HIGH COURT OF MADHYA PRADESH: PRINCIPAL SEAT AT JABALPUR

Writ Petition No.1175/2013

Confederation of Real Estate Developers Association of India (CREDAI)
Versus
The State of MP & another

Writ Petition No.15/2013

M/s. Regal Samarth Krishna Builders
Versus
The State of MP & another

Writ Petition No.429/2013

Millennium Education & Development Society
Versus
The State of MP & another

Writ Petition No.6772/2013

M/s Opel Developers
Versus
The State of MP & another

Writ Petition No.6828/2013

M/s Fortune Builders
Versus
The State of MP & another

Writ Petition No.9225/2013

M/s. Nirupam Associates
Versus
The State of MP & another

Writ Petition No.9831/2013

Mahindra Dwellings Pvt. Ltd.
Versus
The State of MP & another

Writ Petition No.10052/2013

M/s. K.L. Sharma & Associates
Versus
The State of MP & another

Writ Petition No.10190/2013

Essarjee Constructions Pvt. Ltd.
Versus
The State of MP & another

Writ Petition No.14785/2013

M/s Fortune Builders
Versus
The State of MP & another

Writ Petition No.19705/2013

M/s Raksha Builders
Versus
The State of MP & another

Writ Petition No.20065/2013

M/s. Sterling Globe Builders
Versus
The State of MP & another

Writ Petition No.22449/2013

Ram Kumar Narwani
Versus
The State of MP & another

Writ Petition No.847/2014

Partner Viny Raj Modi M/s Shri Balaji Infrastructures
Versus
The State of MP & another

Writ Petition No.2044/2014

Essarjee Education Society
Versus
The State of MP & another

Writ Petition No.2167/2014

M/s Agrawal Builders Colonizers Company
Versus
The State of MP & another

Writ Petition No.3196/2014

M/s Rishikesh Nirman
Versus
The State of MP & another

Writ Petition No.5206/2014

Chinar Retails & Infrastructure Pvt. Ltd.
Versus
The State of MP & another

Writ Petition No.6142/2013

Smt. Omvati Patidar
Versus
The State of MP & another

Writ Petition No.6148/2013

Laxmi Narayan Patidar
Versus
The State of MP & another

Writ Petition No.19662/2013

M/s Aaksm Build Corporation
Versus
The State of MP & another

Writ Petition No.20854/2013

Satya Prakash Colonizers Pvt. Ltd.
Versus
The State of MP & another

Writ Petition No.3945/2014

Sazda Enterprises
Versus
The State of MP & another

Writ Petition No.2836/2013

M/s Harshit Infra
Versus
The State of MP & another

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Shri Siddharth Gupta, learned counsel for the petitioners in Writ Petition Nos. 15/2013, 429/2013, 1175/2013, 6772/2013, 6828/2013, 9225/2013, 9831/2013, 10052/2013, 10190/2013, 14785/2013, 19705/2013, 20065/2013, 22449/2013 and W.P.Nos. 847/2014, 2044/2014, 2167/2014, 3196/2014 and 5206/2014.

Shri Atul Anand Awasthy, learned counsel for the petitioners in Writ Petition Nos. 6142/2013, 6148/2013.

Shri Ashok Agrawal, learned counsel with Shri Yogendra Patel, learned counsel for the petitioner in Writ Petition No. 19662/2013.

Shri Rahul Diwaker, learned counsel for the petitioners in Writ Petition No. 20854/2013.

Shri Ajay Mishra, learned counsel for the petitioners in Writ Petition No. 3945/2014.

Shri R.D.Jain, learned Advocate General with Shri Vijay Pandey, learned Govt. Advocate for the respondents/State.

Shri Rajendra Tiwari, learned Senior Counsel assisted by Shri Parag Shrivastava, learned counsel with Shri Vijay Pandey, learned counsel for the respondent no.2-Corporation.

Coram: **Hon'ble the Chief Justice Shri A.M. Khanwilkar**
Hon'ble Shri Justice Shantanu Kemkar.

