

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

WRIT PETITION NO. 957 OF 2013

More Jeevan Yashwant	}	
and 82 Ors.	}	Petitioners
versus		
The Mumbai Municipal	}	
Corporation and Anr.	}	Respondents

WITH

WRIT PETITION NO. 2165 OF 2009

Rajendra Eknath Sawant	}	
and 23 Ors.	}	Petitioners
versus		
The Municipal Corporation	}	
of Greater Mumbai and Ors.	}	Respondents

WITH

WRIT PETITION NO. 1457 OF 2010

New Khardeo-nagar	}	
Co-operative Housing Society	}	Petitioner
versus		
The Mumbai Municipal	}	
Corporation and Ors.	}	Respondents

WITH

WRIT PETITION NO. 1797 OF 2009

Brihan Mumbai Mahapalika	}	
Upanagar Baithi Chawl	}	
Rahiwashi Sangh	}	Petitioner
versus		
The Municipal Corporation	}	
of Greater Mumbai and Ors.	}	Respondents

WITH

WRIT PETITION NO. 1536 OF 2008

New Khardeo-Nagar	}	
Co-operative Housing Society	}	
(proposed)	}	Petitioner

versus
Brihan Mumbai Mahanagar }
Palika and Anr. } **Respondents**

WITH
WRIT PETITION NO. 1158 OF 2013

Anand Narayan Kambli } **Petitioner**
}
}
Chief Accountant }
(Treasurer), Mumbai }
Municipal Corporation }
and Anr. } **Respondents**

Mr. B. S. Nayak for the petitioners in
WP/957/2013 and WP/1453/2010.

Mr. Sangraj D. Rupawate with Mr. Milind
Ingole for the petitioners in
WP/1797/2009 and WP/2165/2009.

Ms. C. S. Savithri for the petitioner in
WP/1158/2013.

Mr. A. Y. Sakhare - Senior Advocate with
Mr. Joel Carlos, Mr. H. C. Pimple and Ms.
Pooja Yadav for respondent-MCGM in
WP/957/2013, WP/1536/2008,
WP/1797/2009, WP/2165/2009 and
WP/1457/2010.

Mr. S. S. Pakale for respondent-MCGM in
WP/1158/2013.

Ms. Kavita N. Solunke - AGP for
respondent no. 2 and Mr. Milind More -
Addl. Government Pleader for respondent
no. 4 in WP/1797/2009.

Mr. Manish Upadhye - AGP for
respondent no. 4 in WP/2165/2009.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATED :- JANUARY 6, 2017

ORAL JUDGMENT:- (Per S. C. Dharmadhikari, J.)

1. The Writ Petition No. 957 of 2013 was directed to be heard along with other writ petitions on board. Those petitions, which have been already admitted, are tagged along with this petition and by consent of all counsel, we have heard these petitions together. Thus, this judgment and order would govern the fate of Writ Petition Nos. 957 of 2013, 1536 of 2008, 1797 of 2009, 2165 of 2009, 1158 of 2013 and 1475 of 2010.

2. Hence, we grant Rule in Writ Petition No. 957 of 2013. Respondents waive service. Since all the pleadings are complete, this petition and others are heard finally.

3. In Writ Petition No. 957 of 2013, the 83 petitioners have impleaded the Mumbai Municipal Corporation, established and incorporated under the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as “the MMC Act”), as the first respondent. The second respondent is the Administrative Officer (Estate).

4. It is the case of these petitioners that they are ex-municipal employees. They have retired from the services of the Municipal Corporation on attaining the age of superannuation. It is stated that in or about 1989, the Municipal Corporation decided to allot residential accommodation in its possession to its employees and the claim is that they were to be allotted on permanent tenancy/ownership basis. The petitioners were informed to form an association of such persons. This petition involves Plot – CTS Nos. 41, 42, 72, 73, 84, 85 and 86 situate at Ghatla Municipal Colony, Khardeonagar, Chembur, Mumbai 400 071. Though the petitioners claim to be ex-employees, a statement is made in the petition in para 2 that they are either ex-employees or slum dwellers, who are photo-pass document holders.

5. We must, at once, clarify that we are dealing with the claims of ex-employees of the Mumbai Municipal Corporation, who have approached this court on the footing that there is a representation from the Municipal Corporation to them that their occupancy would be converted on permanent tenancy/ownership basis and in terms of certain decisions taken by the Municipal Corporation. It is relying on these decisions that the ex-employees are claiming a writ of mandamus or any other appropriate writ, order or direction in the nature thereof,

directing the Municipal Corporation not to make applicable a circular dated 7th October, 2010 Annexure 'E' to the petition and that the respondents should release their retiral benefits/dues with effect from the date of their retirement, with interest at the rate of 18% per annum from that date till payment. The petitioners are also claiming a direction to the respondents not to evict them from their respective tenements.

6. The petition proceeds on the footing that the tenements, which are occupied by the present petitioners, were included by the Municipal Corporation in the scheme of permanent housing accommodation in the year 1992 and on 25th April, 1992, the Municipal Corporation issued a letter to that effect. However, till date, this scheme has not been implemented. The petitioners and similarly situated persons forwarded several representations/letters to the respondents, but the respondents are declining to implement their own scheme.

7. This petition is founded on the basis that though the ex-employees and who have been allotted quarters and accommodations, styled as “staff quarters”, ordinarily have no right, title and interest in the same, yet, going by the representation to these persons that their tenements would be converted into ownership or permanent tenancy that they have a

right to apply and for being considered along with similarly placed municipal employees or ex-employees of the Municipal Corporation. That is how they claim a vested or pre-existing legal right, enabling them to apply for a writ of mandamus. In para 4 of this petition, it is stated that the petitioners have formed a proposed co-operative housing society of the occupants of municipal tenements. In the year 1975, the first respondent/Municipal Corporation acquired lands at Ghatla village, Chembur, Mumbai for development of the scheme for housing dis-housed persons. The said land was marshy land and was being used as dumping ground for garbage collected in Mumbai. Considering the situation and topography of the land, the Municipal Corporation decided to construct semi-permanent ground floor structures for housing dis-housed persons as well as its employees. The first respondent constructed 56 colonies comprising of 478 tenements, each admeasuring about 140 square feet for the purpose of housing the dis-housed and allotting the surplus tenements to the municipal employees. After a lapse of time, the municipal tenants' association represented to the Improvement Committee of the first respondent and requested that these tenements be converted into permanent tenancies or granted on ownership basis. After great persuasion, the first respondent accepted these proposals. By a decision, the

Municipal Corporation made its intention clear that the land of the tenements at Parksite (Vikhroli), Barvenagar (Ghatkopar), Mithanagar (Goregaon West) and Deonar would be granted on ownership basis. The Municipal Corporation passed a Resolution dated 1st September, 1989 bearing number 343 to this effect. It was also clarified that these tenements were not staff quarters. They were not given to the employees as service tenements, but were allotted on leave and licence or rental basis. The tenements were not related to the service conditions.

8. The petitioners state that 313 tenements, out of 478 are occupied by the municipal employees. These persons were assured as above. Therefore, they were told to form a co-operative housing society. There are 165 project affected persons, to whom the first respondent has allotted tenements on ownership basis. It is claimed that the petitioners are members of societies included in the scheme of conversion of municipal tenements into ownership basis. Then, there is a reference made to various meetings with the Municipal Corporation and proposals exchanged therein. It is submitted that the proposals have been accepted. They were recommended for the sanction of the Municipal Corporation, but are still pending. The petitioners, therefore, complain that though the proposals have not been

finalised, yet, the eviction proceedings have been initiated against some of the retired employees of the Municipal Corporation. They have approached this court by challenging the proceedings on the ground of arbitrariness and discrimination. They argue that some of the similarly placed persons have been allotted tenements on permanent basis or there is a conversion effected. Therefore, those against whom eviction proceedings are initiated, are entitled to be treated on par and similarly. Then, there is a reference made to a conversion of 'H' Block of the Deonar Colony in favour of the municipal employees into ownership basis. Then, some tenements in 'B' Block of Mithanagar were converted into ownership basis and the occupants were permitted to form a co-operative housing society. Then, the argument is that the Municipal Corporation issued a circular on 16th October, 2008, whereunder, the retired employees were allowed to retain their accommodations by making payment of normal rent till the finalization of the court proceedings. It is also alleged that 10% of the gratuity amount was withheld and from out of remaining 90%, accommodation rent would be recovered. A copy of this circular is annexed as Annexure 'A' to the petition. The argument is that similar petitions have been entertained by this court and knowing fully well and being aware of the pendency of legal proceedings, the Municipal Corporation issued the circular

on 7th October, 2010. By this circular, the Municipal Corporation decided to impose and recover penal rent at three times the present rent from the occupants of the tenements in question. As to how this circular works to the prejudice of the present petitioners and similarly placed occupants is then explained and copy of the circular is annexed as Annexure 'E'. It is then complained that despite specific directions issued by the court not to evict the employees who are occupying the staff quarters and not to take coercive action, the Municipal Corporation is issuing eviction notices to the retired employees. The Municipal Corporation has not taken a decision on the proposals and recommendations, which have emanated from several statutory authorities. That is how the petitioners have approached this court.

9. Their second grievance pertains to withholding of their retiral dues. According to the petitioners, these dues have not been released because they refused to handover possession of the tenements in their possession. This act is completely contrary to the mandate of Articles 14, 16 and 21 of the Constitution of India. It is claimed that terminal benefits and particularly gratuity and pension are not a bounty, but a right. That has co-relation with the services rendered. These services have been rendered to the

complete satisfaction of the municipal authorities. None of these employees had been visited with penalties or other punishments, which would enable withholding their terminal benefits. The terminal benefits are withheld only because of their alleged wrongful possession of the municipal tenements. It is complained that withholding of these terminal dues works as double jeopardy in the sense that the petitioners cannot afford a housing accommodation in Mumbai. Secondly, the rentals being, as they are, even they cannot be paid in the absence of the terminal benefits being released and in the form of money. Thirdly, some of these persons, who are old and incapacitated, cannot support themselves in the absence of these terminal benefits, some of which are admissible monthly. In these circumstances that the petitions, under Article 226 of the Constitution of India, have been filed.

10. The petitioners proceed to annex lists of the municipal employees and the two lists that are annexed contain the names of original employees or their nominees. Then, one of the annexure is a circular and which is dated 16th October, 2008. This circular states that the Municipal Commissioner has passed an order. That order pertains to Deonar, Govandi, Barvenagar (Ghatkopar), Mithanagar (Goregaon) and Parksite (Vikhroli).

