

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 24.05.2010

Judgment delivered on: 31.5. 2010

1. CM. 6546/2010 in W.P.(C)No.3267/10

Cellular Operators Association
of India & Ors.

.....Petitioners

Through: Dr. A.M. Singhvi, Sr. Advocate, Mr.
C.A. Sundaram, Sr. Adv. and Mr.
Ramji Srinivasan, Sr. Adv. with Mr.
Manjul Bajpai, Mr. Ashish Yadav, Mr.
Aneesh Patnaik and Ms. Rohini Musa
Adv.

Versus

MCD

.....Respondent

Through: Mr. Parag P. Tripathi, ASG
with Ms. Maninder Acharya, Adv.

2. CM. 6867/2010 in W.P.(C)No.3423/2010

Idea Cellular Ltd.

.....Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with Ms.
Sonali Jaitely and Ms. Devika, Adv.

Versus

MCD & Ors.

..... Respondents

Through: Mr. Parag P. Tripathi, ASG
with Ms. Maninder Acharya, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

KAILASH GAMBHIR, J.

*

1. This order shall dispose of two interim applications bearing Nos. 6546/10 and CM 6867/10 filed by the respective petitioners in W.P. (C) No. 3267/2010 and W.P.(C) No. 3423/2010. Since common questions of law and facts are involved in both the writ petitions and identical reliefs have been claimed by the petitioners in their respective interim applications, therefore, the same are being disposed of by this common order.

2. These writ petitions have been filed by various individual companies as well as associations representing the interest of cellular

licensees. In the past few years, cellular mobile industry has grown exponentially and as per the facts placed on record, cellular subscribers crossed 563 million by February, 2010, covering roughly half the country's population. The paradox is that more people have access to mobile phones than toilets in India. With the first telephone services in 1881 to first time cellular services in 1999 and now boasting to be the second largest user of mobile phones in the world, the cellular phone has indeed been a revolution of one of a kind. It is an inevitable truth that mobile phone is no more a luxury but a part of our very existence. We cannot dispute our dependence on the mobile phone today when owning it has become proportional to personal empowerment. It is a silver bullet to the vagaries and vicissitudes of life.

Earlier, the connectivity was scarce but now the service providers with their impeccable connectivity have lured the rickshaw vala and the millionaire alike to its consortium. Our voice and messages through mobile reaches to the other end. These cellular service providers are required to establish a complete cellular network. The cellular towers carry the regular signals and pass on the calls from

one cell to another and, therefore, these towers are an integral component of the mobile network and are required to be strategically located keeping in mind the radio frequency design, topography, traffic and coverage in the given area. As per the petitioners, cellular towers are the backbone of the cellular mobile telephony and are critical for providing seamless cellular services.

3. These mobile service providers did not raise the question of competence or jurisdiction of the MCD so long they were being governed under the previous policy of the MCD dated 20.11.03 and 7.2.2008 but the regnant power of these cell phone service providers has got a jolt by the new policy of the MCD. Besides others, the main cause of heart burn of the petitioners is the fee hike of 2000% in 2010 from that of what was in the year 2000.

To give a conspectus, these cellular operators have been granted licence under the Telegraph Act and various mobile towers have been installed by them on various private lands and buildings in various parts of Delhi after taking the consent of the private property owners. The petitioners have also stated that for erection of a telecommunication tower at any location an approval/clearance is

required to be taken from Wireless Planning Committee i.e. Standing Advisory Committee on Frequency Allocation (for short referred as SACFA). This Committee clears the height of towers from the point of civil aviation also. It has also been stated that various Government agencies like Airport Authority of India, Railways, ISRO, ONGC, AIR Department of Electronics, Navy, Defence etc. are part of SACFA. Besides this, the cellular operators were also required to take the permission of the MCD for the installation of cellular towers in the area under the jurisdiction of the Municipal Corporation of Delhi. Vide office order dated 20.11.2003 issued by the MCD, permission for installation of temporary structure on roof top of various premises for cellular/basic mobile phone was to be accorded on payment of one time permission charges of Rs. 1 lakh per site and in case the site/tower was to be shared by other cellular phone operator/operators an additional amount of Rs. 50,000/- per sharing was required to be paid. Before granting the said permission these cellular/basic telecom operators were required, besides the fee, to fulfill other conditions laid down by the MCD, which are referred as under:-

“1. That Cellular and Basic Telecom Operators shall apply to the Commissioner, MCD along with the consent letter of the building owner, necessary drawings and structural Safety Certificate issued by a qualified Structural Engineer from one of the following five institutions:-

- (a) Indian Institute of Technology (I.I.T), Delhi.
- (b) Central Building Research Institute (CBRI), Roorkee.
- (c) Rail India Technical and Economic Services Ltd. (RITES), Delhi.
- (d) National Council for Building Material, Faridabad.
- (e) Indian Institute of Technology (I.I.T), Roorkee.