Whether approved for reporting: YES

Date of hearing: 31.10.2014

O R D E R

(Passed on this 13th day of January 2015)

Per: Shantanu Kemkar, J.

This common order will govern disposal of all the above mentioned writ petitions together as in all these writ petitions, the challenge is made to the vires of the order / circular dated 24.09.2012 issued by the State Government as also the permanent order No.18/2012 issued by the Bhopal Municipal Corporation (for short, the Municipal Corporation) whereby they have imposed '**Narmada Tax**' as a pre-condition for grant of sanction for raising construction of building.

For the sake of convenience, we shall narrate the facts of Writ Petition No.1175/2013.

2. The petitioner – a company registered under the provisions of Companies Act, 1956 is an association of the Private Colonizers & Real Estate Developers. It has challenged the constitutionality and vires of the Order/ Circular dated 24.09.2012 issued by the State Government by which the State has approved the resolution dated 30.03.2012 passed by the Municipal

Corporation resolving to impose '**Narmada Tax**' to be paid at the rate mentioned in the resolution, as pre-condition for grant of building construction permission to the applicants.

3. The extract of the impugned orders is reproduced below: -

मध्यप्रदेश शासन
नगरीय प्रशासन एवं विकास विभाग
मंत्रालय

क्रमांक एफ 6–39/2010/18–3 भोपाल, दिनांक 24 सितम्बर 2012

प्रति,

आयुक्त,
नगर पालिका निगम,
भोपाल ।

विषयः– नगर निगम सीमांतर्गत भवन निर्माण की अनुमति के साथ नर्मदाकर का अधिरोपण एवं वसूली विषयक ।

संदर्भः– आपका पत्र क्रमांक 415/आ.क./12 दिनांक 23.06.2012

राज्य शासन एतदद्वारा नगर पालिका निगम भोपाल के परिषद संकल्प दिनांक 30.03.2012 द्वारा पारित ''नर्मदाकर'' वसूलने के निम्नानुसार प्रस्ताव का अनुमोदन प्रदान किया जाता हैः–

क्र	सारणी	नर्मदाकर की निर्धारित दर
1	500 वर्गफीट तक	शून्य
2	500 वर्गफीट से 1000 वर्गफीट तक	रूपये 1/– प्रति वर्गफीट
3	1000 वर्गफीट से 1500 वर्गफीट तक	रूपये 2/– प्रति वर्गफीट
4	1500 वर्गफीट से 3000 वर्गफीट तक	रूपये 4/– प्रति वर्गफीट
5	3000 वर्गफीट से 4000 वर्गफीट तक	रूपये 6/– प्रति वर्गफीट
6	4000 वर्गफीट से उपर	रूपये 15/– प्रति वर्गफीट

2/ उक्त नर्मदाकर नगर निगम भोपाल की सीमांतर्गत प्रत्येक भवन स्वामी, प्रबंधक, व्यवस्थापक, भागीदार पर भवन निर्माण अनुमति के साथ वसूली योग्य होगा ।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार

हस्ताक्षर
20.09.13
(के.के. कातिया)
उपसचिव
म.प्र. शासन
नगरीय प्रशासन एवं विकास विभाग

पृष्ठां क्रमांक एफ 6–39/2010/18–3 भोपाल, दिनांक 24 सितम्बर 2012

It will be useful to reproduce Annexure P-2 dated 15.10.2012 which reads thus :-

कार्यालय नगर पालिका निगम भोपाल
सामान्य प्रषासन विभाग

स्थाई आदेष क्रं0 18/2012

विषय : – नगर निगम सीमा अंतर्गत भवन र्निमाण की अनुमति के साथ नर्मदा कर का अधिरोपण एवं वसुली ।

