

Bombay High Court

Jayantilal Dharamsi And Ors. vs Board Of Trustees Of Port Of Bombay on 1 October, 1990

Equivalent citations: 1991 (2) BomCR 283, (1990) 92 BOMLR 596

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Bench: S Daud

JUDGMENT S.M. Daud, J.

1. These petitions under Article 226 of the Constitution take exception to the respondent's (BPT) attempt to exact rent on the basis of a document, hereinafter referred to as the `Kirloskar report'.

2. Petitioners are in occupation of plots of land belonging to the BPT and either the plots by themselves or the structures built thereon are being used for commercial or residential purposes. The plots were taken on rent from the BPT in between the years 1940 to 1950. From time to time there have been increases in the rent payable by the petitioners. Affairs of the BPT are regulated by the Major Port Trust Act, 1963 (MPT Act). The BPT's real estate, including structures, covers an area of about 720 hectares. The land owned by the BPT ranges from Colaba to Ravli junction inclusive of PIRPAU, Butcher Island, Titwala and other islands. About 306 hectares of the area are occupied by the lessees of the BPT holding leasehold rights under different tenures.

3. The BPT entertained a feeling that the real estate owned by them was not yielding as much of an income as it should. Therefore, it inserted an advertisement which was published in various newspapers including The Times of India issue dated 30th August, 1978. The advertisement invited proposals from Consultancy firms/Practising Valuers to undertake an exercise to ascertain the market value of lands of the entire BPT, including land in the docks and bunders. The scope of service expected from the consultancy firms was -

(i) To give an estimate of the market value of the BPT land, dividing them into convenient zones, and blocks to be delineated on the Port Trust estates and having regard to the various factors relevant to the valuation for the Port Trust estatesin all the land a admeasuring about 1800 acres....

(ii) The estimate of market value should indicate values of lands both in vacant and occupied conditions and for different users;

(iii) The market value should be given separately for each zone or block in two relevant dates, viz. as on 1st January, 1975 and 1st January, 1978.....(the latter date being later on varied to 1st January, 1980.)

(iv) To lay down a general formula for the guiding principles to enable the Port Trust to arrive at land values rationally at a future date and realise a fair share of the future increase in land values periodically.

The Consultants submitted a report on December 25, 1980. They explained their approach and methodology in Chapter III. It was made clear that the complexity of the assignment involved many

aspects and that data had been collected from the records of the different departments of the BPT, physical verification of the conditions at various sites, from Associate Expert Valuers, from the legal department, development plans of Greater Bombay, economic factors influencing the land value in the city like Bombay, on the basis of land and building sale transactions from 1970 onwards, and prevailing price of sale transactions in respect of land and structures etc.etc.. The Consultants had deployed a team of Management Consultants, Economists with assistants, Chartered Accountants, Urban Planners, Civil Engineers, legal experts valuation experts and assistants. In Chapter IV of the report, the Consultants dealt with the practice influencing land prices in Bombay. While dealing with this aspect it was opined that the original reason for giving the BPT lands on lease was to support and indirectly assist the growth of Bombay Port. The Port having grown to its present dimensions, the original purpose could be declared as having come to an end. In fact the development had been of such a magnitude that the Port had come to a saturation point. Continuance of the leasing system at subsidised rates for a long time would mean contributing to the over-crowding and depriving the BPT of its right to use land for the development of the Port and its facilities. This necessitated an increase in the rent and its periodical revision - both being necessary and legitimate. A table showing the comparison between increase of wholesale prices and land rates was drawn up and that table gives the wide divergence between the two, having 1970-71 as the base year will 100. While the wholesale price index stood at 175 in 1974-75, the land rates were 600 for residential and 900 for commercial/industry users. For the year 1979-80, the wholesale price index stood at 217 whereas the land rates stood at 1100 for users of residential and 1500 for commercial/industry. A table showing the population of Greater Bombay was drawn up and this showed that there had been an increase from 9,27,990 in 1901 to 60,30,000 in 1971. It was observed that there was no necessity to continue with long leases that there was an absolute necessity to revise the price of land owned by the BPT- the recommendation being that such revisions should be more and more frequent. The yield rate from the land i.e. rent. should be equal to that of the commercial rate of interest. The object of the recommended revisions and increases was explained in the report at para 5.1.1 thus :---

"The Bombay Port Trust is a statutory organisation which is created as a "body corporate" under the Trust Act, 1873, and reconstituted by the Bombay Port Trust Act, 1879. The trust has been entrusted with the management and conduct of Port activities and has been vested with all powers incidental and essential to carry out these functions. To mention a few powers in brief : to acquire and own property - moveable as well as immoveable, to employ personnel, to raise finance by taxes, port-fees, pilotages from the units availing of the services rendered by the BPT to raise loans etc. and to spend money on various matters.

