

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.5077 OF 2012

The Municipal Corporation of ..Petitioners
Greater Mumbai and Ors

Vs

Smt.Nilima Sunil Nadkarni .. Respondent

WITH

WRIT PETITION NO.1773 OF 2014untitled folder 2

The Municipal Corporation of ..Petitioners
Greater Mumbai and Ors

Vs

Shri Jagannath K. Burange .. Respondent

WITH

WRIT PETITION NO.7006 OF 2014

The Municipal Corporation of ..Petitioners
Greater Mumbai and Ors

Vs

The Workman employed under it .. Respondent
represented by Mumbai
Mahanagarpalika Karyaleen
Karmachari Sanghatana ..

WITH

WRIT PETITION NO.9768 OF 2012

The Municipal Corporation of ..Petitioners
Greater Mumbai and Ors

Vs

Goutam Laxman Ingle .. Respondent

WITH

WRIT PETITION NO.8491 OF 2014

The Municipal Corporation of
Greater Mumbai and Ors

..Petitioners

Vs

Arvind Dayanand Sartape

.. Respondent

WITH

WRIT PETITION NO.10305 OF 2012

The Municipal Corporation of
Greater Mumbai and Ors

..Petitioners

Vs

Raghunath A Mandarkar

.. Respondent

Mr. Suresh S. Pakale a/w Ms. Pallavi A. Thakar, Advocate for
Petitioners.

Mr. Prakash Devdas a/w Ms. Vidula S. Patil, Advocate for
Respondent.

CORAM : R.G.KETKAR,J.
RESERVED ON : 21.01.2015
PRONOUNCED ON: 04/03/2015

ORDER:

1. Heard Mr. Suresh S. Pakale, learned counsel for the petitioners and Mr. Prakash Devdas, learned counsel for the respondent in all petitions at length. By order dated 29.1.2013, this Court directed to hear all these petitions finally at the stage of admission itself. In view thereof, Rule. Mr. Devdas waives service on behalf of the respondent in all the petitions. At the request and by consent of the parties, Rule is made returnable

forthwith and the petitions are taken up for final hearing.

2. All these Petitions raise following common questions of law, namely:

(i) whether the provisions of the Industrial Employment (Standing Orders) Act, 1946 (for short, "S.O.Act") prevail over the Mumbai Municipal Corporation Act, 1888 (for short, "Corporation Act")?

(ii) whether the Model Standing Orders (for short, M.S.Os) prevail over the Municipal Service Rules and Regulations and the Manual of Departmental Enquiries?

As common questions of law arise in these petitions, the same can conveniently be disposed of by this common Judgment. Before considering these questions of law, it is necessary to state few facts giving rise to filing of these petitions.

3. Writ Petition No.5077 of 2012 is instituted by the Municipal Corporation of Greater Mumbai (for short, "Corporation") challenging the Judgment and order dated 2.2.2012 passed by the learned Member, Industrial Court, Mumbai (for short, "Tribunal") in Complaint (ULP) No.375 of 2005. The said complaint was instituted by the respondent against the Corporation in the capacity as an employee under section 28 read with Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971

(for short, "MRTP & PULP Act"), seeking directions to the Corporation to withdraw the punishment order dated 21.7.2004, thereby releasing the increments withheld with retrospective effect with difference in pay. The respondent was served with chargesheet dated 16.12.2003 along with copies of statements recorded during the preliminary enquiry. It was alleged that the respondent had failed to obtain increment certificate of Shri R.M.Kalekar, then Assistant Engineer, duly sanctioned and certified by Ms Sawant and as a result of which instead of withholding increment of Mr. Kalekar he continued to get increment. The charge of gross negligence of duty was levelled against the respondent. In substance, it was contended that the enquiry proceedings were not held as per the procedure laid down in the Manual of Departmental Enquiries as also M.S.Os. The findings recorded by the Enquiry Officer were perverse.

4. The Corporation opposed the complaint by filing a detailed reply and denied all the relevant assertions. The parties led evidence. On the basis of evidence on record, the Tribunal held that the chargesheet issued and enquiry conducted against the respondent were as per the provisions of the Corporation Act and the Manual of Departmental Enquiries. It was further held that the alleged misconduct was committed by the respondent during the period from February 1993 to July

1993. The chargesheet was, however, issued on 16.12.2003. There was no explanation in the chargesheet for not taking any action for more than ten years from the date of the alleged misconduct. The Tribunal came to the conclusion that the charges levelled in the chargesheet were stale charges and further action taken in pursuance thereof is illegal. The Tribunal accordingly quashed the complaint. It is against this order, the Corporation instituted this petition under Articles 226 and 277 of the Constitution of India.

5. Writ Petition No.1773 of 2014 is instituted by the Corporation under Articles 226 and 227 of the Constitution of India challenging the Judgment and order dated 7.9.2013 passed by the Tribunal in Complaint (ULP) No.2 of 2010 filed by the respondent. The respondent filed that complaint under section 28 read with Items 5 and 9 of Schedule IV of the MRTP & PULP Act in the capacity of an employee against the Corporation and the Municipal Commissioner for issuing directions to them to withdraw the punishment order dated 17.4.2003 and to pay difference in pay and all other benefits from the date from which the increment was due as if no punishment or stoppage of increment was inflicted together with interest at the rate of 12% per annum on the amount due with consequential benefits. The respondent contended that he was working as Head Clerk doing

mainly clerical work with the Corporation in its Printing Press. He was issued chargesheet dated 24.10.2002. It was contended that the chargesheet was not issued in accordance with M.S.Os. The findings of the Enquiry Officer were perverse. The respondent was inflicted punishment of stoppage of increments of two years permanently. Punishment of stoppage of increments is not provided in the M.S.Os. The Corporation does not have authority to issue punishment order which is not provided in the M.S.Os.

6. The Corporation resisted the complaint by filing reply and denied all the adverse assertions. After considering the evidence on record, the Tribunal held that it was not open to the Corporation to impose penalty not contemplated by the M.S.Os. Relying upon the decision of this Court (Coram: Dr. D.Y.Chandrachud,J.) in the case of Sitaram Tukaram Walunj Vs. Municipal Corporation of Greater Mumbai, Writ Petition No.8711 of 2007 decided on 15.4.2008, wherein it was held that as between the Corporation Act and the S.O. Act, the latter will prevail in relation to the conditions of service of workmen governed by the Act. The Tribunal further held that provisions of M.S.Os are applicable to the employees of Corporation. Provisions of M.S.Os will prevail over the Service Rules and the Manual of Departmental Enquiries of the Corporation. It was further held that penalty of stoppage of increments is not one of the penalties

provided under the M.S.Os. Consistent with these findings, the Tribunal partly allowed the complaint and held that by imposing punishment of stoppage of two increments permanently on 17.4.2003 which is not provided under the M.S.Os, the Corporation committed an unfair labour practice under Item 9 of Schedule IV of the MRTP & PULP Act.