नर्मदा कर वसूलने के संबंध में निगम सम्मिलन संकल्प क्र0 04 दिनांक 29/03/12 एवं स्थगित सम्मिलन दि0 30/03/2012 अनुसार भोपाल नगर निगम सीमा के अंदर प्रत्येक भवन स्वामी प्रबंधक व्यावस्थपक भागीदार पर भवन निर्माण अनुमति के साथ वसुली हेतु पारित किये गये प्रस्तांव पर म0प्र0 षासन नगरीय प्रषासन एवं विकांस विभाग मंत्रालय के आदेष क्र0 एफ 6–39/2010/18–3 भोपाल दि0 24 सितम्बर 2012 के द्वारा दिये गये अनूमोदन अनूसार आवेदकों से भवन निमार्ण की अनूमति के समय निम्नतालिका अनूसार नर्मदा कर की दरें आरोपित की जाती है –

क्र	सारणी	नर्मदाकर की निर्धारित दर
1	500 वर्गफीट तक	शून्य
2	500 वर्गफीट से 1000 वर्गफीट तक	रूपये 1/– प्रति वर्गफीट
3	1000 वर्गफीट से 1500 वर्गफीट तक	रूपये 2/– प्रति वर्गफीट
4	1500 वर्गफीट से 3000 वर्गफीट तक	रूपये 4/– प्रति वर्गफीट
5	3000 वर्गफीट से 4000 वर्गफीट तक	रूपये 6/– प्रति वर्गफीट
6	4000 वर्गफीट से उपर	रूपये 15/– प्रति वर्गफीट

नर्मदा कर नवीन विकसीत होती कॉलोनियो एवं भवनो की भवन अनूग्या जारी करते समय आवेदकों सम भवन निमार्ण की अनुमति के साथ केवल एक बार प्राप्त की जावे । संग्रहित नर्मदा कर पथक बैंक खाते मे जमा किया जावे । जिसका उपयोग केवल नर्मदा परियोजना के लिए आरक्षित रहेगा ।

तदनूसार आवष्यक कार्यवाही की जावे

(रजनिष श्रीवास्तव)
आई ए स
आयुक्त
नगर निगम भोपाल

पृष्ठां कमांक 654 704/सा0 प्र0 वि0 2012 भोपाल, दिनांक 15 10 2012श

4. The petitioner has challenged the impugned action on the ground that the same is not within the legislative competence of the State Government as it is not falling under Entry 49 of the List-II of the Seventh Schedule. It has

also been challenged on the ground that for grant of building construction permission the fees has already been provided under Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short `the Act of 1973') and Madhya Pradesh Bhumi Vikas Rules, 2012 (for short, `Rules of 2012') and as such when for grant of building construction permission the fees has already been imposed, the levy of Narmada Tax would amount to double taxation. The third ground on which the challenge to the impugned `**Narmada Tax**' has been made is that the same has been imposed at the `**flat rate**' and, therefore, the same being violative of Article 14 of the Constitution of India, it is liable to be struck down.

5. In reply the respondents have justified the imposition of tax by stating that in order to improve the urban infrastructure, the Central Government has introduced a scheme named "Jawaharlal Nehru Urban Renewable Mission" (for short, the Scheme). For implementation of the Scheme, various major cities of the entire country were identified so that their basic infrastructure like development of slum areas, improvement of traffic and transportation, sewage, water supply etc. can be effectively done. Amongst the various cities, Bhopal is also selected as one of the cities for improvement of its basic infrastructure. The funds are being provided by the Central Government for the scheme and for effective supply of water to the city of Bhopal, "Narmada Water Supply Project" was sanctioned by the Central Government. Out of the total cost of "Narmada Water Supply Project", 50% fund is to be provided by the Central Government, 20% by the State Government and rest 30% (which comes to Rs.721 crores) is to be borne by the Municipal Corporation. This

huge amount, which is required to be spent by the Municipal Corporation is being arranged by the Municipal Corporation by taking loans from different financial resources. In order to meet the expenses of the said "Narmada Water Supply Project", the tax has been imposed. It is further case of the respondents that the imposition of the tax is to recover the amount invested by the Municipal Corporation for establishment of the infrastructure and maintenance to bring the Narmada water from Hoshangabad to Bhopal. The respondents stated that though the nomenclature of the tax is `**Narmada Tax**', but it has no relation with the water tax but is actually tax on lands. A specific stand has been taken by the learned Advocate General that the impugned 'Narmada Tax' is not tax on 'water', but is a tax on `lands', when it is proposed to be developed.