The Port activities to be carried out and the powers incidental thereto are provided for in details by the relevant Port Trust Acts. As a part of this, the BPT is entrusted with the ownership of approximately 1800 acres of land, either original or reclaimed. These property rights vested in BPT are to be exercised so as to attain the objectives set before them which imply creating the facilities and services essential in general for the public interest."

The Consultant's remark about the rent being outpaced by the maintenance expenses is in these words :---

"The rent of the rented land, which is almost 1/3 of the land possessed by the BPT, has remained stationary and for long years, whereas the cost for maintaining the estates and services are increasing day-by-day and on account of the general growth of the Bombay Port Harbour, the lessees are enjoying advantages directly and indirectly, in having landed property in the vicinity of the BPT activities. Naturally it is not wrong on the part of the owners of the estate to have a feeling that they are not getting a fair share as owners on the land which has an added value arising out of the growth of the Port activities conducted by the BPT itself. The Outcome of this feeling is that the BPT has tried to revise the rent rates in the years 1951 and 1968, especially for monthly and 15 monthly rents, wherever such revision was possible. The revised rent rates were accepted by most of the lessees but were also challenged by a few of them either in courts of law or by refusing to pay the revised rent and additional proportionate deposits therefore."

In regard to the legal position, the Consultants agreed that all the leases were governed by the Transfer of Property Act, 1882 (TP Act). However, the leases entered into by the BPT in the earlier years had turned out to be not beneficial to the lessor because they contained certain clauses. These clauses conferred a possibly unintended advantage upon the lessees, with the result that getting actual possession was difficult and time-consuming. The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Rent Act), did not apply to BPT land, which, because of it being a "local authority" had earned an exemption from the operation of the Act vide section 4 thereof. The report then referred to information collected in regard to land use from leading international ports. The Consultants spoke of different methods of valuation of land and opted for a blockwise valuation. In para 8.9 this was explained. At the end the Consultants recommended thus :---

"The land values cannot, however, be worked out without reference to yield. As pointed out more than once, the BPT lands are not to be sold, they are only to be leased. Thus, what is real is the lease-rent and the land value is notional. To connect lease-rent with land value, we have to think of a reasonable yield rate. We consider it very reasonable to assume a 12% yield on residential use and 15% on commercial and industrial use."

They recognised that the figures suggested by them were not binding on the BPT which was left with the option to decide for itself as to what yield rates would be appropriate.

4. On receipt of the Kirloskar Report the Secretary of the BPT drew up a note dated August 4, 1982, suggesting that rents be enhanced to bring them in line with the recommendations made by the Kirloskar Consultants. The increases were to be based on the assumption that land on which there were lessees was worth Rs. 521 crores. The trustees were to consider the Secretary's proposal in their meeting scheduled for August 9, 1982. At the request of some of the members who pleaded that they had not had sufficient time to study the report, the meeting was adjourned to 23rd August, 1982. At that meeting the proposals were accepted in toto, it being resolved that iniquities in individual cases could be looked into by the management to give relief against unintended distress. The revised rates had to be brought into force from 1st October as the enhancement would have to be preceded by quit notices. In the light of this resolution, the lessees including the petitioners, were served with notices terminating their tenancies coupled with the option that they could continue upon their agreeing to pay the revised rent fixed at 12% for residential premises and 15% for commercial/industrial

premises - these rates being pegged to the appreciated value of the land as computed in the Kirloskar Report. The result of the suggested increase as from 1982 together with the earlier ones acquiesced in is given below petition-wise :

1) Jayantilal Dharamsi - W.P. No. 35 of 1983.

Year Plot No. G-2. Plot No. H-1.

1948 --- 66.44 1955 166.69 ---

1968 222.97 87.08 1972 278.71 108.05 1976 445.94 181.05 1977 515.61 208.26 1978 585.29 235.47
1979 654.97 262.68 1980 724.65 289.90 1981 794.33 317.11 1982 7,082.02 4,515.86

2) Taherbhai Tayabali - W.P. No. 89/83.

1951 99.37 1962 296.44 1972 370.55 1976 608.77 1977 701.44 1978 794.04 1979 886.68 1980 979.32
1981 1,019.02 1982 13,398.10

3) Janata Iron & Trading Co. - W.P. No. 90/83.