These colonies contain structures. These are chawl type structures and single storeyed. These have been occupied by retired employees of the Municipal Corporation. This order of the Commissioner refers to the concession granted to these employees, inasmuch as from the date of their retirement till the final orders passed in legal proceedings, the tenements were allowed to be occupied on payment of rent. On 1st November, 2007, the Municipal Commissioner has ordered that 10% of the amount from the terminal/pensionary benefits of these employees should be kept aside and from the balance 90% outstanding, rent be adjusted and recovered. Together with this, the eviction proceedings should be commenced. Then, there is a reference to the order passed by this court in Writ Petition No.2273 of 2003. A communication follows that order. Then, there is a copy of an order passed in Writ Petition No. 1797 of 2009. There also an ad-interim order has been passed directing the Municipal Corporation not to evict the members of the petitioner association from the present accommodations. Then, there is a reference made to a further ad-interim order in Writ Petition No. 1797 of 2009, which is more or less on similar lines.

11. Then follows a circular dated 7th October, 2010, which is challenged. A perusal of this circular would reveal as to how the

policy of the Municipal Corporation has been that in the event a municipal employee does not vacate and handover the premises styled as municipal staff quarters, to the Municipal Corporation, post his/her retirement, then, for next three months he can be granted permission to occupy the same on payment of prevailing market rent plus service charges. If any employee dies while in municipal service or is unable to vacate the premises on account of illness and medical treatment, then, the heirs/employee are allowed to occupy the premises for six months on similar lines. Thereafter, penal rent be charged and recovered from such employees. However, despite such directions and policy, there is a growing tendency of not handing over the municipal premises. The municipal premises are retained unlawfully and illegally, thereby, depriving those in-service and awaiting staff quarter allotment. This has inconvenienced those in-service employees and has also affected the municipal affairs. It is in these circumstances that even after penal rent being charged, the possession could not be recovered. Therefore, what the Municipal Corporation has decided is that some tenements have to be allotted as a special case to the municipal employees on permanent tenancy basis. Therefore, the others, who are in-service or those who have retired, are expecting a package of this nature being extended to them. For all these reasons and to

discourage the tendency as noted in the circular, the Municipal Corporation formulated a policy, whereunder, they directed all the authorities that from 1st October, 2010, this policy and this circular should be implemented strictly. The penal rent is determined in terms of this circular. The petitioners are relying upon some communications and which have been addressed to the occupants in Ghatla village, informing that eviction proceedings would be commenced for failure of that occupant to handover vacant and peaceful possession of the tenement.

12. Thereafter, Brihanmumbai Mahapalika Upnagar Baithi Chawl Rahiwashi Sangh addressed a representation dated 29th April, 2009 to the Municipal Commissioner inviting his attention to allotment of certain tenements in Deonar on permanent tenancy/ownership basis as special case. Therefore, the expectation is that similar benefit will be extended to these occupants as well.

13. The petitioners have filed an affidavit in rejoinder, dealing with the affidavit in reply dated 13th June, 2014 filed in this court by the Municipal Corporation.

14. We were unable to obtain even a copy of this reply, though it is stated to have been filed in the record of this court. Neither this court's staff or the registry was able to trace out the original

affidavit in reply nor have they obtained a copy of the same from any of the advocates appearing for the parties. The tenor of this affidavit will have to be gathered from the affidavit in rejoinder.

15. The affidavit in reply proceeds to state that the tenements are constructed by the respondents by making budgetary provisions. The said quarters are allotted to the employees during service tenure and are required to be vacated on retirement from the municipal services. The quarters so constructed under any budget cannot be given on ownership basis. Certain premises are treated as service quarters and allotted to the municipal employees because they are undertaking particular work and where the presence of the said employees is required all the time, namely, Fire Brigade, Hospitals, Water Works etc. The service quarters are allotted free of charge and except the employees and their family members, no one else is allowed to occupy the same. It is stated that if these service quarters are allotted on ownership basis, the functioning of these departments will be seriously affected. The tenements are constructed for allotment to the municipal employees and according to the service seniority, these allotments are made to those employees who have put in more than 10 years service and to those who have more than three years to retire from the

service. In special cases, an employee should have put in service of more than one year and should have about three years to retire. The tenements are allotted to the municipal employees on leave and licence basis and such allottee has to execute a leave and licence agreement as well as undertaking to vacate the municipal tenement within three months of his/her ceasing to be in municipal service. The rules prescribe that these respondents will not entertain any proposal for alternative accommodation to any municipal employee on his ceasing to be in service. It is stated that in Brihanmumbai Mahanagarpalika, approximately 1,30,000 employees are working. In comparison to the number of employees, the staff quarters are totally insufficient and inadequate. There is a very long waiting list. The employees in this waiting list are awaiting allotment of staff quarters. On account of shortage of staff quarters, it is not possible to allot these quarters to the employees, who are working in emergency municipal duties. It is stated that as far as Khardeo Nagar, Ghatla, there are 378 municipal tenements plus 100 tenements in transit camp. The total of this is 478 tenements. The tenements are allotted to the municipal employees as staff quarters and to the project affected persons on tenancy basis and not on ownership basis. As far as the challenge to the circular is concerned, the affidavit explains as to how the Municipal

Commissioner was required to step in and issue this circular. It is stated that as per the directions of the Municipal Commissioner, the retired municipal employees/their legal heirs, who are staying in Baithi Chawls at Deonar, Parksite (Vikhroli) have been permitted to stay in the staff quarters subject to payment of standard rent from the date of retirement till the date of final decision by this court in the writ petitions, namely, Writ Petition No. 2273 of 2003 and Writ Petition No. 1797 of 2009. That is how the circular has been issued on 16th October, 2008. That circular was withdrawn on 30th October, 2010. A revised circular dated 30th October, 2010 is being implemented and action under section 105B of the MMC Act is initiated against all the retired municipal employees/legal heirs of the deceased, who have not vacated the staff quarters even after retirement/death. There is another circular issued on the subject of charging penal rent. This has been followed by the Municipal Commissioner's orders dated 13th January, 2012 and 27th January, 2012. It is stated that section 64(3) of the MMC Act requires that the Improvement Committee or the Education Committee or the Standing Committee may take a decision, but that would be subject to the approval of the Municipal Corporation. The municipal administration vests in the General Body and the executive power vests in the Municipal Commissioner. Hence, the circular

is in accordance with law. There is a reference to another circular dated 5th April, 2013. Thus, the Municipal Corporation justifies its stand and contends that there is no legal right in the petitioners, which can be existing in the petitioners. No direction contrary to law can be issued. Equally, there is a power to withhold the terminal dues on account of wrongful retention of the staff quarters. That power is conferred by the circulars. The argument is that wherever there is silence in the Act and the rules or regulations, that field is occupied by the administrative circulars and instructions. They fill the gap and in accordance with law. These administrative instructions and circulars, so long as they do not contravene the constitutional mandate nor are contrary to the law, the parent Act, can be safely relied upon. Hence, there is no substance to the challenge to the legality of these circulars.

16. It is to such an affidavit that the petitioners have responded and by contending that the same is silent on the policy of the Municipal Corporation to extend the benefits, which are referred to in the petition. Therefore, once a promise is given to the municipal employees, who may have retired from the services, that the quarters allotted to them would be granted on permanent tenancy basis or ownership basis, then, that assurance or

promise has to be fulfilled. The Municipal Corporation cannot back out of the same.

17. It is on these materials that we have heard these petitions.

18. The Municipal Corporation has tendered a compilation containing the policies, circulars, resolutions and judgments of this court, whererunder, similar challenge was negatived. Finally, the Municipal Corporation relies upon the correspondence on the subject.

19. The thrust of the Municipal Corporations' stand is that the municipal tenements and staff quarters are public property. No public property can be disposed of save and except in accordance with law. The mandate of the MMC Act does not include disposal of the municipal property in the manner sought by the petitioners. No tenement can be allotted out of turn or as a special case save and except in accordance with law, settled policy and rule of law. Therefore, the retired employees have no right in the property and they cannot claim that they must be granted the tenements on permanent ownership basis or permanent tenancy basis. None of the decisions and relied upon by the petitioners' counsel can be said to be binding, inasmuch as the law does not permit the petitioners to rely upon certain

resolutions and recommendations. Eventually, everything has to be placed before the General Body of the Municipal Corporation. The General Body has yet not passed any resolution conferring any right. Therefore, the policy decision not to grant the conversion nor to permit retention of the quarters on the above basis binds the Municipal Corporation.

20. Then, there are other petitions, which have also been argued. The principal among them is a petition challenging similar action and enforcement of a promise and assurance.

21. Writ Petition No. 1457 of 2010 pertains to New Khardeo Nagar Co-operative Housing Society. It is argued by Mr. Nayak. The other petitions, which were argued are Writ Petition No. 1797 of 2009 and Writ Petition No. 2165 of 2009. Mr. Rupawate appearing in Writ Petition No. 1797 of 2009 would submit that the said petition has been filed by an association of the retired employees or their heirs and legal representatives. These are retired employees/ex-employees of the Municipal Corporation of Greater Mumbai. They have been residing in the ground floor structures of the Municipal Corporation situate at municipal colonies in the suburbs, namely, Mithanagar (Goregaon), Barvenagar (Ghatkopar), Parksite (Vikhroli), Malvani (Malad) and Deonar. The petitioner association has 600 serving and/or

retired municipal employees. This association has been registered as Charitable Trust under the Maharashtra Public Trust Act, 1950 (earlier Bombay Public Trust Act). By this petition, the petitioners are claiming enforcement or implementation of resolution dated 1st September, 1989 of the Municipal Corporation on the subject of conversion of these ground floor structures/accommodations from leave and licence basis to ownership/lease basis to the co-operative housing society. The petitioners have set out the very checkered history of how the Mithanagar and Deonar land came to be acquired by the Municipal Corporation and how the tenements were constructed. It is claimed that respondent no. 1 constructed 368 tenements at Goregaon for the purpose of housing dis-housed persons and allotting the surplus tenements to municipal employees. Though the scheme was floated, there was no response to accept the allotment and therefore, as an incentive, respondent no. 1 offered ownership rights of semi-permanent structures at the concessional and consolidated price of Rs.4,680/-, if the occupants form a co-operative housing society. There was another option for allotment on leave and licence basis. Mr.Rupawate submitted, during the course of arguments, that the members of the Sangh belong to the poorest strata of the society. They could not even afford and arrange the payment of Rs.4680/-