6. The respondents have also stated that under Section 132 (6) (o) of the Municipal Corporation Act, 1956 (in short `the Act') the Municipal Corporation is empowered to impose such tax under the entry 'any other tax', which the State Government has the power to impose under the Constitution of India, with the prior approval of the State Government. Before imposing '**Narmada Tax**', a proposal was sent to the State Government. The State Government in its cabinet meeting has given the consent for imposition of **'Narmada Tax**'. It is thus stated that '**Narmada Tax**' has been imposed by the Municipal Corporation with the prior approval of the State Government.

7. According to the respondents, the imposition of fees for building construction under the provisions of Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for short, the Act of 1973) and the Madhya Pradesh

Bhumi Vikas Rules, 2012 (for short, the Rules of 2012) has nothing to do with the present 'Narmada Tax', which has been imposed under the legislative competence of the State. '**Narmada Tax**' is covered under Entry 49 of Seventh Schedule of List-II, which empowers making laws in regard to taxes on lands and buildings. It has been stated that in the Schedule for imposition of tax as a precondition for grant of building permission, a slab has been provided, and as such, it cannot be said that `**flat rate**' has been imposed, which can be termed to be discriminatory.

8. In the reply affidavit it is asserted that as per Article 246 (3), State has exclusive powers to legislate on the subject enumerated in List-II of the Seventh Schedule. Further, the State has exclusive power to legislate on subjects enumerated in Entry 49 of List-II pertaining to tax on lands and buildings. Thus, during the course of arguments, the learned Advocate General contended that the levy was permissible being tax on lands when it is proposed to be developed. Reliance is then placed on the express provision inserted as Section 132-A dealing with user charges. While inserting Section 132-A the State Legislature, correspondingly, deleted Section 132 (1) (b) which enabled the Corporation to collect water tax in respect of lands and buildings to which water supply is furnished from or which are connected by means of pipe with Municipal Water Works. It was contended that as express provision regarding user charges has been inserted in the year 2010, the general provision such as Section 132 (6) (o), "any other tax" cannot be invoked for that purpose. In other words, to save the action, it became necessary to contend that it is a tax on land when it is proposed to be

developed, ascribable to Entry 49 of List II of the Seventh Schedule of the Constitution.

9. We have considered the submissions made by the learned counsel for the parties and have gone through the various judgments on which reliance has been placed by them.

10. In the present case, a resolution for imposition of `**Narmada Tax**' was passed by the Municipal Corporation in exercise of its powers under Section 136 (6) (o) of the Act of 1956. After passing of the resolution a proposal was sent to the State Government for its approval. The State Government considered the proposal and decided to approve the resolution regarding imposition of `**Narmada Tax**' on the land in its cabinet meeting.

11. Entry 49 of List-II of the Seventh Schedule provides that a tax can be levied on the lands and buildings. The Supreme Court has held that imposition of tax on the land alone is permissible and it is not that the tax is to be imposable on the lands and buildings together. Interpreting Entry 49 of List-II of the Seventh Schedule regarding lands and building the Supreme Court observed that the State Legislature can enact a law for levying tax in respect of the area beneath the surface of the earth. It has also been observed that the land includes not only the face of the earth, but everything under it or over it. The Supreme Court has also held that the word `land' cannot be assigned a narrow meaning so as to confine it to the surface of the earth. It includes all strata above or below. It also held that under Entry 49 in List-II, the land remains a land without regard to the use to which it is

being subjected. It is open for the legislature to ignore the nature of the user and tax the land. At the same time, it is also permissible to identify for the purpose of classification, the land by reference to its user. While taxing the land it is open for the Legislature to consider the land which produces a particular growth or useful for a particular utility and to classify it separately and tax the same. See **[Ajoy Kumar Mukherjee Vs. Local Board of Barpeta[1], Assistant Commissioner of Urban Land Tax, Madras and others Vs. Buckingham and Carnatic Company Limited[2], The State of Bihar and others Vs. Indian Aluminium Company and others[3] & India Cement Limited and others Vs. State of Tamil Nadu and others[4].**

12. Having regard to the aforesaid legal propositions, in our considered view, the challenge of the petitioner about competency of the State Government for levying of `**Narmada Tax**' on the lands has no merit and cannot be accepted and, therefore, we hold that the levy of `Narmada Tax' on the lands is within the competence of the State under Entry 49 of List-II of the Seventh Schedule.

