

BDPSPS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1648 OF 2017

1] Union of India	)	
represented through	)	
General Manager, Western	)	
Railway, having his office at	)	
Western Railway Headquarters,	)	
Churchgate – 400 020	)	 Petitioner.

V/s

1] Municipal Corporation of	)	
Greater Mumbai, a statutory	)	
Corporation constituted under	)	
the provisions of the Mumbai	)	
Municipal Corporation Act, 1888	)	
having its office at Mahapalika	)	
Building, Mahapalika Marg,	)	
Mumbai – 400001	)	

2] Municipal Commissioner,	)	
Municipal Corporation for	)	
Greater Mumbai, having his	)	
Office at Mahapalika Building,	)	
Mahapalika Marg, Mumbai 400001)	)	

3] Additional Municipal	)	
Commissioner (City) Municipal	)	
Corporation for Greater Mumbai	)	
having his office at Mahapalika	)	
Building, Mahapalika Marg,	)	
Mumbai – 400001	)	 Respondents.

WITH
WRIT PETITION NO.197 OF 2017

Jugmohan Chandrabhan Gupt	 Petitioner.
V/s	
The Municipal Corporation of	
Brihan Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.30 OF 2017

JMD Advertisers	 Petitioners.
v/s	
Municipal Corporation for	
Greater Mumbai and Others	 Respondents

WITH
WRIT PETITION (L) NO. 40 OF 2017

M/s. Guju Ads and Others	 Petitioners
V/s	
Municipal Corporation of	
Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITON (L) NO.53 OF 2017

M/s Media Marketing Services	 Petitioners.
V/s	
The Municipal Corporation of	
Greater Mumbai and Ors	 Respondents.

WITH
WRIT PETITON (L) NO.55 OF 2017

IP Verma Media Marketing Pvt. Ltd.	 Petitioners.
V/s	
The Municipal Corporation for	
Greater Mumbai and Others	 Respondents.

WITH
WRIT PETITION (L) NO.56 OF 2017

IPV Eco Project (GMP) Pvt. Ltd.	Petitioners.
V/s	
The Municipal Corporation of Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION (L) NO.63 OF 2017

M/s Pioneer Publicity Co. Proration Pvt. Ltd Through Shyam Chauhan	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.776 OF 2017

Geet Publicity	 Petitioner.
V/s	
The Brihanmumbai Mahanagarpalika and Others	 Respondents.

WITH
WRIT PETITION NO.1235 OF 2017

Alakh Advertising and Publicity Pvt. Ltd.	 Petitioners.
V/s	
The Brihanmumbai Mahanagar Palika and Others	 Respondents.

WITH
NOTICE OF MOTION NO.321 OF 2017
IN
WRIT PETITION NO.1235 OF 2017

Alakh Advertising and Publicity Pvt. Ltd. Petitioners.

V/s

The Brihanmumbai Mahanagar Palika
and Others Respondents.

WITH

WRIT PETITION NO. 1280 OF 2017

M/s. Saharsh Publicity

Through Prop. Neelam Mane Petitioner.

V/s

The Municipal Corporation
for Gr. Mumbai and Others Respondents.

WITH

WRIT PETITION NO.1506 OF 2017

Union of India Petitioner.

V/s

Municipal Corporation for
Greater Mumbai and Others Respondents.

WITH

WRIT PETITION NO.1648 OF 2017

Union of India

Through

General Manager Petitioner.

V/s

Municipal Corporation of
Greater Mumbai and Others Respondents.

WITH

WRIT PETITION NO.1652 OF 2017

Vantage Advertising Pvt. Ltd. Petitioner.

V/s

The Municipal Corporation for
Gr. Mumbai and Others Respondents.

WITH
WRIT PETITION NO.2088 OF 2017

Onyx Media	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.2092 OF 2017

Sakshi Advertising	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.2100 OF 2017

M/s. Bright Outdoor Media Pvt. Ltd.	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.2434 OF 2017

M/s. MMS Media Developers	
V/s	
The Municipal Corporation for Gr. Mumbai and Others	 Respondents.

WITH
WRIT PETITION NO.2436 OF 2017

M/s. Ooh Media Marketing Services	 Petitioners.
--------------------------------------	-------------------

V/s
The Municipal Corporation for
Gr. Mumbai and Others Respondents.

WITH
WRIT PETITION NO.2477 OF 2017

M/s. Roshan Space Brandcom
Pvt. Ltd. Through its CEO Sajid Khan Petitioner.

V/s
The Municipal Corporation for
Gr. Mumbai and others Respondents.

WITH
WRIT PETITION NO.2480 OF 2017

M/s A Fast Runner Petitioner

V/s
The Municipal Corporation for
Gr. Mumbai and others Respondents.

WITH
WRIT PETITION NO.2554 OF 2017

Wallop Advertising Petitioner.

V/s
The Municipal Corporation for
Gr. Mumbai and others Respondents.

WITH
WRIT PETITION NO.2555 OF 2017

M/s. A Fast Runner Petitioner.

V/s
The Municipal Corporation for
Gr. Mumbai and others Respondents.

WITH
WRIT PETITION NO.2587 OF 2017

M/s Symbiosis Advertising	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and others	Respondents.

WITH
WRIT PETITION NO.2597 OF 2017

M/s Zest Enterprise	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and others	Respondents.

WITH
WRIT PETITION NO.2601 OF 2017

M/s Gurukripa Advertising	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and others	Respondents.

WITH
WRIT PETITION NO.2696 OF 2017

M/s. Laqshya Media Pvt. Ltd.	 Petitioner.
V/s	
The Municipal Corporation for Gr. Mumbai and others	 Respondents.

Mr. Navin Parekh along with Ms. Shakti Parwaney i/by Ms. Hetal Patel
for the Petitioner in WP/197/2017.

Dr. Milind Sathe, Senior Counsel along with Mr. Bhavik Manek, Mr.
Tushar Kadam and Ms. Radhika Dixit, Mr. Hazreen i/by M/s. MDP and
Partners for the Petitioner in WPL/40/2017.

Mr. Sanjeev Gorwadkar, Senior counsel along with Mr. A. P. Seteenson and Mr. Amul Jawale i/by M/s. APS Law Associates for the Petitioner in WP/53/2017, WP/55/2017, WP/56/2017, WP/63/2017, WP/1652/2017, WP/1280/2017, WP/2088/2017, WP/2092/2017, WP/2100/2017, WP/2434/2017. WP/2436/2017, WP/2477/2017, WP/2480/2017, WP/2555/2017, WP/2587/2017, WP/2597/2017, WP/2601/2017, WP/2696/2017.

Dr. Milind Sathe, Senior Counsel along with Mr. Bhushan Deshmukh and Mr. Manoj Agre i/by Mr. G. B. Kedia for the Petitioner in WP/30/2017.

Mr. Anil C. Singh, Addl. Solicitor General along with Ms. Geethika Gandhi Ms. Raghini Wagh, Ms. Mohinee Chougule, Ms. Priyanka i/by Mr. Suresh Kumar for petitioner in WP/1648/2017 and WP/1506/2017 and for Respondents Central and Western Railway in all Writ Petitions.

Mr. J. S. Kini i/by Mr. Suresh Dubey for the Petitioner in WP/776/2017, WP/1235/2017 and Applicant in NMW/321/2017.