7. Writ Petition No.10305 of 2012 is instituted by the Corporation under Articles 226 and 277 of the Constitution of India challenging the Judgment and order dated 10.7.2012 passed by the Tribunal in Complaint (ULP) No.293 of 2010 instituted by the respondent. The respondent instituted that complaint under section 28 read with Item 9 of Schedule IV of the MRTP & PULP Act seeking declaration that the Corporation and the Deputy Municipal Commissioner have engaged in unfair labour practice. It was further prayed that the order of suspension, chargesheet, findings and the punishment be quashed and set aside and the Corporation be directed to treat the period of suspension as period spent on duty and pay wages and other allowances and all consequential benefits as if he was not suspended and no punishment was inflicted on him. The respondent also prayed for giving difference in pay and all other benefits from the date from which increment is due as if no punishment of stoppage of increment was inflicted with interest

at the rate of 12% P.A, on the amount due with consequential benefits. The respondent contended that he was employed as Task Force Security Guard (Commando) from 3.10.1989. While he was on duty on 20.1.2008 in the night some incident had taken place in Ward No.20 in K.E.M. Hospital, ie Emergency Ward, where Dr. Amol Bansode was assaulted by the relatives of the patient who was accompanied by the Municipal Councilor. The allegation against the respondent was that he was supposed to stop relatives of the patient from entering in Ward No.20 and prevent assault on Doctors who were on duties at the relevant time. Dr. Bansode had lodged F.I.R on 28.1.2008 at Bhoiwada Police Station. The offence came to be registered under Sections 353, 332, 504 and 34 Indian Penal Code against unknown persons. Doctors started agitation demanding that action be taken against persons who were responsible for not preventing assailants from attacking Dr. Bansode. As a sequel to the complaint by the doctor, the respondent was suspended on 8.2.2008 on the ground of negligence. On 30.9.2008 he was issued chargesheet. The enquiry was conducted against him and the respondent was placed under suspension with effect from 3.3.2008. After conclusion of the enquiry, the respondent was held guilty of negligence and penalty of permanently stoppage of one year increment was inflicted.

8. The Corporation resisted the complaint by filing Written Statement. The parties led evidence. After considering the material on record, the Tribunal held that the enquiry conducted against the respondent was vitiated as it was not conducted as per the provisions of the M.S.Os. The Tribunal relied upon the decision in the case of Sitaram Tukaran Walunj (supra) and held that M.S.Os are applicable to the respondent. Stoppage of increment is not one of the penalties provided thereunder. Consistent with these findings, the Tribunal allowed the complaint and declared that by not conducting enquiry against the respondent as per the M.S.Os as also by not awarding punishment as per the M.S.Os, the Corporation has engaged in unfair labour practice under Item 9 of schedule IV of the MRTP & PULP Act. It is against this order, the Corporation has instituted the present petition.

9. Writ Petition No.9768 of 2012 is instituted by the Corporation challenging the Judgment and order dated 7.8.2012 passed by the learned President of the Tribunal, in Complaint (ULP) No.143 of 2010. That complaint was instituted by the respondent against the Corporation and the Municipal Commissioner under section 28 read with Item 9 of Schedule IV of the MRTP & PULP Act for declaration that they have engaged in unfair labour practice. The respondent was working as Head

Clerk doing mainly clerical work. On 29.4.2008, he was issued chargesheet. He denied the charges levelled against him. The departmental enquiry was conducted against him. The Enquiry Officer found him guilty of all charges levelled against him and inflicted punishment of stoppage of increment for three years permanently. The respondent contended that the chargesheet issued was not in accordance with M.S.Os; that the enquiry was not conducted as per the provisions of M.S.Os as also punishment inflicted is not in accordance with M.S.Os. The action on the part of the Corporation was in contravention of the provisions of the M.S.Os and thus they committed unfair labour practice under Item 9 of Schedule IV.

10. The Corporation resisted the complaint by filing reply. On the basis of pleadings of the parties, the issues were framed and the parties led evidence. The Tribunal held that the complainant is a workman; that he proved that enquiry was vitiated for not conducting it as per the provisions of the M.S.Os. The Tribunal relied upon the decision of this Court in the case of Sitaram Tukaram Walunj (supra) wherein it was held that provisions of the M.S.Os prevail over the Act. The disciplinary action has to be initiated as per the provisions of M.S.Os only. Failure to comply the provisions of M.S.Os amounts to unfair labour practice under Item 9 of Schedule IV of the Act. It was also held that stoppage

of increment is not one of the penalties provided under the M.S.Os. Consistent with these findings, the Tribunal allowed the complaint. It is against this order, the Corporation has instituted the present petition.

11. Writ Petition No.7006 of 2014 is instituted by the Corporation under Articles 226 and 227 of the Constitution of India challenging the Judgment and order dated 26.9.2013 passed by the Tribunal in Reference (ID) No.22 of 2006. By that order, the Tribunal allowed the reference and quashed and set aside the punishment orders dated 6.8.1999 and 11.1.2001 passed against the respondent and declared that the respondent-workman is entitled to all consequential benefits.

12. The Commissioner of Labour, Mumbai in exercise of his powers under section 12(5) of the Industrial Disputes Act,1947 (for short, "I.D.Act") referred the dispute between the Corporation and the respondent vide order of reference dated 28.3.2006 in respect of punishment orders dated 6.8.1999 and 11.1.2011. The respondent was working as Accounts Officer, Grade II. He was served with charge sheet dated 27.5.1998 under the provisions of the Municipal Corporation Services Rules. In pursuance thereof, enquiry was conducted against him. After conclusion of the enquiry, Enquiry Officer found him guilty and accordingly submitted his findings. Based upon the findings, by

order dated 6.8.1999 pay of the respondent was reduced by two stages in the present post for a period of five years with effect on future increments and further it was ordered that he will not be entitled for increment and promotion during the year of 5 years as a measure of punishment. The respondent preferred Appeal before the Appellate Authority. By order dated 11.1.2001 ordered reduction of his basic pay by two stages in the present post for two years with effect of postponing future increments of his pay. During the period of undergoing punishment, the respondent will not earn any increment and will not get any promotion.

13. After the matter was referred to the Tribunal, the respondent filed statement of claim which was opposed by the Corporation by filing reply. The Corporation contended that the respondent is not a workman. After considering the evidence on record, the Tribunal held that the respondent was a workman. On merits, the Tribunal held that M.S.Os are applicable to the Corporation as it does not have own certified Standing Orders framed under the Act. It was further held that the service rules are not certified under the provisions of the Act. The Corporation has also not obtained exemption. In view of the decision of this Court in the case of Sitaram Tukaram Walunj (*supra*), where it is held that the provisions of M.S.Os prevail over the service Rules of the Corporation. Consistent with this finding, the Tribunal

allowed the reference. It is against this order, the present petition is instituted.

14. By Writ Petition No.8491 of 2014 under Articles 226 and 227 of the Constitution of India, the Corporation and the Municipal Commissioner have challenged the Judgment and order dated 10.9.2013 passed by the Tribunal in Complaint (ULP) No.225 of 2004. That complaint was filed by the respondent under section 28 read with Item 9 of Schedule IV of the MRTP & PULP Act. The respondent was employed as a Rent Collector from 20.12.1976. On account of acts and/or omissions amounting to misconduct of respondent, the enquiry was conducted against him. The respondent was also placed under suspension from 9.4.2004 to 19.9.2005. After conclusion of the enquiry he was found guilty and punishment of stoppage of increment was inflicted. The respondent filed complaint challenging action of the Corporation. The Corporation filed Written Statement opposing the complaint. On the basis of the pleadings of the parties, the necessary issues were framed. The parties led evidence. After considering the evidence on record, the Tribunal held that the respondent is a workman within the meaning of Section 2(s) of the I.D. Act and as such an employee within the meaning of Section 3(5) of the MRTP & PULP Act. It was further held that the provisions of the M.S.Os apply and not the service Rules and

Regulations of the Corporation. The Tribunal further held that the enquiry is vitiated as it was not conducted in accordance with the provisions of M.S.Os and it was conducted as per the Service Rules and Regulations of the Corporation. The Tribunal relied upon the decision of this Court in the case of Sitaram Tukaram Walunj (supra) and held that Corporation has engaged in unfair labour practice under Item 9 Schedule IV of the Act for not following provisions of M.S.Os framed under the Act. It was further declared that the enquiry conducted against the Municipal Servants (Conduct of Service and Discipline) Rules is vitiated as it was not conducted as per the provisions of the M.S.Os. It is against these orders, the Corporation has instituted these petitions. For appreciating the controversy between the parties, facts from Writ Petition No.5077 of 2012 are taken into consideration.