at that time. That is how they were accommodated and on sympathetic grounds. It is clear from the record, according to the petitioners that Deonar land was dumping ground. Some portion of the land was utilised for housing the municipal employees and the Municipal Corporation constructed about 582 semi-permanent structures. Most of them were granted on leave and licence basis. By circular dated 31st January, 1968, the Municipal Corporation offered "Cheap Tenements" at Malvani Municipal Colony, Malad (West) to the full time municipal employees on ownership basis. A copy of this circular is annexed as Exhibit 'B' to the petition. Despite concession, there was no response and Class III and Class IV municipal employees preferred to take the allotments on leave and licence basis. The members of the petitioner association/sangh are Class III and Class IV employees. They were allotted the ground floor structures in the municipal colonies on leave and licence basis. The allotments were made mainly between 1960-1970. One of the members, namely, Tanaji Ramji Pawar was employed as 'Jamadar'. He was allotted one room in Barvenagar, Ghatkopar (East) by allotment letter dated 14th November, 1973. The allotment was on leave and licence basis. The municipal fees was Rs.38.01 per month. The security deposit of Rs.76.02 and agreement fee of Rs.1/- was recovered from him after execution of

the leave and licence agreement. The possession of the tenement was handed over to him. Thus, such an allotment cannot be termed as allotment of staff quarter/service quarter much less a service tenancy. This is a leave and licence agreement simplicitor. No House Rent Allowance was deducted from the salary and therefore, similarly placed employees can claim the benefit and in terms of the Municipal Corporation resolution.

22. It is stated that 1211 tenements were constructed at S. G. Barve Nagar, Ghatkopar (West) in the year 1959-60 for project affected persons and allotting the surplus 200 tenements to the municipal employees on leave and licence basis. In the year 1966, the tenements were converted into permanent tenancy basis subject to payment of the standard rent and furnishing fresh agreements. Thus, the tenements of the members of the petitioner sangh were also liable to be converted into permanent tenancy basis. This proposal was approved by the Deputy Municipal Commissioner (Improvements) and was communicated by respondent no. 3 by letter dated 24th June, 1966. A copy of the said letter is annexed as Exhibit 'D'.

23. It is in these circumstances that the Municipal Tenants' Association represented to the Improvement Committee of the Municipal Corporation to grant/allot the tenements in such

colonies on ownership basis. After continuous persuasion, the second respondent to the petition accepted these proposals. The Municipal Commissioner, thereafter, disclosed his intention to grant the tenements at Parksite (Vikhroli), Barvenagar (Ghatkopar), Mithanagar (Goregaon) and Deonar on ownership basis. That is how the Municipal Corporation passed Resolution No. 343 dated 1st September, 1989. The original Marathi resolution and a translated copy thereof in English are annexed as Exhibits 'E' and 'E-1' respectively.

24. Thus, the conversion was to be effected in terms of this resolution. However, despite the preliminary work of formation of a co-operative housing society was completed, the Additional Municipal Commissioner informed one of the promoters that some information be provided in terms of his queries raised in the order dated 30th April, 1988, copy of which is at Exhibit 'F'. Thereafter, by another letter dated 27th January, 1990, addressed by the Ward Officer (Estates) of the Municipal Corporation, the General Secretary of the proposed co-operative housing society was informed that their request to convert the tenements will be considered on compliance of certain requirements. A copy of the said letter dated 27th January, 1990 is annexed as Exhibit 'G'. Similar letters have been addressed in

November, 1990 and there is compliance therewith by the proposed society on 18th February, 1991. Then, the Senior Ward Officer (Estates) sought approval of his superiors in December, 1991, so that the conversion can be given effect to. The 20 identical tenements at Malvani Municipal Colony were converted into ownership from leave and licence basis in pursuance of the municipal decision and contained in the resolution noted above. The petitioners rely upon an office note in that behalf. Once the Malvani Colony was identically placed, then, there is no reason not to consider the request of the petitioners, made from the year 1990 and pursued throughout.

25. The petitioners do not dispute that there are budgetary provisions, under which the staff quarters and other tenements were constructed. Equally, they are aware of the mandate of section 64 of the MMC Act. However, there is a provision enabling grant of lease, sale or creating rights in respect of municipal properties and there is a special power conferred in the Municipal Commissioner, who can act in accordance with the sanction of the Municipal Corporation. It is in these circumstances that the petitioners rely upon their representations, the outcome of several meetings, the prior decisions and equally the steps taken with regard to some of the

tenements in other municipal colonies. The petitioners place reliance on their representations and the assurance given to them on 20th October, 1989 by the Municipal Corporation. As required, an offer was submitted by the petitioners. The petitioners complied with the requisitions and other terms in the letters of the Municipal Corporation. It is in these circumstances that the petitioners submit that they were hopeful of the benefits being granted. They were also hoping that till the outcome of the proceedings pending in this court, no coercive measures would be initiated. The petitioners also relied upon certain correspondence with their architect. It is in these circumstances that the petitioners concede that their earlier petition could not be proceeded for want of registration in favour of their association. The fresh petition now filed is not barred and they only seek enforcement of the Resolution No. 343 dated 1st September, 1989 and every consequence flowing therefrom.

26. To such a petition, there is an affidavit in reply filed by one Narayan Venkatesh Pai, Assistant Municipal Commissioner (Estate), in-charge in the employment of the Municipal Corporation. After reiterating the contents of the similar affidavit filed in Writ Petition No. 957 of 2013 and the 2010 petition, what has been stated is that there was waiting list of

10113 employees. They are awaiting regular allotment and 35 employees are awaiting allotment as special cases. The affidavit explains as to how even the Mayor of the Municipal Corporation was informed that it will not be possible to consider the request of the petitioners. The proposals and which were discussed, never gained any finality. There may be recommendations and proposals, but there are no firm decisions. It is not as if the resolution relied upon by the petitioners can be said to be a decision in itself. That resolution of the Municipal Corporation has to be considered in the backdrop of the legal provisions and the powers vesting in the Municipal Commissioner/Corporation. The resolution passed by the Improvement Committee cannot be said to be final. It is contended that a policy decision has to be taken not in terms of this resolution for it is just a recommendation. It is a recommendation to the Commissioner for regularisation of the tenancy into ownership basis. The Municipal Corporation passed a resolution thereby requesting the Commissioner to regularise the tenancy and that is how the subject Resolution No. 343 dated 1st September, 1989 reads. It cannot create any right in favour of the petitioners by itself. Rather, the Municipal Commissioner has passed an order on 1st November, 2007 directing retention of 10% amount of the gratuity of the retired municipal employees and recover the rent

from the remaining 90% amount. Further, he has decided to initiate proceedings for their eviction. Thus, there is no policy or decision either by the Municipal Corporation to convert the staff quarters into ownership basis or for the retirees to apply for redevelopment/reconstruction or otherwise under the D. C. Regulations, 1991.

27. The other petition, namely, Writ Petition No. 2165 of 2009 is also claiming the same reliefs and which is filed by certain individuals, who are members of the Brihanmumbai Mahapalika Upnagar Baithi Chawl Rahiwashi Sangh. In terms of identical pleadings, these petitioners also claim same reliefs. Though we have not been shown any affidavit in reply specifically filed in this petition, we can safely say that the stand of the Municipal Corporation is adequately disclosed in the affidavits filed in reply to the other petitions.

28. Mr. Rupawate appearing in these two petitions for the petitioners submits that this is a case where the Municipal Corporation has itself initiated the proposals. The proposals have been initiated as early as on 30th April, 1988 and 1st September, 1989. Though the budgetary provision may be claimed to have been made, but the construction of the premises is not from the municipal budget. Going by the pleadings of the petitioners, the

premises cannot be termed as staff quarters. Mr. Rupawate has invited our attention to the record of pages 62-63 of Writ Petition No. 1797 of 2009 to submit that the resolution of the Improvement Committee is not quashed or set aside. It remains on the record of the Municipal Corporation. The Corporation may place its interpretation on such resolution, but if the MMC Act is perused, it is evident that the Improvement Committee is one of the important committees, through which the municipal administration and municipal functions are discharged. This committee is empowered to deal with the municipal estates. Mr. Rupawate would submit that the Commissioner may write to the Government in the year 2007 and may seek to resile from this resolution, but in terms of the proviso to sub-section (3) of section 64 of the MMC Act, so long as a decision is not taken by the State Government, all the resolutions of the Municipal Corporation are binding on the respondents. The State Government has not taken any decision on the Municipal Commissioner's proposal. The Municipal Commissioner as well has not followed up the matter. Once the State Government has not replied to the Municipal Commissioner's letter, then, it is not possible for the Municipal Corporation to assume that Resolution No.343 is a mere proposal or recommendation. Our attention is invited to the fact that the record would indicate that throughout the Municipal Corporation

was seeking to rely on its own decision and grant the request of the parties. In that regard, Mr. Rupawate relies upon the documents at pages 84 to 86 and pages 92 to 96 of the paper book. He would submit that the record of the petitions from pages 59 to 70 would reveal as to how the Brihanmumbai Mahanagarpalika has taken a decision to enforce the proposals of the Improvement Committee. Thus, it is not a mere recommendation or proposal of the Improvement Committee, but a final binding decision of the Municipal Corporation, which is sought to be enforced in this petition. Therefore, the requirement that the petitioners must possess a pre-existing legal right so as to seek a writ of mandamus is satisfied. The record would indicate that the petitioners demanded justice but that was denied to them. Mr. Rupawate has invited our attention to the letter of the then Municipal Commissioner dated 20th December, 2007, copy of which is annexed to the record of this petition. He would, therefore, submit that this is not a case where any sympathy or charity is invoked, but enforcement of a pre-existing legal right in favour of the petitioners. He would submit that the writ petitions must succeed.

29. On the other hand, Mr. Sakhare, learned senior counsel appearing for the Municipal Corporation in these petitions would submit that the writ petitions have no merit. They must be

dismissed for they are not founded on any legal right. The petitioners are not project affected persons or those municipal tenants whose homes or structures were dilapidated and therefore, they had to move out for being accommodated by the Municipal Corporation in distinct or other buildings. The petitions are filed by ex-employees in the sense they have served the Municipal Corporation and obtained a service accommodation during their tenure. These persons, on retirement, have refused to vacate and handover their tenements to the Corporation. The Estates Department, therefore, feels acute shortage of housing accommodation and to house the existing in-service employees. It is in these circumstances that Mr. Sakhare would submit that it is immaterial whether the premises are handed over on deduction of House Rent Allowance or on leave and licence basis. Looked at from any angle, they are municipal premises/staff quarters and none can claim a vested right to occupy them. The right to occupy emanates from the employment with the Municipal Corporation. Even the allotment is not as of right. It is based on availability of accommodation and fulfillment of the eligibility criteria. Having fulfilled that, the municipal employee becomes entitled to occupy the municipal property. Therefore, he occupies it as a part of the services, whether as licensee or otherwise, yet, the property retains its character as “municipal property”.