Mr. Mohammed Zain Khan for the Petitioner in WP/2554/2017.

Mr. Joaquim Reis, Senior Counsel along with Mr. Abhijeet Joshi, Mr. Nigel Quraishy, Mr. Sagar Patil and Ms. Pooja Yadav for the Respondents-M.C.G.M. in all Writ Petitions.

Mr. Himanshu Takke, Asst. Government Pleader, for the Respondent in WP/197/2017 and WP/40/2017.

Mr. Amit Shastri, Asst. Government Pleader, for the Respondent in WP/30/2017 and WP/2597/2017.

Ms. Jyoti Chavan , Asst. Government Pleader, for the Respondent in WPL/53/2017, WP/2100/017 and WP/2480/2017.

Ms. Uma Palsuledesai, Asst. Government Pleader, for the Respondent in WPL/55/2017, WP/1652/2017 and WP/2092/2017.

Mr. S. B. Gore, Asst. Government Pleader, for the Respondent in WPL/56/2017 and WPL/63/2017.

Mr. Hemant Haryan, Asst. Government Pleader, for the Respondent in WP/2436/2017, WP/2587/2017 and WP/2601/2017.

Mrs. P. H. Kantharia, Government Pleader along with Ms. Deepali Patankar, Honorary Asst. to Government Pleader, for the Respondent in WP/2555/2017 and WP/2696/2017.

Mr. Manish Upadhye, Asst. Government Pleader, for the Respondent in WP/2088/2017.

Mr. Sukanta Karmarkar, Asst. Government Pleader, for the Respondent in WP/1280/2017 and WP/2554/2017.

Mr. Kaushal Trivedi, Asst. Government Pleader, for the Respondent in WP/2434/2017 and WP/2477/2017.

**CORAM: B. R. GAVAI &
SANDEEP K. SHINDE JJ.**

**Judgment reserved on 15/12/2017
Judgment pronounced on 21/12/2017**

JUDGMENT: (Per B.R. Gavai, J.)

1] Rule. Rule is made returnable forthwith. Respondents waive service. Heard by consent of parties.

2] All these Petitions have been filed by the Petitioners, inter alia praying for an order restraining the Respondent – Municipal

Corporation of Greater Mumbai (“MCGM”) and its authorities from applying the provisions of sections 328 and 328A of the Mumbai Municipal Corporation Act (herein after referred to as “the MMC Act”) or any other provisions in respect of hoardings belonging to Union of India (Railways) in any manner whatsoever. Petitioners further seek a declaration that the activities of Railways on the Railway properties, including commercial activities, which are permissible under the provisions of the Railways Act, 1989 (hereinafter referred to as “the Railways Act”) including activities of agents of Railways are not subject to the jurisdiction of Municipal Authorities either under the provisions of the MMC Act or any other law.

3] Writ Petition No.1648 of 2017 has been filed by the General Manager of the Western Railway, whereas rest of the Petitions are filed by private entities, who are engaged in the business of advertising.

4] Since common questions of fact and law are involved, all these Petitions have been heard and decided together.

5] We have heard Mr. Anil Singh, the learned Additional Solicitor General for Railways, learned Senior Counsel Dr. Milind Sathe, Mr. Sanjeev Gorwadkar and learned Counsel Mr. Navin Parekh and Mr. Khan appearing on behalf of the other Petitioners and Mr. Reis, learned Senior Counsel appearing on behalf of the Respondent – MCGM.

6] On behalf of the Petitioners, it is submitted that the power to make construction on Railways, including the erection of structures for displaying hoarding is exclusively with the Railways in view of Section 11 of the Railways Act. It is further submitted that, clause (31) of Section 2 gives a wide meaning to 'Railways' and, as such, it will also include the structures which are erected for displaying the advertisements. It is submitted that, developing any railway land for commercial use is also exclusively within the domain of Railway Authorities. It is further submitted that in view of Section 184 of the Railways Act, railway administration is not liable to pay any tax in aid of the funds of any local authority unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification. It is further submitted that unless

the notification as contemplated under section 184 is published/notified by the Central Government, railway administration is not liable to pay any tax to the local authority. It is further submitted that in view of Section 185 of the Railways Act, railway administration is not liable to pay any tax to any local authority in respect of any advertisement made on any part of the railway unless the Central Government by notification declares the railway administration to be liable to pay the tax specified in such notification.

7] Learned Counsel appearing on behalf of the Petitioners submitted that in view of the aforesaid provisions and the provisions of Article 285 of the Constitution, it will have to be held that the Respondent-MCGM has no jurisdiction to regulate the hoardings erected on the property of railways and recover any tax on the same. It is further submitted on behalf of the Petitioners that though what is sought to be recovered by the Corporation is termed as a “fee”, in effect, it is not a fee but a tax. It is submitted that no services of whatsoever nature are being provided by the Corporation for grant of license and that there is not even a remotest element of *quid pro quo* in so far the charges sought to be recovered by the Corporation are concerned. It is further

submitted that all inspection with regard to the stability of the structures etc. is being done by the Railways and, as such, charges which are sought to be recovered by the Corporation are nothing but compulsory exaction of money without rendering any services.

8] Mr. Anil Singh, learned Additional Solicitor General, relied on the judgments of the Apex Court in the case of *Subhas Dutta vs. Union of India & Ors.*¹ and in the case of *Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla and Others*².

9] Mr. Sathe, learned Senior Counsel further submitted that in view of Section 44 of the Maharashtra Regional Town Planning Act, 1966, since no permission is required to be obtained by the Central Government or State Government for any development, the MCGM will have no power to regulate the hoardings erected on the land of railways. Learned Senior Counsel relied on the judgment of the Apex Court in the case of *Union of India vs. Purna Municipal Council and Others*³, Division Bench Judgment of this Court in the case of

1 2001 SCC OnLine Cal 178

2 (1992) 3 SCC 285

3 (1992) 1 SCC 100

*Municipal Commissioner of Bombay vs. The Agent, G.I.P. Railway Company*¹, Division Bench Judgment of this Court in the case of *The Great Indian Peninsula Railway vs. The Municipal Corporation of Bombay*², Division Bench Judgment of this Court in the case of *The Union of India vs. Bhusawal Municipal Council*³ and the Judgment of the Apex Court in the case of *Delhi Race Club Limited vs. Union of India and others*⁴.

10] Per contra, Mr Reis, learned Senior Counsel appearing on behalf of MCGM, submitted that in view of provisions of Section 328A of the MMC Act, no person can erect a hoarding or structure for advertisement without the written permission of the Commissioner. He submitted that clause (d) of second proviso to sub-section (1) of Section 328, would reveal that such of the hoardings which are facing any street, are also included in the category of the hoardings, which require permission under Section 328A. The learned Senior Counsel submitted that in view of Section 479, since the permission is required under Section 328A, MCGM is entitled to charge fees at such rate as

1 ILR XXXIV 252

2 ILR Vol XVI 104

3 AIR 1982 Bombay 512

4 (2012) 8 SCC 680

shall from time to time be fixed by the Commissioner. He submitted that immunity which is granted to the railways under Sections 184 and 185 of the Railways Act is only in so far as taxes are concerned and what is being charged by the MCGM is not a “tax” but a “fee” for grant of permission under Section 328A. The learned Senior Counsel further submitted that Division Bench of this Court in the case of *Yog Advertising & Marketing Services and Ors. vs. Municipal Corporation of Greater Mumbai and Ors.*¹ has held such a levy to be “fee” and not “tax”. The learned Counsel further submitted that the Division Bench has further found that there need not be any direct co-relation between the services rendered and the fees levied. He submitted that even if some co-relation is established, charging of such a fee would be permissible. The learned Counsel submitted that the Corporation is processing the applications and, as such, it cannot be said that fees/charges are without there being any co-relation with the services rendered and, as such, the same are not a tax but fees.