15. In support of this petition, Mr. Pakale submitted that the respondent had filed complaint alleging commission of unfair labour practice under Item 9 of Schedule IV of MRTP & PULP Act. She, inter alia, contended that:

1) The enquiry proceedings were not held as per the procedure laid down in the Manual of Departmental Enquiries and also the Model M.S.Os and, therefore, the enquiry was not fair and proper.

2) The charge of misconduct of gross negligence is not proved against the complainant.

3) The complainant is governed by the M.S.Os of the S.O. Act. As per the provisions of M.S.Os, the minor punishment for minor misconduct is censure, warning, suspension for 3 days. In the M.S.Os, there is no provision of withholding increment.

The Corporation while resisting the complaint, inter alia, submitted that:-

1) No case is made out for invoking Item 9 Schedule IV of MRTP & PULP Act. The allegations made by the complainant are vague and do not constitute unfair labour practice as defined under Item 9 of Schedule IV. Therefore, the complaint is liable to be dismissed.

2) The respondent-employee had committed major misconduct (gross negligence) which attracts major punishment and not minor misconduct as incorrectly stated in the complaint.

3) The enquiry was conducted as per the Rules and Regulations of the Corporation framed under the Corporation Act. Under the Manual of Departmental Enquiries and the Corporation Act, a major punishment is provided for cases of gross misconduct (or gross negligence of duties); whereas the punishment awarded to the respondent is well within the scope and ambit of the said service rules.

(4) After considering the evidence, the Enquiry Officer has prepared an enquiry report and also recommended punishment.

(5) The charges of gross negligence are proved against the complainant. The complainant participated in the enquiry conducted as per the Service Rules, the Competent Authority after examining the enquiry report and the nature of misconduct etc., awarded the punishment which is within the ambit of the Service Rules; so no fault could be attributed to the same.

(6) The provisions of the M.S.Os are not applicable to the establishment of the petitioner Corporation. Without prejudice, it is submitted that even if it is assumed that the provisions of S.O. Act are applicable, the complainant has not stated as to how and which provisions of Standing Orders are violated.

(7) Similarly, the punishment provided for major misconduct in the M.S.Os are more severe than the punishment awarded by the Corporation; and so the Corporation has committed no wrong. Thus, the allegations made in the complaints are baseless and without any foundation whatsoever.

16. The respondent did not lead any evidence in support of her case. On behalf of the Corporation, Shri Ramesh D. Kamble was examined. On the basis of the pleadings of the parties, the Tribunal framed as many as seven Issues at Exhibit O-4. He submitted that the Tribunal ought to have dismissed the

complaint only on the ground that there were no pleadings as to whether the establishment in which she was employed was an **'Industrial Establishment'** as defined under the S.O.Act. The Tribunal ought to have framed issue as to whether the Corporation and its establishment is an "Industrial Establishment" as defined under the S.O.Act and as to whether the provisions of the S.O.Act are applicable to the petitioner's establishment particularly when the petitioner had disputed that the provisions of the S.O.Act were applicable to their establishments. Without framing this issue, the Tribunal answered the said issue no.1 in a very casual manner answering the same as partly affirmative as is evident from paragraph 7 of the impugned order.

17. Mr. Pakale further submitted that the Tribunal ought to have framed another issue as to whether the punishment awarded against the respondent was inconsistent with the provisions of the M.S.Os particularly in the light of the allegations and the reply by the Corporation. He submitted that the Tribunal did not apply its mind to the pleadings and did not properly raise the issues by deciding the complaint in haphazard manner which had resulted into miscarriage of justice.

18. He further submitted that even otherwise the Tribunal ought to have dismissed the complaint on the ground that the

the respondent failed to prove the case by adducing oral evidence. In spite of that, the Tribunal held that the Corporation has committed unfair labour practice as is evident from paragraph 12 of the impugned order. He submitted that neither the pleadings nor the evidence laid were considered and discussed before arriving at such a conclusion. The observations were made without there being any foundation whatsoever. The charges levelled against the respondent were quasi criminal nature and ought to have been considered more carefully. The Tribunal decided the complaint on the point which was not specifically raised and pleaded and/or no issue in that behalf was framed. The Tribunal held that the charges levelled in the chargesheet dated 16.12.2003 were in respect of the incident of 1993. The charges in the chargesheet were stale and that there was no explanation as to why action was not initiated for more than 10 years. The Tribunal further observed that when the chargesheet itself is quashed and set aside, it was not necessary to answer remaining issues namely: (1) whether the enquiry was fair and proper (2) perversity of the findings (iii) proving the charges before the court etc. Therefore, every action taken by the Corporation in connection with the chargesheet, i.e. conducting of the enquiry, imposition of punishment also became illegal and deserved to be quashed and set aside. He submitted

that the impugned order is liable to be set aside as the same suffers from non-applicaiton of mind, gross illegality and perversity.

19. Mr. Pakale submitted that the Corporation is incorporated under Section 5 of the Corporation Act. It is not an Industrial Establishment as defined under the S.O.Act. It is possible that some of the work undertaken in some of the departments and sections of the Corporation may fall within the definition of an “Industrial Establishment” as defined under the S.O.Act. However, this is a mixed question of law and fact which can be decided on the basis of evidence on record. He submitted that the Corporation Act is a Special Act whereas the S.O.Act is a General Act. The provisions of a Special Act, namely the Corporation Act, will, therefore supersede and/or override the provisions of a General Act, namely S.O. Act. The onus of proving inconsistency between the Central Act and the State Act (albeit, one General and the other Special) lies on the party placing reliance upon the Central Act, namely ,S.O. Act. He submitted that no such stand was taken by the respondent before the Tribunal. The inconsistency must exist on facts and not on mere possibilities. The Tribunal ought to have dismissed the complaint on this short count alone.

20. He submitted that Rules and Regulations framed under the

Corporation Act, though are in the form of subordinate legislation, have statutory force and effect. Under the provisions of the Corporation Act and the Rules framed thereunder, employee acquired a status and gets the right to hold office. He submitted that the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) is per incuriam as clause 32 of M.S.Os in Schedule I was not brought to the notice of the learned Single Judge. Section 13-B of the S.O.Act lays down that the S.O.Act shall not apply to certain industrial establishments set out therein. He submitted that the list of Service Rules set out under section 13-B is merely illustrative and not exhaustive. In other words, the Municipal Rules framed under the Corporation Act which are on the same line with the Rules set out in Section 13-B and, therefore, the S.O. Act will not apply to the Corporation.

21. He submitted that generally, the Employments can broadly described in the following three categories; namely;

- (i) Relationship of Master-Servant, purely governed by contractual employments under the Industrial laws;
- (ii) Employments with either the Central or State Government or with the local self government
- (iii) Employments governed under the Rules framed by the statutory bodies as per the relevant statute.

He submitted that in the present case, second category of

employment has to be considered. He submitted that once such an appointment is made, the rights and obligations of the parties are governed by the statute under which their appointments were made and not by contractual law. The principles applicable to a master-servant relationship (but unregulated by any statute) will not apply to those employees employed by Local Self Government. He submitted that in the present case, the respondent nowhere pleaded that the department in which she is employed is an **“Industrial Establishment”**. Till date no Court has held and/or recorded any such finding that the said department is an **“Industrial Establishment”**. In the absence of any such finding, it would not be proper to hold that the provisions of the Standing Order Act are applicable to the Corporation.

