

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 10, 2020

+ W.P.(C) 3712/2019, CM Nos. 17056/2019 & 29137/2019

M/S PACIFIC DEVELOPMENT CORPORATION
LTD.

..... Petitioner

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Devashish Bharuka and
Mr. Ravi Bharuka, Adv.

versus

SOUTH DELHI MUNICIPAL CORPORATION AND
ANR.

..... Respondents

Through: Mr. Kunal Vajani, SC for SDMC with
Mr. Paras Anand, Mr. Varun Ahuja,
Mr. Junaid Qurshi and Mr. Jaibir Singh
Sethi, Adv. for SDMC/R1.
Ms. Vibha Mahajan Seth, Adv.
for R2.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present writ petition has been filed by the petitioner
with the following prayers:-

*“In the light of the facts and circumstances stated
hereinabove it is most humbly prayed that this
Hon'ble Court may be graciously pleased to:*

(a) Issue a writ of mandamus or any other similar writ, order or direction commanding upon the Respondent no.1 to produce the entire records / file with regard to the issue of charging of parking fee by the Petitioner with regard to vehicles parked at the Pacific Metro Mall on the plot situated at Najafgarh Road, Tagore Gardens, Tilak Nagar, New Delhi;

(b) Issue a writ of mandamus or any other similar writ, order or direction commanding upon the Respondent no.1 from not interfering with the exclusive right and authority of the petitioner from charging parking fee with regard to vehicles parked at the Pacific Metro Mall on the plot situated at Najafgarh Road, Tagore Gardens, Tilak Nagar, New Delhi at the rates as fixed / determined by the Petitioner;

(bl) Issue a writ of Certiorari or any other similar writ, order or direction setting aside/ quashing the order dated 14.05.2018 passed by the Executive Engineer, SDMC (Annexure P/1) directing the Petitioner not to charge any parking charges.

(c) Pass such further order(s) which this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.

2. Vide the impugned order dated May 14, 2018 issued by the Executive Engineer of respondent No.1/ SDMC, petitioner was restrained from charging parking fee till the case of the petitioner based on the representations/letters preferred by the petitioner on February 23, 2018 and May 01, 2018 was decided by the respondent No.1/SDMC.

3. The case of the Petitioner is stated as herein below:

3.1 DDA vide letter dated May 07, 2003 allotted a land admeasuring 35,000 sq.m at Khyala (between Subhash Nagar and Tagore Garden Metro Station) on perpetual leasehold basis to respondent No. 2/ Delhi Metro Rail Corporation (“DMRC”, for short) for the purpose of Mass Rapid Transit System (“MRTS”, for short) Project. The land was handed over to respondent No. 2/ DMRC on June 26, 2003.

3.2 On July 21, 2003, Ministry of Urban Development (“MoUD”, for short), Govt. of India vide its letter to Municipal Corporation of Delhi (“MCD”, for short) informed that the Cabinet has permitted respondent no.2/DMRC to generate revenue through property development.

3.3 Pursuant thereto respondent No.2 / DMRC entered into a Concessionaire Agreement dated March 08, 2007 (“Concessionaire Agreement”, for short) with the petitioner i.e. M/s Pacific Development Corporation Ltd. (formerly known as “Naman Buildcon Ltd.”) for an area of 33951.5 sq.m , to develop, finance, construct, commission, operate, manage and maintain the project (built up spaces and facilities in specified area) and the project facility for a period of thirty years. This project was awarded to the petitioner on Build-Operate Transfer (“BOT”, for short) basis. Petitioner’s case is that in terms of the Concessionaire Agreement, the petitioner had paid a sum of ₹60 crores upfront and has been paying ₹2.16 cores on a quarterly basis since November 17, 2010. The quarterly payment would be escalated @ 20% after the expiry of three years from the date of first payment on a

compounding basis. The petitioner, in return, is entitled to receive all receivables from the use of project and project facility after the payment of aforesaid dues to respondent No.2 / DMRC.

3.4 On March 30, 2009, MoUD vide its order directed that the property development activities of respondent No. 2 / DMRC undertaken to supplement the cost of project is to be considered as part of the project. The same was to increase the non-operational revenues i.e. revenues from advertisement, retailing, real estate at metro stations, parking lot revenues, etc. in lines with global examples of metro such as Hong Kong Metro.

3.5 Respondent no.1/SDMC in terms of Section 332 of the Delhi Municipal Corporation Act, 1957 (“DMC” Act, for short), sanctioned the building plan for construction of a commercial complex in the name of respondent No. 2 / DMRC through the petitioner / concessionaire on May 18, 2009. Similarly, DDA issued an NOC to respondent No. 2 / DMRC for property development of the subject land on March 15, 2010 subject to fulfilment of guidelines given in the MoUD order dated March 30, 2009 and Master Plan of Delhi 2021 (“MPD-2021”, for short).

3.6 The petitioner completed the construction of the commercial complex on January 21, 2011 and completion certificate was issued by respondent no.1/SDMC in the name of respondent No. 2 / DMRC through petitioner / concessionaire.

3.7 It is the case of the petitioner that respondent No.1/SDMC issued a public notice dated December 21, 2015 whereby it directed that the areas reserved for parking in commercial / office / malls / hospital complexes is free from Floor Area Ratio (“FAR”, for short) and the same is meant for parking by public without any fee. Through the above notice, respondent No. 1 / SDMC also requested the general public to inform them about collection of any such parking fees so as to take appropriate action.

3.8 The petitioner received a notice dated January 19, 2016 from Remunerative Project Cell of respondent no.1/SDMC directing them to stop the misuse of parking space in their commercial complex as per public notice dated December 21, 2015.

3.9 Petitioner duly replied to the above-mentioned notice vide reply / letter dated January 25, 2016 *inter-alia* clarifying that “Pacific Metro Mall” does not come within the jurisdiction of respondent No.1/ SDMC and that the property belongs to respondent No.2 / DMRC.

3.10 Subsequently, the petitioner received a show-cause notice dated March 30, 2016 under Section 345-A of the DMC Act, with a direction to stop charging parking fees from visitors / public visiting the petitioner’s complex / premises. It was mentioned in the said show-cause notice that as per MPD-2021 / sanctioned building plan, the area reserved for parking cannot be put to commercial use / profit-making by

collecting parking fees as the same is sanctioned free from FAR.

3.11 The petitioner replied to the aforesaid show-cause notice vide letter dated April 01, 2016 *inter-alia* again clarifying that “Pacific Metro Mall” does not come within the jurisdiction of respondent No.1/SDMC, as the plot on which Pacific Metro Mall is constructed initially belonged to DDA and subsequently DDA had transferred the plot to respondent No.2 / DMRC as per the directions of MoUD. It was pointed out by the petitioner in the said reply that respondent No.2 / DMRC was the real owner and the petitioner was just the concessionaire of the property. It was also pointed out by the petitioner that charging of parking fee does not come within the ambit of Section 345-A of the DMC Act and that as per MPD-2021 in paragraph no.12.14.3, there is a clear mention about the parking strategies to be employed to manage and bring down public parking space demand. It is the petitioner’s case that it also clarified in the said reply that Hon’ble Lt. Governor, Delhi on June 15, 2010 had given specific instructions to MCD that no future sealing of metro properties will be carried out without prior sanction of the Lt. Governor.

3.12 Respondent No.2 / DMRC also responded to the show-cause notice dated March 30, 2016 by stating that recovery of parking charges is in line with paragraph no.12.14.3.7 of MPD-2021 and MoUD order dated March 30, 2009.

3.13 Thereafter the petitioner received a notice dated April 26, 2006 for a meeting in the chamber of Deputy Commissioner of respondent No.1 / SDMC on April 27, 2016 at 11.00 am. The petitioner, however, vide its letter dated April 28, 2016 informed respondent No.1 / SDMC that collection of parking charges was in pursuance to the Concessionaire Agreement entered into with respondent No.2 / DMRC and that in the meantime the petitioner was not collecting any charges under the head of parking charges.