1960 100.28 1969 173.20 1972 219.00 1976 341.01 1977 395.76 1978 450.51 1979 505.25 1980
560.01 1981 614.76 1982 2,111.36

4) Indian Cable Co. Ltd. - W.P. No. 984/83.

1960 604.43 1968 805.91 1972 1,007.39 1976 1,511.09 1977 1,762.93 1978 2,014.78 1979 2,266.63
1980 2,518.48 1981 2,770.33 1982 26,831.64

5) Shaiklal Barmare - W.P. No. 1375/83.

1961 88.06 1969 133.28 1972 165.17 1977 248.75 1978 288.55 1979 330.34 1980 372.13 1981 411.93
1982 453.72 1983 8,507.25

6) Saudagar Jehangir - W.P. No. 2311/83.

Plot No.7 Plot No. 16 Plot No. 17/A
1968 240.12 758.77 47.82
1970 240.12 758.77 60.14
1972 240.12 758.77 60.14
1977 240.12 789.41 90.21
1978 240.12 789.41 105.25
1979 240.12 789.14 120.28
1980 240.12 817.79 142.00
1981 240.12 826.89 157.60
1982 240.12 868.71 165.39
1983 1,680.08 7,704.83 3,097.67

- 7) Mohamed Ismail Ebrahim - W.P. No. 2719/83.
1975 1,262.46
1983 5,234.74
- 8) Nuriddin Kalimuddin - W.P. No. 1734/85
1961 126.62
1969 191.64
1972 237.50
1977 357.68
1978 414.90
1979 474.99
1980 535.08
1982 652.40
1983 12,232.49
- 9) Batliboi & Co. Ltd. - W.P. No. 1734/85.
1974 2,470.37
1975 2,617.70
1975 2,811.00
1981 3,090.33
1982 11,977.96
- 10) Judith Rebello - W.P. No. 2146/85.
1959 244.00
1968 278.78
1971 389.14
1972 486.43
1974 599.52
1977 925.93
1977 1,075.81
1978 1,225.69
1979 1,375.52
1980 1,498.80
1981 1,675.33
1982 6,743.85
- 11) P.M. Tanna, W.P. No. 511/86.
1960 83.60
1967 123.20
1973 182.60
1977 275.00
1978 319.00
1979 365.20
1980 411.40
1981 455.04
1982 501.60
1983 8,261.01
- 12) M/s. Vegoils Ltd. - W.P. No. 552 of 1986.
1976 81.97
1977 93.56
1978 105.15
1979 116.74
1980 128.34
1981 455.40
1982 501.60
1983 8,261.01
- 13) Ramesh Mansukhlal Shah - W.P. No. 822/86.

1968	48.75	
1970	60.14	
1977	142.67	
1978	166.44	
1978	190.22	
1979	214.00	
1980	237.78	
1981	261.55	
1983		5,421.13
14) Mohamed Umar Hanmohamed & ors. - W.P. No. 1223/86.		
Plot No.8 Plot No.8/A.		
1972	84.45	100.78
1977	126.89	151.17
1978	141.79	176.37
1979	168.90	201.56
1980	190.01	226.76
1981	211.13	251.95
1982	232.24	277.15
1983	3,610.24	5,190.71
15) The Ocean View Co-op. Hsg. Society - W.P. No. 2031/89.		
1970	2,408.20	
1971	3,612.30	
1986	25,407.64	
16) Ajanta Ideal Co-op. Hsg. Society - W.P. No. 2601/89.		
1971	1,687.08	
1972	2,530.62	
1986	26,284.75	

The petitioners were not agreeable and applied for a reconsideration of the rents demand

5. Generally stated, the case of the petitioners is that the Kirloskar Consultants had been virtually pointed out their role. They were given directions to fix the yield rate on the basis of the then prevalent value of the land. This communication was itself in violation of the expected reasonableness and fairness from the BPT which was as instrumentality of the State and an authority within the contemplation of the expression "State" appearing in Article 12 of the Constitution. The BPT could not profiteer because it had been exempted from the purview of the Rent Act under section 4. In fact, the exemption was given on the understanding that being and instrumentality of the State, the BPT would not take advantage of the position in which it was placed by being the owner of large chunks of land. The enhancement in rent claimed was out of all proportion to the maintenance and service charges. The valuation of the lands taken for fixing the yield was arrived at by taking market forces as the base. This was impermissible for otherwise a State-instrumentality would be doing that which the Rent Act prevented ordinary landlords from doing. Petitioners sought writs to quash the communications addressed to them terminating their tenancies as an alternative to calling upon them to pay exorbitant rents.