22. He submitted that before enacting the S.O. Act, conditions of service of all industrial employees were invariably ill-defined and vague. Most of the time, employees were not aware of such service conditions. There was absolutely no uniformity among the various conditions of service for employees discharging identical duties in the same establishment. They were generally ad-hoc or at the mercy of the employer. With the growth of the trade union movement and the right of collective bargaining, employees started putting forth their demands to end the sad

and confusing state of affairs. Recognising the rough deal that was being given to workers by employer who would not define their conditions of service and the inevitability of industrial strike in such a situation, the legislation intervened and enacted the S.O.Act. S.O Act was specially designed to define the terms of employment of workmen and to bring about uniformity among those workmen working in the same industrial establishment. One of the objects was to give the workmen a collective voice in defining the terms of employment and to subject to terms of employment to the scrutiny of quasi-judicial authorities. The object of the Standing Order Act is to provide for certain rules and regulations defined with sufficient precision governing conditions of employment in industrial establishment. In other words, the employers of these establishments were made imperative to accurately and uniformly formulate service conditions of the employment and further make the same known to all workmen employed by them in their industrial establishments.

23. Mr. Pakale submitted that the Corporation is not an **“Industrial Establishment”** and unless and until this issue is determined and decided conclusively, the provisions of the S.O.Act cannot be made applicable to the Corporation. He submitted that the Corporation is a Local Self Government

formed by charter from sovereign power created by the incorporation of the people and invested with subordinate powers of legislation for the purpose of assisting the State Government and equating and administering its local and internal affairs. He submitted that the Corporation Act is a self-contained and comprehensive legislation covering in its width and ambit each and every aspect. The provisions in respect of officers and employees are exhaustive and clear leaving little ambiguity to the subordinate legislation. The Corporation has to frame the Service Rules and Regulations within the frame work of the Corporation Act. The same are subjected to the approval of the State Government and prior publication. The appointments made by the Corporation in municipal service are either in the nature of a civil post or as a 'status'. The service conditions of the municipal employees are governed by the special statute, namely the Corporation Act. The relationship under reference cannot be equated with the Master-Servant relationship governed by the common law principles of contractual law. The term 'statute' includes both statutory rules and regulations. These rules and regulations operate as unilateral force which not only binds the Corporation but is also binding upon its employees.

24. In the present case, once an employee is appointed, his rights and obligations are not governed by contractual principles

but by the Corporation Act. The relationship is governed by the special statute, namely the Corporation Act and not the S.O.Act. Employees of the Corporation are also entitled to protection under Articles 14, 15 and 16 of the Constitution of India. The municipal employees have certain rights and privileges and suffer from certain disabilities which may be disregarded at common law which ordinarily governs the ordinary Master-Servant relationship. The legal position of a municipal employee is more of a 'status' rather than a 'contractual' appointment. The hallmark of a status is its attachment to a legal relationship of rights and duties imposed upon by the public law rather than a mutual agreement between the parties. He submitted that in the case of Sitaram Tukaram Walunj, the learned Single Judge did not decide whether the Corporation or any of its departments or sections is an **“Industrial Establishment”**. After recording concession, the learned Single Judge proceeded to observe that the S.O.Act is a Special Act and the Corporation Act is a General Act. The learned Single Judge did not comparatively examine the provisions of these two Acts. The learned Single Judge relied upon the decision of the Apex Court in the case of U.P.S.E. Board Vs. Hari Shankar Jain, 1978 LAB I.C. 1657 and held that the the S.O.Act is a Special Act and consequently held that the Corporation Act is a General Act. Before holding so, the learned

Single Judge ought to have considered the provisions of both the Statutes and after examining the same ought to have recorded a finding in that regard. No such exercise has been undertaken. He, therefore, submitted that the said decision cannot be considered as an authority on the **“Industrial Establishment”**.

25. Mr Pakale also relied upon the decision of Raman Nimbissan Vs. State Electricity Board (1967) 1 LLJ 252 and Thiruvengkataswami Vs. Coimbatore Municipality, 1968 (1) LLJ 361. He submitted that the issue in that case was not as to whether the municipality as defined under the District Municipalities Act was an Industrial Establishment or not. Equally, it was not contended by either of the parties that entire municipality was an Industrial Establishment. The issue in that case was limited to one of the activities carried out in one of the departments, amongst many, falling within the definition of an “Industrial Establishment”. The issue in the present case is whether the entire Corporation as a whole is an “Industrial Establishment and whether that issue is conclusively decided by any Competent Court in the past. He submitted that no such exercise has been undertaken either by the Tribunal or any other Competent Court. He submitted that the decision in the case of Thiruvengkataswami (supra) was challenged in appeal by Coimbatore Municipality. The Division Bench set aside the

findings recorded by the learned Single Judge (P.S.Kailashan, J.) (as the learned Judge then was). The decision of the Division Bench in the case of Thiruvengkataswami was referred to the Full Bench of the Madras High Court in view of the decision of the Apex Court in the case of U.P. State Electricity Board (supra). The following issues were referred:

- (a) Whether the electrical undertaking of a Municipality will be an Industrial Establishment.
- (b) Whether a Department of a Municipality like its electrical undertaking forming part of the entire municipal administration can be subjected to the provisions of the S.O.Act; and
- (c) Whether the provisions of the S.O.Act will prevail over the provisions of the Tamil Nadu District Municipalities Act and the Rules framed thereunder in their applicability of such Municipal Electrical undertakings.

Mr. Pakale submitted that the issue was only in respect of one of the departments of the municipality and not the entire Municipality as a whole. The Full Bench answered third issue as under :

“The decision of the Division Bench in Coimbatore Municipality to the effect that the provisions of the District Municipality Act or the Rules framed in exercise of the powers conferred under Section 74 of that Act would

constitute special law and would exclude the applicability of the Standing Orders Act, which would be in the nature of general law applicable to all industrial establishments through out the territory coming within its scope cannot be sustained. (1984(2) LLJ 273 concluding portion of para 10)".

On the first two issues, the findings recorded by the Division Bench remained largely undisturbed. He submitted that the law laid down by the Division Bench of Madras High Court on Issues (a) and (b) is still a good law and has not been disturbed by the superior Court.

26. Mr. Pakale also distinguished the decision of the Apex Court in the case of U.P.Electricity Board (supra) by submitting that the Apex Court was not required to consider whether the department of Electricity Board was an Industrial Establishment or not. The Apex Court proceeded on the assumption that the Electricity Department was an Industrial Establishment. Similarly it was not in dispute that the earlier establishments, wherein the concerned employees were employed and the establishments which subsequently merged into Electricity Board, were Industrial Establishments and were governed by the provisions of the S.O.Act. Similarly, it was never in dispute that the Electricity Board was not an Industrial Establishment. As a matter of fact the State of U.P had issued a notification under section 13-B of

the S.O.Act whereby the said department was accepted to be an Industrial Establishment. The only issue that fell for consideration was : whether Section 13-B of the S.O. Act applies only to Industrial Establishments of the Government or also to other Industrial Establishments and which Act will prevail? The Apex Court while answering the above issue examined in detail the provisions of S.O. Act and the Electricity (Supply) Act, 1948 and recorded a finding that the S.O. Act is a Special Act whereas the Electricity (Supply) Act, 1948 is a General Act. He submitted that the Apex Court examined the provisions of the S.O.Act and Electricity (Supply) Act, 1948. He submitted that the decision delivered by the Division Bench of Madras High Court in the case of Coimbatore Municipal Council (supra) was not cited before the Apex Court. He submitted that in the present case, the Corporation is not an Industrial Establishment as defined under the Payment of Wages Act, 1936 or a factory under the Factories Act, 1948. In other words, Mr Pakale submitted that the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) is of no assistance to the respondent as the issue whether the Corporation is an Industrial Establishment is not conclusively determined. Even otherwise, in view of clause 32 of the Bombay Industrial Employment (S.O.) Rules,1959 and the provisions of Standing Orders, the said decision is also not

applicable. Mr.Pakale also relied upon the decisions in the case of (1) DRadha Krishna Vs. A.P.S.C. Board, 1974 LAB. I.C. 1509, (2) Sangli Miraj Kupwad Cities Municipal Corporation Vs. Mahapalika Kamgar Sabha, Writ Petition No.4647 of 2011 decided by (Coram: Anoop V. Mohta, J.) on 23.7.2012. For all these reasons, he submitted that the impugned orders are liable to be quashed and set aside and the Petitions deserve to be allowed.