11] The learned Counsel further submitted that, as a matter of fact, fees are not being paid by the Railways but by the advertisers acting as

¹ 2016(2) ABR 229 : 2017(1) ALLMR 349

agents of the Railways and, as such, there could not be any restriction on levy of the fees on such advertisers. The learned Senior Counsel further submitted that the Apex Court in the case of *Links Advertisers and Business Promoters vs. Commissioner, Corporation of the City of Bangalore*¹, has clearly held that, the Bangalore Municipal Corporation was entitled to levy tax on advertisement, fixed behind compound wall if it was facing towards the street, even if it was within the railway premises. He further submitted that the learned Single Judge of the Madras High Court in *Ragavendra Ad Lab vs. Senior Divisional Commercial Manager*², has also held that the hoardings in the railway premises are also subject to regulation of the statutory provisions enacted by the concerned State. He further submitted that Division Bench of this Court in its various orders passed in PIL has held that railways are also bound by the policy framed by the Corporation. Learned Senior Counsel, therefore, submitted that all these Petitions deserve to be dismissed.

12] For appreciating the rival submissions, it will be necessary for us to go into the history of this litigation. In the year 1999, a Writ

1 AIR 1977 SC 1646

2 MADLG-2013-1-455

Petition came to be filed in this Court being Writ Petition No.4175 of 1999, seeking regulation of hoarding and display of advertisements in City of Mumbai. The said Writ Petition came to be disposed of by Order dated 27/4/2001 by this Court, directing the Municipal Corporation to formulate policy guidelines for grant of permission for display of sky-signs and advertisements. On 10/1/2001, MCGM formulated the policy guidelines as aforesaid under Sections 328 and 328A of the MMC Act, 1888. Again, another Writ Petition came to be filed in the year 2002 being Writ Petition No.1132 of 2002, seeking orders in relation to regulation of hoardings and advertisements in City of Mumbai. Between 2008 and 2010, it appears that certain orders were passed from time to time in the aforesaid Petitions. It further appears that during that period, Commissioner of MCGM addressed certain communications to the railway administration inviting its attention to the policy guidelines and requiring Railway Authorities to seek NOC for any hoardings on the Railway properties. On 30/7/2012, Writ Petition No.1132 of 2002 came to be disposed of after noting the modalities formulated by the MCGM for grant of permission for sky-signs and hoardings.

13] It appears that on 20/8/2014, the Municipal Commissioner addressed a communication to the railways, asking them not to erect hoardings on railway properties, which are visible from the public street without first obtaining permission under Section 328 and 328A of the MMC Act. It appears that since railway authorities did not respond, a Notice of Motion came to be filed in Writ Petition No.1132 of 2002, seeking the following reliefs:-

“(a) That the Hon'ble Court be pleased to direct the General Manager, Central Railway and General Manager, Western Railway to obtain the permission from M.C.G.M before erecting hoardings on their land and to pay the advertisement fees as per the provisions of section 328 / 328A of MMC Act.

(b) That the Hon'ble Court be pleased to direct the General Manager, Central Railway and General Manager, Western Railway to rectify the hoardings and remove the violations as pointed out by the M.C.G.M by issuing the notices to Central Railway and Western Railway for having erected the hoardings against the Policy Guidelines failing which they will be liable for removal by the M.C.G.M.

(c) That the Hon'ble Court be pleased to issue directions that all advertisements visible from public streets attract the provisions of Section 328 / 328A of the BMC Act and come under the purview of the Policy Guidelines framed by the MCGM in

pursuance of the same.”

It appears that during the hearing of the said Motion, it was sought to be urged on behalf of the Petitioners therein and the Corporation that the order dated 30/7/2012 also binds the Railway Authorities. It was urged that the Railway Authorities were not complying with the directions and, as such, it was necessary to issue directions to the Railway Authorities to comply with the order dated 30/7/2012. However, Division Bench of this Court, while deciding the Motion on 2/8/2016, disagreed with the said contention raised on behalf of the Corporation and the Petitioners therein. It categorically held that the order dated 30/7/2012 in Writ Petition No. 1132 of 2002 shall not apply to the railways. It was observed by the Court that there was no adjudication of the grounds on which the railway is agitating against the notices issued by the Municipal Corporation. As such Division Bench has passed the following order:-

“6. In the circumstances, we dispose of this notice of motion by directing the Commissioner / Additional Commissioner of the Municipal Corporation to adjudicate the question / grounds raised by the Railways while opposing

the notices issued by the Municipal Corporation. Railway is permitted to submit a fresh detailed objection / representation in regard to the said notices within one month from today.

7. Interveners to whom the Railway has allotted hoardings are permitted to submit their written submissions within the aforesaid period.”

It appears that in pursuance of the aforesaid order passed by this Court, the matter was placed before the Additional Commissioner of MCGM. The written submissions were filed on behalf of the Petitioner – Railways as well as the other Petitioners. Vide Order dated 9/11/2016, the Additional Municipal Commissioner of MCGM rejected the contentions raised on behalf of the Petitioners on various grounds. It was held by the Additional Commissioner that, what was levied by the Corporation was a fee and not a tax and therefore provisions of Sections 184 and 185 would not be applicable. It was further held that the issue with regard to applicability of the policy framed by the Corporation has already been upheld by this court. It was further held that the charges that were to be recovered, were to be recovered from the advertisers and not from the Railways and, as such, the provisions of Section 184 and 185 of the Railways Act would not be applicable.

Being aggrieved thereby, present Petitions have been filed.

14] For appreciating the rival contentions, it will also be necessary for us to refer to Article 285 of the Constitution of India as well as some of the provisions of the MMC Act as well as the Railways Act.

Article 285 of the Constitution of India reads thus:

“285. Exemption of property of the Union from State taxation.”-(1) The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.”

Chapter-XI of MMC Act provides for Regulation of Streets. It will be relevant to refer to Sections 328 and 328A of the MMC Act, which read as under:-

“328. Regulations as to sky-signs.

(1) No person shall, without the written permission of the Commissioner erect, fix or retain any sky-sign, whether now existing or not, [where a sky-sign is a poster depicting any scene from a cinematographic film, stage play or other stage performance, such permission shall not be granted, unless prior scrutiny of such poster is made by the Commissioner and he is satisfied that the erection or fixing of such poster is not likely to offend against decency or morality. No permission under this section] shall be granted, or renewed, for any period exceeding two years from the date of each such permission or renewal:

$$[* \quad * \quad * \quad *]$$

[Provided that] in any of the following cases a written permission or renewal by the Commissioner under this section shall become void, namely:—

- (a) if any addition to the sky-sign be made except for the purpose of making it secure under the direction of the municipal [city engineer];
- (b) if any change be made in the sky-sign, or any part thereof;
- (c) if the sky-sign or any part thereof fall either through accident, decay or any other cause ;
- (d) if any addition or alteration be made to, or in, the building or structure upon or over which the sky-sign is erected, fixed or retained, if such addition or alteration involves the distribution of the sky-sign or any part thereof;
- (e) if the building or structure upon or over which the sky-sign is erected, fixed or retained become unoccupied or be demolished or destroyed.