3.14 Petitioner's case is that after a period of one and a half years, the petitioner received a second show-cause notice dated October 30, 2017 under Section 345-A of the DMC Act. The contents of the show-cause notice were verbatim to the earlier show-cause notice dated March 30, 2016, alleging misuse of parking space against sanctioned plan. The petitioner, immediately, replied to the second show-cause notice dated October 30, 2017 vide letter dated November 02, 2017, reiterating its stand with respect to the issue and informing respondent No.1 / SDMC that respondent No.2 / DMRC is the owner of the property and that petitioner is only a concessionaire and further stating that parking fee is being charged in line with MPD-2021 and as well as in the terms of Concessionaire Agreement.

3.15 It is also stated that respondent no.1/SDMC illegally and without following the principles of natural justice sealed the parking area of the petitioner on November 07, 2017 pursuant to a sealing order dated November 07, 2017.

3.16 Respondent No.2 / DMRC on November 07, 2017 wrote to respondent No.1/SDMC to withdraw the order of sealing of the parking area of the petitioner stating that there is no alleged misuse of parking or other commercial use whatsoever.

3.17 Aggrieved by the show-cause notice issued dated October 30, 2017 and the illegal sealing action on November 07, 2017 by respondent No.1 / SDMC, petitioner filed a writ petition W.P.(C) 9907/2017 before this Hon'ble Court. Respondent no.1/SDMC duly entered appearance and filed a counter affidavit in the said writ petition.

3.18 In the minutes of the meeting and corrigendum of the Standing Committee of respondent No.1 / SDMC dated March 16, 2018, it was noted that the Standing Committee deliberated upon the ownership and decided to segregate the petitioner's mall from free parking charges notification as the land was owned by DMRC / DDA. The said decision was taken after due deliberations by Chairman, Ward Committee, West Zone and Deputy Commissioner, West Zone and Chairman, Standing Committee.

3.19 The petitioner on the basis of the aforesaid minutes of the meeting of the Standing Committee requested the Executive Engineer, West Zone of respondent no.1/SDMC and Deputy Commissioner, West Zone of respondent no.1/SDMC vide letters dated March 21, 2018 and March 23, 2018 respectively, to permit the petitioner charge parking

fees and to duly revoke earlier notices issued in connection with parking in “Pacific Metro Mall”.

3.20 Respondent No.1/SDMC vide its communication dated April 09, 2018 which in accordance with the discussion held in Standing Committee’s meeting dated March 06, 2018, separated the petitioner from free parking fee notification.

3.21 Subsequently, on the basis of a civil miscellaneous application moved for withdrawal of the petition, April 18, 2018 petitioner’s writ petition W.P.(C) 9907/2017 was dismissed as withdrawn.

3.22 Petitioner on May 01, 2018 sent a communication to respondent no.1/SDMC clarifying that as per the Standing Committee’s decision dated March 06, 2018 and based on a report dated September 18, 2017 sent by respondent no.1/SDMC to Standing Committee stating that the property belongs to DDA/ DUSIB, the petitioner has started charging parking fees at “Pacific Metro Mall”.

3.23 The Executive Engineer of respondent no.1/SDMC intimated petitioner vide letter dated May 14, 2018 that hearing has been fixed on May 16, 2018 at 3.00 pm in the office of the Deputy Commissioner, West Zone, SDMC on the basis of representation preferred by the petitioner on May 01, 2018. The Deputy Commissioner of respondent no.1/SDMC also directed vide impugned order dated May 14, 2018 not to charge any parking fees until the case of the petitioner is decided.

3.24 A detailed reply to the impugned order was given by the petitioner on May 16, 2018 with all documents. In the meanwhile respondent No.2 / DMRC also wrote to the SHO and respondent No.1 / SDMC not to cause hindrances in charging of parking fee / operations vide communications dated May 18, 2018 and June 08, 2018.

3.25 Thereafter clarification was sought by the Deputy Commissioner, SDMC from respondent No.2 / DMRC as to whether the petitioner / concessionaire was authorised to collect parking fees, and also to provide copies of lease agreement between DDA and respondent No.2 / DMRC and Concessionaire Agreement between petitioner and Respondent No.2 / DMRC, if any such documents exist.

3.26 To this respondent no.2 / DMRC replied vide letter dated June 20, 2018 that petitioner is authorised to levy parking charges on vehicles parked at designated parking area in "Pacific Metro Mall". It was also stated by respondent No.2 / DMRC that no perpetual lease deed has been executed between DDA and respondent No.2 / DMRC with regard to property development project at Khyala.

3.27 Since the petitioner did not receive any update / order on the proceedings taking place before the office of the Deputy Commissioner, West Zone, SDMC, thereafter, preferred an RTI application dated February 11, 2019 before respondent no.1 / SDMC for providing the entire file of representation of petitioner seeking permission to collect parking charges from vehicles parked in the parking area.

3.28 In reply to the aforesaid RTI application, respondent no.1/SDMC vide its letter dated March 11, 2019 requested the petitioner to inspect the record / file on any working day at the specified time and to take photocopy of the required documents after depositing necessary charges.

3.29 Based on the inspection granted as per the reply to the RTI application, petitioner received certain documents / communications from the file maintained on petitioner by respondent No.1 / SDMC and found the following file notings:-

- a. Deputy Commissioner, West Zone, SDMC noted in the file on July 16, 2018 that the parking space is respondent No.2 / DMRC property and that there is no bar in collecting parking fees.
- b. Assistant Legal Officer, West Zone, SDMC on July 25, 2018 noted that the land belongs to respondent No.2 / DMRC and that the petitioner has authorisation from Respondent No.2 / DMRC to collect parking fees.
- c. Assistant Legal Officer posed a question in the file notings qua the basis of transfer of land from DDA on July 30, 2018 and answers the same on July 31, 2018.
- d. Chief Law Officer, West Zone, SDMC noted in the file on August 21, 2018 mentioning that the parking area was free from FAR charges.
- e. Thereafter on August 29, 2018 the Assistant Engineer (building), West Zone, confirmed in the file that there is no specific bar on collecting parking charges.

f. Thereafter the Law Officer, SDMC took note of para no.12.4.3 and para no.12.4.3.7 of MPD-2021 pertaining to parking revenue and requested the competent authority to take decision in accordance with the same.

g. The file moved up till the Commissioner, SDMC who directed for a discussion on September 15, 2018.

h. The Chief Law Officer, however, on October 10, 2018 noted to “*stick to our stand already taken before Hon’ble the High Court through additional standing counsel*”.

4. The petitioner submits herein that respondent No.1 / SDMC has chosen not to take a final decision despite the impugned order dated May 14, 2018 whereby petitioner was refrained from charging any parking fee unless the case is decided. This inaction by the respondent no.1/SDMC in taking a final decision even after a lapse of more than eight months from the date of the said impugned order has resulted in heavy losses on a daily basis to the petitioner.

5. It is also submitted by the petitioner that the file notings obtained under RTI Act, 2005 reflect a complete turn-around in the stand taken by respondent No.1 / SDMC as initially respondent no.1/SDMC seemed to have fully appreciated the fact that there was no restraint upon the petitioner to charge parking fee on DMRC / Metro land and at a later stage the said stand was completely reversed arbitrarily without assigning any reason.

6. It is the petitioner’s case that the parking lot in which the petitioner is collecting parking charges is owned by

respondent No.2 / DMRC and that such collection is in terms of the Concessionaire Agreement entered into between petitioner and respondent No.2 / DMRC. Clause 3.6.3 of the Concessionaire Agreement entitles petitioner to the entire receivables including parking charges to be collected and deposited in an escrow account. Moreover, respondent No.2 / DMRC replied vide letter dated June 20, 2018 *inter-alia* that it has authorised the petitioner to levy parking charges at the designated area. Therefore, respondent No.1/SDMC does not have the power or jurisdiction to regulate the quantum of parking charges and any such attempt was completely arbitrary.

7. Petitioner also relied upon order dated March 30, 2009 of MoUD, whereby it was directed that the property development activities of respondent No.2 / DMRC undertaken to supplement the cost of the project is to be considered as part of the project. Suffice to say commercialization of certain lands for subsidizing metro tickets and respondent No.1/SDMC cannot override the said sanction of the Central Government.