27 On the other hand, Mr. Devdas supported the impugned orders. He submitted that the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra), has been implemented by the Corporation. The said decision was not challenged by the Corporation. The Corporation has given benefit of that decision from 2008 onwards and several punishment orders were quashed and set aside by the Industrial Court and those judgments were confirmed by this Court. He submitted that in the case of Agra Electricity Supply Company Ltd Vs. Alladdin, 1969 (2) SCC 598, the Apex Court observed in paragraph 10 thus:

“The argument, however, was that even if that Award was erroneous, the company did not appeal against it, consequently it became final and the issue there decided being the same and between the same parties, principles analogous to the principle of res judicata would apply “

28. He submitted that the Corporation did not plead before the

Industrial Court that the activities conducted by it do not fall within the definition of “**Industrial Establishment**” under section 2(e) of the S.O. Act. Even in the present petitions, no such contention is raised by the Corporation. In other words, the arguments advanced on behalf of the Corporation are without any pleading to that effect. He submitted that the number of writ petitions preferred by the Corporation raising similar issues have been dismissed by this Court. He relied upon the orders passed in Writ Petitions No.7708 of 2010, 9385 of 2010 and 268 of 2011. The said decisions have not been challenged by the Corporation and, in fact, have been implemented. He, therefore, submitted that the Corporation is estopped from raising the issue that it is not an Industrial Establishment for the first time in this Court and, that too, during the course of arguments.

29. He further submitted that the contention that all the departments of the Corporation do not fall within the definition of Section 2(e) of the S.O. Act read with Section 2 of the Payment of Wages Act, 1936, was never raised in the Written Statement either before the Industrial Court or even in the present Petitions. The question of giving findings on whether the Corporation is an Industrial Establishment or not, was not before the Industrial Court. Before the Industrial Court, the only contention advanced was that the Corporation Act is a Special

Act and the statutory Rules framed thereunder will prevail over the M.S.Os. He submitted that Section 61 of the Corporation Act lays down the obligatory and discretionary duties and powers of the Municipal Authorities. In particular, clauses (a), (b) and (m) thereof clearly establish that the Corporation is an industrial establishment. The said duties are covered under section 2(g) of the Payment of Wages Act, 1936. The intention of the legislature is to have uniform conditions of service in an organization and not different set of conditions of service for employees in different departments/sections of the same establishment. The Corporation is one establishment. The Corporation is one integrity whole, because the true relations between the departments constitute the Corporation. The unity of management and control, functional integrity and unity of employment exists. The employees are transferable from one department to another department within the Corporation. In such a situation, application of Standing Orders to some employees and to others statutory rules framed under the Corporation Act will create conflict and that is not the intention of the legislature. An employee on transfer to a water supply department will have different conditions of service. This will affect the smooth relations which exists in the Corporation. In short, he submitted that there cannot be different conditions of

service for different departments and, therefore, the Corporation as a whole has to be treated as an Industrial Establishment.

30. In the case of Agra Electricity Supply Co. Ltd (supra), the Apex Court held in paragraph 10 as under:

“On principle, it seems expedient and desirable that matters specified in the schedule to the Act should be covered by uniform Standing Orders applicable to all the workmen employed in an industrial establishment. It is not difficult to imagine how the application of two sets of standing orders in respect of the said matters is bound to lead to confusion in the working of the establishment and cause dissatisfaction amongst the employees.”

Admittedly, the Corporation conducts activities relating to construction, development or maintenance of buildings, roads, bridges, supply of water etc. The activities falling under clauses (a), (ab) and (m) of Section 61 and other provisions clearly establish that the activities are obligatory and fall within the definition of section 2(ii) of the Payment of Wages Act, 1936. In any case, the question whether the Corporation is an industrial establishment has to be raised before the Industrial Court and cannot be raised for the first time during the course of arguments. He submitted that in the case of U.P. State Electricity Board (supra), the Apex Court held that between the Electricity (Supply) Act, 1948 and S.O. Act, the S.O. Act is a Special Act. In L.I.C of India Vs. D.J. Bahadur, 1980 LAB I.C. 1218 and in particular in paragraphs 49, 52 to 54, the Apex Court held that

between the L.I.C.Act and the I.D.Act, the I.D.Act is a special statute and L.I.C.Act is a general statute. He also relied upon the decision of this Court in the case of Pyarelal (supra) and in particular paragraph 7 thereof. In the case of Pyarelal (supra), the learned Single Judge of this Court relied upon the decision in the case of P.M.C. Vs. Keshav Ganpat Bhise, 1983 (2) Bombay C.R. 715. In both these cases, it is held that municipality is an industrial establishment as defined in Section 2(e) of S.O.Act.

31. Mr. Devdas relied upon the decision of this Court in the case of M.C.G.M. Vs. Laxman Saidoo Timmanapaty 1991 I CLR 653 wherein after following decision of the learned Single Judge of this Court in the case of Kishore Vs M.R.Bhise, 1987 (2) I.L.R. 61, this court has taken the view that as between M.S.Os and Certified Standing Orders, provisions of M.S.Os would prevail. It was held that M.S.Os would prevail over the municipal rules. It was also noted therein that Advocate on behalf of the Corporation had conceded the position that no notification under section 13-B of the S.O.Act was issued.

32. Mr. Devdas submitted that as far as reliance placed on the decision of the learned Single Judge of this Court in the case of Sangli Miraj Kupwad Cities Municipal Corporation, Sangli (supra) the said decision is challenged and is a subject matter of L.P.A.

No.203 of 2012 and L.P.A. No.316 of 2012. He submitted that clause 32 of Schedule I, M.S.O., A – For workmen doing manual or technical work of the Bombay Industrial Employment Standing Orders (Rules), 1959 provides protection to workmen that any benefits provided under any law or rights accrued as per contract of service, custom or usage or an agreement, settlement or an Award cannot be derogated as a result of operation of the S.O.Act. The said rule provides that if any conditions of service settled under any settlement or agreement or Award which is beneficial to the workmen, then the conditions of service in the Standing Orders which may be less beneficial cannot be imposed upon the concerned workmen. The S.O.Act is a beneficial legislation to the workmen of MCGM. The Corporation Act mainly deals with working of local body including rendering services whereas the S.O.Act is specialized in dealing with the conditions of service of workmen employed in industrial establishment. Though the Corporation is a statutory body, activities of the Corporation are covered by the expression 'industry' as defined under section 2(j) of the I.D.Act. Section 2(e) of the S.O.Act read with section 2 of the Payment of Wages Act, 1936 coupled with the activities of the Corporation covered in Section 2(ii) of the Payment of Wages Act, it cannot be debated or doubted that the Corporation is an industrial establishment as defined under

section 2(e) of the S.O.Act. For all these reasons, he submitted that no case is made out for interfering with the impugned order.

33. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Having regard to the submissions advanced by the learned counsel appearing for the parties, following points arise for my consideration:-

(i) Whether the S.O.Act is a Special Act relating exclusively to the service conditions of persons employed in the Corporation and, therefore, its provisions would prevail over the provisions of the Corporation Act?

(ii) Whether the M.S.Os prevail over the Municipal Service Rules and Regulations and the Manual of Departmental Enquiries?

(iii) Whether the Municipal Service Rules and Regulations are covered by Section 13-B of the S.O.Act as the list of service rules set out therein is merely illustrative and not exhaustive?

(iv) Whether the Corporation is an **“Industrial Establishment”** as defined under section 2(e) of the S.O.Act?

(iv) Whether the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) is

per incuraium as clause 32 of M.S.Os in Schedule I was not considered in that decision?

34. Points No.1 and 2:

(i) Whether the S.O.Act is a Special Act relating exclusively to the service conditions of persons employed in the corporation and, therefore, its provisions would prevail over the provisions of the Corporation Act?

(ii) Whether the M.S.Os prevail over the Municipal Service Rules and Regulations and the Manual of Departmental Enquiries?

Mr. Pakale submitted that the Corporation Act is a Special Act whereas the S.O.Act is a General Act. The provisions of the Special Act, namely the Corporation Act, will, therefore, supersede and/or override the provisions of the General Act, namely the S.O.Act. The onus of proving inconsistency between the Central Act and the State Act (albeit, one General and the other Special) lies on the party placing reliance upon the Central Act, namely the S.O.Act. In order to consider this submission, it is necessary to refer to some of the decisions relied by the learned counsel appearing for the parties. In the case of L.I.C. of India (supra), the Apex Court considered the question whether the L.I.C.Act is a special legislation or a general legislation and that the I.D.Act is a general statute so that the latter pro tanto repeals

or prevails over the earlier one. The decisive point is as to whether the I.D.Act can be displaced or dismissed as a general statute. The Apex Court considered the provisions of both the Acts. In paragraphs 52 to 54, Hon'ble Mr. Justice V.R.Krishna Iyer observed thus :

“52. What are we confronted with in the present case, so that I may determine as between the two enactments which is the special? The only subject which has led to this litigation and which is the bone of contention between the parties is 'an industrial dispute between the Corporation and its workmen' qua workmen. If we refuse to be obfuscated by legal abracadabra and see plainly what is so obvious, the conclusion that flows, in the wake of the study I have made, is that vis-a-vis 'industrial disputes' at the termination of the settlement as between the workmen and the Corporation the ID Act is a special legislation and the L.I.C. Act a general legislation. Likewise, when compensation on nationalisation is the question, the L.I.C. Act is the special statute. An application of the generalia maxim as expounded by English textbooks and decisions leaves us in no doubt- that the ID Act being special law, prevails over the L.I.C. Act which is but general law.

53. I am satisfied in this conclusion by citations but I content myself with a recent case where this Court tackling a closely allied question came to the identical conclusion. [U.P. State Electricity Board v. H.S. Jain]. The problem that arose there was as to whether the standing orders under the Industrial Employment (Standing Orders) Act, 1946, prevailed as against Regulations regarding the age of superannuation made by the Electricity Board under the specific power vested by Section [79\(c\)](#) of the Electricity (Supply) Act, 1948, which was contended to be a special law as against the Industrial Employment (Standing Orders) Act. This Court (a bench of three Judges) speaking through Chinnappa Reddy, J., observed : (ibid at 365-66).

The maxim "Generalia specialibus non derogant" is quite well known. The rule flowing from the maxim . has been explained in Mary Seward v. Veera Cruz, as follows :

"Now if anything be certain it is this, that where there are general "words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so".

In *J. K. Cotton Spinning and Weaving Mills Co. Ltd. v. [State of Uttar Pradesh](#)*, (1961)ILLJ540SC , this Court observed (at page 1174) :

"The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect."

We have already shown that the Industrial Employment (Standing Orders) Act is a special Act dealing with a specific subject, namely with conditions of service, enumerated in the Schedule, of workmen in industrial establishments. It is impossible to conceive that Parliament sought to abrogate the provisions of the Industrial Employment (Standing Orders) Act embodying as they do hardwon and precious rights of workmen and prescribing as they do an elaborate procedure, including a quasi-judicial determination, by a general, incidental provision like Section [79\(c\)](#) of the Electricity (Supply) Act. It is obvious that Parliament did not have before it the Standing Orders Act when it passed the Electricity (Supply) Act and Parliament never meant that the Standing Orders Act should stand pro tanto repealed by Section [79\(c\)](#) of the Electricity Supply Act. We are clearly of the view that the provisions of the Standing Orders Act must prevail over Section [79\(c\)](#) of the Electricity Supply Act, in regard to matters to which the Standing Orders Act applies.

I respectfully agree and apply the reasoning and the conclusion to the near-identical situation before me and hold that the ID Act relates specially and specifically to industrial disputes between work men and employers and the L.I.C.

Act, like the Electricity (Supply) Act, 1948, is a general statute which is silent on workmen's disputes, even though it may be a special legislation regulating the take-over of private insurance business.

54. A plausible submission was made by the appellants, which was repelled by the High Court, that the L.I.C. Act contained provisions regarding conditions of service of employees and they would be redundant if the ID Act was held to prevail. This is doubly fallacious. For one thing, the provisions of Sections [11](#) and [49](#) are the usual general provisions giving a statutory corporation (like a municipality or university) power to recruit and prescribe conditions of service of its total staff-not anything special regarding 'workmen'. This Court in Bangalore Water Supply and Sewerage case (1978)ILLJ349SC (7 Judges Bench) and long ago in D. N. Banerji v. [P.R. Mukherjee](#) [1953]4SCR302 (5 Judges' Bench) has held that the ID Act applied to workmen employed by those bodies when disputes arose. The general provision would still apply to other echelons and even to workmen if no industrial dispute was raised. Secondly, no case of redundant words arose because the Corporation, like a University, employed not only workmen but others also and to regulate their conditions of service, power was needed. Again, in situations where no dispute arose, power in the employer to fix the terms of employment had to be vested. This is a common provision of a general sort, not a particularised provision to canalise an industrial dispute."

35. In paragraph 53, the Apex Court considered the earlier decision in U.P.State Electricity Board (supra). In that case, the question that arose was whether the standing orders under the S.O.Act prevailed as against Regulations regarding the age of superannuation made by the Electricity Board under section 79(c) of the Electricity (Supply) Act,1948. The Apex Court held in that case that the S.O.Act is a special Act dealing with a specific subject, namely with conditions of service, enumerated

in the Schedule, of workmen in industrial establishments. It is impossible to conceive that Parliament sought to abrogate the provisions of the S.O.Act embodying as they do hardwon and precious rights of workmen and prescribing as they do an elaborate procedure including a quasi-judicial determination, by a general, incidental provision like Section 79(c) of the Electricity (Supply) Act, 1948 in regard to matters to which the S.O.Act applies.