(2) Where any sky-sign shall be erected, fixed or retained after the[coming into force of this section in the city or in the suburbs after the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950,] [or in the extended suburbs after the coming into force of the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956,] upon or over any land, building or structure save, and except as permitted as herein before provided, the owner or person in occupation of such land, building or structure shall be deemed to be the person who has erected, fixed or retained, such sky-sign in contravention of the provisions of this section, unless he proves that such contravention was committed by a person not in his employment or under his control, or was committed without his connivance.

(3) If any sky-sign be erected, fixed or retained contrary to the provisions of this section, or after permission for the erection, fixing or retention thereof for any period shall have expired or become void, the Commissioner may, by written notice, require the owner or occupier of the land, building or structure, upon or over which the sky-sign is erected, fixed or retained, to take down and remove such sky-sign.

The expression "sky-sign" shall in this section mean any word, letter, model, sign, device or representation in the nature of an advertisement, announcement or direction, supported on or attached to any post, pole, standard frame-work or other support wholly or in part upon or over any land, building or structure which, or any part of which sky-sign, shall be visible against the sky from some

point in any street and includes all and every part of any such post, pole, standard framework or other support. The expression “sky-sign” shall also include any balloon, parachute, or other similar device employed wholly or in part for the purposes of any advertisement, announcement or direction upon or over any land, building or structure or upon or over any street, but shall not include-

(a) any flagstaff, pole, vane or weathercock, unless adapted or used wholly or in part for the purpose of any advertisement, announcement or direction ;

(b) any sign, or any board, frame or other contrivance securely fixed to or on the top of the wall or parapet of any building, or on the cornice or blocking course of any wall, or to the ridge of a roof:

Provided that such board, frame or other contrivance be of one continuous face and not open work, and do not extend in height more than three feet above any part of the wall, or parapet or ridge to, against, or on which it is fixed or supported ;

(c) any word, letter, model, sign, device or representation as aforesaid, relating exclusively to the business of a railway company, and place wholly upon or over any railway, railway station, yard, platform or station approach belonging to a railway company and so placed that it cannot fall into any street or public place ;

(d) any notice of land or building to be sold, or let, placed upon such land or

buildings.”

“328A. Regulation and control of advertisements.

(1) No person shall, without the written permission of the Commissioner, erect, exhibition, fix or retain any advertisement whether now existing or not, upon any land, building wall, hoarding or structure [Where an advertisement depicts any scene from a cinematographic film, stage play or other stage performance, such permission shall not be granted, unless prior scrutiny of such advertisement is made by the Commissioner and he is satisfied that the erection or exhibition of such advertisement is not likely to offend against decency or morality:]

[Provided that, the power of the Commissioner under this sub-section shall be subject to the regulations framed in this behalf]

Provided always that [any permission under this section] shall not be necessary in respect of any advertisement which is not an illuminated advertisement nor a sky-sign and which-

(a) is exhibited within the window of any building;

(b) relates to the trade or business carried on within the land or building upon which such advertisement is exhibited or to any sale or letting of such land or building or any effects therein or to any sale, entertainment or meeting to be held upon or in the same; [or to the trade or business carried on by the owner of any tram-car, omnibus or other vehicle upon which such advertisement is exhibited;]

(c) relates to the business of any railway company ;

(d) is exhibited within any railway station or upon any wall or other property of a railway company, except

any portion of the surface of such wall or property fronting any street:

[Provided also that such permission shall not be necessary for a period of three years—

(i) after the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950, in respect of advertisements upon a site in the suburbs which was occupied by advertisements on the first day of January 1950.

(ii) after the coming into force of the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956 in respect of advertisements upon a site in the extended suburbs which was occupied by advertisement on the first day of January 1956.]

(2) Where any advertisement shall be erected, exhibited, fixed or retained after three months from the enactment of this section [or, as the case may be, the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950] [or the coming into force of the Bombay Municipal [Further Extension of Limits and Schedule BBA (Amendment)] Act, 1956], upon any land, building, wall hoarding or structure save and except as permitted or exempted from permission as herein before provided, the owner or person in occupation of such land, building, wall, hoarding or structure shall be deemed to be the person who has erected, exhibited, fixed or retained such advertisement in contravention of the provisions of this section, unless he proves that such contravention was committed by a person not in his employment or under his control or was committed without his connivance.

(3) If any advertisement be erected, exhibited,

fixed or retained contrary to the provisions of this section after the written permission for the erection, exhibition, fixing or retention thereof for any period shall have expired or become void, the Commissioner may by notice in writing, require the owner or occupier of the land, building, wall, hoarding or structure upon which the same is erected, exhibited, fixed or retained, to take down or remove such advertisement.

(4) [(a)] The word “structure” in this section shall include [a tram- car, omnibus and any other vehicle and any moveable board] used primarily as an advertisement or an advertising medium; [and

(b) the expression “illuminated advertisement ” in this section shall not include an illuminated display of goods, if such display-

(i) is of goods merely bearing labels showing the name of the article or of it’s manufacturer or of both, and

(ii) is made by lighting which is not, in the opinion of the Commissioner, more than is necessary to make the goods and labels visible at night.]”

It will be relevant to refer to Section 479(1) and (2) of the MMC Act, which read thus:

“479. Licences and written permission to specify condition etc., on which they are granted.

(1) Whenever it is provided in this Act that a licence or a written permission may be given for any purpose, such licence or written permission

shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same.

Fees to be chargeable.

(2) For every such licence or written permission a fee may be charged at such rate as shall from time to time be fixed by the [Commissioner], with the sanction of the corporation.”

It will also be relevant to refer to clause (31) of Section 2 of the Railways Act, which reads as under:-

“2(31) “railway” means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes-

(a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, sidings, or yards, or branches used for the purposes of, or connection with, a railway;

(c) all electric traction equipments, power supply and distribution installation used for the purposes of, or in connection with, a railway;

(d) all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water supply installations, staff dwellings and any other works constructed for the purpose of, or in connection with, railway;

(e) all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and

(f) all ferries, ships, boats and rafts which are used on any canal, river, lake or other navigable inland waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration, but does not include-

(i) a tramway wholly within a municipal area; and

(ii) lines of rails built in any exhibition ground, fair, park, or any other place solely for the purpose of recreation;”

It will also be relevant to refer to Sections 11, 184 and 185 of the Railways Act, which read as under:-

“11. Power of railway administrations to execute all necessary works.— Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of this Act and the provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any contract between the non-Government railway and the Central Government, a railway administration may, for the purposes of constructing or maintaining a railway-

(a) make or construct in or upon, across, under or

over any lands, or any streets, hills, valleys, roads, railway, tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes, oil-pipes, sewers, electric supply lines, or telegraph lines, such temporary or permanent inclined-planes, bridges, tunnels, culverts, embankments, aquaducts, roads, lines of railways, passages, conduits, drains, piers, cuttings and fences, in-take wells, tube wells, dams, river training and protection works as it thinks proper;

(b) alter the course of any rivers, brooks, streams or other water courses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter either temporarily or permanently, the course of any rivers, brooks, streams or other water courses or any roads, streets or ways, or raise or sink the level thereof, in order to carry them more conveniently over or under or by the side of the railway;

(c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper;

[(da) developing any railway land for commercial use;]

(e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead;

(f) erect, operate, maintain or repair any telegraph and telephone lines in connection with the

working of the railway;

(g) erect, operate, maintain or repair any electric traction equipment, power supply and distribution installation in connection with the working of the railway; and

(h) do all other acts necessary for making, maintaining, altering or repairing and using the railway.”