30. There can be at best a recommendation or proposal for sympathetic consideration of the petitioners' plight, particularly on retirement. The grievance that on retirement such people, who have served the Municipal Corporation, would be rendered homeless, has resulted in the proposals being mooted. They cannot bind the Municipal Corporation. They remain as recommendations and proposals. No finality is attached to them for in terms thereof, a decision has to be taken by the competent authority under the MMC Act. That decision has not been placed on file. In the circumstances, Mr. Sakhare would submit that there is no right in the petitioners and the petitions ought to be dismissed.

31. Even on the second point, Mr. Sakhare would submit that bearing in mind the conduct of the petitioners, particularly of not vacating or wrongfully retaining the municipal properties and premises, the action of withholding their terminal dues has rightly been taken. They cannot insist on the terminal dues being released even though their wrongful conduct has caused loss to the Corporation. That has adversely affected the budgetary proposals. The payment of pension and gratuity is from public funds. Therefore, in larger public interest, the Municipal Corporation has discretion to withhold the terminal benefits. The argument that under the Payment of Gratuity Act, 1972, no such

power is conferred in the authority and therefore gratuity and pension cannot be withheld, would not apply here. In the present case, the Municipal Corporation of Greater Mumbai has its own regulations and rules, governing pension and conditions of service. Therefore, these conditions of service, which prescribe terminal benefits do not envisage the releasing of the same if there is a loss caused to the Municipal Corporation. In the present case, there are municipal dues, which are outstanding. These petitioners are not entitled to occupy the premises, after their cessation from municipal services, at a concessional or lower rate. These petitioners would have to pay the prevailing market rent. The differential rent has to be recovered and that can be recovered and adjusted against the terminal benefits. Therefore, wrongful retention of the Corporation's property must visit them with such consequences. There is nothing wrongful and illegal about the act of the Municipal Corporation. The Payment of Gratuity Act, 1972 is inapplicable to this case. The right to obtain pension also flows from the Municipal Rules. It is thus, both benefits, namely, pension and gratuity, can be obtained only under the Rules of the Municipal Corporation. These rules enable the Municipal Corporation to effect deductions or make appropriate adjustments. For all these reasons, he would submit that the second contention also has no merit.

32. Alternatively and without prejudice, it is submitted by Mr.Sakhare that the petitioners have invoked this court's jurisdiction under Article 226 of the Constitution of India. That jurisdiction is equitable and discretionary. That jurisdiction cannot be utilised to grant any benefits or reliefs to a wrongdoer or a law breaker. This court's jurisdiction is used and utilised by such persons and even if they cannot obtain substantive relief, they would walk away with a monetary gain. In such circumstances, he would submit that the writ jurisdiction cannot be invoked. They are not entitled for any relief. The writ petitions be dismissed.

33. Mr. Sakhare has relied upon the compilations, which have been tendered on behalf of the Municipal Corporation of documents and judgments. The copies of these compilations have been handed over to the counsel appearing for the petitioners and therefore, he would submit that the law of the land is that public property cannot be retained wrongfully and illegally. Secondly, for retention of public property wrongfully and illegally, the writ jurisdiction cannot be utilised and invoked. This court should, therefore, not grant any relief in favour of the petitioners. Their petitions be dismissed.

34. The arguments of Mr. Rupawate and Mr. Sakhare respectively are adopted by Mr. Nayak and Mr. Pakale. Mr. Nayak, in addition, has tendered a compilation of judgments to submit that the pensionary benefits are obtained for services rendered. He would submit that gratuity and pension is earned on satisfactory service rendered to the Municipal Corporation. This is not a charity. The Municipal Corporation is not obliging the petitioners by paying them pension and gratuity. That is the petitioners' right. If that is how the matter has to be viewed, then, irrespective of the conduct of the petitioners, which may be appearing to be wrongful and illegal to the Corporation, their terminal dues cannot be withheld. In law, there is no warrant for such action. Mr. Nayak would, therefore, submit that going by the law of the land, this action cannot be sustained and the petitions to that extent deserve to be allowed.

35. As far as the substantive reliefs are concerned, just like any other municipal property occupants, even the petitioners are relying on the assurances and promises given to them by the Municipal Corporation. The Municipal Corporation cannot pick and choose occupants for granting benefits. If they have granted certain benefits and to a particular class of occupants, who also enters the municipal premises initially with some authority and

later on refuses to handover the same, then, there cannot be a different treatment to the petitioners. They cannot be picked and chosen for eviction or recovery by coercive means. Hence, the mandate of Articles 14 and 16 of the Constitution of India is violated.

36. Mr. Pakale has invited our attention to the pension regulations, copy of which has been handed over to us. Mr. Pakale would submit that the Pension Rules, 1953 have been framed by the Municipal Corporation. Rule 2 clarifies that these rules apply to all municipal servants who hold a lien on a permanent post or would hold a lien on such a post had their lien not been suspended under the Municipal Service Regulations. These rules do not apply only to those servants, who are enlisted in Sub-Rule (2) of Rule 2. However, these rules would apply to a municipal servant, who is in service on 6th June, 1955. Mr. Pakale has referred to section 81(2) of the MMC Act to submit that these rules have a statutory force. The word “pension” is defined in these rules and according to Mr. Pakale, in a comprehensive and wide sense. That includes gratuity. Therefore, the pension is admissible in terms of these rules. The gratuity is also admissible in terms of these rules. Sub-section (5) of Section 4 of the Payment of Gratuity Act, 1972 indicates as to how nothing in this section

shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Therefore, the Payment of Gratuity Act, 1972 is inapplicable. Secondly, all judgments relied upon by Mr. Nayak are distinguishable. Mr. Pakale would adopt the arguments of Mr. Sakhare on this point. Additionally, he would submit that as far as the municipal servants are concerned, they are in a peculiar position. The State Government/Municipal Corporation has provided composite monetary/retirement benefits as a civil security measure to their employees. The employee, who is covered under the said rules, on his retirement, obtains substantial amount credited to the GPF Account and pensionary benefits. The employee makes no monetary contribution towards the pensionary benefits. Therefore, there is adequate protection to a retiree from the municipal services. He, therefore, should not retain the municipal premises after his retirement and again expect a reward or premium for such an act. All the more, therefore, the writ petitions be dismissed.

37. Mr. Sakhare and Mr. Pakale have relied upon the following judgments in support of their above contentions:-

- (i) Secretary, ONGC Ltd. and Anr. vs. V. U. Warriar, (2005) SCC 245.

(ii) U. P. State Sugar Corporation Ltd. and Ors. vs. Kamal Swaroop Tondon, (2008) 2 SCC 41.

(iii) Wazir Chand vs. Union of India and Ors., (2001) 6 SCC 596.

(iv) P Rajan Sandhi vs. Union of India and Anr., (2010) 10 SCC 338.

(v) Jaswant Singh Gill vs. Bharat Coking Coal Limited, (2007) 1 SCC 663.

(vi) Ramchandra Keshavrao Paralikar vs. Municipal Corporation of Greater Mumbai, Writ Petition No. 118 of 1983, decided on 5th July, 1990.

38. For properly appreciating the rival contentions, we must first clear the factual background. We must clarify at once that this is not a case of those persons who are in occupation of municipal properties and premises because they are displaced by a public project and therefore, styled as project affected persons. They are not the dis-housed occupants of municipal premises because such premises have become unfit for human inhabitation by passage of time. These are ex-municipal servicemen or employees, who have retired from municipal services. During their tenure, they were allowed to occupy the municipal premises on account of the specific orders of allotment. The terms and conditions of this allotment are clear. Even if the allotment of

municipal premises in favour of the employees is on leave and licence basis or in lieu of the Housing Rent Allowance, still, the nature of occupancy remains the same. This occupancy does not create any right, title or interest in the municipal property, which is a public property.

39. It is high time that we clarify that those in possession of public property have no right to continue in their possession and occupation. The municipal servants must realise, like others, that they are public servants. The Municipal Corporation must realise that it is a trustee of the public property. They do not have authority to dispose of these properties as if they belong to them exclusively. They are made over to the municipalities for municipal administration and governance. Therefore, the local authorities and Municipal Corporations are as much bound by the mandate of Article 14 of the Constitution of India, as these employees. This court cannot perpetuate an illegal act by its writ. Equal protection of the law postulates that those not entitled to any relief based on a right cannot continue to insist on the same. Once a leave and licence arrangement in law does not confer any right, title and interest in the property, much less of tenancy, then, we do not see how the Municipal property, coming in the petitioners' possession during the course of their services, places

them in a different class. They are comparable with those municipal servants to whom municipal premises are allotted in lieu of payment of House Rent Allowance. The House Rent Allowance is paid because those occupying their own or rented premises should be in a position to bear the monetary liability. In some cases, the salary is not enough to meet these expenses and therefore, such schemes, namely, payment of House Rent Allowance or grant of housing accommodation in lieu thereof, are proposed and implemented. These schemes are implemented so as to assist the municipal employees and public servants and in return, it is expected that they render efficient and prompt services. The municipal services are rendered to fulfill the mandate of the constitution of India and Sections 61 and 63 of the MMC Act. We need not highlight as to what are the duties of the Municipal Corporation and its functions. There is enough indication in that regard in the MMC Act itself. That contains both, the obligatory and discretionary duties. Eventually, all municipal services are rendered for the welfare and benefit of the residents of the city. The Municipal Corporations themselves occupy a constitutional status. The Constitution envisages establishment and incorporation of a Municipal Corporation so as to ensure better and quality municipal governance. Given this status, the municipal employees ought to be aware that if they

occupy municipal properties during the course of their services, then, they are also obliged to handover these premises on their retirement or superannuation so that the Municipal Corporation can utilise them for housing those who have entered the services or existing employees. Given the shortage of accommodation, there is a huge waiting list. Hence, we find that the contrary impression that parties like the petitioners and municipal authorities entertain needs to be dispelled forthwith. None can, therefore, take a decision to handover municipal properties to anybody save and except in accordance with law. No provision has been brought to our notice in the MMC Act, which obliges the Municipal Corporation to make a provision for housing its retired employees. Therefore, there is no statutory right, which can be claimed in such matters.