36. In the case of the U.P.State Electricity Board (*supra*), in paragraph 5, the Apex Court observed that the S.O.Act is specially designed to define the terms of employment of workmen in industrial establishments to give the workmen a collective voice in defining the terms of employment and to subject the terms of employment to the scrutiny of quasi-judicial authorities by the application of the test of fairness and reasonableness. The Electricity (Supply) Act, 1948 is a Special Act in regard to the subject of development of Electricity whereas the S.O.Act is a special Act in regard to the subject of Conditions of Service of workmen in industrial establishments. If Section 79(c) of the Electricity (Supply) Act generally provides for the making of regulations providing for the conditions of service of the employees of the Board, it can only be regraded as a general provision which must yield to the special provisions of the S.O.Act

in respect of matters covered by the latter Act.

37. In paragraph 10, the Apex Court considered its earlier decision in the Rajasthan State Electricity Board case (AIR 1967 SC 1857 and Sukhdev Singh and Ors. case (AIR 1975 SC 1331) and also the arguments advanced on behalf of the appellants that the Regulations made Under Section 79(c) of the Electricity Supply Act being statutory in nature stood on so high a pedestal as to override, by its very nature, the standing orders made under the S.O. Act. In paragraph 11, it was observed thus:

“11. The propositions that Statutory Bodies are "authorities" within the meaning of Article 12 of the Constitution, that the employees of these bodies have a statutory status and that Regulations made under the statutes creating these bodies have the force of law are not in dispute before us. The question is not whether the employees and the Board have a statutory status; they undoubtedly have. The question is not whether the Regulations made Under Section 79 have the force of law; again, they undoubtedly have. The question is whether 79(c) of the Electricity Supply Act is a general law and, therefore, Regulations cannot be made under it in respect of matters covered by the Industrial Establishments (Standing Order) Act, a special law. That question we have answered and the answer to that question makes irrelevant the submissions based on the statutory status of the employees and the statutory force of the Regulations.”

(emphasis supplied)

In paragraph 15, the Apex Court considered the decision of the Madras High Court in Raman Nambissan (supra) and Thiruvencataswami (supra) and observed thus:

15. Shri Garg relied on certain observations of the Madras High Court in *Raman Nambissan v. State Electricity Board*, [], and *Thiruvengkataswami v. Coimbatore Municipality*, []. **In Raman Nambissan's case it was held that the mere fact that the Electricity Board had adopted the rules and Regulations of the Government of Madras as its transitory rules and Regulations did not bring the workmen employed in industrial establishments under the Board within the mischief of Section of the Industrial Establishments (Standing Order) Act. In Thiruvengkataswami's case it was held that rules made by the Government under the District Municipalities Act could not be considered to be rules notified Under Section 13B of the Standing Orders Act merely because the rules were made by the Government and published in the Government Gazette. We agree with the conclusions in both cases. In Thiruvengkataswami's case Kailasam, J., also observed that the Industrial Establishments (Standing Order) Act was a special Act relating exclusively to the service conditions of persons employed in industrial establishments, and, therefore, its provisions prevailed over the provisions of the District Municipalities Act. We entirely agree. But, the learned Judge went on to say "S. 13B cannot be availed of for purposes of framing rules to govern the relationships in an industrial establishment under private management or in a statutory Corporation. This rule can apply only to industrial establishments in respect of which the Government is authorised to frame rules and Regulations relating to the conditions of employment in industrial establishments". There we disagree. Our disagreement, however, is only in regard to industrial establishment under Statutory Corporations which are authored by statute to make rules and Regulations and not in regard to those under Statutory Corporation not so authorised, nor in regard to those under private management. Our reasons are mentioned in the previous paragraph."**

(emphasis supplied)

38. In the case of *Pyarelal (supra)*, the learned Single Judge of this Court referred to the decision of *S.Baginathan Vs. Secretary to Government of Tamil Nadu, Rural Development and Local*

Administration Deptt, Madras, 1984 L.I.C. 1290 and reproduced paragraph 16 as under :

"16. Applying the ratio of the decision of the Supreme Court in the U.P. State Electricity Board v. Hari Shankar Jain AIR 1979 SC 65 : 1978 L.I.C. 1657 referred to earlier, we hold on the third question set out at the beginning that the provisions of the Standing Orders Act, if applicable to a Municipal undertaking as an 'Industrial establishment' defined in the Standing Orders Act, being in the nature of a special enactment, will prevail over the provisions of the District Municipalities Act, and the rules thereunder and to this extent, the decision of the Division Bench in the Coimbatore Municipality v. Thiruvengataswami ILR 1973 (I) Mad. 405 : 87 Mad. L.W. 462: 1974 L.I.C. 667 is not correct.'

39. The learned Single Judge referred to the decision of P.M.C. (supra) and reproduced paragraph 11 which is to the following effect.

"11. Shri Sawant the learned counsel also relied on the provisions contained in Section 13-B of the Act to suggest that the provisions under the Act would not be applicable to the respondent since the Corporation have themselves made Rules and Regulations and, therefore, those Standing Orders or Rules would govern the parties. For obvious reasons this contention cannot be upheld inasmuch as the dominating requirement of the said provision is that such rules or regulations are required to be notified in this behalf meaning thereby that a general prescription or enactment of the rules is not enough and those must be so notified, so as not to make them applicable to certain Industrial Establishments as contemplated by Section 13-B. That contention, therefore, also is of no substance".

40. In the case of Pyarelal (supra), the learned Single Judge of this Court observed in paragraph 7 that "It was never disputed before the Courts below that the present Establishment

(Respondent) is not an industrial establishment and, therefore, there can be no doubt that the S.O.Act must apply to the present establishment. During the arguments before the Court it was not urged that the present establishment is not an industrial establishment. However, after the arguments were over, the counsel for the respondent gave a note disputing that the present establishment is an industrial establishment as defined in Section 2(e). **In my view, it involves a factual aspect and unless the same is raised before the trial Court it is not possible to entertain such objection in a writ petition** after the arguments are over. Applying the above analogy, the learned Single Judge observed that there is no reason why the present establishment should not be covered by the definition of 'Industrial Establishment', particularly when there is already an averment in the complaint that there are as many as 150 employees working with respondent no.1, which fact has not been denied in the written statement. It can hardly be disputed that the establishment, where the petitioner is working is concerned with the development activities. Thus, the present establishment is fully covered by the definition 'Industrial Establishment' as defined in the Act.

41. In the case of Sitaram Tukaram Walunj (supra), the learned Single Judge considered the decision of the Apex Court in the

case of U.P.S.E.Board (supra) as also the decision of this Court in the case of M.C.G.M (supra) as also Pyarelal (supra). The learned Single Judge also considered the provisions of the S.O.Act and in particular Sections 1(3), 2A, 13-B. It was observed in paragraph 4 that the Corporation Act is general legislation pertaining to municipal legislation governing the area of Brihan Mumbai. The S.O.Act constitutes special legislation for the subject governed by that Act. It was thereafter observed in paragraph 6 as under :

“6. Having regard to the line of precedent on the subject, there is no manner of doubt that as between the Municipal Act and Industrial Employment (Standing Order) Act, 1946, the latter will have to prevail in relation to the conditions of service of those workmen governed by the latter Act. The Model Standing Orders which are applicable to the clerical workmen inter alia provide for the imposition of penalty for misconduct. Model Standing Order 32(1) provides for the following penalties, viz.: (i) a warning or censure; (ii) a fine subject to the provisions of the Payment of Wages Act, 1936; (iii) suspension not exceeding four days; and (iv) dismissal without notice. Similarly, Model Standing Order 24 provides that the workman may be warned, censured or fined for certain specified acts or omissions, amongst them being negligence in the performance of duties or neglect of work. Stoppage of increments is not one of the penalties provided therein. That being the position, there is merit in the submission urged on behalf of the Petitioner that it was not open to the Municipal Corporation to impose a penalty not contemplated by the Model Standing Orders. The Industrial Court has manifestly erred in holding that the penalty of a fine comprehends withholding of increments. Imposition of a fine as penalty is clearly distinct from

withholding of an increment and the two cannot be equated. Similarly, there is no warrant for the Industrial Court to hold that a complaint under Maharashtra Recognition of Trade Unions and Unfair Labour Practices Act, 1971 would not be maintainable. The Model Standing Orders are part of every contract of employment. A breach of the Model Standing Orders will, therefore, amount to a breach of Item 9 of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.”