“184. Taxation on railways by local authorities.-

(1) Notwithstanding anything to the contrary contained in any other law, a railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification.

(2) While a notification of the Central Government under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax specified in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Central Government may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable.

(3) The Central Government may at any time revoke or vary a notification issued under sub-section (1).

(4) Nothing in this section shall be construed to prevent any railway administration from entering into a contract with any local authority for the supply of water or light, or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render to the railway administration.”

“185. Taxation on railways for advertisement.—

(1) Notwithstanding anything to the contrary contained in any other law, a railway administration shall not be liable to pay any tax to any local authority in respect of any advertisement made on any part of the railway unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification.

The Central Government may at any time revoke or vary a notification issued under sub-section (1).”

15] Perusal of Section 328 of MMC Act would reveal that, no person can erect, fix or retain any sky-sign without the permission of the Commissioner of MCGM. It would further reveal that where a sky-sign is a poster depicting any scene from a cinematographic film, stage play or other stage performance, such permission shall not be granted, unless prior scrutiny of such poster is made by the Commissioner and he is satisfied that the erection or fixing of such poster is not likely to offend against decency or morality. Under Section 328A, a similar provision is made, requiring written permission of Commissioner for erecting, exhibiting, fixing or retaining any advertisement whether now existing or not upon any land, building, wall, hoarding or structure. Perusal of clause (d) of second proviso of sub-section (1) of Section 328A would reveal that such permission shall not be necessary in respect of any advertisement which is exhibited within any railway

station or upon any wall or other property of a railway company. However, when any portion of the surface of such wall or property is fronting any street, it will be carved out from clause (d). The effect would be that, when any portion of the surface of such wall or property fronts any street, permission would be required under section 328A. Under section 479 of MMC Act, it is required that whenever it is provided under the Act that a licence or a written permission may be given for any purpose, such licence or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same. Sub-section (2) of Section 479 provides that, for every such licence or written permission, a fee may be charged at such rate as shall from time to time be fixed by the Commissioner, with the sanction of the Corporation.

16] Perusal of clause (31) of Section 2 of the Railways Act, would reveal that the term “railway” has been given a very wide meaning. It means a railway, or any portion of a railway for the public carriage of passengers or goods. It includes all lands within the fences or other

boundary marks indicating the limits of the land appurtenant to a railway. It also includes all lines of rails, sidings, or yards, or branches for the purposes of, or in connection with, a railway. It also includes all electric traction equipments, power supply and distribution installations used for the purposes of, or in connection with, a railway. It also includes all rolling stock, stations, offices, warehouses, wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institutes, hospitals, water works and water supply installations, staff dwellings and any other work constructed for the purpose of, or in connection with, railway. It also includes all vehicles which are used on any road for the purposes of traffic of a railway and owned, hired or worked by railway.

17] Under Section 11 of the Railways Act, railway administration has been bestowed with various powers for the purpose of constructing or maintaining railway. The said power is notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of the said Act and provisions of any law for the acquisition of land for a public purpose or for companies, and subject also, in the case of a non-Government railway, to the provisions of any

contract between the non-Government railway and the Central Government. Clause (d) of Section 11, would reveal that the railway administration is also empowered to erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper. Under clause (da), which is inserted by Act 47 of 2005, railway administration is also empowered for developing any railway land for commercial use.

18] Sub-section (1) of Section 184 of the Railways Act provides that notwithstanding anything to the contrary contained in any other law, a railway administration shall not be liable to pay any tax in aid of the funds of any local authority unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification. Sub-section (2) thereof provides that while a notification of the Central Government under sub-section (1) is in force, the railway administration shall be liable to pay to the local authority either the tax specified in the notification or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Central

Government may, having regard to all the circumstances of the case, from time to time, determine to be fair and reasonable. Sub-section (3) thereof empowers the Central Government to revoke or vary a notification issued under sub-section (1) at any time. Sub-section (4) thereof enables the railway administration to enter into contract with any local authority for the supply of water or light, or for the scavenging of railway premises, or for any other service which the local authority may be rendering or be prepared to render to the railway administration.

19] Section 185 deals with taxation on railways for advertisement. The said section also begins with non-obstante clause. It provides that notwithstanding anything to the contrary contained in any other law, a railway administration shall not be liable to pay any tax to any local authority in respect of any advertisement made on any part of the railway unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification. Under sub-section (2) thereof, the Central Government is empowered to revoke or vary a notification issued under sub-section (1) at any time. Sub-section (1) of Section 197, further provides that

for the purposes of various sections including Sections 184 and 185, the word “railway” whether it occurs alone or as a prefix to another word, has reference to a railway or portion of a railway under construction and to a railway or portion of a railway not used for the public carriage of passengers, animals or goods as well as to a railway falling within the definition of that word in clause (31) of section 2.

20] At the outset, we may state that there is no dispute between the parties that in so far as advertisements, which are within the railway station or upon any wall or other property of the railway, except the one which are fronting any street, no permission is required under Section 328A. The only controversy is with regard to advertisements which are situated on the property of railway and which have frontage against the street.

21] It is the contention of MCGM that in view of provisions of Section 328A, permission of the Corporation would be necessary and the Corporation has power to remove the same if the permission is not obtained. It is the Contention of the Corporation that under sub-section (1) of Section 479, prior permission of the Commissioner is

required and for that the Corporation is entitled to charge fees under sub-section (2) of the said Section. Per contra, it is the contention of the Railway and other Petitioners that in view of various provisions contained in the Railways Act, Corporation has no power to insist upon its permission for erection of such hoardings, which have advertisements facing the street. It is also the contention of the Railways and the Petitioners that in view of the provisions of the Railways Act, Corporation has no right to levy taxes on the advertisements situated on the property of the Railways.

22] We have already referred to the provisions of Section 11 hereinabove. The Railways Act, 1989 succeeds the Indian Railways Act 1890, whereas the present MMC Act succeeds the City of Bombay Municipal Act (Bom Act III of 1888) [hereinafter referred to as “Bombay Municipal Act”] In the Indian Railways Act 1890, section 7 has provisions which are corresponding with the provisions contained in Section 11 of the Railways Act, 1989, which reads thus :-

“7. Authority of railway administration to execute all necessary works.- (1) Subject to the provisions of this Act and, in the case of immoveable property not belonging to the railway administration, to the provisions of any enactment for the time being in force

for the acquisition of land for public purposes and for companies, and subject also, in the case of a railway company, to the provisions of any contract between the company and the Government, a railway administration may, for the purpose of constructing the railway or the accommodation or other works connected therewith, and notwithstanding anything in any other enactment for the time being in force,

(a) make or construct in, upon, across, under or over any lands, or any streets, hills, valleys, roads, the railways or tramways, or any rivers, canals, brooks, streams or other waters, or any drains, water-pipes, gas-pipes or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, roads, [lines of the railway, ways], passages, conduits, drains, piers, cuttings and fences as the railway administration thinks proper;

(b) alter the course of any rivers, brooks, streams, or watercourses, for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them, and divert or alter, as well temporarily as permanently, the course of any rivers, brooks, streams or watercourses or any roads, streets or ways, or raise or sink the level thereof, in order the more conveniently to carry them over or under or by the side of the railway, as the railway administration thinks proper;

(c) make drains or conduits into, through or under any lands adjoining the railway for the purpose of conveying water from or to the railway;

(d) erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery, apparatus and other works and conveniences as the railway administration thinks proper;

(e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them and substitute others in their stead; and

(f) do all other acts necessary for making, maintaining, altering or repairing and using the railway.