6. The BPT in its return defends its action on various grounds. It was contended that its estate was not bringing an adequate return having regard to the value thereof. It was this which had constrained the Trustees to raise the rent. The BPT had to perform several functions under the MPT Act and all these functions were in the nature of public purposes. The Kirloskar Consultants had been given a mandate to suggest a scientific and rational basis for fixing rent of different categories of lessees. These Consultants had taken relevant factors into consideration and thereafter submitted a report. The report had been subjected to an in-depth study by the BPT authorities. The Trustees had discussed the matter fully. The valuation of the land fixed at Rs. 521/- crores by the Kirloskar Consultants was not arbitrary or unreasonable. On the basis of this valuation, the BPT had called upon its tenants to pay at 12 to 15 per cent, depending upon the user of the land i.e. whether it be for residential or commercial/industrial purposes. The lessees holding long term leases had not been touched, though they would be, as and when the periods of their leases expired. Expenditure on maintenance had been gradually raising and this was taken into consideration to arrive at the net percentage return of 12 and 15 per cent mentioned above which was much below that compared to the gradual rise in the maintenance costs. As it is there was a disparity between the realised rent and the billed rent. In 1989-90 for instance it had a minus rate of return taking into consideration the expenditure incurred on maintenance. As early as the year 1962, the BPT had been told by a World Bank team that the rate of return on its real estate was hopelessly inadequate and needed a review. This was further commented upon by the Comptroller and Auditor-General of India in his report for the year 1979-80. Having regard to all these factors, the BPT which was under a legal obligation to secure a fair and reasonable revenue for its estate for attending to its manifold public duties, had proposed the enhancement assailed in the petitions. The petitions were without merit and deserved to be dismissed with costs.

7. In regard to the justification of the BPT for raising rent, the petitioners have submitted rejoinders. Therein it is contended that the expenses taken into consideration by the BPT for justifying the enhancement is a distortion of the real position. The furnished expenses relate not only to lessees like the petitioners, but also employees of the BPT who have been provided with quarters, as an incident of their employment. The expenses incurred on service quarters cannot be a part of the expenditure which the BPT was under any obligation to meet by over-charging lessees like the petitioners. All that the BPT could take into consideration for enhancing the rent payable by lessees like the petitioners, was the expenditure incurred on non-service tenants.

8. A number of petitioners are lessees of plots which cannot be built upon and which are required to be kept open by virtue of clauses appearing in the covenants of lease. These are petitioners figuring in Writ Petition No. 35 of 1983, whose plots are at Sewree; W.P. No. 1890 of 1983, whose plots are at Darukhana, W.P. No. 1734 of 1985, whose plots are at Mazgaon, W.P. No. 1375, 2311, 2719 of 1984, their plots being at Mahim, W.P. Nos. 511, 822 and 1223 of 1986, their plots also being at Mahim, W.P. No. 984 of 1983 whose plot is at Frere Estate, it being used for storage of non-hazardous goods; W.P. No. 241 of 1984 whose plot is at Mahim being used for storage of timber and in respect of petitioner in W.P. No. 2146 of 1985 - the plot has a structure the user whereof is limited to parking and repairs to lorries-situated at Mazgaon. Petitioners in W.P. Nos. 2031 and 2061 of 1989, have their plots of lands at Colaba on which stand multi-storeyed buildings used for residential purposes. The building in the first Writ Petition has ground plus seven storeys with 28 flats and in

the other there are a stilt plus 11 floors. These petitioners plead some special difficulties in their plots. In regard to the Mahim plots, it is contended that the lessees are not allowed to put up any structures. Petitioners in the 1989 petitions contend that what they took on lease was open plots of land which had not been developed. The entire development was attended to by them and no amenities of any nature had been provided by the BPT.

9. Two questions arising for determination in these petitions may be formulated thus :---

(1) Whether the demanded raise in rent is violative of the MPT Act ?

(2) Whether the demanded raise smacks of arbitrariness/caprice and is therefore, violative of the constitutional restraint upon the BPT as an instrumentality of the State?

10. The first question has to be considered in the background of section 33, 34, 49 and 52 of the MPT Act. These are given below with the headings of the Chapters in which they are to be found. Sections 49 and 52 appear in Chapter VI. Its heading is thus :---

"Imposition and recovery of rates at Ports".