8. Mr. Sandeep Sethi, learned Senior Counsel appearing on behalf of the Petitioner vehemently argued that FAR has no connection whatsoever with charging of parking fees. He stated that FAR relates to the extent of permissible construction directly relatable to the total area of plot on which the building is to be constructed and it does not control the use of land, which may be commercial, residential or

mixed or any other in terms of MPD-2021 framed by DDA. In other words, FAR and land use are two completely different concepts and cannot be inter-mingled in order to deny the petitioner of its right to collect parking charges. To substantiate his contention learned counsel has relied upon Paragraphs 12.14 and 12.14.3 of the MPD-2021 which mandate users to pay for parking as well as Clause 1.2 read with Clause 7.4.9 of Unified Building Byelaws of Delhi, 2016 (“Unified Building Bye Laws” for short) which reiterates basement will not be counted in FAR if it is used for parking.

9. It is submitted by Mr. Sethi that the impugned order dated May 14, 2018 is without any jurisdiction as there is no provision under DMC Act and its Rules or Regulations framed thereto or DDA Act, 1957 or MPD-2021 which empowers or authorises respondent no.1/SDMC to prevent or regulate the collection, including quantum of parking charges in a private property. To buttress his submission, he has relied upon two judgments of this Court; *Sports and leisure apparel ltd v. MCD reported in AIR 2015 Del 15* and *C.L. Batra v. MCD reported in 68(1997) DLT 817*, which states that every action of respondent corporation must trace a power under the DMC Act or any other statute and that the same is absent in the present case.

10. It is further submitted by Mr. Sethi that there are 22 other malls in Delhi where parking fees are being charged and the pick and choose approach meted out to petitioner is

arbitrary and attracts violation of Article 14 of the Constitution. He also states that out of the total 113 parking sites as listed out in the website of respondent No.1/SDMC, in 103 sites parking fees are charged through licensed contractors including parking sites at New Delhi Station, Airport, multi-level parking at the Delhi High Court and various other metro stations. In substance, the plea of Mr. Sethi is that the petitioner is within its right to collect the parking charges in the Mall and, presses the relief as claimed in the petition.

11. The respondent No.2/DMRC through its counsel has also affirmed the rights of the petitioner/concessionaire in charging parking fees. It is submitted in consonance with submissions of the petitioner that a land admeasuring 35,000 sq.m was allotted to respondent No.2 / DMRC by DDA vide letter dt. May 07, 2003 and subsequently, a Concessionaire Agreement was entered into between petitioner and respondent No.2 / DMRC.

12. It is submitted on behalf of respondent No.2/DMRC that as per the concessionaire agreement, the petitioner was granted concession to develop, procure, finance, manage, maintain and license the use of the built up spaces and facilities to develop a commercial complex on the subject land. Thus, the petitioner / concessionaire has been allowed to sub-license the use of project facility during the period of the agreement and derive incomes there from in the form of license fees, maintenance charges and other use charges

which includes parking charges as well. The counsel also stated that the project is on BOT basis as per the Concessionaire Agreement, it has been mentioned that the concessionaire unconditionally and irrevocably agrees to receive and deposit all receivables into an escrow account maintained with bank. The amounts / funds in this escrow account are used to first remit / clear to respondent No.2/DMRC all its dues / claims under the Concessionaire Agreement and till the time any amount is outstanding to respondent No.2/DMRC from the petitioner.

13. It is submitted by the counsel for respondent No.2 / DMRC that an order dated March 30, 2009 was issued by MoUD to augment non-operational revenues i.e., revenues from advertisement, retailing of spaces at metro stations, parking lot revenues, etc. This is to ensure financial stability for metro projects owing to its highly capital-intensive nature as well as to subsidise the charges for passengers without any government subsidies. It is further averred that construction of multi-level car parking incurs huge costs in construction and the petitioner is left with no other option but to charge parking fees to recover the cost of constructions and to make-up for operational and maintenance costs of the same.

14. It is further submitted that the subject parking referred to in the present petition does not fall within respondent No.1/ SDMC's jurisdiction and relied on the minutes of the meeting of the MCD's Standing Committee held on March 06, 2018 wherein it was categorically stated that petitioner's

Mall should be de-listed from free parking notification and that MCD lacks jurisdiction over the plot of land.

15. The case of the respondent No.1 / SDMC and so contended by its counsel Mr. Kunal Vajani is that even though vide letter dated May 07, 2003, DDA allotted a land admeasuring 35,000 sq.m at Khyala on a perpetual lease basis, the same was for the purpose of a construction depot and nothing else whatsoever as per clause 4 of the said letter. Learned counsel also relied upon a letter dated June 20, 2018 addressed by respondent no.2/ DMRC to respondent No.1/ SDMC which records that there exists no perpetual lease deed executed between DDA and respondent No.2/ DMRC with regard to the subject land.

16. It is submitted by Mr. Vajani that under the Concessionaire Agreement, there is no clause which grants permission either by DDA or respondent No.2 / DMRC to the petitioner for levying parking charges in spaces constructed free from FAR or in respect of Equivalent Car Spaces ("ECS", for short). In fact, it is recorded in the Concessionaire Agreement that the petitioner shall at all times adhere to all applicable laws as well as requirements / approvals of civic and other government authorities.

17. While acknowledging that the order issued by the MoUD dated March 30, 2009 is with a view to facilitate the property developmental proposals of respondent No.2/ DMRC ensuring maximum revenue generation, the counsel for the respondent No.1/ SDMC, avers that clause (X) of the

said order clearly prescribes that requirements like change in land use, adherence to master plan, approval of local bodies etc., will continue to be applicable as per provisions of existing laws. He also submitted that applicability of the said order and the guidelines prescribed therein were prospective in nature, thus making it applicable only to concessions / agreements entered into after March 30, 2009. The counsel contests that the petitioner has placed reliance on clause 2 of the MoUD order dated March 30, 2009 which is nothing but a “preface” and completely ignored the “operative part” of the said order.

18. He stated that petitioner has suppressed the copies of building plan sanctioned by respondent no.1/ SDMC as the same contains remarks regarding sanctioned area for construction after the utilization of the permissible FAR as well as in respect of area free from FAR (32986.642 sq. m and 49726.675 sq. m respectively). The said sanctioned plan also notes that multi-level parking to be constructed by the petitioner was free from FAR as per clause 8.10 (k) of Unified Building Bye-laws. There is also a mention in the said sanctioned building plan that in case the basement is used in conformity with the ‘Use Premises’, it shall be counted in FAR and if the same is misused it would be taken over / municipalised by local body / authority as per clause 8 (5) (d) and 8 (5) (e) respectively of Chapter 17 of MPD-2021. Learned counsel further alleges that any deviation against the sanctioned plan including change of “Use” than what is

sanctioned / permissible is a cognizable offence as per DMC [amended] Act, 1984. To substantiate this argument he has relied upon a judgment rendered by the Hon'ble High Court of Andhra Pradesh in the case of **Ch. Madan Mohan v. Municipal Corporation Hyderabad AIR 2003 AP 393** which held in paragraph 28 that '*...if plot area earmarked for parking places or other common facilities are allowed to put to commercial use by the owner or group of owners of multi-storeyed, the same would amount to fraud on the statute*' and a division bench judgment delivered by the Hon'ble High Court of Gujarat in **R/LPA No. 1412/2018 Ruchi Malls Pvt. Ltd. v. State of Gujarat** wherein it was held that recovery of parking fees from outsiders cannot be said to be on the principle of *quid pro quo* and will not attract Article 19 (1) (g). It was also held by the Court that when a statute does not contemplate parking fee or parking charges to be levied from visitors of malls or complexes or multiplexes, Court cannot rationalise and regulate the parking policy/parking fees.

19. It is further stated that DDA while granting NOC dated March 15, 2010 to respondent No.2 / DMRC, categorically emphasised on relevant guidelines from the order dated March 30, 2009 issued by MoUD, stating that requirements like change in land use, adherence to master plan (including development control norms for Metro along property development prescribed in MPD-2021 such as ground coverage 25% and FAR 100), approval of local bodies etc. will continue to be applicable as per provisions of existing

laws. Occupancy certificate dated January 21, 2011 issued, by respondent no.1/ SDMC to respondent no.2/ DMRC through petitioner as per the completion building drawings / plans submitted, is also stated to be suppressed as the same would reveal similar remarks as contained in the sanctioned plan dated May 18, 2009.