The said decision has been followed subsequently in (1) M.C.G.M. Vs. Mr Madhusudan S Kanth, Writ petition No.9385 of 2010 decided on 13.12.2010 (Coram: Smt.Nishita Mhatre, J.), (2) M.C.G.M. Vs. Dr. Shivajirao T. Kawale, Writ Petition No.7708 of 2010 decided on 17th January, 2011 (Coram: smt Nishita Mhatre, J.), Municipal Commissioner, M.C.G.M. Vs. Shri Laxman Gangaram Kunchikorve, Writ Petition No.268 of 2011 decided on 31.1.2011 (Coram: Smt.Nishita Mhatre,J.).

42. Mr. Devdas submitted that the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) was not challenged by the Corporation and in fact has been implemented by the Corporation. The Corporation has given benefit of that decision from 2008 onwards and several punishment orders were quashed and set aside by the Industrial Court and those judgments were confirmed by this Court. He relied upon the orders passed in (1) M.C.G.M. Vs. Mr Madhusudan

S Kanth, Writ petition No.9385 of 2010 decided on 13.12.2010 (Coram: Smt.Nishita Mhatre, J.), (2) M.C.G.M. Vs. Dr. Shivajirao T. Kawale, Writ Petition No.7708 of 2010 decided on 17th January, 2011 (Coram: smt Nishita Mhatre, J.), Municipal Commissioner, M.C.G.M. Vs. Shri Laxman Gangaram Kunchikurve, Writ Petition No.268 of 2011 decided on 31.1.2011 (Coram: Smt.Nishita Mhatre,J.). Mr. Pakale was not in a position to controvert this submission. Thus, this Court has consistently held that the S.O.Act will prevail over the Corporation Act. In view thereof, the issue whether the S.O.Act will prevail over the Corporation Act is no longer res integra and is concluded by the aforesaid decisions. In my opinion, between the S.O.Act and the Corporation Act, the provisions of former will prevail over later in case of conflict between the two. Points No.1 and 2 are accordingly answered.

43. Point No.(iii): Whether the Municipal Service Rules and Regulations are covered by Section 13-B of the S.O.Act as the list of service rules set out therein is merely illustrative and not exhaustive?

Mr. Pakale submitted that the Municipal Service Rules and Regulations are covered by Section 13-B of the S.O.Act as the list of service rules set out therein is merely illustrative and not exhaustive. It is not possible to accept this contention for more

than one reason. In the first place, admittedly the notification contemplated under section 14 of the S.O.Act is not issued. In other words, the Corporation is not exempted from operation of the S.O.Act. Secondly, Section 13-B reads as under ;

“13-B. Act not to apply to certain industrial establishments:-

Nothing in this Act shall apply to an industrial establishment in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification,Control and Appeal) Rules or the Indian Railway Establishment code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply).”

Perusal of Section 13-B clearly shows that the provisions of the S.O.Act shall not apply to an industrial establishment in so in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Services (Classification,Control and Appeal) Rules or the Indian Railway Establishment code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply. Thus, in so far as the workmen employed in an industrial

establishment to whom those specific rules apply are only exempt from operation of the Act. In other words, the Municipal Service rules and Regulations are not referred in Section 13-B. If the submission off Mr Pakale that the rules set out in Section 13-B are illustrative and not exhaustive is accepted in that event the Corporation shall stand exempted from applicability of the S.O.Act without there being any notification to that effect. That apart, it will amount to adding something in the Section which is not there. Point no.3 is answered accordingly.

44. Point No.(iv): Whether the Corporation is an “Industrial Establishment” as defined under section 2(e) of the S.O.Act?

As noted earlier, the contention that the corporation is not an industrial establishment within the definition of Section 2(e) of the S.O. Act was never raised in the Written Statement before the Industrial Court. The said contention was not agitated before the Industrial Court. Even in the present petition, the said contention is not raised. Mr Pakale submitted that the question whether the Corporation is an industrial establishment is a mixed question of law and facts. In the case of Pyarelal (supra), the learned single Judge of this Court observed in paragraph 7 that the question whether the establishment is an industrial establishment involves a factual aspect and unless the same is

raised before the trial Court, it is not possible to entertain such objection in a writ petition. This is more so as Mr Pakale submitted that the said question is a mixed question of law and fact. Assuming that the Corporation is entitled to agitate this point, admittedly the Corporation employs many more than 100 employees. It can hardly be disputed that the corporation is an Industrial Establishment. Having regard to the activities of the corporation falling under clauses (a), (ab), (m) of Section 61 clearly establish that the activities are obligatory and fall within the definition of Section 2(ii) of the Payment of Wages Act, 1936. In view of the decision of this court in the case of Sitaram Tukaram Walunj (supra), I do not find any merit in the submission of Mr Pakale that the corporation is not an Industrial Establishment as defined under section 2(e) of the S.O. Act. Point no.4 is answered accordingly.

45. Point No.(iv): Whether the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) is per incuraium as clause 32 of M.S.Os in Schedule I was not considered in that decision?

Mr. Pakale submitted that the decision of the learned Single Judge of this Court in the case of Sitaram Tukaram Walunj (supra) is per incuraium as clause 32 of M.S.Os in Schedule I, was not considered in that decision. Section 32 reads thus:

"32. Nothing contained in these Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment."

Perusal of clause 32 clearly shows that nothing contained in the Standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage or an agreement, settlement or award applicable to the establishment. In other words, that said clause provides that if any condition of service settled under any settlement or agreement or award which is beneficial to the workmen, than the condition of service in the Standing Orders which may be less beneficial cannot be imposed upon the concerned workmen. I, therefore, do not find any merit in the submission of Mr Pakale that the decision in the case of Sitaram Tukaram Walunj (supra) is per incuraium.

46. In the light of the aforesaid discussion, I do not find any merit in the submissions advanced by Mr. Pakale. Hence, the Petitions fail and the same are dismissed. Rule is discharged. In the circumstances of the case, however, there shall be no order as to costs.

47. At this stage, Mr. Pakale states that in Writ Petition No.5077 of 2012, ad-interim order was passed on 27.7.2012 to

the effect that no coercive steps shall be taken against the petitioner in pursuance of the impugned order. He further submitted that in Writ Petition No.1773 of 2014, ad-interim order was passed on 14.2.2014 and the same was continued pending the hearing of the petition. He, therefore, submitted that for a period of eight weeks from today, ad-interim orders passed in Writ Petition No.5077 of 2012 and Writ Petition No.1773 of 2014 may be continued.

48. Ms Patil opposes this oral application on the ground that the issue raised in these petitions is covered by the decision in the case of Sitaram Tukaram Walunj (supra).

49. Having regard to the fact that in Writ Petition No.5077 of 2012, ad-interim order was operating from 27.7.2012 and in Writ Petition No.1773 of 2014, ad-interim order was operating from 14.2.2014, I find that the request made by Mr.Pakale is reasonable. Hence, notwithstanding dismissal of these petitions, the ad-interim orders granted in Writ Petition No.5077 of 2012 and Writ Petition No.1773 of 2014 shall remain in force for a period of eight weeks from today. Order accordingly.

(R.G.Ketkar,J.)