MCD shall not recognize Structural Safety Certificate from any other source.

- 2. That they shall be solely responsible for any damage to the building and for public safety.
- 3. That they shall take special precautions for fire safety, lightening etc.
- 4. That permission shall not be granted for any listed Heritage building or any other building falling within Bunglow zone area (Civil Lines).
- 5. That they shall furnish to Assessor and Collector MCD a copy of the agreement concluded between the Cellular or Basic Telecom Operator and the owner of the building.
- 6. Generator sets installed at the tower site to cater to the power requirements of the antenna should conform to the noise and emission norms prescribed by DPCC.
- 7. In case of buildings which were unauthorized or which may be so declared at a latter point of time, permission for installation of towers shall be granted on fulfillment of all the above conditions. However, that shall not imply any change whatsoever in the status of the unauthorized building and shall be without prejudice to the right of the MCD to demolish the said building through the due process of law. In undertaking such a demolition MCD will not be under any obligation to send prior intimation to the owner of the tower, nor will it be liable for the loss of the owner of the tower as a consequence of demolition of the unauthorized building. The operators shall indemnify MCD to this effect.
- 8. The licencees shall share the towers for fixing their respective antennas provided that the prescribed conditions are duly fulfilled so as to ensure curtailing of multiple towers and optimizing the use of the existing ones.

9. In case of any complaints against such tower construction, the time shall be referred to the office of Director General Cellular Operators Association of India and Secretary General, Association of Basic Telecom Services to investigate the complaints and take remedial measures wherever necessary.”

4. While the said office order dated 20.11.2003 was in operation, another circular dated 7.2.2008 was issued by the MCD directing these cellular operators to comply with certain other directives. The need for issuing the said fresh directions arose as vide letter dated 13.9.2007 the Hon’ble Lt. Governor of Delhi gave directions to keep the permission for the cellular tower operators in abeyance apprehending these towers to be a source of health hazard. Subsequent to the said communication from the Hon’ble Lt. Governor, Principal Secretary, Government of NCT of Delhi vide its DO letter dated 10.1.2008 communicated the approval of the Lt. Governor for permitting the cell towers in the residential areas only after due consultation with the concerned RWAs and not merely to be left to bilateral negotiations between telecom companies and individual residents/house owners. Keeping in view the apprehension of health hazard in mind, the said circular imposed further conditions to the conditions already enforced vide office order dated 20.11.2003, which are as follows:-

- ❖ “Installation of Base Station Antennas within the premises of schools and hospitals may be avoided because children and patients are more susceptible to Electro Magnetic Field.
- ❖ Installation of Base Station Antennas in narrow lanes should be avoided in order to reduce the risks caused by any earthquake or wind related disaster.
- ❖ The Base Station Antennas should be at least 3 m away from the nearby building and antennas should not directly face the building. Further, the lower end of the antenna should be at least 3 meter above the ground or roof.
- ❖ In case of multiple transmitter sites at a specific locality, operator be asked for sharing of a common tower infrastructure as far as possible.
- ❖ Operator should be asked to prohibit the Access to Base Station Antenna sites for general public by suitable means such as wire fencing, locking of the door to the roof etc. Access to tower site, even for the maintenance personnel, should be for a minimum period as far as possible.
- ❖ Operator should be asked to put up sign boards/Warning Signs at the Base Station Antenna sites, which should be clearly visible and identifiable. A warning sign should be placed at the entrance of such zone. The “Warning Sing” should discourage longer stay in the zone, even for the maintenance personnel. The sign board may contain the following text:
 - i) Danger! RF radiations, Do not enter!
 - ii) Restricted Area
- ❖ While granting permission, it should be advised to the operators that the operators and maintenance personnel, who are dealing with radio frequency devices should be educated for possible hazards and for taking measures for protection from electromagnetic radiations from these devices with Base Station Antennas installed on towers and at any other outdoor sites.”