20. It is submitted by Mr. Vajani that respondent No.1/ SDMC issued a public notice dated December 21, 2015 stating that places earmarked for parking in commercial / office / malls / hospital complexes is free from FAR and the same is meant for parking by public free of cost. Petitioner, on the same day i.e. December 21, 2015, was served with a Notice [No.AC(RPC)/2015/D-814] issued by respondent No.1/ SDMC directing to stop the misuse of parking spaces permitted in free from FAR areas. It is further submitted that respondent No.1/ SDMC issued a further Notice [No.AC(RPC)/2015/D-952] dated January 19, 2016, once again directing to stop the misuse of parking spaces and recorded that non-compliance thereof would tantamount to actions under DMC Act as well as Rules including sealing of the premises.

21. According to Mr. Vajani in the meanwhile Respondent no.1/ SDMC issued a Circular [No.AC(RPC)/2015/B-1047] dated February 5, 2016, authorising Zonal Deputy Commissioners to take further appropriate actions against properties which continue to charge parking fees.

22. Thereafter Mr. Vajani submitted that petitioner had voluntarily submitted an application dated March 04, 2016 for regularisation of excess FAR area to the extent of 7639 sq. m. and on March 17, 2016 paid an aggregate sum of ₹53,13,68,640/- towards additional FAR charges, inspection fees and cess charges. Subsequently, regularised building plans were sanctioned by respondent No.1/ SDMC on March 21, 2016 and the building comprised of two basement floors including multi-level parking and ECS parking spaces earmarked for the purpose of parking which are free from FAR as per MPD-2021. It is vehemently submitted that respondent No.1/ SDMC has not levied any FAR charges whatsoever for the free from FAR areas constructed at petitioner's mall.

23. He admitted that respondent no.1 issued a show-cause notice dated March 30, 2016 under Section 345-A of DMC Act directing petitioner to stop the misuse of parking areas by way of charging parking fee from visitors. In response to the same, petitioner preferred a letter dated April 01, 2016, *inter-alia* stating that petitioner was a mere concessionaire and not the owner of the property and that charging of parking fees and its sanctity does not come within the purview of misuse under Section 345-A of the DMC Act. It is also stated that respondent No.1/ SDMC does not have jurisdiction over the subject land, there was no misuse of parking area and as per provisions of para 12.4.3 and 12.4.3.7 of MPD-2021, petitioner was well within its rights to claim parking charges.

Respondent No.2/DMRC also replied to the show-cause notice vide letter dated April 28, 2018 on similar lines. In the context of the said show-cause notice and replies, it is submitted by Mr. Vajani that it was well within its powers under Section 345-A and 347 read with Section 491 of the DMC Act as well as Rules made thereunder to take action in respect of misuse of the ECS parking spaces in the free of FAR areas constructed by the petitioner at the “Pacific Metro Mall”. It is also submitted that para 12 of MPD-2021 referred to by the petitioner has no application whatsoever as the same falls under the Chapter named ‘Transportation’ which has no bearing whatsoever to a commercial complex. In support of his contentions, Mr. Vajani has relied upon two Apex Court judgments reported as **1992 (2) SCC 683, M/s Pine Chemical v. Assessing Authority**, wherein paragraph 9 it was held that *“It is well settled that if power to do an act or pass an order can be traced to an enabling provision, then even if that provision is not specifically referred to, the act or order shall be traced to, the act or order shall be deemed to have been done or made under the enabling provision”* and **2004 (2) SCC 297, DDA v. Joginder Mongiya**, wherein paragraph 30 it was held that, *“Only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter”*.

24. It is pointed out by Mr. Vajani that pursuant to a meeting held at the office of Dy. Commissioner, West Zone of SDMC on April 27, 2016, petitioner in a letter dated April

28, 2016 addressed to respondent No.2/SDMC, confirmed to the Dy. Commissioner, West Zone, that it won't be collecting any parking charges.

25. It is claimed by Mr. Vajani that the sealing action of Petitioner's parking area vide sealing order dated November 07, 2017 was pursuant to a second show-cause notice dated October 30, 2017. Sealing order dated November 07, 2017 was passed after scrutinizing petitioner's reply dated November 02, 2017 to the said show cause notice and finding it to be unsatisfactory as well as ad verbum to the reply dated April 01, 2016 preferred against the first show-cause notice dated March 30, 2016.

26. He controverted the submission/stand taken by the petitioner by submitting that the meeting of Standing Committee held on March 06, 2018 was a mere discussion on the letter dated February 23, 2018 preferred by petitioner with regard to the issue of parking charges, duly noting the same was sub-judice before this court in W.P (C) 9907/2017 and that the said meeting did not take a final decision on the issue of collecting parking charges or on the jurisdictional amenability of the subject plot as alleged by the petitioner.

27. He further stated that the respondent No.1/ SDMC in its reply dated April 09, 2018, duly addressed the representations/letters of the petitioner dated March 21, 2018 and March 23, 2018, which merely records the deliberations of the standing committee meeting and that the recording of

exclusion of petitioner from free parking notification cannot be construed as permission granted for charging parking fees.

28. It is stated by him that the impugned order dated May 14, 2018, directing the petitioner not to charge parking fees until petitioner's case is decided, is good in law and that the same was issued in response to the communication sent by the petitioner vide letter dated May 01, 2018 clarifying inter-alia that they had started charging parking fees based on the alleged standing committee meeting decision on March 06, 2018. He also relied on the following Judgments to contend no court can give a direction to a Government to refrain from enforcing a provision of law or do something which is contrary to law:-

1. ***M/s Narinder Chand Hem Raj v. Lt. Governor & Ors.***
1971 (2) SCC 747

2. ***State of U.P v. Harish Chandra*** ***1996 (6) SCC 3093***

29. Having heard the learned counsel for the parties, before I deal with their submissions, it is important to delineate the broad submissions made by them.

30. The submissions of Mr. Sandeep Sethi are the following:-

(i) The impugned order dated May 14, 2018 is violative of the considered decision taken by the Standing Committee of SDMC on March 06, 2018. The Executive Engineer, who passed the impugned order dated May 14, 2018 has no jurisdiction to overturn the decision of Statutory Committee of SDMC. That the order is null void.

(ii) The jurisdiction of respondent No.1/SDMC is limited to sanction of building plan and to ensure construction as per such plan. The building plan of the petitioner was sanctioned on May 18, 2009. The completion certificate was issued on January 21, 2011. It is not the respondent's case that any part of the construction is violative of building plan. Thus, jurisdiction of the SDMC ends there and there is no concern with the collection of parking charges at the petitioner's premises. Neither the sanction plan nor the completion certificate prescribed a condition that the petitioner cannot charge the parking in its premises.

(iii) The petitioner is a concessionaire of respondent no.2/DMRC. The petitioner has built a Mall on a land belonging to respondent No.2/ DMRC. DMRC is authorized by a sanction of Central Government dated March 30, 2009 to commercialize certain lands for subsidizing metro tickets. In furtherance of such sanction, respondent No.2/ DMRC has specifically permitted the petitioner to charge for parking in the said premises. The respondent No.1/ SDMC has no right, title or interest in the said land as the owner has authorized the petitioner to charge. Respondent No.1 / SDMC cannot restrain the petitioner from charging the same. In any event, respondent No.1 / SDMC cannot override the sanction of the Central Government dated March 30, 2009.

(iv) FAR has no connection with the charging of the parking fee as the same relates to the extent of permissible construction directly relatable to the total area of plot on which the building is to be constructed and it does not control the use of the land which

may be commercial, residential or mix or any other in terms of MPD-2021. In other words, the FAR and the land use are two completely different concepts and cannot be intermingled in order to deny the petitioner of its right to collect parking charges. To substantiate his contention, learned Senior Counsel relied upon paragraph 12.14 and 12.14.3 of the MPD-2021 which mandates pay for parking as well as the clause 1.2 read with clause 7.4.9 of Unified Building Bye laws which reiterates basement will not be counted in FAR, if it is used for parking.