(2) The exercise of the powers conferred on a railway administration, by sub-section (1) shall be subject to the control of the [Central Government]”

23] As early as in 1909, a somewhat similar question arose for consideration before Division Bench of this Court in the case of *Municipal Commissioner of Bombay vs. The Agent G.I.P. Railway Company*¹. The Agent of the G.I.P. Railway Company was charged in the Presidency Magistrate's Court at the instance of the then Bombay Municipality for having used the Company's premises for storing timber without a license granted by the Municipal Commissioner. After recording the evidence, the learned Magistrate referred the following question under section 432 of the Criminal Procedure Code (Act V 1898) :-

“Do the statutory powers given to the Railway Company (section 7 of the Indian Railways Act IX of 1890) preclude the necessity of obtaining a license from the Municipal Commissioner, to use premises in such a manner as is necessary for the convenient making, altering, repairing and using

1 ILR Vol XXXIV 252

the Railway?”

It will be relevant to refer to sections 394(1), (b) and (d) of the City of Bombay Municipal Act (1888), which read as under:-

“(1) No person shall use any premises for any of the purposes hereinbelow mentioned, without, or otherwise than in conformity with the terms of, a license granted by the Commissioner in this behalf, namely

(b) any purpose which is, in the opinion of the Commissioner, dangerous to life, health or property, or likely to create a nuisance,

(d) storing for other than domestic use or selling timber, firewood, char-coal, coal, coke, ashes, hay, grass, straw or any other combustible thing.”

It could thus be seen that in the said case also, no person could have used the premises for storing timber or firewood etc, other than domestic use, unless the license was granted by the Commissioner. Section 479 of the 1888 Act also provided similar provisions as are contained in present Section 479 of the MMC Act and the Court also considered the same. Sub-section (3) of Section 479 of the Bombay Municipal Act, provided as under:-

“Subject to the provisions of clause (d) of section 403, any license or written permission granted under this Act may at any time be suspended or revoked by the Commissioner, if any of its restrictions or conditions is infringed or evaded by the person to whom the same has been granted, or if the said person is convicted of an infringement of any of the provisions of this Act or of any regulation or by-law made hereunder in any matter to which such license or permission relates.”

In that case, it was sought to be urged on behalf of the Municipality that though the Commissioner could not prohibit the use of any premises, the use of which was authorised by the terms of section 7 of the Railways Act, 1890, yet he still had reserved to him, under section 394(1)(d) a power of regulating the method in which the Railway Company should store timber upon its premises even though such storing was authorised by section 7(1)(f). In view of the rival contentions, the aforesaid question which we have reproduced arose for consideration before the Division Bench. After considering various provisions of the Bombay Municipal Act and the provisions of Section 7 of the Railways Act, 1890 which are analogous with the provisions contained in Section 11 of the Railways Act 1989, Division Bench

observed thus:-

“It is not disputed that the unrestricted provisions of section 394 would empower the Commissioner to refuse in his discretion to grant a license. This view has the authority of a ruling of this Court in its favour : see Haji Esmail v. Municipal Commissioner of Bombay. [(1903) 28 Bom. 253 : 5 Bom. L.R. 1001]

It was at first contended by counsel for the Commissioner that the power of refusal extended to such a case as the present but being pressed by the words of section 7 of the Railways Act “notwithstanding anything in any other enactment for the time being in force” and by the consideration that such a contention if upheld would give to the Commissioner, under section 394 (b), the power, if he thought fit, to prohibit the working of the Railway in parts of the city, he modified and reduced the argument to this, that although by reason of the terms of section 7 of the Railways Act the Commissioner could not prohibit the use of any premises, the use of which was authorised by the terms of section 7, yet he still had reserved to him under section 394(1)(d) a power of regulating the method in which the Railway Company should store timber upon its premises even though such storing was authorised by section 7(1)(f); and authorities were cited to the Court in support of the general proposition that an implied repeal of one Act by a later Act will not be inferred if it is possible even partially to harmonise the provisions of the two acts. While we recognise this as a general rule of construction, we do not think that there is any scope for its application in the present case; in the first place, it would involve an almost complete rewriting of section 394, part of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet

another part being altogether deleted. It seems to us very doubtful whether such a recasting of the section would be warranted by any recognised principles of construction. In the second place we have not only the provision that the words of section 7 shall be read notwithstanding anything in any other enactment for the time being in force, but we have an express declaration in sub-section (2) of the authority which shall have control of the Railway administration in the exercise of its powers under sub-section (1). That authority is the Governor General in Council and not the Municipal Commissioner.

The provisions of the Railways Act to which we have referred provide, we think, for an undivided and exclusive control of Railway administrations by the Supreme Government.

Considerations of convenience and the safety of the public and security of property have been pressed upon us in argument. But we do not think there is any practical force in any of these suggestions, for, if the Municipal Commissioner is really of opinion that the Railway Company is exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it is always open to him to make a representation to that effect to the Governor General in Council in order that the state of affairs complained of may be inquired into and if necessary remedied by the proper authority.”

It could thus be seen that, in the said case it was sought to be urged on behalf of the Bombay Municipality that an implied repeal of one Act by a later Act would not be inferred if it was possible even partially to harmonise the provisions of the two Acts. However, the said

contention was rejected by the Division Bench. It was observed that if such an exercise was to be done, it would involve complete rewriting of section 394, part of it being left to stand, another part being restricted without any precise guidance as to the limits of the restriction and yet another part being altogether deleted. This Court further observed that it was stated in section 7 of the Railways Act, 1890 that the provisions were notwithstanding anything in any other enactment for the time being in force. Division Bench of this Court further observed that there is an express declaration in sub-section (2) of the authority, which shall have control of the Railway administration, that is the Governor General in Council and not the Municipal Commissioner. Division Bench of this Court further observed that the provisions of Railways Act provided for undivided and exclusive control of Railway administration by the Supreme Government. The Division Bench further observed that if the Municipal Commissioner was of the opinion that the Railway Company was exercising its statutory powers in a manner inconsistent with the health of the inhabitants of Bombay or the safety of property therein, it was always open to him to make a representation to that effect to the Governor General in Council.

24] No doubt, provisions of sub-section (2) of Section 7 of 1890 Act are not contained in the Railways Act of 1989. However, it is to be noted that when Indian Railways Act 1890 was enacted, the Railways were mostly managed by private companies and the Government of India primarily played its role of co-ordinating and regulating authority in various matters and, as such, its role was reflected in the Act. The Statement of Objects and Reasons of 1989 Act would itself reveal that except for a very small portion of the railway, now the entire railway system has become a part of Government of India. Perusal of various provisions of the Act would reveal that the entire control of the railway rests with the Government of India.