5. Even after the imposition of the aforesaid further conditions, the MCD felt that adequate measures were still not in place to ensure the safety and health of the people from other harmful effects of cellular towers, hence it issued yet another office order dated 8.4.2010 in

supersession of all earlier orders on the subject. This time the MCD formulated comprehensive conditions to be fulfilled by the cellular operators before they could install the towers on the roof tops of private properties, lands and other structures within the jurisdiction of the MCD. Besides laying down various other conditions, one of the condition is the imposition of fee of Rs. 5 lakhs per tower and Rs. 1 lakh per service provider in case of sharing for a period of five years. No doubt the petitioners are aggrieved with certain other stringent conditions imposed in the new policy but their Achilles' heel is clause 6 of the said office order under which the said fee has been imposed. Before proceeding further it would be appropriate to reproduce the new policy of the MCD, which came into force through office order No. TP/G/6901/10 dated 8.4.2010:-

OFFICE ORDER

SUBJECT: Permission for installation of Temporary Structures for Cellular Mobile Phone Services on Roof Top/Ground Level or various Premises Falling in the Area under Jurisdiction of Municipal Corporation of Delhi.

In supersession of all earlier orders on the subject mentioned above, permission/License for installation of temporary structures on Roof-Tops/Ground level of various premises for Cellular/Basic Mobile Phone Services shall be accorded as per the policy approved by the Corporation vide Item no.U.B.No.392 dated 16th March, 2010, earlier approved by the Standing Committee vide Resolution No.722 dated 09.02.2010 and para 25 modified vide in anticipation approval from Chairman Standing Committee dated 29.03.2010

and Hon'ble Mayor (for Corporation) on dated 06.04.2010, subject to the following conditions:-

1. For installation of Base Station Antennas, clearances is required from Airports Authority of India, DUAC, Chief Fire Officer (DFS), ASI & DMRC (wherever applicable).
2. Structural stability certificate from any one of the following five institutions are required to be obtained by the Cellular and Basic Cellular Operators:-
 - (a) Indian Institute of Technology (IIT), Delhi.
 - (b) Central Building Research Institute (CBRI), Roorkee.
 - (c) Rail India Technical & Economic Services Ltd. (RITES), Delhi.
 - (d) National Council for Cement & Building Material, 34 KM Stone, Delhi Mathura Road, Faridabad (Haryana).
 - (e) Indian Institute of Technology (IIT), Roorkee.
3. In case of buildings which were unauthorized or which may be so declared at a later point of time, permission for installation of tower shall be granted on fulfillment of all the conditions. However, that shall not imply any change whatsoever in the status of the unauthorized building and shall be without prejudice to the right of MCD to demolish the said building through the due process of law. While undertaking such a demolition, MCD will not be under any obligation to send prior intimation to the owner of the tower, nor will it be liable for loss of the tower as a consequence of demolition of the unauthorized building. The operators shall indemnify MCD to this effect.
4. The licensees shall share the towers for fixing their respective antennas provided that the prescribed conditions are duly fulfilled so as to ensure curtailing of multiple towers and optimizing the use of the existing ones.
5. Priority of Selection of site shall be as under;-
 - a. All Municipal Buildings including Community Centres, except schools, hospitals & dispensaries.
 - b. Other Government Building.
 - c. Other Non-Residential buildings i.e. industrial, commercial & institutional buildings.
 - d. Along the right of way of major drains after clearance from DEMS of MCD.
 - e. Vacant land after clearance from concerned authority.

- f. i) Residential vacant plot leaving 3M setback all around.
- ii) Residential buildings.

Note:- Erection of Cell Tower on residential buildings shall only be allowed in those case where no alternative is available.

- iii) Group Housing.

6. Fees:

Rs.5 lacs per tower plus.

Rs.1 lacs per service provider in case of sharing.

- 7. For Municipal Building Rs.25/- per sq. ft. per month shall be charged towards license fee for the space to be used for erecting the temporary structure subject to a minimum of Rs.25,000/- per month. License fee shall be payable for three months in advance and thereafter by 10th day of each month.

Any Cell Operator desirous to erect tower on any Municipal Building or land will make an application to the land owning agency i.e. to the office of ADC (L& E) for Municipal Buildings and to the Estate Department of Slum & JJ for their buildings and also execute an agreement for license fee as mentioned above.

The license fee shall be deposited in the office of ADC (L&E) and Estate Department of Slum & JJ, as the case may be:-

- (i) No objection nfrom the concerned department having its administrative control on the building/land where erection of Cell Tower is proposed.
- (ii) No objection from Engineering Department from structural safety point of view. In case, the Engineering Department is not in a position to certify the structural safety aspect, the same could be got examined by Cell Operators from the Institutes already identified and approved for private building.