(v) There is no provision under the DMC Act and its rules or regulations framed thereto or DDA Act or MPD-2021 which empowers or authorizes respondent No.1 / SDMC to provide for or regulate the collection including quantum of parking charges in a private property. Reliance was placed on the judgment of this Court in *Sports Leasures Apparel Limited (Supra)*, *CL Batra (Supra)*.

(vi) There are 22 other malls in Delhi where parking fee is being charged and pick and chose approach has been adopted against the petitioner which is arbitrary and violative of Article 14 of the Constitution of India. In fact, a submission has been made that from the website of the respondent No.1 / SDMC it is seen that at 103 sites parking fee is charged through license contractors including New Delhi Railway Station, Airport and multilevel parking at Delhi High Court.

31. Insofar as the submissions of Mr. Vajani are concerned, they are the following:-

(i) There is no clause which grants permission by DDA or

respondent No.2 / DMRC to the petitioner for levy parking charges in space constructed free from FAR.

(ii) For all times the petitioner has to adhere to all applicable laws of civic and other Government Authorities.

(iii) Even the MoUD order dated March 30, 2019, in clause X thereof, clearly prescribes the requirements like change in land uses, and adherence to master plan, approval of local bodies etc. will be applicable as per the provisions of existing laws.

(iv) The building plan sanctioned by respondent No.1 / SDMC contains the remark regarding sanctioned construction after the utilization of permissible FAR as well as in respect of free FAR. The said sanction plan also notes that the multi level parking to be constructed by the petitioner was free from FAR as per clause 8.10 (K) of the Unified Building Byelaws.

(v) There is also a mention in the sanction plan of the building that in case the basement is used in conformity with used premises, it shall be counted in FAR.

(vi) If the same is misused, it would be taken over / municipalized by local body / Authority as per clauses 8 (5)(d) and 8 (5)(e) of Chapter 17 of the MPD-2021.

(vii) The petitioner had voluntarily submitted an application dated March 04, 2016 for regularization of excess FAR area to the extent of 7639 Sq. m. and paid aggregate sum of ₹53,13,68,640/- towards inspection fee and cess charges.

32. Having noted the broad submission, I note that in support of his submission, Mr. Sethi had relied upon Paragraphs 12.14, 12.14.3 and 12.14.3.7 of the MPD-2021, which are reproduced as

under:-

12.14. PARKING

With the phenomenal increase in personalized motor vehicles, one of the major problems being faced today is an acute shortage of parking space. In the absence of adequate organized parking space and facilities, valuable road space is being used for vehicular parking. The problem of parking in the city can be broadly divided into the following categories:

- i) Along streets*
- ii) In planned commercial centres.*
- iii) In residential colonies.*
- iv) In the large institutional complexes.*

Experience has shown that:

- (a) The provisions relating to parking within the plot area are normally not adhered to resulting in vehicles spilling over on to the roads and adding to congestion; and*
- (b) The lack of enforcement and inadequate policy interventions has resulted in growth of parking demand along with growth of vehicles in the city.*

In the above background, the whole subject of parking has become a matter of serious public concern and requires a carefully considered policy and planned measures to alleviate the problem to the maximum feasible extent in existing areas and for adequate provisioning with reference to future developments. As recommended by the Environment Pollution (Prevention & Control) Authority for the National Capital Region, the approach should be focused more on demand management (restricting

vehicle numbers) through enforcement and pricing policy rather than only on increasing supply of parking.

Parameters for the National Mission on Sustainable Habitat (NMSH) of 2011 state that parking management strategies should be aimed at encouraging more efficient use of existing parking facilities, reduce parking demand and shift travel to non-private modes.

Individual user of personal vehicle should pay for the use of the space for parking. Therefore, the „user pays“ principle should govern the pricing of parking. Parking is a consumer commodity, not a legal right. No subsidized parking is to be provided in public spaces. To ensure accessibility to maximum number of people, parking for paratransport / feeder modes/ NMT is to be prioritized and subsidized. In areas designated for public parking, short term parking must be prioritized over long-term parking, in order to maximize turnover and enable economic vibrancy. The parking policy for the Delhi aims to deliver the objectives of NMSH, through its vision, policies, following strategies and standards:

- Private vehicle must be parked on “fully-paid rented or owned’ space, based on the ‘user pays’ principle.*
- Parking management must be effectively used as a tool to reduce overall demand for parking space.*
- Pricing and enforcement will be key drivers to eliminate or reduce long term on street parking demand for private vehicles.*
- Planning and design of public parking facilities (surface,*

underground or multi-level) in an area need to provide for all modes and include creation of pedestrianized areas/ public spaces in the area with necessary amenities.

- *Parking is permitted in all use zones except Recreational Open space, which shall not be used or converted for parking. No environmentally sensitive lands shall be used/ converted for parking of any kind. Surface Parking would only be provided to meet the parking requirement of the park premise. Creation of underground parking structures within or under green recreational open spaces is prohibited under all circumstances.*
- *Parking spaces will be adequately provided on priority basis for IPT, pick and ride and feeder systems especially non-motorised transport and fully subsidized.*

In this background, the following measures are proposed.

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XXXXX

XXXXX

12.14.3. PARKING PRICING *The supply of free / inexpensive parking at the final destination is a key decision factor for people choosing to drive a personal vehicle, rather than taking a bus, Metro, IPT, NMT, walk or carpool. It is suggested that the following pricing strategies be employed to manage and bring down public parking space demand:*

i) Pricing of parking should be based on principle of „user pay“, reflecting the cost of the public good – precious urban space. Current parking rates in cities are low and act as a hidden subsidy to the car owners. Parking rates should be freed up and

market driven. Parking revenue should be augmented and utilised to create a dedicated fund for public transport.

ii) No government subsidized parking for private motor vehicles is to be provided in public spaces or roads. High parking fee should be charged in order to make the use of public transport attractive. Efforts should be made to make cycle parking attractive to promote use of cycling.

iii) Implement localized variable scale of parking fee based on time, location and use based local demand and congestion levels. As a thumbrule – higher the congestion, higher the fee to be levied in the area to reduce parking demand.

iv) Curb Spillover Parking Impact: Spillover parking from high-priced areas should be minimized (through pricing and enforcement) as it may cause excessive congestion within neighbourhood streets making access difficult for emergency vehicles. Market-rate parking pricing is to be applied to this entire zone, not just a few streets. The entire area should be implemented as a PMD zone.

v) Actual Parking pricing rates may be taken up by ULBs from time to time as per their notifications based on the above suggested principles.

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12.14.3.7. MULTI-LEVEL PARKING FOR PRIVATE MODES

Several multilevel parking projects have been implemented by local bodies / agencies in the recent past. It has been seen that none of the parking lots are being used even to half their capacity due to availability of unlimited subsidized parking on streets/

public spaces in the vicinity of these projects. In other words, low-pricing of on-street parking is leading to failure of off-street multilevel parking facilities.

Therefore, multi-level parking projects should be integrated as part of comprehensive PMD schemes at designated locations. In order to ensure viability of the projects and optimum use, strict enforcement and appropriate pricing of on-street parking, is required. Preferably, on-street and off-street parking (including multi-level) should be managed and enforced by a single agency. All multi-level or exclusive parking facilities for private parking shall also provide at least 10% of total space provision for IPT modes, NMV and feeder buses, as per local requirement.

Detailed regulations and comprehensive parking policy may be worked out subsequently, in consultation with all stakeholders.

For plots for multi-level car parking already earmarked / designated by local bodies, the existing development control norms will continue, as follows:

- i. Minimum Plot Size – 1000 sqm.*
- ii. In order to compensate the cost of Multi-level parking and also to fulfill the growing need of parking spaces within urban area, a maximum of 25 % of gross floor area may be utilized as commercial / office space.*
- iii. In addition to the permissible parking spaces on max. FAR, 3 times additional space for parking component shall be provided.*
- iv. Maximum FAR permissible shall be 100 (excluding parking area) or as per the comprehensive scheme. However, no FAR*

shall be permissible in plots / existing buildings where 5% addl. ground coverage is permissible (Refer para 8 (4) i) Parking Standards, Chapter 17.0 Development Code).

v. Maximum ground coverage shall be 66.6%. The maximum height shall be restricted to permissible height of the land use in which the plot falls. There will be restriction on the number of levels of basement subject to structural safety.

vi. In case of comprehensive schemes, development controls including height shall be as per approved scheme.

vii. Number of basements - No Limit, subject to adequate safety measures.

viii. For development of Multilevel Parking, models should be worked out to encourage the private sector initiative with restricted commercial component, not exceeding 10% limited to FAR 40 on the plot.

ix. Specific proposals requiring relaxation in above-mentioned norms for already designated sites would be referred to the Authority.”