40. The right that has been claimed and sought to be enforced is based on a decision of the Improvement Committee. The Improvement Committee is stated to have considered and sympathetically the request of certain types of occupants of Municipal Properties. We have been shown several documents in that regard and from the paper book. It has been pointed out that though the allotment is made on a specific condition that the allottee is in municipal service and therefore, he would be

required to comply with certain conditions, including executing an agreement and undertaking to handover the premises. Yet, in 1966, some association was informed by the then Deputy Municipal Commissioner (Improvements) that the request of the employees, to continue in occupation as tenants on their retirement, can be accepted. Reliance is placed on the letter dated 24th June, 1966, whereunder, one administrative officer (Estates) has informed the Secretary of the municipal employees' association that this Deputy Municipal Commissioner (Improvement) has approved their request subject to condition that they pay standard rent and furnish fresh agreement if they desire to continue to remain in occupation of their tenements. In this letter, we do not see any decision of the Municipal Corporation. Then, what is pressed into service is a resolution and which was passed in the Municipal Corporation's meeting held on 1st September, 1989. Resolution No. 343 dated 1st September, 1989 refers to the letters of the Commissioner dated 4th July, 1989 and 7th August, 1989. That letter refers to the plight of the municipal servants, who have been rendered homeless because of certain developments. That specifically refers to the condition of the municipal tenements as well. Therefore, Barvenagar (Ghatkopar), Mithanagar (Goregaon) and Deonar Municipal Colonies and Parksite (Vikhroli) contain

structures and singly storeyed. They were granted on leave and licence basis. However, there is a conversion proposed by the Municipal Commissioner and on ownership basis. Therefore, the recommendation of the Municipal Commissioner was placed before the Municipal Corporation's General Body and that General Body resolved that these proposals/recommendations of the Municipal Commissioner can be temporarily approved provided the co-operative housing society of such occupants presents a concrete proposal for consideration of the Commissioner and thereafter the Commissioner forwards it for approval of the Municipal Corporation. Thus, this is a proposal which has to be initiated from the Municipal Commissioner. We do not see how this resolution can be termed as a final decision of the Corporation to grant permanent occupancy rights. These are not final recommendations or accepted proposals so as to convert the individual occupancy into either ownership or permanent tenancy basis. This is at best a request emanating from all these occupants, on which the Municipal Commissioner endorses his remarks and observations and then forwards them to the House. The General Body has considered them and resolved to accept them provided fulfillment of certain terms and conditions and satisfaction of the same by the Municipal Commissioner. In that event, the House may consider approving the same. Beyond this,

we do not read anything, much less a vested right, which can be claimed by the petitioners to continue in occupation and possession. Once they understand this as only a request made by them to the Municipal Corporation for consideration of their cases sympathetically, then, all the more we do not see how moved by their plight alone, the municipal properties can be handed over to them permanently. Further, if this court were to allow such a request and issue the writ as prayed, that would be a mockery of the rule of law. This court's orders and writ cannot be contrary to the MMC Act. The municipal property can be disposed off only in accordance with section 92 of the MMC Act. The petitioners ought to be aware of this settled legal position and as annunciated in the MMC Act. No public property can be disposed off even by a public body except as authorised by law. If we agree to the request of the petitioner, none would ever vacate staff or service quarters, but retain them even after their retirement. Those in public service and fulfilling the criteria of a public servant would then have to wait for allotment of premises in the event they require them. We cannot direct a Municipal Corporation and particularly the Municipal Corporation of Greater Mumbai, which has a work force of more than one lakh employees, to grant the permanent occupancies and in the form requested. We have found from the record that there is no

dispute that there is a waiting list of employees. There is no dispute that it becomes difficult for the Municipal Corporation to house even the staff members who render emergency services. Thus, those working and serving in the Firebrigade, Water Works and hospitals, whose presence is required by the establishment 24/7 have to be housed at distant accommodations. In that event, their availability is a huge question mark and not assured. Therefore, when their presence is required to meet an emergency, then, all the more such request as made by the petitioners cannot be granted. Once the municipal premises have not been allotted to them independent of their identity as municipal servants, then, all the more such reliefs as are claimed in these petitions cannot be granted.

41. Mr. Rupawate would submit that the issue is not covered by a Single Judge Bench decision of this court, in Writ Petition No. 110 of 1983, decided on 5th July, 1990 rendered by Hon'ble Mr. Justice M. L. Pendse as his Lordship then was. He would submit that much water has flown after this decision. We do not see any substance in this contention either. Mr. Rupawate placed reliance on a letter, which has been addressed by the Municipal Commissioner of Greater Mumbai to the Government. We have carefully perused that letter. That letter highlights what we have

been shown from the records of the present petitions. The Municipal Corporation has placed before us the entire compilation of documents, based on which we must consider these cases. There are as many as five compilations placed before us by the counsel appearing for the Municipal Corporation. These compilations contain policies and relevant circulars. We have carefully considered a policy and which has been stated to be in force, which is for allotment of staff/service quarters. Rather, they are the rules of allotment. It is the entitlement of employees, who have put in 10 years service and their eligibility for allotment of the staff quarters, which is placed in the forefront, but the allotment is conditional. The allotment will be on the basis of seniority in service, taking into account the date of joining the service. The allottee should execute a leave and licence agreement. Pausing here, it is apparent that the allotment of municipal properties or staff quarters to municipal servants is under these rules. The manner in which the allotment is made is set out and that envisages a leave and licence agreement as per the instructions prevailing at the time of the agreement. That fortifies the position that the licensee has no right, title and interest in the premises. The licence fees have to be paid by him. He would render himself liable to departmental action under the Municipal Service (Conduct and Discipline) Rules for violation of

the conditions of allotment. The allotment is of a residential tenement. It is for residence of the employee and his/her family members. Their names have to be listed in the leave and licence agreement. Thus, this is a residential accommodation and granted for residence of the employee and his/her authorized family members. The terms and conditions indicate as to how possession of this tenement shall be immediately surrendered to the concerned Ward Officer on ceasing to be a municipal employee. Thus, it is not as if post retirement until his/her obtaining a private accommodation that he can retain the municipal premises. We do not see any change in this policy. Rather from the rules, though they were revised on 19th March, 2002, what we have noted is, by passage of time, certain additional terms and conditions have been incorporated and to take care of those who indulge in irregularities while in possession of these tenements. By passage of time, the municipal administration has learnt a lesson and is by now wise enough to realise that any municipal servant, while in service, unfortunately expires or is dead, his/her heir or legal representative is not entitled to continue and reside in the premises. They would have to vacate the municipal premises within two months of the death of the employee. It was found that on sympathetic grounds, extensions are obtained and thereafter,

the vacant possession thereof is not handed over. It is unfortunate that the Municipal Corporation had to insert a rule that if the husband and wife both work in the Department, then, they would be entitled to only one tenement and allotment may not be of more than one or two tenements, one in the name of husband and another in the name of wife. The circulars of the Municipal Corporation and which have been compiled, indicate as to how the applications have to be made. One such circular dated 2nd July, 1990 and subsequent to that of 16th October, 2008, 30th October, 2010 and 7th September, 2010 are highlighted by Mr. Sakhare, because he would submit and rightly that there is increasing trend of employees not vacating the staff quarters or to obtain peaceful possession of the municipal tenements. The circulars empower the Municipal Commissioner and higher authorities therefore to withhold the retrial benefits of those retirees who are continuing to occupy the tenements even after the permissible period. We would advert to this aspect a little later. What we have noted from these circulars is that when such authorities are empowered to take a harsh decision, then, all the more allowing the petitioners to retain the tenements, despite ceasing to be in service and retiring decades back would, as rightly contended before us by the Corporation, be putting a premium on their wrongful and illegal acts. No premium attaches

to such patent illegality. We cannot, in the garb of any sympathetic considerations, allow retention of the municipal staff quarters. What we have further noted is that there are resolutions passed from time to time. On 10th August, 1989, the Improvement Committee recommended that the Municipal Commissioner be requested to allot premises on ownership basis at Barvenagar, Mithanagar, Parksite and Deonar, as per the decisions contained in the Municipal Commissioner's letters dated 4th July, 1989 and 7th August, 1989. These letters set out the special circumstances for such a decision and also to allot some of the tenements to project affected persons. The Municipal Corporation approved this recommendation of the Municipal Commissioner on 1st September, 1989, but mentioning clearly that these are special factors and circumstances. It had not passed a firm resolution nor has taken any final and binding decision. It, as noted above, only directed that the Municipal Commissioner should forward the necessary proposal specifying the terms and conditions for allotment for due consideration and specific approval of the Municipal Corporation. There are further representations and correspondence, which would indicate as to how this whole proposal was not found to be feasible. It was not possible to pick up some tenements in occupation of retired persons and conferring on them alone the benefit of permanent

occupancy or tenancy. We have already referred to the Commissioner's letter. The Commissioner's letter, copy of which is placed before us in this compilation, indicates as to how there is acute shortage of accommodation. He has, in his detailed letter addressed to the Government, pointed out that all these persons while entering the municipal service have undertaken to vacate the municipal tenements on ceasing to be in municipal services. Such undertakings and agreements are in force. These agreements have certain sanctity and a legal efficacy. The Municipal Corporation is right in insisting that they abide by their undertakings and voluntarily surrender the premises in their possession to the Municipal Corporation. Thus, his case was that by accepting all the terms and conditions, the benefit is obtained in the form of allotment of staff quarters and municipal premises. The Municipal Commissioner points out that in the last five decades or more, new premises could not be constructed by the Municipal Corporation. It is not possible to obtain any vacant land or property for construction of new houses. What he has highlighted is that even if there are Improvement Committee and General Body recommendations from the year 1989, there is huge wait list of the municipal employees awaiting allotment of municipal accommodation. If the existing premises are handed over on permanent tenancy/ occupancy, then, this wait listed

employees can never be provided any municipal premises. Thereafter, he highlights as to how municipal governance is the primary duty and responsibility of the Municipal Corporation. The Municipal Corporation serves the residents and members of the public. The Municipal Corporation is a public body. Those joining the services of the Corporation and later on retiring from the services would never surrender or handover the municipal premises in their occupation. That would set a bad precedent. The Municipal Corporation's premises and particularly those vacant lands, which are reserved for construction of residential structures, have been encroached and it is very difficult to obtain vacant possession thereof. It is in these circumstances and when the municipal employees obtain municipal houses, which are public properties, for their residence, it is their bounden duty to hand them over to the Municipal Corporation after their retirement. Converting them into permanent occupancy would defeat the larger public interest. These nine important points, which he has highlighted in a detailed letter addressed to the State Government may have been noticed, but no action one way or the other has been taken thereon. However, based on that, no right can be claimed by the petitioners. The State Government is neither accepting the stand of the Municipal Commissioner set out in his letter dated 20th December, 2007 nor has rejected it.