Once the agreement for license is entered into, Cell Operator can apply for a permission to the EE (Bldg.) of concerned Zone, who will process the case for grant of permission in accordance with the guidelines issued.

- 8. That Cell Operator shall be solely responsible for any damage to the building and for public safety.
- 9. That Cell Operator shall take special precautions for fire safety, lightening etc.

10. *That Cell Operator shall furnish to Assessor & Collector, MCD a copy of the agreement executed between the Cellular or Basic Telecom Operator and the owner of the building.*
11. Generator sets installed at the tower site to cater to the power requirements of the antenna should conform to the noise and omission norms and other requirements prescribed by DPCC.
12. That Cellular & basic Telecom Operators shall produce a certificate from the Manufacturer of D.G. set to the effect that set installed meets the following Standards and Guidelines as laid down in the Noise Pollution (regulation and Control) Rules, 2000 as notified by Ministry of Environment and Forest vide its notification dated 14th February, 2000.”

NOISE STANDARDS FOR DG SETS (15-500KVA)

The total sound power level, L_w of a DG Set should be less than $94+10 \log_{10}$ (KVA), db(A), at eth manufacturing stage, where KVA is the nominal power rating of a DG Set.

This level should fall by 5 db(A) every five year, till 2007 i.e. in 2002 and then in 2007.

13. MANDATORY ACOUNSTIC ENCLOUSRE /ACOUSTIC TREATMENT OF ROOM FOR STATIONARY DG SETS 95 KVA 7 ABOVE)

Noise from the DG Set should be controlled by providing an acoustic enclosure or by treating the room acoustically.

The acoustic enclosure/acoustic treatment of the room should be designed for minimum 25 (dB(A) Insertion loss or for meeting the ambient noise standards, whichever is on the higher side (if the actual ambient noise is on the higher side), it may not be possible to check the performance of the acoustic enclosure / acoustic treatment. Under such circumstances the performance may be checked for noise reduction upto actual ambient noise level, preferably, in the right time. The measurement for insertion loss may be done at different points at 0.5m from the acoustic enclosure/room, and then averaged.

The DG set should also be provided with proper exhaust muffler with insertion loss of minimum 25 dB(A). To ensure the compliance of Guidelines at user end, Cell Operators will furnish noise-monitoring report from DPCC.

14. The Operator shall ensure to prohibit the access to base station antenna sites for general public by suitable means such as wire fencing, locking of the door to the roof etc., access to tower site even for maintenance personnel should be for a minimum period as far as possible.

15. Installation of Base Station Antennas shall be allowed only on:-
- (a) The buildings which abuts on minimum 9.00 M wide road in order to reduce the risks caused by any earthquake or wind related disaster.
 - (b) The existing sites of the Cell Towers abutting on roads having ROW less than 9.00 M could only be regularized after the specific clearance from the Fire Department regarding the width of the road.
16. The Base Station Antennas should be atleast 3m away from the nearby building and antennas should not directly face the building. Further, the lower end of the antenna should be at least 3.00 meter above the ground or roof.
17. In case of multiple transmitter sites at a specific locality sharing of a common tower infrastructure, should be explored, as far as possible which can be coordinated through a nodal agency.
18. Access to base Station Antenna sites should be prohibited for general public by suitable means such as wire fencing, locking of the door to the roof etc. Access to lower site, even for the maintenance personnel, should be for a minimum period as far as possible.
19. Sign boards/Warning signs are to be provided at Base Station Antenna sites which should be clearly visible and identifiable. A warning sign should be placed at the entrance of such zone.
20. The ‘Warning Sign’ should discourage longer stay in the zone, even for the maintenance personnel. The sign board may contain the following text:
- i. Danger ! RF radiations, Do not enter.
 - ii. Restricted Area.
21. The operators and maintenance personnel, who are dealing with radio frequency devices, specially with Base Station Antenna installed on towers and at any other outdoor sites, should be protected from electromagnetic radiations. The operator and maintenance personnel dealing with the radio frequency devices should be properly educated for possible hazards and for taking measures for protection from electromagnetic radiations when & where required.
22. Submission of an undertaking from the Operator that installation of Cell Tower does not cause any adverse effect to the health of human being of the area and MCD shall be kept harmless out of this.