The two sections to the extent relevant are 49(1) (c) and (d) and 52 read thus :-

"49 (1). Every Board shall, from time to time also frame a scale of rates on payment of which, and a statement of conditions under which, any property belonging to, or in the possession or occupation of, the Board or any place within the limits of the port or the port approaches may be used for the purposes specified hereunder :---

(a)

(b)

(c) leasing of land or sheds by owners of goods imported or intended for export or by steamer agents,

(d) any other use of any land, building, works, vessels of appliances belonging to or provided by the Board."

"52. Every scale of rates and every statement of conditions framed by a Board under the foregoing provisions of this Chapter shall be submitted to the Central Government for sanction and shall have effect when so sanctioned and published by the Board in the Official Gazette."

Sections 33 and 34 appear in Chapter IV which goes under the heading "Property and Contracts". The two sections, to the extent relevant, read as follows :---

"33. Subject to the provisions of section 34 a Board shall be competent to enter into and perform any contract necessary for the performance of its functions under this Act."

"34. (1) Every contract shall, on behalf of a Board, be made by the Chairman or by any such Officer of the Board not below the rank of the Head of a Department as the Chairman may by general or special order, authorise in this behalf, and shall be sealed with the common seal of the Board.

Provided.....

Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years, and no other contract whereof the value or amount exceeds such value or amount as the Central Government, may from time to time fix in this behalf, shall be made unless it has been previously approved by the Central Government."

It is the petitioners, contention that the impugned raise falls under Chapter VI. The rates spoken of by that Chapter have been defined in section 2(v) to include rent. Every set of rates or variation in the terms of rent had to be the result of a framed scale which alongwith the statement of conditions had to be submitted to the Central Government for sanction. It was only the rates and conditions so sanctioned and published in the Official Gazette, which could be enforced by the BPT. Admittedly that had not been done in the present case and therefore, the demand made upon the petitioners was violative of the law. The BPT's answer is that Chapter VI applies only to rates chargeable by it in respect of temporary or transitory leases and that too in respect of property "within the limits of the port or the port approaches". The lands figuring in the petitions are outside the limits of the port and in support of this submission reliance is placed upon the declaration about the limits of the Port of Bombay issued under section 5 of the Indian Ports Act, 1908. Now so far as this notification dated 28th October, 1972 issued by the Government of India in the Ministry of Shipping and Transport, is concerned, the petition lands admittedly do not fall within the port limits. Counsel for the BPT relies upon the heading of Chapter VI to support the contentions advanced by him. It is argued that the Chapter relates to rates at ports and rates at ports and that on property falling outside the port limits would not be governed by section 49. Petitioners' reply is that the Chapter heading cannot control the clear words of section 49. This contention is sought to be supported by the following passage from *Frick India Ltd. v. Union of India*, reported in 1990 (48) E.L.T. 627 S.C.

"It is well-settled that the headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing provisions which are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision. But even in such a case it could not be used for cutting down the wide-application of the clear words used in the provision."

There is a common-sense way of looking at the issue. The sections relied upon by the parties both relate to rent in a broad sense of the word and the question is which of the sections is applicable to lands outside the port limits. The Chapter heading in which sections 49 and 52 appear may not be decisive. Nonetheless, it is a relevant factor to be taken into consideration, when there be a doubt as

to the true meaning and import of the sections appearing therein. Chapter VI deals with rates on ports and section 49 in terms speaks of rates for the use of port property for various specified purposes. Sub-section (a) speaks of property for the purpose of approaching.....any buoy, mooring, wharf, quay, pier, dock, land, building etc. etc.....Sub-section (b) speaks of use of the port's property in entering upon or plying for hire etc. on any wharf, quay, pier, dock etc. etc.....Sub-section (c) speaks of leasing of land or sheds by a particular class of persons, being the owners of goods imported or intended for export or by steamer agents. Sub-section (d) is in the nature of a remainder, for it deals with "any other use of any other land and the building etc. etc. belonging or provided by the Board". Had sections 33 and 34 not found a place in the BPT Act, something could have been said for the view canvassed on behalf of the petitioners viz. that sub-section 49(1) did govern the rates chargeable to lessees of the petition lands by the BPT. Chapter IV deals with property and contracts and the 1st section confers upon the Board a competence to enter into and perform any contract necessary for the performance of its functions under the Act. Section 34(1) prescribed the mode in which contracts shall be drawn up and expressed. The second proviso deals with the contracts for the acquisition; sale or lease of immoveable property for a term exceeding 30 years and other contracts whereof the value or amount exceeds such value or amount as the Central Government may from time to time fix in this behalf. In respect of such contracts i.e. specified above they can take effect only after the Board has secured the previous approval of the Central Government. In other words, contracts other than those fettered by the second proviso can be freely entered into by the BPT on its own. The lease contracts figuring in this instant case pertain to durations of month to month and 15 monthly ones. Sections 33 and 34 have to have a meaning and there is no reason why the petition leases should not be held to be governable by these sections. It would require some strain upon the language to take recourse to sections 49 and 52 for governance of the petition leases. Where two parts of a statute may be applicable to a given set of circumstances, the rules of construction require that the one which has a more apposite application should be preferred as against which can only be applied with some difficulty. In terms, section 49 would appear to govern leases of a temporary and transitory character and only to the use of property meant for such temporary and transient phases. As against that, sections 33 and 34 apply to leases of land outside the port areas and where the duration of the lease is month-to-month or 15 monthly. Negating the contention raised by the petitioners, I hold that there is no violation of the MPT Act in the demanded raise.