33. On the other hand, Mr. Vajani had relied upon and referred to Byelaws 1.1, 1.3.3, 1.4.80, 2.8, 7.4, 7.4.9, 7.4.10 and 8.10 of the Unified Building Byelaws for Delhi, 2016. The same are reproduced as under:-

“1.1 Jurisdiction

These Unified Building Bye-Laws shall be applicable to the area under jurisdiction of the Delhi Development Authority and concerned local bodies.

XXXX

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1.3.3 All mandatory Master Plan / Development Control Regulations regarding use, coverage, FAR, set-backs, open spaces, height, number of stories, number of dwelling units, parking standards etc., for various categories of buildings, including modifications therein, made from time to time, shall be applicable mutatis-mutandis in the building Regulations under this clause. All amendments / modifications made in these Regulations will automatically be included as part of these Unified Building Bye-Laws.

Note: Extract relating to Development Control Regulations / provisions are reproduced from Master Plan for Delhi. (Chapter 5 and Annexure VI of this document).

XXXX

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1.4.80 Parking Space: *An area enclosed or unenclosed, covered or open, sufficient in size to park vehicles, together with a driveway connecting the parking space with a street or alley and permitting ingress and egress of the vehicles.*

xxx

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2.8 Plans for Building Requiring Clearance from Delhi Fire Service

The building plans for buildings covered under Rule 27 of Delhi Fire Service Rules shall be marked fire and life safety measures as per the National Building Code of India concerning minimum standards for fire prevention and fire protection as covered under Rule 33 of the Delhi Fire Service Rules as amended from time to time; unless otherwise specified in these bye-laws.

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7.4 Basement

The construction of the basement shall be allowed by authority / concerned local body in accordance with the land use and other provisions specified under the Master Plan for Delhi / Zonal Development Plan. The basement shall have the following requirement:-

XXXX

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XXXX

7.4.9 *Basement is not to be counted in FAR if used for parking, household storage and services.*

7.4.10 *Parking in basement can also be permitted by means of a car lift. In case of residential buildings (except group housing), ramps are not mandatory. However, for other than residential buildings, ramps are mandatory for plot size above 3000 sq.m.*

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8.10 General features- free from FAR calculations

(k) Multilevel car parking with car lifts would be permitted with adequate fire safety.”

34. That apart, he had relied upon clauses 5.0, 8(4) and 8(5) of Chapter 17 of MPD-2021. The same are also reproduced as under:-

CLAUSE 5.0 USE PREMISES DESIGNATED

The use premises and Uses / Use Activities with similar nomenclature are given with the controls of specific premises in the respective chapters.

xxx

xxx

xxx

8(4) PARKING STANDARDS

Parking Standards have been prescribed in each use premises however, where it is not prescribed, it will be followed as given in the Table 17.2.

Table 17.2: Parking Standards

<i>S.No.</i>	<i>Use Premises</i>	<i>Permissible Equivalent Car Spaces (ECS) per 100 sqm. Of floor area</i>
<i>1.</i>	<i>Residential</i>	<i>2.0</i>
<i>2.</i>	<i>Commercial</i>	<i>3.0</i>
<i>3.</i>	<i>Manufacturing</i>	<i>2.0</i>
<i>4.</i>	<i>Government</i>	<i>1.8</i>
<i>5.</i>	<i>Public and Semi-Public Facilities</i>	<i>2.0</i>
<i>[6.</i>	<i>All Use Premises within TOD Zone</i>	<i>1.33]</i>

2 [Notes:

**** Additional parking may be created within integrated schemes only as paid, shared parking facilities accessible to general public at all times.***

***** Planned commercial centres may be developed/ redeveloped as per integrated schemes, in which mixed use component may be introduced along with comprehensive PMD plans, feeder systems, public spaces, etc. In such cases, parking norms may be rationalized and ECS norms for mixed use may be applied subject to approval of Technical Committee of DDA. Activities permitted shall be as per Table 5.1 of the Master Plan.]***

i) In existing buildings having plot area of more than 2000 sqm., an extra ground coverage of 5% shall be permissible for construction of automated multi-level parking to provide

dedicated parking structures for additional needs.

ii) For the provision of car parking spaces, the space standards shall be as given in Table 17.3.

Table 17.3: Space Standards for Car Parking

<i>Sl. No.</i>	<i>Type of parking</i>	<i>Area in sqm. Per ECS</i>
<i>1.</i>	<i>Open</i>	<i>23</i>
<i>2.</i>	<i>Ground floor covered</i>	<i>28</i>
<i>3.</i>	<i>Basement</i>	<i>32</i>
<i>4.</i>	<i>Multi level with ramps</i>	<i>30</i>
<i>5.</i>	<i>Automated multilevel with lifts</i>	<i>16</i>

iii) In the use premises, parking on the above standards shall be provided within the plot.

iv) In cases, where the building (except hotel) with sanctioned plan is existing/ under construction and where building plans stand sanctioned as per MPD-2021, the parking is to be provided for additional FAR availed, shall be as per the parking standards prescribed in MPD- 2021.

v) Parking is one of the utilities permitted in all use zones except in regional park / ridge, Recreational Open Space and parks as per the approved Zonal Plan/ layout plan.

vi) The standards given in Equivalent Car Space (ECS) shall include parking for all types of vehicles i.e. cars, scooters, cycles, light and heavy commercial vehicles, buses etc. Parking adequacy statement / study for large projects like Stadia, Shopping Malls, Multiplexes will be desirable. Mode-wise parking spaces are to be marked on drawings to be submitted

for approval.]

Table 17.4: Indicative On-site Parking (ECS) Requirements for projects*

<i>Mode</i>	<i>ECS Standard by mode</i>	<i>Area in Sq.m. (including Circulation)</i>	<i>Distribution by mode- per 1 ECS/100 sq.m of Built Up Area for all projects</i>	<i>Distribution by mode per 1 ECS / 100 sq.m. of Built Up Area within TOD Zone.</i>
<i>Cars/ Taxis</i>	<i>1</i>	<i>23.00</i>	<i>0.60</i>	<i>0.60</i>
<i>2 Wheelers</i>	<i>0.25</i>	<i>5.75</i>	<i>0.25</i>	<i>0.10</i>
<i>Cycles</i>	<i>0.1</i>	<i>2.30</i>	<i>0.05</i>	<i>0.10</i>
<i>Buses/Shared Vans</i>	<i>3.5</i>	<i>80.50</i>	<i>0.05</i>	<i>0.10</i>
<i>Commercial vehicles</i>	<i>3.5</i>	<i>80.50</i>	<i>0.05</i>	<i>0.10</i>
<i>Total</i>			<i>1.00 ECS</i>	<i>1.00 ECS</i>

** The above figures are indicative and may be customized on case to case basis. However minimum proportion of cycle parking is mandatory.]*

8(5) BASEMENTS

a) Basement(s) upto the setback line maximum equivalent to parking and services requirement, such as Air Conditioning Plant and equipment, water storage, Boiler, Electric Sub-Station HT and LT Panel rooms, Transformer Compartment, Control Room, Pump House, Generator Room and other mechanical services and installation of electrical and fire fighting equipments, and other services required for the maintenance of the building with prior approval of the concerned agencies, could be permitted and not to be counted in FAR. [In case of Hotels Laundry, Cold Room for storing Food articles, Linen store, Garbage room, Housekeeping store and cold storage may be allowed.]

b) The basement(s) [beyond building line] shall be kept flushed with the ground and shall be ventilated with mechanical means of ventilation; and

c) Basement(s) shall be designed to take full load of the fire tender, wherever required and subject to adequate safety measures.

d) In case the basement is used for activity in conformity with the use premises, wherever permitted, the same shall be counted in FAR subject to clearance from the Fire Authorities and other statutory bodies.

e) Parking area, if misused, is liable to be municipalized / taken over by the Local Body / Authority.

f) The ESS, fire fighting installations and underground water tank shall neither be counted in ground coverage nor in FAR.