13. As regards the petitioners' contention that since the respondents are already charging fees for grant of building permission and, therefore, the tax on the land on the applicants seeking permission for raising construction would amount to double taxation cannot be accepted as the impugned tax cannot be equated with the fees being charged under the Act of 1973 and the

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[1] **AIR 1965 SC 1561**
[2] **AIR 1970 SC 169**
[3] **(1997) 8 SCC 360**
[4] **(1990) 1 SCC 12**

Rules of 2012 for grant of building permission. Thus, the petitioners contention that it would amount to double taxation is also rejected.

14 Reverting to the argument of the petitioners about the challenge to the levy of tax – be it tax on lands and buildings – at the time of grant of building permission and not after construction or not referable to water actually consumed during the construction. The argument proceeds that assuming the proposed levy is in the nature of tax on lands when it is proposed to be developed, the provision such as Section 132 A (1) (a) or deleted 132 (1) (b) cannot be invoked. That provision is limited to supply of water to lands and buildings by means of pipe with Municipal Water Works. At best, the provision such as Section 132 (A) (1) (a) or deleted 132 (1) (b) would be attracted to such cases, which will have to be decided on case to case basis, before levy of the tax. We find force in this argument of the petitioners. For, the quintessence of the taxing provision is that the water must be supplied by the local Government. In other words, the incidence of tax is on the water actually consumed and that water is supplied by the Corporation. Tax cannot be levied in anticipation, be it for the lands and buildings. It cannot be levied in advance on the basis of proposal of development of the land in question.

15. The next question is whether the levy can be justified on the touchstone of flat rate or one time tax? Further, is it open to levy one time tax, even if the proposal to develop the land was to be later on abandoned or the land development permission granted by the planning authorities was to lapse due to non-construction of building within the specified time/statutory

period? To answer these questions, it will be useful to refer to the decision of the Supreme Court in the case of **Kunnathat Thathunni Moopil Nair Vs. State of Kerala**[5]. In para 8, it is observed that tax has reference to income actually made or which could have been made with due diligence, and, therefore, is levied with due regard to the incidence of taxation.

16. So far as the petitioners' contention that the imposition of `**flat rate**' of tax on the lands without specific reference to its nature, utility, location, productive capacity or other variable facts is violative of Article 14 of the Constitution of India, the levy of tax is solely based upon the built-up area in a blanket manner across the whole municipal area on the flat rate basis, treats `unequals as equals' and `equals as unequals', and therefore, is violative of Article 14 of the Constitution of India, we find that similar question came up for consideration before the Supreme Court in various matters. In **Kunnathat Thathunni Moopil Nair Vs. State of Kerala [supra]**, the Supreme Court has observed that different kinds of property may be subjected to different rates of taxation but so long as there is a rational basis for the classification, Article 14 will not come in the way of such a classification resulting in unequal burdens on different classes of properties but if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property. In ***New Manek Chowk Spinning and Weaving Mills Company Limited Vs. Municipal Corporation of the City of Ahmedabad[6],*** the Supreme

[5] **AIR 1961 SC 552**
[6] **AIR 1967 SC 1801**

Court has held that the levy of tax in the Municipal District based on floor area to be violative of Article 14 of the Constitution of India. The Supreme Court did not approve the method of adopting of flat rate for a floor area for determining the annual value adopted by the Corporation of Ahmedabad.