23. The operator shall display on board (minimum size 24"x48') at conspicuous space of the building at Ground Floor, the following details;

(i) Operators name and Address

(ii) Contact persons name, address and Telephone Number

(iii) Address of Complaint Redressing Authorities with Telephone Numbers

(iv) Police Control Room : 100

(v) Fire Control Room : 101

(vi) Ambulance : 102

(vii) Any other important information, if any

(viii) Details of insurance policy

24. In case of any complaints against such tower construction, the same shall be referred to the office of Director / General Cellular Operators Association of India and Secretary General, Association of Basic Telecom Services, to investigate the complaints and to take remedial measures wherever necessary.

25. The operators, who have erected cell towers without permission, shall apply to MCD for regularization within 30 days, as per earlier policy in force, prior to implementation of this new policy after obtaining NOC from ASI & AAI wherever applicable.

NOC from R.W.As shall not be insisted upon and the fee shall be paid as per the new policy. In case of non-compliance, action for removal of Cell towers shall be initiated as per Law. The existing towers abutting on roads having ROW less than 9 mtrs. shall be regularized after clearance of the Fire Department.

26. Identification of the sites:-

For issuing of any NOC, a recommendation is to be given by TRAI to the fact that the proposed tower is essentially required at the site/vicinity as the nearest tower of this company is existing at a distance of..... M and no sharing of tower with other company is available. In case of residential buildings, it shall also be certified that no other alternative is available with the service provider.

27. NOCs:

- (i) In case of group housing residential building, NOC from all the occupants of the housing block along with the NOC of the society is required.
- (ii) (a) In case of the plotted residential building owned by different floor owners, NOC from all the floor owners is required.
- (b) In case of lease hold property NOC of lessor is required.
- (iii) In case, building abuts on road having less than 9 M ROW, NOC from Fire Department is required.

28. Application:

- (a) Before erection of Cell Tower, application shall be filed jointly by the owner(s) of the building & the Mobile Service Provider Co. Copy of agreement between the service provider company & the owner shall also be submitted alongwith the application.
- (b) In case of the Municipal building, NOC of the Head of the Department / Land & Estate Deptt. under whose jurisdiction building or land is situated is required.
- (c) The application shall be filed under the signature of Architect, registered with the Council of Architecture who will certify that the proposed tower is safe in all respect. Alongwith the structural design calculation on the basis of which certificate is being issued for record purpose.
- (d) Erection of tower shall only be permitted only on regularized buildings.
- (e) A certificate on affidavit shall be submitted by the service provider company that erection of the proposed tower is not harmful to the health of the nearby residents.
- (f) Permission shall only be granted to the service providers who have license from Telecommunication Department, Govt. of India.
- (g) The service provider company shall provide 3rd party insurance and details of the insurance policy shall be depicted on the display board.
- (h)
- (i) The NOC shall be got renewed on payment of requisite fee every 5 years.

- (iii) The Towers existing more than 5 years are also required to be renewed within one month on payment of requisite fee.
- (iv) MCD reserves its right to withdraw permission at any time without assigning any reason.
- (v) The erection of the tower shall be completed within 3 months from grant of NOC and report of erection be made to the Building Deptt. of the concerned Zone.

29. Revised guidelines shall be prepared time to time keeping in mind the international standards & technology.

CHIEF TOWN PLANNER”

6. The petitioners have taken various legal objections questioning the very jurisdiction and competence of the MCD to legislate in the field of the Central Government, Telegraph being a central subject under Entry 31 of List-I of Schedule VII of the Constitution of India. Fiercely denouncing enhancing the rate of fee from Rs. 1 lakh, which was for a block of 20 years, to Rs. 5 lakhs for a block of 5 years, the petitioners term such an increase as wholly unfair, unjust, arbitrary and illegal. The contention of the petitioners was that such a hike in the fee does not commensurate with the cost of services being provided by the Municipal Authority besides the fact that the

imposition of such levy is beyond the competence, jurisdiction and power of the MCD.

7. Before hearing arguments on interim applications of the petitioners, this Court vide orders dated 19.5.2010 directed the MCD to first show this Court the rationale behind increasing the fee from the existing Rs. 1 lakh, which was a one time measure for a period of 20 years to Rs. 5 lakhs for a period of 5 years. Pursuant to the said directions given by this Court, the Commissioner, MCD has filed his affidavit. The said affidavit has been filed by the respondent/MCD confining its stand to one of the conditions of the policy relating to the fee hike. The only justification given by the MCD in its affidavit is that the fee imposed by the respondent MCD is a regulatory fee and for imposition of a regulatory fee, existence of *quid pro quo* is not necessary. The Commissioner has further explained that the MCD has certain other statutory and obligatory functions, which include promoting public safety, health, convenience, general welfare, securing or removal of dangerous buildings and places, taking actions against unauthorized constructions, removal of nuisance etc. and with these services being rendered by the MCD, there need not be direct

