATE***

BEVERAGES MANUFACTURING AND MARKETING CORPORATION V. CIT[11]. The Apex Court has held as follows:

> ***"41.*** *The judgment relied on by the learned ASG in Jalkal Vibhag Nagar Nigam* ***[Jalkal Vibhag Nagar Nigam v. Pradeshiya Industrial & Investment Corpn., (2021) 20 SCC 657 : 2021 SCC OnLine SC 960] would not render any assistance to support the case of the Revenue. The said judgment only considers whether the levy of water tax under Section 52-A of the U.P. Water Supply and Sewerage Act is a fee or whether it is a tax covered by Entry 49 of List II of the Seventh Schedule to the Constitution. The said judgment in fact maintains and does not take away the basic constitutional distinction between "fee" and "tax".*** *Having regard to language used in Section 40(a)(ii-b), we are of the view that the aforesaid judgment does not support the case of the Revenue."*
>
> *(Emphasis supplied)*

The Apex Court clearly holds that the judgment in ***JALKAL*** in fact maintains and does not take away the basic constitutional distinction between a fee and a tax. Even otherwise, judgment of the Nine Judge Bench in ***JINDAL STAINLESS LIMITED,*** *supra* makes out the clear distinction and holds there must be a *quid pro quo* for charging a fee. The submission of the learned senior counsel to justify the BCC charges and GBWSP charges is untenable and therefore, they are the ones which are to be held to be illegal.

---

[11] *(2022)4 SCC 240*

SUMMARY OF THE FINDINGS:

(i) Advance Probable Pro Rata Charges are held to be legal in the light of the preceding analysis.

(ii) Treated Water Charges are also held to be legal, in the light of its foundation in the statute.

(iii) Beneficiary Capital Contribution Charges and Greater Bangalore Water Sewerage Project charges are held to be illegal, in the light of the aforesaid reasons.

34. A parting observation in the circumstances may not be inapt. Hue and cry are so loud by the petitioners that they are not willing to pay any charges, as they are not receiving any benefit from the Board. Strange submissions are made that they would not depend upon the Board for any service ignoring the fact that sewerage is also a service by the Board. If the Board does not maintain sewerage, it would undoubtedly result in chaos. But the Board also cannot impose imposts contrary to law. Importance of water cannot be ignored by any citizen of any land. Water is the most important of the elements of nature. River valleys have always been the cradle of civilization from ***orient*** to the ***occident.***

Civilization, after civilization have thrived over water, flourished with water, perished without water. Therefore, water is a lifeline to civilization. Water for all other purposes stands on a different footing, and potable water, on a different footing. It takes immense expenditure to convert water to potable water by the distribution Boards. Ground water sometimes could be potable, but at most of the times not dependable. The Board performs the functions of distribution of potable water. If, the citizens of the State, are wanting to enjoy pure potable water, *de hors* all impurities, it is necessary for them to be a part of augmenting revenue to such distribution Boards, by payment of charges, a *caveat* legally determined charges.

35. For the aforesaid reasons, the following:

ORDER

(i) The Writ Petitions are allowed in part.

(ii) The demand of **Advance Probable Pro Rata Charges** and **Treated Water Charges for Construction** are upheld.

(iii) The demand of **Beneficiary Capital Contribution Charges and Greater Bangalore Water Sewerage project charges** are held to be illegal.

(iv) The obliteration as found in clause (iii) *supra* will not come in the way of the State or the Board to bring in the charges that are held to be illegal under the provisions of the Act or the Rules, by making suitable amendments to the Act, Rules or the Regulations.

(iv) Petitioners in these petitions who have deposited amounts demanded as **Beneficiary Capital Contribution Charges and Greater Bangalore Water Sewerage project charges** are entitled to refund of the same, for which purpose the petitioners shall submit a representation. The same shall merit consideration within 12 weeks from the date of receipt of the copy of this order.

(v) In cases where in the event the petitioners have deposited the amount before this Court, as a condition precedent for grant of the interim order, the Registry shall refund those amounts to the petitioners, in case of any deposit of the kind.

Sd/-
JUDGE

Bkp/CT:SS