35. That apart, he had relied upon building plans of the Pacific Mall sanctioned by respondent No.1 / SDMC on May 18, 2009, January 21, 2011 and March 21, 2016.

36. It is an accepted position that a land measuring 35000 sq. m was allotted to respondent No.2 / DMRC by the DDA on May 07, 2003. The respondent No.2 / DMRC considering the public utility services rendered by and with an aim to subsidize the charges for the passengers, decided to undertake the commercial exploitation of land situated at Khayala. According to respondent No.2 / DMRC it invited proposals for selection of the concessionaire for the project and pursuant thereto selected the petitioner herein. The grant of concession was for developing, procuring, financing, constructing, managing, maintaining and licensing the use of built up spaces and facilities. The condition of grant of concession includes, to sub-license the use of the project facilities during the period of the agreement and derive

incomes, therefore, in the form of license fees, in assistance charges and other user charges. In this regard, a reference is made by Mr. Sethi to the order dated March 30, 2009 of the MoUD conveying the sanction of the President for implementation of guidelines with regard to property development to ensure fetching of maximum revenue on substantial basis. It may also be stated here that, it is specified in the said order that requirements of charge in land use, adherence to master plan, appearance of local bodies etc., shall continue to be applicable as per the provisions of existing laws.

37. It is an accepted position that the respondent No.1 / SDMC sanctioned the building plan for construction of a commercial complex in the name of respondent No.2 / DMRC through the petitioner / concessionaire. Similarly, the DDA issued NOC to respondent No.2 / DMRC for property development of the subject land on March 15, 2020, subject to fulfillment of guidelines given in the MoUD order dated March 30, 2009 and MPD 2021. The petitioner completed the construction of the commercial complex on January 21, 2011 and completion certificate was issued by the SDMC in the name of the respondent No.2 / DMRC through petitioner. As the things were going, thus on December 21, 2015 the SDMC issued public notice whereby it was directed that areas reserved for parking in commercial / office / malls / hospital complexes is free from FAR and the same is meant for parking by public without any fee. In fact, the petitioner received a notice dated January 19, 2016, from respondent No.1 / SDMC directing them to stop the misuse of

parking space in their commercial complex. The petitioner replied to the same by stating that the mall does not come under the jurisdiction of respondent No.1 / SDMC and the property belongs to DMRC. Yet another show-cause notice dated March 30, 2016 under Section 345-A of the DMC Act was issued with a direction to stop charging parking fee from visitors / public visiting the petitioner's complex. It was stated that as per MPD-2021 / sanctioned building plan, the area reserved for parking cannot be put to commercial use / profit making by collecting parking fee as the same is sanctioned free from FAR. It appears that thereafter, a meeting was held by Deputy Commissioner wherein they have reiterated that parking fee is being collected in pursuance to the Concessionaire Agreement entered with the respondent No.2 / DMRC. In any case, it was informed that the petitioner was not collecting any charges under the head of parking charges. It was contended by Mr. Sethi that on November 07, 2017, the SDMC has without any show-cause notice sealed the parking area. Aggrieved by the show cause notice and the sealing order date November 07, 2017, the petitioner filed W.P. (C) 9907/2017. It appears during the pendency of this writ petition, the Standing Committee of the SDMC deliberated on the ownership and decided to segregate the petitioner's mall from free parking charges notification as the land is owned by DMRC / DDA. In fact, a communication dated April 09, 2018 was sent, whereby the petitioner's parking was separated from free parking notifications. This resulted in the withdrawal of the writ petition and petitioner charging the

parking fees at the mall. It appears that after some time on May 14, 2018, the impugned order was issued, directing the petitioner not to charge the parking fees, until the case is decided.

38. In this regard, it must be stated that the stand of the petitioner other than already noted above is that petitioner is able to recover all the expenses during the concession period by operating the parking space. That apart, it is stated that the expenses of maintaining a private parking lot is more than that of a public parking lot.

39. There is no dispute that as per clause 7.4.9 of the Unified Building Bye laws, under the heading “Basement” it is stipulated that *“basement is not to be counted in FAR if used for parking, household, storage and services”*. In the case in hand, there are two basements, lower basement and upper basement. The lower basement has not been counted for FAR. Similarly, upper basement has been counted for FAR to the extent of 7819.226 sq. m in view of clause 8(5) of the Unified Building Byelaws, while the rest is free from FAR for an area of 14312.511 sq.m . It is also a conceded position that in the case in hand as per the sanction plans, the multi-level parking at -1 and +3 level to the extent of 2778.696 sq.m and 3968.363 sq.m are free from FAR.

40. The FAR means Floor Area Ratio, which is the ratio of the total floor area of the building to the size of the piece of land. The FAR is an important rule in the construction of a building which has to be strictly complied. The land can be constructed upon to the extent of permissible FAR. There are areas in a building, which are not counted in FAR, viz., basement, machine

room, lift, escalator, plant and machinery, water pool, swimming pool at any level (if not commercial), platform around the trees, fountain, munties over stair case, DG room, control room, toilets served by a public corridor etc. The areas counted in FAR can be used / commercially exploited as per the permissible usage. The areas, which are free from FAR are called the common areas. These areas, as the name suggest, are common to all the occupiers in the mall / building and not to the owner / concessioner (in this case). These areas cannot be leased / sold by the owner / lessee / concessionaire. It can be used by the occupiers without any hindrance. The occupants have indivisible right in the common areas.

41. Further, building plans have been sanctioned as per building bye laws. In the case in hand, the parking spaces have been provided in the basement and at second and third floor. That apart, other facilities like lifts, toilets etc., presumed to have been provided by the petitioner. It can also be said that building plans have been sanctioned subject to condition of providing parking area, toilets, lifts etc. It follows that these areas are for the enjoyment of the occupiers and it is expected that it is the occupiers, who shall in unison maintain these common areas. It is not expected that a visitor to the building shall maintain it by paying charges for utilizing the common area. If such charges are permitted to be accepted then it shall be against the spirit / intention of the Byelaws, which stipulate granting of such facilities in a building i.e. mall in the case in hand. In this regard, I may reproduce paragraphs 26 and 27 of the judgment in **Ch.**

Madan Mohan (supra), as relied upon by Mr. Vajani, as under:-

“26. As per various legal provisions as seen from the above, a builder/owner of a commercial complex could not have got the benefit of more floor area or permission to construct such commercial complex if had not, as a condition precedent, provided the required parking area as per Building Bye-laws, Multi-storeyed Building Regulations, 1981 and the regulations issued in G.O. Ms. No. 423, dated 31-7-1998. A person who, purporting to obey the law; be it statute law or delegated legislation or sub-delegated legislation, has got benefit of more FAR and permission for construction of commercial building cannot turn around and say that he is also entitled to make money out of the parking area. If he is permitted, it would defeat the very municipal administration law in letter and spirit. A builder could not have constructed a multi-storeyed complex covering the entire plot area without leaving regulation parking area. Therefore, the legal provision requiring a builder to provide parking area acts as an encumbrance on the right to enjoy property and right to possess property. It is no gainsaying to say that right to property includes right to own the land and right to possess the land. In case where common areas are provided as a first step to own, possess and enjoy the area including built up area (other than common area), can it be said that builder or owner continues to be in possession of such common areas? I have already referred to the provisions of the Apartments Act wherein it was laid down that so much percentage of common interest vests in the apartment owner and it cannot be alienated or leased out to any person for any use. Indeed, the right of possession continues for sometime only as long as the act of possession lasts (See Blackstone's Commentaries on the Laws of England; Vol.11). A builder/owner who under law impliedly waives right over common areas including parking areas cannot claim any acts of possession, and hence has no right to possession.