co-relation of the fee and the services rendered by the MCD. The Commissioner has further submitted that the MCD has to ensure that the buildings on which the said towers are installed are structurally stable and that the citizens are not exposed to harmful radiations emanating from these towers. The Commissioner has also explained that vide resolution No. 569 dated 25.9.2002, the Standing Committee approved the enhancement of one time charges from Rs. 1 lakh per site to Rs. 2 lakhs per site and when this issue was considered again on 11.11.2002, the hike was recommended to be raised to Rs. 5 lakhs per site, but the said order could not be enforced due to protest lodged by the Cellular Operators Association. The Commissioner has also clarified that in the last ten years the salaries of the personnel of MCD have increased manifold and besides that lot of money has been spent by the MCD on improving the infrastructure of Delhi. The Commissioner has also pointed out the huge deficit between the receipt and expenditure of the respondent Corporation during the year 2008-09 and even the estimated receipt for the current year is far less than the estimated expenditure.

8. Mr. Parag P. Tripathi, learned ASG appearing for the respondent submitted that the respondent/MCD has imposed only a regulatory fee and not a compensatory fee, the case, which the petitioners are trying to build up. Counsel further submitted that it is the MCD who is primarily responsible to take care of public health and building bye laws and for that the MCD is legally competent to charge the regulatory fee. In support of his arguments counsel placed reliance on the judgment of the Apex court in the case of ***State of West Bengal vs Kesoram Industries Ltd. 2004 (10) SCC 201*** and ***B.S.E. Brokers Forum, Bombay & Ors. vs Securities and Exchange Board of India & Ors. 2001(3) SCC 482***. He further submitted that based on various reports of the experts taking a view that the mobile phone radiations have a serious effect on human health, therefore, as a precautionary and regulatory measure, the respondent/MCD has formulated the said policy and has also simultaneously imposed a fee of Rs. 5 lakhs for regulating the installation of these cellular towers. Counsel thus submitted that it is the prime duty of the MCD being the civic municipal authority to take care of the health of its people so that they are not exposed to any harm with the installation of the said mobile towers. Counsel further

submitted that if the fee imposition is excessive or extortionist then the onus is on the petitioners to show how and in what manner they claim it to be excessive or extortionist and not for the MCD who has imposed such fee.

9. Mr. Parag Tripathi in the alternative also submitted that even if the said fee is termed as a compensatory fee then also there is a complete justification for the MCD to impose the said fee. The contention of counsel for the respondent was that the MCD has to spend large amounts of money to take care of the health of the people and for maintaining the roads and other infrastructure and for supervising and regulating the said towers, therefore, in comparison to the expenses incurred by the MCD for regulating the said towers, the hike in fee cannot be termed as unjustifiable.

10. Mr. Sundram, learned Sr. Advocate appearing for the petitioner on the other hand submitted that the respondent MCD has failed to disclose, either from the record or from its short affidavit, the exact reasons or rationale behind raising the fee from Rs. 1 lakh, which was a one time measure for 20 years, to Rs. 5 lakhs for a period of 5 years. Counsel further submitted that it is for the MCD to show that

for charging the regulatory fee what extra measures or regulations the MCD will be required to undertake and what is the co-relation between such measures and the fee being imposed by them.

11. Refuting the contentions of counsel for the respondent, counsel for the petitioners submitted that the judgment of the Apex Court in ***State of West Bengal vs Kesoram Industries Ltd. (Supra)*** relied on by the respondent has overlooked para 110 of the same which gives a view contrary to the one canvassed by the respondent/MCD. Counsel for the petitioners also placed reliance on the decision of the Constitution Bench in ***Jindal Stainless Ltd. & Anr. vs State of Haryana 2006 (7) SCC 241***. Mr. Sundram also placed reliance on the report of the World Health Organisation, placed on record at pages 167 to 169 of the paper book, wherein WHO has given an opinion that there is no convincing scientific evidence to show that weak RF signals from its stations and wireless networks cause adverse health effects. Counsel also submitted that the regulatory fee in view of the judgment of the Constitution Bench in ***Jindal Stainless Ltd. case*** now is a part of the compensatory fee and for that co-relation has to be shown for imposing a particular fee and in the absence of such co-relation counsel submitted that it would come

under the category of tax and not a regulatory fee or a compensatory fee.