17. The respondents had contended that the parameter specified in the impugned order with reference to specified square feet is a measure and is the basis for permissible classification. Further, the settled legal position is, it is open to the legislature to ignore the nature of user while imposing tax on the lands and buildings. Even this argument does not commend to us. The measure of area in square feet by itself can be no rational classification. Inasmuch as, for a rational classification - various other factors must be reckoned - such as the Class to which the building belongs, the nature of construction, the purpose for which it is used, its location, its capacity for profitable user and other relevant circumstances etc.

18. In the case of **State of Kerala Vs. Haji K. Haji K. Kutta Naha and others**[7]**,** the Supreme Court while dealing with the challenge to the levy of tax on the basis of `**floor area**' irrespective of all others consideration for which the building is used, the nature of structure, the town and locality in which the building is situate, the economic rent which may be obtained from the building, the cost of the building and other related circumstances which may appropriately be taken into consideration in any rational system of taxation of building, held that in enacting the Kerala Buildings Tax Act no attempt of any rational classification is made by the Legislature. The

[7] **AIR 1969 SC 378**

Legislature has not taken into consideration in imposing tax, the class to which a building belongs, the nature of construction, the purpose for which it is used, its situation, its capacity for profitable user and other relevant circumstances which have a bearing on matters of taxation and have adopted merely the `**floor area**' of the building as the basis of tax irrespective of all other considerations and in the circumstances it held that the charging section of the Act is violative of the equality clause of the Constitution. It has been further observed by the Supreme Court that the `**flat rate**' method according to the `**floor area**' could only be applied where the majority of properties are so nearly alike in character as to be regarded identical for rating purposes.

19. In the present case also, we find that the rate of tax has no co-relation with the utility, activity, nature of user of the building of which tax is being levied. The same rates are prescribed on lands on which construction for industrial, commercial, residential, educational, charitable buildings etc. will be proposed and there is no distinction in regard to the nature, use and the locality for which the permission is being sought. Two buildings of entirely different nature, value and utility are being taxed at the same rate, which amounts to discrimination. The location of the area, which plays an important role has also been given complete go-by and whole municipal area of Bhopal and all types of lands and buildings having varied locations and nature of constructions are being taxed at one flat rate. It is also clear that a construction in the under-developed area of city has been equated with the highly developed modernized building in developed area as no distinction has

been drawn in respect of this.

20. Having regard to the aforesaid clear legal position set out by the Supreme Court in the case of **State of Kerala Vs. Haji K. Haji K. Kutta Naha and others** (supra), we are of the considered view the imposition of `**Narmada Tax**' on the basis of built up area in a blanket manner across the whole municipal area on the `**flat rate**' basis is violative of Article 14 of the Constitution of India. As a result, the impugned order dated 24.9.2012 as also the permanent order no. 18/2012 deserve to be and are hereby quashed. The amount of `**Narmada Tax**' deposited by the petitioners in pursuance to the interim order be refunded to them.

21. The next question is in the context of the relief claimed by the petitioners to refund the amount collected by the Authorities with interest. The petitioners, by virtue of conditional order passed by this Court, were required to pay the amount as demanded by the Authorities. Since, the petitioners have succeeded in these petitions on the finding that the levy is without authority of law, to do complete justice it is appropriate to direct the respondents to refund the amount deposited by the petitioners with some reasonable interest thereon - from the date of deposit till it is refunded. This aspect has been noted in the order dated 20.03.2014 while rejecting the prayer for modifying the conditional order passed by this Court and for granting unconditional interim relief to the petitioners. The petitioners having parted with the amount demanded by the authorities, which demand, as aforesaid, is without authority of law, the respondents are obliged to refund the amount so collected to the concerned petitioner with some reasonable

interest thereon, more particularly because of having opposed the prayer for granting unconditional interim relief to the petitioners. The question is: what should be the quantum of reasonable interest? Considering the prevailing interest rate payable by the Bank on any fixed deposit, we deem it appropriate to direct the respondents to refund the amount collected, from the respective petitioners with interest thereon at the rate of 9% per annum. That would meet the ends of justice.

22. Petitions allowed on the above terms.

(A.M. Khanwilkar)
Chief Justice

(Shantanu Kemkar)
Judge

AD/