Mr. Rupawate has invited our attention to Section 64 of the MMC Act. That appears under sub heading “Respective Functions of the several Municipal Authorities”. Section 64 reads as under:-

64. Functions of the several municipal authorities

(1) The respective functions of the several municipal authorities and of any committee appointed under sections 39, 40, 41, 49A or 50 shall be such as are specifically prescribed in or under this Act.

(2) Except as in this Act otherwise expressly provided, the municipal government of Greater Bombay vests in the corporation.

(2A) On the occurrence of any accident or unforeseen event, or on the threatened occurrence of any disaster, involving or likely to involve extensive damage to any property of the Corporation or danger to human or animal life, the Mayor and the Commissioner with the approval of the Mayor shall take such immediate action, as the emergency shall appear to them to justify and require, reporting forthwith to the Standing Committee or the Corporation, when they have done so, the action they have taken and their reasons for taking the same and the cost, if any, incurred or likely to be incurred in consequence of such action which is not covered by a current budget grant:

Provided that, in the absence of either the Mayor or the Commissioner, any one who is present shall take such immediate decision and action;

(3) Subject, whenever it is in this Act expressly so directed, to the approval or sanction of the Corporation or the standing committee or the Improvements Committee, or the Education Committee and subject also to all other restrictions, limitations and conditions imposed by this Act, the entire executive power for purpose of carrying out the provisions of this Act vests in the Commissioner, who shall also—

(a) perform all the duties and exercise all the powers specifically imposed or conferred upon him by this Act;

(b) prescribe the duties of, and exercise supervision and control over, the acts and proceedings of all municipal officers and servants, other than the municipal secretary and the municipal officers and servants immediately subordinate to him, and subject to the regulations at the time being in force under section 81 dispose of all questions relating to the service of the said officers and servants and their pay, privileges and allowances;

(c) perform the duties and exercise the powers imposed or conferred upon the General Manager by this Act in his absence or on failure by him to perform or exercise the same.

(d) give such directives to the General Manager, in the performance of his duties and exercise of his powers as the Commissioner may, from time to time, consider necessary. Where any such directives are given, the General Manager shall be bound to carry them out within the period specified in such directives or within such extended period as the Commissioner may, suo motu at the request of the General Manager, permit, so, however, that the extended period shall not exceed three months in the aggregate. Where the General Manager fails to carry out the directives even within the extended period, the Commissioner shall be entitled to act under clause (c) above, as if there has been a failure by the General Manager to perform his duties or exercise his powers:

Provided that, the Brihan Mumbai Electric Supply and Transport Committee may by a resolution passed by a majority of not less than three-fourths of the total number of its members restrain the General-Manager from carrying out any such directive or directives received by him from the Commissioner; and in the case of such a restraint, the General Manager shall not be deemed to have failed in carrying out any such directive.

(e) be responsible for implementing the decision of the Corporation, the Standing

committee, the Improvements Committee, the Brihan Mumbai Electric Supply and Transport Committee and the Education Committee:

Provided that, the Corporation, the Standing committee or any other Committees, as the case may be, shall obtain and take into consideration the remarks of the Commissioner, before making any resolution:

Provided also that, if the Commissioner is of the opinion that the resolution passed or decision taken by the Corporation or any of the Committee is against the provisions of any law, for the time being in force or may lead to wastage of municipal fund or seeks to divert the funds allocated for any of the obligatory duties of the Corporation to some other purpose or is against the policy of the State Government, he may, before implementing the decision, seek the direction from the State Government and the State Government shall, within forty five days from the date of receipt of such reference may by the Commissioner, issue direction to the Commissioner whether such decision should be implemented or not and the direction issued by the State Government shall be binding on the Corporation, or the concerned Committee, as the case may be.

(3A) Where, any proposal of the Commissioner requires sanction or approval of any committee constituted under the provisions of this Act, the committee shall consider and dispose of any such proposal within forty-five days reckoned from the date of the meeting of the committee held immediately after the proposal is received by the Municipal Secretary, whether the item pertaining to such proposal is taken on the agenda of such meeting or not, failing which the sanction or approval to such proposal shall be deemed to have been given by such committee and a report to that effect shall be made by the Commissioner to the corporation:

Provided that, any such deemed sanction or approval shall be restricted to the extent the proposal conforms to the provisions of this Act or any other law for the time being in force.

(4) Subject whenever expressly so directed in this Act to the approval of the corporation or the Brihan Mumbai Electric Supply and Transport Committee and subject also to all other restrictions, limitations and conditions imposed by this Act, the entire executive power for the purpose of carrying out the provisions of Chapter XVIA of this Act, vests in the General Manager who shall also—

(a) perform all the duties and exercise all the powers specifically imposed or conferred upon him by this Act and perform such other duties in connection with the Brihan Mumbai Electric Supply and Transport Undertaking as may be required of him by the Brihan Mumbai Electric Supply and Transport Committee;

(b) prescribe the duties of, and exercise supervision and control over the acts and proceedings of all municipal officers and servants appointed under Chapter XVIA and subject to the regulations for the time being in force under section 460V, dispose of all questions relating to the service of the said officers and servants and their pay, privileges and allowances;

(c) on the occurrence or threatened occurrence of any sudden accident for unforeseen event involving or likely to involve extensive damage to any property of the corporation pertaining to the Brihan Mumbai Electric Supply and Transport Undertaking or danger to human life arising from or in connection with any part of that undertaking, take such immediate action as the emergency shall appear to him to justify or require, reporting forthwith to the Briham Mumbai Electric Supply and Transport Committee, when he has done so, the action he has taken and his reason for taking the same and the amount of cost, if any, incurred or likely to be incurred in consequence of such action, which is not covered by a budget grant within the meaning of that expression as defined in section 130.

42. Sub-section (3) of section 64 states that whenever it is in this Act expressly so directed, subject to the approval or sanction of the Corporation or the Standing Committee or the Improvements Committee or the Education Committee and subject also to all other restrictions, limitations and conditions imposed by this Act, the entire executive power for the purpose of carrying out the provisions of this Act vests in the Commissioner and who shall also perform the duties, which are set out in clauses (a) to (e) of this sub-section. Thus, the Commissioner would be responsible for implementing the duties of the Municipal Corporation. However, if the Commissioner is of the opinion that the resolution passed or decision taken by the Corporation or any of its committees is against the provisions of any law, for the time being in force or may lead to wastage of municipal funds or seek to divert the funds allocated for any of the obligatory duties of the Corporation to some other purpose or is against the policy of the State Government, he may, before implementing the decision, seek direction from the State Government and the State Government shall, within forty five days from the date of receipt of such letter, issue direction to the Commissioner whether such decision should be implemented or not. We do not see how this section and with the amendments thereto would alter the legal position. Rather, if something that requires a specific approval of

the Municipal Corporation, the Commissioner cannot do that on his own. Even if there is a resolution of the Municipal Corporation or a decision taken by it, if that decision is found to be violating the mandate of law, then, the Commissioner can move the State Government and ask for it being quashed and set aside. Merely because the State Government has not acted or taken any decision, that does not mean that the Commissioner is bound by the Corporation's decision and which in any event is not borne out by the record. As held above, there is no decision or order of the Municipal Corporation accepting the petitioners' request to convert staff quarters in their occupation and possession into permanent occupancies. Similarly, as is clear from Section 92 of the MMC Act, a municipal property, with respect to its disposal, is governed by the same. It is the discretion of the Commissioner and as is evident from clauses (a) and (b) of Section 92. Similarly, it is with the sanction of the Municipal Corporation, the Commissioner may lease, sell or otherwise convey the immovable property belonging to the Corporation. After clause (d) appears clause (dd). Thus, what is clear from these provisions is that a municipal property cannot be disposed of at the sweet will of the Municipal Commissioner/Corporation.

43. With regard to the manner of disposal of such property and the mandate flowing from Article 14 of the Constitution of India, the Hon'ble Supreme Court in the case of *M. I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and Ors.*¹ held as under:-

66. A bare glance at the terms of agreement shows that not only that the clauses of the agreement are unreasonable for the Mahapalika but they are atrocious. No person of ordinary prudence shall ever enter into such an agreement. A trustee, which the Mahapalika is, has to be more cautious, in dealing with its properties. Valuable land in the heart of commercial area has been handed on a platter to the builder for it to exploit and to make run away profits. As a matter of fact on examining the terms of the agreement we find that Mahapalika has been completely ousted from the underground shopping complex for an indefinite period. It has completely abdicated its functions.

67. To repeat, the agreement is completely one sided favouring the builder. The land of immense value has been handed over to it to construct underground shopping complex in violation of the public trust doctrine and the Master Plan for the city of Lucknow. Mahapalika has no right to step in even if there is any violation by the builder of the terms of the agreement or otherwise. Mahapalika, though considered to be the owner of the land, is completely ousted and divested of the land for a period which is not definite and which depends wholly on the discretion of the builder.

44. In the case of *Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh*² the Hon'ble Supreme Court of India has held thus:-

"15. The concept of 'State' has changed in recent years. In all democratic dispensations the State has assumed the role of a regulator and provider of different kinds of services and benefits to the people like jobs, contracts, licences, plots of land, mineral rights and social security

¹ AIR 1999 SC 2468

² AIR 2011 SC 1834

benefits. In his work "The Modern State" MacIver (1964 Paperback Edition) advocated that the State should be viewed mainly as a service corporation. He highlighted difference in perception about the theory of State in the following words:

"To some people State is essentially a class-structure, "an organization of one class dominating over the other classes"; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power- system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community "organised for action under legal rules". Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the State as a great "corporation" and others consider it as indistinguishable from society itself."

18. For achieving the goals of Justice and Equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good. In principle, no exception can be taken to the use of discretion by the political functionaries and officers of the State and/or its agencies/instrumentalities provided that this is done in a rational and judicious manner without any discrimination against anyone. In our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of rule of law.