12. Dr. A.M Singhvi, learned Sr. Advocate appearing for the petitioners also placed reliance on the judgment of ***Jindal Stainless (supra)*** relying on the principle of equivalence as envisaged by the said judgment with special emphasis on para 45 of the same. He also placed reliance on the judgment of the Apex Court in ***Gupta Modern Breweries vs. State of J& K & Ors. (2007) 6 SCC 317*** (with special emphasis on para 33 of the same) and on ***M.Chandru vs. Member- Secretary, Chennai Metropolitan and Development Authority & Anr. (2009) 4 SCC 72.***

13. Both the counsel for the petitioners and respondent addressed arguments only with regard to one of the conditions of the policy i.e. the fee hike, while with regard to other conditions no arguments were addressed.

14. I have heard learned counsel for the parties at considerable length and given my conscious consideration to the pleas raised by both the parties.

15. The petitioners are seeking quashing of the office order dated 20.11.03, circular dated 7.2.08 and office order dated 8.4.10 in the main writ petitions and in the interim application they are seeking the stay of these office orders and circular till the final disposal of these writ petitions. It is a settled legal position and is well known rule of practice and procedure that at the interlocutory stage normally the High Court will not grant such interim relief, grant of which will amount to granting the final relief in the writ petition. The Apex Court as far back as in 1985 in ***Assistant Collector of Central Exercise vs. Dunlop India Ltd. (1985) 1 SCC 260*** has settled the law in this regard where it held that:

"We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations."

This was subsequently followed in ***State of Rajasthan vs. Swaika Properties (1985) 3 SCC 217*** till late in ***State of U.P vs. Ram Sukhi (2005) 9 SCC 733***.

This court is also mindful of the judicial trend for granting stay, settled from the case of ***Siliguri Municipality vs. Amalendu Das (1984) 2 SCC 436*** to the recent rulings of the Apex Court in the case of ***Benara Valves Ltd. Vs. CCE (2006) 13 SCC 347*** which has been reiterated lately in ***Pennar Industries Ltd. State Of A.P (2009) 5 SCC 208***.

Hence, taking note of the well established legal principles and peculiar facts and situation of the case in hand, this Court is of the view that any decision on the interim application of the petitioners would tantamount to giving a final view in the matter and, therefore, better course in the given facts and circumstances of the case would be to hear the present writ petitions finally. Even otherwise both the parties have addressed the arguments only on one of the components of the policy and not on the entire policy itself and, from this point also it would not be appropriate to forficate the said policy and take a view on one of its elements. Hence, taking a holistic approach, it would be more appropriate to give opportunity to the respondents to

file their counter affidavit, and once the pleadings are complete, then only to hear these matters finally.

16. Therefore, keeping in mind the ensconced legal principles, and in the peculiar facts and circumstances of the case at hand, during the course of the arguments with a view to find out a workable solution, a proposal was given to the MCD to accept a provisional amount of Rs. 2.5 lakhs after giving an adjustment of Rs. 1 lakh already received by them, but the MCD adopting a very recalcitrant and obstinate position refused to accept the said suggestion given by the Court. In such a scenario, to balance the equities and to safeguard the economic interest of the respondent/MCD, this Court directs the petitioners and their members to deposit an amount of Rs. 2 lakhs out of Rs. 5 lakh per tower, as stipulated by condition No. 6 in the impugned policy and Rs. 50,000/- per service provider in case of sharing, in the name of the Registrar General of this Court by way of FDR for an initial period of six months and for the balance amount the petitioners shall give an undertaking by way of an affidavit that they shall pay the said amount along with interest thereon at the bank rate payable on the fixed deposit in the event of the impugned policy

raising the fee is ultimately upheld. However, in the event the said fee hike is set aside by this Court, then the amount of FDRs shall be released in favour of the licensees along with interest accrued thereupon.

17. One of the most important issues on which the parties have yet to address arguments is that whether these cell towers are a source of health hazard or not. There cannot be any two views about the fact that the issue of public health and public safety must be placed at a higher pedestal than monetary considerations. Earlier in the circular dated 7.2.2008, reference has been made to the communication received from the office of the Lt.Governor, wherein the stand taken was that the cell towers are a source of health hazard.