25] We may also refer to the judgment of the Division Bench of this Court in the case of *The Great Indian Peninsula Railway vs. The Municipal Corporation of Bombay*¹. In the said case, GIP Railways while constructing the Harbour Branch Railway, laid down the lines of rails in a level crossing across a public street known as Sewri Koliwada Road, which vested in the Municipal Corporation of Bombay

1 BLR Vol XVI 104

under section 289 of the Bombay City Municipal Act. The Bombay City Municipal Corporation filed a suit to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under Section 293 of the Act or acquiring the land required for the level crossing under the Land Acquisition Act, 1894. It was sought to be contended on behalf of Defendant – Railways that they had an authority to make and maintain the lines of railway under section 7 of the Indian Railways Act, 1890. The suit was decreed, declaring that the defendant company could make its private terms with the Municipality or it could acquire the portion of the street it needed under the Land Acquisition Act, but until it had done the one or the other, it was a trespasser on Municipal land. The said decree was carried in appeal by GIP Railways before Division Bench of this Court. It was sought to be contended on behalf of the Corporation that in view of Section 289 of the City of Bombay Municipal Act, which is almost analogous to Section 289 of the MMC Act, all public streets, and the pavements, stones and other materials vested in the Corporation and unless the permission under section 293 of the

erstwhile Act was granted and confirmed by the Government or the land required for level crossing was acquired under the Land Acquisition Act, railway had no authority to lay down the lines of railways. In so far as the contention with regard to Section 289 of the Bombay Municipal Act is concerned, Division Bench observed thus:-

“The effect of s. 289 of the Bombay City Municipal Act vesting all public streets, pavements, stones and other materials in the Corporation and under the control of the Commissioner is only to vest in that body such property as is necessary for the control, protection and maintenance of the street as highway for public use : *see Mayor, etc., of Tunbridge Wells vs. Baird* ([1896] A.C. 434, 442.]”

The Division Bench of this Court in the said case further observed as under:-

“The statutory authority under s. 7 of the Railways Act to lay the railway across the street without resort to the Land Acquisition Act being in our opinion established, the application of s. 293 of the City of Bombay Municipal Act is excluded by the words “notwithstanding anything in any other enactment for the time being in force.” The Railways Act, s. 16, overrides the Municipal Act and the sole control over the railway administration is vested in the Governor General. (See s. 16(2) and *Municipal Commissioner of Bombay v. G.I.P. Railway* [(1909) 11 Bom.L.R. 1181]. The evidence so

far as it goes indicates that the railway across the Sewri Koliwada Road has the approval of the controlling authority.

We, therefore, reverse the decree of the lower Court and allow the appeal dismissing the suit with costs throughout.”

(Emphasis supplied)

26] It could be seen that provisions which are contained in section 11 of the 1989 Act are identical with Section 7 of the 1890 Act. Section 11 also begins with non-obstante clause. It provides that, notwithstanding anything contained in any other law for the time being in force, railway administration is empowered to execute various measures for the purpose of constructing or maintaining railway. Clause (d) thereof deals with erection and construction of such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper. Clause (da) thereof, which is inserted by the Act 47 of 2005, enables it to take steps for developing any railway land for commercial use. Clause (h) thereof, enables it to do all other acts necessary for making, maintaining altering or repairing and using the railway.

27] We find that in view of interpretation placed by the Division

Bench of this Court on Section 7 of 1890 Act, which is analogous to Section 11 of the 1989 Act, that too while construing the conflict between the provisions of the said Act and City of Bombay Municipal Act, which is a predecessor of the MMC Act, it will have to be held that the provisions of section 328 and 328A and 479, would not be applicable to any of the activities that railway administration may execute in pursuance of the powers vested in it under Section 11. Undisputedly, since under clause (da) of Section 11, the railway administration is also empowered to develop any railway land for commercial use and since under clause (d), it is also empowered to erect and construct such houses, warehouses, offices and other buildings, and such yards, stations, wharves, engines, machinery apparatus and other works and conveniences as the railway administration thinks proper; the hoardings which are erected by the railways on its land would not require the permission of the Corporation either under Section 328 or 328A of the MMC Act and consequently no license would be required under section 479.

28] The next question that we are required to answer is, as to whether the Corporation would be entitled to levy advertisement tax

or not on the advertisements displayed on the hoardings erected on the land of the railways. Ordinarily, having answered the first question, it would not have been necessary for us to answer the said question. However, since the Corporation relied on the judgment of the Apex Court in the case of *Links Advertisers and Business Promoters vs. Commissioner, Corporation of the City of Bangalore*¹, we find that it will be necessary for us to deal with the said issue.

29] It will have to be noted that the case of Link Advertisers and Business Promoters (supra) was decided by the Hon'ble Supreme Court on 21st April, 1977. However, the Railways Act, 1989 which contains section 185 has been enacted in the year 1989. Their Lordships, in the said case, have referred to Section 136 of Bangalore Municipal Corporation Act, 1949, relevant part of which reads thus:

“Every person who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding or structure any advertisement or who displays any advertisement to public view in any manner whatsoever, in any place whether public or private, shall pay on every advertisement which is so erected, exhibited, fixed retained or displayed to public view, a tax calculated at such rates and in such manner and

1 AIR 1977 SC 1646

subject to such exemptions, as the corporation may, with the approval of the Government, by resolution determined:

X X X

“Provided further that no such tax shall be levied on any advertisement which is not a sky-sign and which-

X X X

(e) *is exhibited* within any railway station or upon any wall or other property of a railway except any portion of the surface of such wall or property *fronting any street*.

Explanation 1- The word 'structure' in this section shall include any movable board on wheels used as an advertisement or an advertisement medium.
(Emphasis supplied).”

Their Lordships observed that the intention of the statute was to tax certain types of advertisements. The pith and substance of the entire section was the taxation of advertisements fixed, erected, or exhibited on any land, building, wall, hoarding, structure etc. Their Lordships held that the tax contemplated under section 136 was on advertisements and not tax on premises or buildings. It could thus be seen that when Their Lordships decided the said case, there was no provision like Section 185, which clearly provides that notwithstanding anything contained in any other law, railway

administration is not liable to pay any tax to any local authority in respect of any advertisement made on any part of the railway, unless the Central Government by notification declares that railway administration to be liable to pay the tax specified in such notification. Undisputedly, no such notification has been issued by the Central Government. As such, the said judgment would not be applicable to the facts of the present case, in view of specific provision contained in Section 185 of the Railways Act, which were not present in erstwhile Railways Act of 1890.