19. In his work 'Administrative Law' (6th) Edition, Prof. H.W.R. Wade, highlighted distinction between powers of public authorities and those of private persons in the following words:

"... The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms."

Prof. Wade went on to say:

"..... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law; it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities: it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration: it operates wherever discretion is given for some public purpose, for example where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere." (emphasis supplied)

31. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non- discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

32. We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organizations or institutions de hors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favoritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

33. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the Society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of

eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

34. The allotment of land by the State or its agencies/instrumentalities to a body/ organization/ institution which carry the tag of caste, community or religion is not only contrary to the idea of Secular Democratic Republic but is also fraught with grave danger of dividing the society on caste or communal lines. The allotment of land to such bodies/organisations/institutions on political considerations or by way of favoritism and/or nepotism or with a view to nurture the vote bank for future is constitutionally impermissible.”

45. It is not as if a public property is in exclusive domain of the municipal administrators. It is a public property. Ultimately, all power is in the nature of a trust. In these circumstances, we cannot call upon the Commissioner or the Corporation to betray this trust, which is reposed in them. Eventually, public trust is paramount in discharge of public duties. We cannot direct the Municipal Corporation to dispose of the properties after invoking the above principles. Any decision and equally by us would run counter to these provisions and the mandate flowing from the MMC Act.

46. Lastly, what remains for consideration is the second contention of Mr. Nayak. They would submit that withholding of terminal/retiral benefits is in the nature of penalty or

punishment. Merely because the premises have not been handed over, these terminal benefits cannot be withheld is the argument. The entitlement to retired or terminal dues has no relation and is not connected with the conduct of the petitioners post retirement. Pension and gratuity etc. are rights flowing from rendering of satisfactory and complete services and therefore, there is no mandate in law to withhold the pensionary benefits is the further submission.

47. Mr. Nayak has placed heavy reliance on some decisions in that regard. He would, firstly, rely upon a judgment of a learned Single Judge Bench of Delhi High Court in the case of *Texmaco Ltd. vs. Ram Dhan and Anr.*³. That judgment directly interprets Section 4 of the Payment of Gratuity Act, 1972. That section reads as under:-

“4. Payment of Gratuity. - (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, -

(a) on his superannuation, or

(b) On his retirement or resignation,

(c) On his death or disablement due to accident or disease:

Provided that completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

³ Civil Writ Petition No. 1110 of 1989 (Delhi H. C.)

Provided further that in case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is minor, the share of such minor, shall be deposited with the Controlling Authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation. - for the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account;

Provided further that in the case of an employee who is employed in a seasonal establishment, and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation. - In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed **Ten Lakh rupees**.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (i)

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee may be wholly or partially forfeited

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

48. The gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation or on his retirement or resignation, on his death or disablement due to accident or disease. The Hon'ble Single Judge was of the opinion that there has to be something in the Act itself which would empower withholding gratuity and there being nothing provided by the Act, withholding of such gratuity for not vacating the staff or service quarters was in clear contravention thereof.

49. The decision then relied upon by Mr. Nayak in the case of *R. Kapur vs. Director of Inspection (Painting and Publication)*

*Income Tax and Anr.*⁴ is also interpreting the provision of gratuity to a retired Government officer. That was a case where the death-cum-retirement gratuity was claimed by a Government servant, who worked and retired as Director General of Income Tax. While working, he occupied a pooled Central Government accommodation. The licence fee was fixed at a certain amount. He had to pay the increased licence fee. Thereafter, he was transferred to Delhi. However, he continued to retain the Government premises. During the period of his occupation, proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 were initiated. The Estate Officer levied damages. Then, against that, an appeal was filed before the District Judge. The further proceedings are also referred in the judgment and order of the tribunal, from which, the appeal to the Hon'ble Supreme Court arose. The tribunal, on consideration of all these, held that death-cum-retirement gratuity cannot be withheld merely because the employee did not vacate the premises. The absence of any authority in law and power in the statute or an instrument having force of statute was the focal issue. The Hon'ble Supreme Court held as under:-

“.....The Tribunal on a consideration of the above held that death-cum-retirement gratuity (hereinafter referred to as 'D. C. R. G.') could not be withheld merely because the employee has not vacated the

4 1994(69) FLR 1137

allotted premises during the course of his employment. Inasmuch as the appellant continued to retain the allotted residence even after retirement, interest at the rate of 10% could be paid to the appellant.

As regard the refund of the excess damages i.e. Rs.1070 for the period 1-10-1979 to 20-11-1981, it was directed to be refunded and the recovery of damages could be made under Fundamental Rule 48-A (iv) (c) (ii) (8).

In this appeal before us the appellant urges that he would be entitled to 18% interest at least in view of judgment of this Court in *State of Kerala and others v. M. Padmanabhan Nair* 1983 (50) FLR 145 (SC). Relying on this ruling, it is submitted that there is unjustified culpable delay in issuing the No Demand Certificate. The Tribunal having held that D. C. R. G. cannot be withheld because of the pendency of the claim for damages should have awarded interest at the rate of 18% per annum.

The respondent has not entered appearance.

This Court in *M. Padmanabhan Nair's* (supra) has held as under:

“Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment”

The Tribunal having come to the conclusion that D. C. R. G. cannot be withheld merely because the claim for damages for unauthorised occupation is pending, should in our considered opinion, have granted interest at the rate of 18% since right to gratuity is not dependent upon the appellant vacating the official accommodation. Having regard to these circumstances, we feel that it is a fit case in which the award of 18% is warranted and it is so ordered. The D. C. R. G. due to the appellant will carry interest at

the rate of 18% per annum from 1-6-1986 till the date of payment. Of course this shall be without prejudice to the right of the respondent to recover damages under Fundamental Rule 48-A. Thus, the civil appeal is allowed. However, there shall be no order as to costs.”

50. Mr. Nayak, amongst others, also relied upon a judgment in the case of *V. U. Warriar vs. Secretary, Oil and Natural Gas Commission, Dehradun and Anr.*⁵. That was a decision rendered against the Secretary, Oil and Natural Gas Commission (ONGC), Dehradun and another by this court. The ONGC was aggrieved and dissatisfied with this decision and carried the matter in appeal to the Hon'ble Supreme Court of India. That judgment has been expressly reversed by the Hon'ble Supreme Court of India⁶. In reversing that judgment, the Hon'ble Supreme Court of India made the following pertinent observations and which are relied upon by Mr. Sakhare and Mr. Pakale:-

“17. Having heard the learned counsel for the parties, in our opinion, the appeals deserve to be allowed. It is no doubt true that pensionary benefits, such as gratuity, cannot be said to be “bounty”. Ordinarily, therefore, payment of benefit of gratuity cannot be withheld by an employer. In the instant case, however, it is the specific case of the Commission that the Commission is having a statutory status. In exercise of statutory powers under Section 32(1) of the Act, regulations known as the Oil and Natural Gas Commission (Death, Retirement and Terminal Gratuity) Regulations, 1969 have been framed by the Commission. In *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* [1975] 1 SCC 421 the Constitution Bench of this Court held that regulations framed by the Commission under Section 32 of the Oil and Natural Gas Commission

⁵ 2003(3) Mh. L. J. 168

⁶ (2005) 5 SCC 245

Act, 1959 are statutory in nature and they are enforceable in a court of law. They provide for eligibility of grant of gratuity, extent of gratuity, etc. Regulation 5 deals with recovery of dues of the Commission and reads thus :

"5. Recovery of dues. - The appointing authority, or any other authority empowered by the Commission in this behalf shall have the right to make recovery of Commission's dues before the payment of the death-cum retirement gratuity due in respect of an officer even without obtaining his consent or without obtaining the consent of the members of his family in the case of the deceased officer, as the case may be."

The above regulation leaves no room of doubt that the Commission has right to effect recovery of its dues from any officer without his consent from gratuity. In the present case admittedly the respondent retired after office hours of February 28, 1990. According to the Commission, he could be allowed four months' time to occupy the quarter which was granted to him. His prayer for extension was considered and rejected stating that it would not be possible for the Commission to accept the prayer in view of several officers waiting for quarters. He was also informed that if he would not vacate the quarter, penal rent as per the policy of the Commission would be recovered from him. But the respondent did not vacate the quarter. It was only after eviction proceedings were initiated that he vacated the quarter on May 16, 1991. In the circumstances, in our opinion, it cannot be said that the action of the Commission was arbitrary, unlawful or unreasonable. It also cannot be said that the Commission had no right to withhold gratuity by deducting the amount which is found "due" to Commission and payable by the respondent towards penal charges for unauthorized occupation of the quarter for the period between July 1, 1990 and May 15, 1991.

26. The matter can be considered from another angle also. It is well-settled that the jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power under that Article can be exercised by the High Court "to reach injustice wherever it is found". More than fifty years before, in *G. Veerappa Pillai v. Raman & Raman Ltd.* [1952] SCR 583, the Constitution Bench of this Court speaking through Chandrasekhara Aiyer, J., observed (at SCR p. 594) that the writs referred to in Article 226 of the Constitution are obviously intended to enable the High Court to issue them

“in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record, and such act, omission, error, or excess has resulted in manifest injustice.”
(emphasis supplied)

27. Similarly, in the leading case of *Sangram Singh v. Election Tribunal, Kotah* [1955] 2 SCR 1, dealing with the ambit and scope of powers of High Courts under Article 226 of the Constitution, Bose, J., stated: (SCR p. 8)

“That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of cases unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.”
(emphasis supplied)

The above principle has been reiterated and followed by this Court in several subsequent cases.

28. As already adverted to by us hereinabove, the facts of the present case did not deserve interference by the High Court in exercise of equitable jurisdiction under Article 226 of the Constitution. The respondent-petitioner before the High Court was a responsible officer holding the post of

Additional Director (Finance & Accounts). He was, thus, "gold collar" employee of the Commission. In the capacity of employee of the Commission, he was allotted a residential quarter. He reached the age of superannuation and retired after office hours of 28-2-1990. He was, therefore, required to vacate the quarter allotted to him by the Commission. The Commission, as per its policy, granted four months' time to vacate. He, however, failed to do so. His prayer for continuing to occupy the quarter was duly considered and rejected on relevant and germane grounds. The residential accommodation constructed by him by taking loan at the concessional rate from the Commission was leased to Commission, but the possession of that quarter was restored to him taking into account the fact that he had retired and now he will have to vacate the quarter allotted to him by the Commission. In spite of that, he continued to occupy the quarter ignoring the warning by the Commission that if he would not vacate latest by 30-6-1990, penal rent would be charged from him. In our judgment, considering all these facts, the High Court was wholly unjustified in exercising extraordinary and equitable jurisdiction in favour of the petitioner - respondent herein - and on that ground also, the order passed by the High Court deserves to be set aside."