27. Applying the above principle, it must be said that the builder, who has a right to possess a built up area not being common area including parking space cannot be said to have right of possession over the common areas and parking areas. In such an event, having regard to the law governing the construction and ownership of multi-storeyed commercial complexes, a owner cannot be said to have absolute right over the common areas and parking areas.”

42. Similarly, even the Hon’ble High Court of Gujarat in its judgment in ***Ruchi Malls Pvt. Ltd. (Supra)*** has in paragraph 19 held as under:

“19. One another aspect is required to be noticed as justification sought to be made by the appellants for charging parking fee for the maintenance of parking space, etc. It is not unknown that in every building, housing society, or commercial building, being constructed after the GDCR came into being, the onus of providing parking is upon the buyers / occupants of such dwelling units, shops, offices etc. and they are required to bear charges towards parking while executing a contract with the vendor. Such contract or agreement between the owner of a building and occupants of establishments is ordinarily part of the deed or is entered into while executing sale/ lease of the property in a mercantile for the obvious reason to meet with maintenance cost of amenities. The mall constructed by the appellants also consists of number of shops, multiplexes, restaurants, etc. and therefore, at the most,

it can be said that the maintenance cost for the parking space, which is to be mandatorily provided as per GDCR, may be proportionately borne by the owner of the mall and occupant/ owner of such shops, multiplexes, restaurants, etc. depending upon the nature of contract they have undergone, but by no stretch of imagination can it be said that the visitors of such shops, multiplexes, restaurants, etc. will have to be fastened with the burden of parking-fee. This is exactly what is sought to be suggested by virtue of the directions issued by learned Single Judge as they give an impression or convey that the "parking policy" is to be framed by the State Government for rationalizing and regulating parking fee from the visitors of malls or commercial complexes. Such directions, in our considered view, are not warranted. We are also of the view that such parking charges upon the visitors would also not be in the interest of business of the shops, multiplexes, restaurants, etc. Therefore, the conclusion reached by learned Single Judge that since there is no provision of free-parking in the GDCR, the mall owners cannot be restrained from charging parking fee, in our opinion, is not a sound one. Learned Single Judge, based on such conclusion has issued the directions to the State Government in Paragraph-26 to take a decision on "parking policy" to rationalize and regulate the parking fees", which, in our opinion, could not have

been issued, in view of the fact that there is no provision at all in the GDCR to rationalise and regulate parking fees, and further, such direction to the State Government amounts to legislate, which is not permissible under Article 226 of the Constitution of India. For same set of reasons as recorded above, learned Single Judge has also fallen in error in issuing consequential directions in clause (iii) of Paragraph-26.”

43. Now coming to the submissions made by Mr. Sethi; he had relied upon paragraphs 12.14, 12.14.3 and 12.14.3.7, of the MPD-2021. The paragraphs have already been reproduced above. They primarily relate to alleviating the lack of adequate organized parking space. The paragraphs highlight the following:-

- (i) Limit the vehicles;
- (ii) Shift to non-private mode;
- (iii) User pay;
- (iv) No subsidized parking;
- (v) Parking for para transport / feeder mode / NMT to be prioritized and subsidized;
- (vi) Multi level parking project should be integrated as part of comprehensive NMD Schemes at designated locations;
- (vii) Appropriate pricing of street parking;
- (viii) To contemplate the cost of multi level parking and also to fulfill the growing need of parking space within urban area, a maximum of 25 % of gross floor area may be utilized as

commercial / office space.

(ix) In addition to the permissible parking space on max. FAR, 3 times additional space for parking shall be provided.

(x) Number of basement – No limit has been proposed.

44. In substance, the paragraphs on which reliance has been placed by Mr. Sethi, primarily stipulate the steps to be taken to make parking, a more organized phenomena by increasing the parking space and by evolving an appropriate pricing policy. The same does not stipulate that the charges can be claimed for parking facilities required to be provided in terms of the building bye laws. The same has no bearing on the issue, which falls for consideration.

45. The next plea of Mr. Sethi that the jurisdiction of respondent No.1/ SDMC is limited to sanction of building plan and ensuring construction as per such plan and not with regard to collection of parking charges at the petitioner's premises when such collection is permitted by the respondent No.2 / DMRC, is concerned, the same, on a first blush looks appealing, but on a deeper consideration, it is seen that when the area being common to all, to be used without any hindrance, the petitioner by restricting the usage to those who pay the parking charges, shall be in violation of the building bye laws. In other words, the collection of parking charges, if not permitted in view of the provisions of the building bye laws then they cannot be collected. In this regard, I may refer to the judgment of **Joginder Kumar Singla Vs. Govt. of NCT of Delhi and Ors. 2005 (117) DLT 220**, wherein the Division Bench of this Court while considering an

argument that the drug controller having granted license under the Drugs and Cosmetics Act, 1940 and Rules thereof for retail and wholesale drugs in residential flats and properties in residential areas in Delhi, held that if law prohibits use of premises for commercial purpose then Licensing Authority under another statute cannot grant license to carry on business. The Drug Authorities are required to satisfy that premises can be used for commercial activities in residential areas. So, in the case in hand, even if it is conceded that the DMRC – respondent No.2 has permitted the collection of parking charges under the Concessionaire Agreement, it shall not mean that the petitioner shall get the right to do so. The permission must be subject to the provisions of the building bye laws which in substance, stipulates area free from FAR, cannot be used for commercial purposes. In fact, the order dated March 30, 2009 of MoUD also vide clause X clearly stipulates as under:

“Other requirements like change in land use, adherence to master plan, approval of local bodies etc. will continue to be applicable as per the provisions of the existing laws.”

46. The aforesaid shall negate the plea of Mr. Sethi that there is no connection of FAR with the charging of parking fee. It also negate the plea of Mr. Sethi that there is no provision under the DMC Act and its Rules or Regulations or DDA Act, 1957 or MPD-2021 which empowers the SDMC to provide or regulate the collection of parking charges in private properties. The reliance placed by Mr. Sethi on the judgments of this Court in ***Sports and Leisure Apparel Ltd (supra)*** and ***C.L. Batra (supra)***

is misplaced and they have no applicability for the following reasons:-

In *Sports and Leisure Apparel Ltd v. MCD (Supra)*, damages were imposed by respondent vide impugned order on the petitioner for violating “Outdoor Advertisement Policy, 2007”. Issue that arose for consideration was whether the damages so proposed were, authorized in law. The Court held that the levy vide impugned order was in the nature of a ‘tax’ and the same was without any express provision of law.

In *C.L. Batra v. MCD (Supra)* Sanction for building plan (alteration / addition) submitted by the petitioner was withheld, as the petitioner failed to produce ‘NOC from House-Tax Department’. The issue which arose for consideration is whether Engineer-in-Chief of MCD was competent to impose ban on grant of sanction of building plans u/s 336 of DMC Act, without obtaining ‘NOC from House-Tax Department’. It was held by the Court that, since there was no express provision either in the Act or in the Byelaws empowering Commissioner / other Authority to demand ‘NOC from House-Tax Department’ before according sanction of building plan, the office orders were *ultra vires* / illegal.

47. That apart, the fact that the petitioner had submitted an application dated March 4, 2016 for regularization of excess FAR and also deposited an amount of Rs.53,13,68,640/- towards additional FAR charges, does demonstrate that it is also the understanding of the petitioner that only area counted in FAR (within permissible limits) can be commercially exploited.

48. The plea of Mr. Sethi of discrimination, inasmuch as that there are 22 other malls in Delhi where parking fee is being charged and pick and choose approach is being adopted is concerned, Article 14 is not meant to perpetuate an illegality. It provides for positive equality and not negative equality. On this ground urged by Mr. Sethi, the illegality committed by the petitioner cannot be countenanced. It is a settled position of law, any action contrary to law, does not confer any right upon any person for similar treatment. Reference in this regard can be had to the judgment of the Supreme Court in the case of *State of Punjab v. Dr. Rajeev Sarwal (1999) 9 SCC 240*.

49. In view of my discussion above, I do not see any merit in the petition filed by the petitioner. The impugned order cannot be interfered with. The same is dismissed. No costs.

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In view of the order passed in the writ petition, the present applications have become infructuous and are dismissed as such.

V. KAMESWAR RAO, J

FEBRUARY 10, 2020/aky/jg/ak