18. During the course of arguments, Mr. Parag Tripathi, learned Additional Solicitor General placed reliance on a report culled out from the internet site known as *Wikipedia*. The said report suggests that the radiations emitted by the fixed infrastructure used in mobile telephones indicates that base stations and their antennas can result in fatigue, destruction of health and loss of memory. The report further goes on to state that in contrast to mobile hand sets, the

antennas emit radiations continuously and therefore, the same are more powerful at close quarters.

19. On the other hand, the report of the World Health Organisation, on which reliance was placed by the petitioners suggests otherwise. The WHO report states that the level of RF exposure from base stations and wireless networks are so low that the temperature increase is insignificant and does not affect human health. The report further suggests that the recent surveys have indicated that RF exposures from base stations and wireless technologies in publicly accessible areas (including schools and hospitals) are normally thousands of times below international standards.

20. A healthy body is the very foundation for all human activities. Our ancient scriptures have laid down the aphorism “*Sariramadyam khaludharma sadhanam*” i.e the body has to be taken care of with a sense of high priority. In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. Right to Health, a fundamental human right stands enshrined in socio-economic justice of our Constitution and the Universal Declaration of Human Rights. The maintenance of health is

a most imperative constitutional goal whose realisation requires interaction of many social and economic factors. The Apex Court in ***Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161*** aptly observed that:

"It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State — neither the Central Government nor any State Government — has the right to take any action which will deprive a person of the enjoyment of these basic essentials."

Article 21 by way of its vast scope has encompassed within its fold Right to health as a fundamental right guaranteed by the Constitution. It would also be pertinent to refer to Article 47 in Part IV of the Constitution which provides that:

"The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the

consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.”

In a series of pronouncements during the recent years the Apex Court has ingeminated that right to health as a fundamental right cannot be compromised. Maintenance and improvement of public health and safety have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of a wholesome society. Attending to public health, therefore, is of high priority. The Apex Court in the case of ***N.D Jayal vs. Union of India (2004)9 SCC 364*** has held that the impact of any project on human health cannot be given a go-by and has to be seriously scrutinized. The Central Government as well as the Municipal Authorities owe constitutional obligation towards each and every citizen that any act of the State or of an individual, be it for commercial gains or otherwise, does not pose any kind of threat to their safety and health. The RF radiations whether pose any such serious health threat or not and what precautions are required to be taken so that there are minimal chances of causing any threat to the health of the public at large appears to be still at the investigation

stage and also various studies and research in different countries are in progress, but no final consensus has emerged as yet. As per the respondent MCD, the latest policy has taken due care of the health and public safety of the citizens. The MCD has taken a stand in their affidavit that the citizens will not be exposed to harmful radiations emitted from the said towers.

21. In view of the conflicting views and studies, this Court is of the view that the Secretary, Telecommunication and Commissioner, MCD shall constitute a broad based committee of Technical and Medical experts who can examine all these various studies and the technology and policy adopted by the developed countries in regulating the installation of cellular towers and antennas. The committee so constituted by these authorities shall also have some representatives from the NGOs' ,Cellular Associations or public spirited citizens who are engaged in the field of espousing the cause of public health and safety. The Secretary, Telecommunication shall convene such a meeting within a period of two weeks from the date of this order and the broad based committee shall be constituted by the Secretary Telecommunication and the Commissioner MCD within a maximum

period of four weeks from the date of this order. The committee so constituted shall submit its report within a period of three months from the date of its constitution.

W.P. (C) Nos. 3267/2010, 3423/2010

22. Since the Ministry of Telecom, Government of India is not a party to these petitions and keeping in view the issues raised in the present petitions, the impleadment of the said Ministry is necessary for the proper and effective adjudication of the controversy involved. Petitioners are accordingly directed to implead Ministry of Telecom as respondent No.2 and an amended memo of parties be filed within a period of two days and steps be taken by the petitioner to serve the newly impleaded respondent No.2 through the standing counsel, Union of India. The petitioner shall also supply a copy of this order to the standing counsel along with complete set of these petitions.

Counter affidavit be filed by the respondent within a period of four weeks. Rejoinder, if any, be filed by the petitioners within a period of three weeks thereafter.

23. In the light of the aforesaid directions the latest policy of the MCD dated 8.4.2010 shall remain in abeyance till the final disposal of these writ petitions, subject to the deposit of amount by way of FDR by individual licensees as directed herein above. It is, however, made clear that these service providers shall continue to remain bound by the terms of the earlier two policies dated 20.11.2003 and 7.2.2008 in addition to the directions given by this court herein above.

24. Matter shall be taken up for final hearing on 15.9.2010.

May 31, 2010

KAILASH GAMBHIR, J.