51. According to the Municipal Corporation's counsel, two principles emerge from this judgment. One is that cases under the payment of gratuity Act must receive a distinct interpretation. In the absence of any stipulation in that enactment, withholding of death-cum-retirement gratuity for wrongful and illegal occupation or retention of the employer's premises is impermissible in law. However, there could be cases where pension and gratuity benefits are better than those guaranteed by the Payment of Gratuity Act, 1972 and the Pension Act, 1871. Such better benefits and which are obtained by employees in terms of settlement, agreement or contract with

the employer, stand on a different footing. All the more, if there are conditions attached to the benefit of pension and gratuity, flowing from such agreement, then, such cases would have to be considered and viewed differently. Similarly, if there are regulations, rules or any instruments or circulars/ administrative instructions, which have a statutory force or which supplement the statutory enactments, then, the retiral benefits can be withheld. The second important feature of this judgment, according to Mr. Sakhare is that this court's equitable and discretionary jurisdiction should not be exercised so as to benefit those employees who not only illegally retain the public premises, but assert that their terminal benefits be released in full, without any deduction. He would submit that some deterrent has to be there, failing which, there would be a gross abuse of the equitable jurisdiction of this court.

52. We see much substance in the contentions of Mr. Sakhare and Mr. Pakale. In the present case, what we find is that there is no blanket refusal to release the terminal benefits. There is a deduction effected therefrom and relying on the circulars of the Municipal Corporation, empowering the Commissioner to do so. That the Commissioner resorts to this circular provided he is satisfied that there is wrongful retention of the premises by

retiring employees and those superannuated from municipal services. They have not obtained any right independent of their status as employees of the Municipal Corporation and rendering municipal services, which would enable them to retain these premises. If there is no specific order converting their occupancy into permanent tenancy or otherwise on ownership basis, then, they must hand over these premises, else, they must face the deduction. Even the deduction is to the extent of 10% and the balance sum is adjusted towards the rent, which can be charged for such illegal and unauthorised occupancy. The rules and regulations in that behalf are clear. The conditions of allotment envisage that in the event the municipal premises are not handed over within a period of three months after cessation of service, then, the Municipal Corporation can charge monthly rent, which can be determined at the prevailing market rate. It is only in specific contingency such as medical condition and ailment of the employee concerned that a concession is granted, but that extends the period of occupation to six months. After that, the same conditions follow. In the event of sudden and unfortunate death of an employee in service as well, some concession is extended. However, if charging and payment of the increased rent is the obligation and that has to be paid for this extended occupation, then, we see no justification in the petitioners'

complaint. They cannot complain that the recoveries cannot be effected from them for such retention or illegal occupation. They would thus be benefited by all retiral benefits being handed over and they would, in turn, continue in possession wrongfully. They would continue to retain the premises and yet obtain full terminal benefits. That is certainly something which must be taken note of. To that extent, we find a distinct departure from the judgments rendered by this court and the Hon'ble Supreme Court of India on Payment of Gratuity Act, 1972. The judgment of the Hon'ble Supreme Court of India was rendered after the applicability of Payment of Gratuity Act, 1972 was conceded. However, in later cases, particularly in the case of ONGC (supra), there is a marked departure. Once there is a specific rule and regulation enabling the recovery of the amount due from the retiral benefits, the validity and legality of which is not challenged, then, no amount of reliance on the Payment of Gratuity Act, 1972 will assist the petitioners in Writ Petition No. 957 of 2013. the argument of Mr. Nayak therein and on this point does not arise for consideration in other cases. That issue is not thus common to all cases. Further, sub-sections (5) and (6) of the Payment of Gratuity Act, 1972 enable the Municipal Corporation to rely on its rules and regulations, which have a statutory force. Even if such rules and regulations are silent with

regard to withholding of retiral benefits, what the Hon'ble Supreme Court of India emphasises is that when parties seek equitable reliefs from this court under Article 226 of the Constitution of India, then, it is the duty of this court not to grant such reliefs or not to extend equities and discretion to such litigants. We, therefore, cannot ignore and brush aside this binding precedent. We have to strike a balance.

53. We made it clear to the petitioners' counsel that in the event the petitioners are ready and willing to handover peaceful possession of their premises within a specific time period, then, the recoveries and as threatened against them may not come into effect. There would be no further deductions or if there is any balance payable post such deduction, it would be released. We have not found any petitioner voluntarily coming forward and to give such an undertaking to this court. We are, therefore, constrained to pass a conditional order in that regard.

54. We, therefore, direct that if such of the petitioners, who surrender and handover peaceful possession of their premises (municipal premises in their possession) within three months from today, the Municipal Corporation shall not make any further deductions, but release all the balance sums due and payable with proportionate interest to such employees. In the event the

petitioners do not handover the premises within this period and continue to retain them, then, all consequences in law shall follow. Meaning thereby, the Municipal Corporation can proceed with its action under section 105B and other provisions of the MMC Act and recover penal rent/damages/compensation as well. That can be recovered by attaching movable and immovable properties of the occupants.

55. However, we have seen a very peculiar feature of this case, Some of the petitioners have retired long time back. Some of these petitions have been filed and are pending in this court for more than five years. In some cases, we have found that this is a successive round of the litigation. This court has also passed some orders for protecting possession of the occupants. We would, therefore, direct the Municipal Corporation not to take into consideration the pendency of these petitions and the period during which the interim order was in force, so as to deduct and adjust the municipal dues in the aforesaid manner. To that extent, the Municipal Corporation stands restrained from enforcing its circulars and decisions withholding or seeking to adjust the retiral dues.

56. We have also found that some assurance, which cannot be termed as a promise enforceable and within the meaning of

Section 115 of the Indian Evidence Act, 1872, was extended from time to time. At least those occupancies from 1960 onwards were taken into account for consideration and extension of genuine benefits. These are municipal structures, which have been now in occupation of these persons for more than four decades. They have not made any provision for housing in Mumbai, either for themselves or their family members. In the event the municipal Corporation decides to develop these properties, particularly at Parksite (Vikhroli), Deonar (Chembur), Barvenagar (Ghatkopar), Mithanagar (Goregaon), Malvani (Malad) etc. and in the event any private party/developer or builder is engaged for development of these municipal properties/land, then, dependent upon the agreements that such developers and builders are ready and willing to execute with the petitioners and take over the entire responsibility of their re-housing/re-accommodating, then, the Municipal Corporation shall not, in any manner, prevent the petitioners from obtaining the benefits under such private arrangement of their rehabilitation. Even if these persons desire relocation to other municipal lands, which are developed/redeveloped, then, even to that course, the Municipal Corporation shall have no objection nor should prevent them from obtaining the benefits in terms of the agreement with the developers. However, we make it clear that it shall not be the

duty of the Municipal Corporation to provide any housing accommodation to the petitioners, much less allowing retention of the present municipal accommodation. Therefore, in the event such benefits are sought to be obtained by the petitioners individually or collectively, the Municipal Corporation should grant them the requisite no-objection certificates/permissions and shall not withhold them only on the ground that they had committed default in repayment of municipal dues, not handed over the municipal properties and premises within a reasonable time, after retirement. Similarly, because some legal proceedings have been initiated, that would not be a ground to withhold the no-objection or consent in the the event that is required or sought. We also direct that this will have no co-relation and the petitioners cannot perpetuate and continue their stay in their premises for they are held to be municipal premises. Once they assume this character, then, the petitioners cannot retain them and endlessly. The above advantage or benefit can be availed by the petitioners only after the municipal premises are handed over to the Municipal Corporation. This order and direction, therefore, to the Municipal Corporation is independent of its powers and its position in law.

57. To support the view that we have taken, it is necessary to refer to other judgments relied upon by Mr. Sakhare. Mr. Sakhare emphasises that the Hon'ble Supreme Court in the case of *S. D. Bandi vs. Divisional Traffic Officer, Karnataka State Road Transport Corporation and Ors.*⁷ observed that there are rules like Rule 7 of the Orissa Civil Services (Pension) Rules, 1992, whereunder, action can be taken for continuing to remain in occupation of Government premises unauthorisedly. Thus, apart from initiating proceedings for eviction against serving Government servant, action by invoking this rule can also be taken against those who have ceased to be in service.

58. Even with regard to criminal prosecution, the attention of the Government of India and the State Government was invited to Section 441 of the Indian Penal Code, 1860 (IPC) as amended by the Orissa Legislature vide the Penal Code (Orissa Amendment) Act, 1986 and it was emphasised that this provision enables the Government to prosecute the offenders for the offence of criminal trespass and even under Section 447 of the IPC. Thus, it would be justified even in launching criminal prosecution. Though the provision in the IPC was recommended to be amended, most of the State Governments did not evince any interest and therefore,

⁷ (2011) 15 SCC 718

that proposal was not pursued by the Hon'ble Supreme Court of India. It is in these circumstances that we are of the opinion that it is too late in the day to complain that no adjustments can be made or that even if adjustments or recoveries are permissible, they should not be made in the subject case. The Hon'ble Supreme Court has commented upon the increasing tendency to hold on to the Government property and termed that there is a mushroom growth of unauthorised occupation of Government premises in almost all parts of the country in flagrant violation of the rules prevailing in the civilised society, which is detrimental to the interest of a large number of Government servants, who have been waiting for years together for allotment of Government premises.

59. We have found that his reliance on a Single Judge Bench judgment of this court in the case of *Ramchandra Keshavrao Paralikar and Anr. vs. The Municipal Corporation of Greater Bombay*⁸ is apposite. From the discussion above, it is apparent that the law has not undergone any change. The learned Single Judge's view on the aspect and point noted above still holds the field. We respectfully concur with the same.

⁸ Writ Petition No. 118 of 1983

60. As a result of the above discussion, the writ petitions fail. Rule is discharged in each of them. However, in the facts and circumstances of the case, there would be no order as to costs.

61. Our order and directions, particularly in relation to the consideration of the petitioners' request would have to be dealt with by the Deputy Municipal Commissioner (Improvements) and subject to the approvals of the further higher authorities.

(B.P.COLABAWALLA, J.) (S.C.DHARMADHIKARI, J.)