30] Apart from that, we may also gainfully refer to the judgment of the Hon'ble Supreme Court in the case of *Union of India vs. Purna Municipal Council and Others*¹. In the said case, Purna Municipal Council had claimed service charges from Railways for certain period. The Union of India contended that in view of Article 285 of the Constitution of India read with Section 135 of the Indian Railways Act, 1890, it was not liable to pay the service charges. The contention on behalf of the Union of India was rejected by the Division Bench of this Court at Aurangabad. The same was challenged before the Apex

¹ (1992) 1 SCC 100

Court. While reversing the Order of this Court, Their Lordships observed thus:

“5. The aforesaid provision, existing as it is, in terms permits taxation of railways by the local authority in the manner given therein; the Central Government being the controlling and the regulating authority permitting liability at a given point of time, its extent and manner. The Indian Railways Act being a central enactment has no rule to play in sub-article (2) of Article 185, for that is a sphere in which the State legislation operates. The reasoning of the High Court to oust the applicability of Section 135 of the Indian Railways Act on the test of sub-article (2) of Article 285 was totally misplaced, as also in not venturing to create room for it in sub-article (1) of Article 285. The interplay of the constitutional and legal provisions being well cut and well defined requires no marked elaboration to stress the point. Accordingly, we allow this appeal, set aside the judgment and order of the High Court and issue the writ and direction asked for in favour of the Union of India restraining the respondent council from raising demands on the railway in regard to service charges. We make it clear that the rights of the local authority as flowing under Section 135 of the Indian Railways Act, 1890 stand preserved in the event of the Central Government moving into the matter, if not already moved. In the circumstances of the case, however, there will be no order as to costs.”

31] The provisions of Section 135 of the Railways Act, 1890 are corresponding to the provisions of Section 184 of the Railways Act, 1989. Their Lordships have, in the aforesaid case, clearly held that

unless the Central Government was moved in pursuance to the provisions of Section 135 of the Railways Act, 1890, the local authority has no jurisdiction to levy tax on railways. It could thus be clearly seen that in view of specific provisions of Sections 184 and 185 of the Railways Act, 1989, railway administration is not liable to pay any tax in aid of the funds of any local authority unless the Central Government, by notification, declares the railway administration to be liable to pay the tax specified in such notification. In so far as taxation on railways for advertisement is concerned, legislative intent is amplified by specific provisions contained in Section 185 of the Railways Act, 1989. The said section begins with a non-obstante clause and provides that, notwithstanding anything to the contrary contained in any other law, railway administration shall not be liable to pay any tax to any local authority in respect of any advertisement made on any part of the railways. No doubt, that if the Central Government by notification declares the railway administration to be liable to pay the tax specified in such notification, railways would be liable to pay the same. However, till the date such notification is issued, no local authority would have an authority to levy a tax on the advertisements made on any part of the railways. We are therefore

of the considered view, that unless the Central Government issues a notification declaring the railway administration to be liable to pay tax, no advertisement tax could be levied by any local authority.

32] The last contention raised on behalf of the Corporation is that the fees that are charged, are from the advertisers/agents of the railways and not from the railways. We find that the said contention is also without any substance. In the case of *Links Advertisers and Business Promoters vs. Commissioner, Corporation of the City of Bangalore*¹, Division Bench of Karnataka High Court had taken a similar view as is sought to be argued on behalf of the Corporation. It will be appropriate to reproduce the relevant observations of the Division Bench of the Karnataka High Court, as are reproduced by Their Lordships of the Apex Court in their Judgment, which read thus:

“In the instant case, we are not faced with any situation as the one envisaged in the second part of the exemption clause relative to advertisement on a wall or other property of the railway 'frontage by street. We are concerned herein with the case of a hoarding put up by and belonging to the appellant and not the railway. Hence, it is plain that no exemption on that

1 AIR 1977 SC 1646

score could be claimed on behalf of the appellant.”

Rejecting the said contention, Their Lordships observed thus:-

“The High Court does not appear to have interpreted the proviso correctly. The view of the High Court that the proviso would only apply to advertisements of such hoardings whose ownership lies with the Railway on which belong to the Railway is not borne out by Clause (e) of the third proviso to Section 136. In other words the question of exigibility to tax is relatable not to the ownership of the hoarding but its situs. Even if the hoarding does not belong to the Railway but to some private party, if it does not front the street and is situated within the Railway premises or within the compound of the railway premises it is clearly exempt. We, therefore do not approve of the line of reasoning adopted by the Division Bench.”

It could thus be clearly seen that Their Lordships have held that the question of exigibility to tax is relatable not to the ownership of the hoarding but its situs. It has been held by Their Lordships that if the hoarding does not belong to railway but to some private party, and if it does not front the street and is situated within the Railway premises or within the compound of the railway premises, it is clearly exempt. As already discussed above, when the Judgment in the case of Links

Advertisers and Business Promoters (supra), was delivered by Their Lordships, the 1989 Act which contains the provisions of Section 185 was not enacted. However, now in view of the provisions of Section 185 as already discussed hereinabove, no tax could be levied in respect of any advertisement made on any part of the railways. As held by Their Lordships, exigibility to tax is relatable not to the ownership of the hoarding but its situs. As already discussed hereinabove, in view of the wide meaning given to the term “railway” in Clause (31) of Section 2 of the Railways Act, 1989 and which is further amplified by section 197 of the said Act, no hoardings situated on any land which comes within the definition of the term “railway”, would be exigible for advertisement tax. In that view of the matter, the contention that since taxes are sought to be recovered from advertisers and not railways, such a levy would be permissible, deserves to be rejected.

33] In the result, all these Petitions deserve to be allowed.

34] However, before we part with the judgment, it will be necessary to note that various Division Benches at Principal Seat as well as the

Nagpur Bench have taken serious cognizance of haphazard manner in which hoardings are erected and thereby endanger the safety of citizens. Various orders were passed by various Division Benches of this Court in Writ Petition No.1132 of 2002. The said Petition is disposed of by order dated 30/7/2012, accepting certain suggestions made on behalf of the Corporation as well as the advertisers and certain directions were issued. Various orders have also been passed by Nagpur Bench of this Court in Writ Petition No.4175 of 1999 alongwith Writ Petition No.4308 of 1999. We are of the considered view that erection of hoardings in haphazard manner thereby endangering the safety of citizens, would not be in the larger public interest. We had therefore inquired from the learned Additional Solicitor General to the Government of India, as to whether Railways would formulate a policy for controlling hoarding activities so as to ensure that hoardings are not erected in haphazard manner and the safety of the citizens is not endangered. Mr. Anil Singh, learned Additional Solicitor General fairly, on instructions of the authorities, stated that the Railway Authorities would frame such policy.

35] We therefore find that it will be appropriate to direct the

Railway Authorities to formulate the policy for regulating the hoardings on the railway properties, after taking into consideration various statutory provisions, so as to ensure that the hoardings are not erected in haphazard manner, that there is no overcrowding of the hoardings and that the safety of citizens is not endangered.

36] We would appreciate if the Railway Authorities also involve the Municipal Corporation of Greater Mumbai while formulating such policy for hoardings within the area of the Municipal Corporation of Greater Mumbai. The same shall be done within a period of six months from today.

37] In the result, the following order:-

ORDER

(i) It is held and declared that -

(a) Provisions of Sections 328 and 328A of the Mumbai Municipal Corporation Act would not be applicable to the hoardings erected by Railways on the railway as defined in Clause (31) of Section 2 read with section 197 of the Railways Act, 1989.

(b) Railway Administration or its agents would not be liable to pay any tax to the Corporation in respect of any advertisement made on any part of the Railways, unless a Notification to that effect is issued by the Central Government under Section 185 of the Railways Act, 1989.

(ii) Rule is made absolute in the aforesaid terms with no order as to costs.

(iii) Since all the above Writ Petitions are disposed of, Notices of Motion, Chamber Summons taken out therein, if any, are also disposed of.

(SANDEEP K. SHINDE, J.)

(B. R. GAVAI, J.)