11. Now to the crucial question. Petitioners submit that the BPT being an instrumentality of the State cannot act arbitrarily or capriciously. It has to conform to standards of fairness and reasonableness and the said standard will be that which underlies rent control legislation. While the statutory limitations in their full rigour may not be applicable, the BPT is not free to devise its own ways to circumvent the restrictions in regard to charging of exorbitant rent. Section 4(1) of the Rent Act exempts the BPT from the restraints placed upon landlords governed by the enactment. But this does not give it a freedom to do what it will irrespective of the well-known concepts of fairness and reasonableness. The BPT agrees that it cannot act arbitrarily. But Counsel representing it plead that the limitation placed upon the landlords under the Rent Act will not, whether in letter or spirit, control its power to act. The standard of reasonableness and fairness expected from an instrumentality of the State has to be matched against another expectation from such an instrumentality. In regard to the BPT it is a statutory body vested with diverse obligations and is

under an obligation to maximise its revenues so as to be in a position to discharge its many responsibilities under the MPT Act. The decided cases on this subject have a bearing on the question and I will not turn to a few of them beginning with *M/s. Kasturilal Lakshmi Reddy v. The State of Jammu & Kashmir*, . The State of Jammu & Kashmir was accused of having created a monopoly in favour of private party, and this, without having invited tenders for the extraction of a much valued raw material. The Court had this to say on the subject :---

"If the Government awards a contract or leases out or otherwise deals with its property or granted any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional constitutional and invalid.....It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State : such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so, such as when a Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property."

Both parties rely upon *Kasturilal* (supra) in support of their somewhat different stands. Petitioners point to the emphasis on reasonableness and fairness in the passage, whereas the BPT emphasises the words laying stress upon the State being exhorted not to favour any particular class of people. What has to be remembered is that we are not dealing here with the grant of a lease for the first time but the continuance thereof subject to a radical variation in the rents payable and deposit expected of the lessees. *Kasturilal* does emphasise the assumption that the Government and its agencies act with fairness and rationally, by observing :-

"One basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the Government action."

In *Ram and Shyam Company v. State of Haryana & others*, , a Division Bench speaking through D.A. Desai, J., said :-

"The marked difference lies in this that while the owner of private property may have a number of considerations which may permit him to dispose of his property for a song. On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be

nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds."

In *Harminder Singh Arora v. Union of India and other*, a three member Bench of the supreme Court said :-

"The Government may enter into a contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. In the absence of any specific policy of the Government it is open to the State to adopt any policy. But if the authority or the State chooses to invite tenders then it must abide by the conditions laid down in the tender notice and the result of the tender and cannot arbitrarily and capriciously accept a much higher tender to the detriment of the State."

Justice Chinnappa Reedy speaking for a two member Bench in *Sachidanand Pandey v. The State of West Bengal*, "State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be served. Public interest is the paramount consideration. One of the methods of securing public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating a departure from the rule, but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

For the BPT, the submission is that by an accident of history, the petitioners and their likes came upon the BPT's land at a stage when there was not much demand for sites belonging to it. They got the plots of land at cheap rates and continuance of the leases, confers upon them an unintended advantage. This has enabled them not only to deprive the BPT of its lawful dues, but what is more reprehensible, confers upon them a position which works to the detriment of others. Reference is made to many decisions about the BPT not being bound by the Rent Act to contend that unless it is allowed to charge appropriate rent it will suffer from lack of resources which in course of time will affect it adversely. Attractive as this argument is, and, though it could be said to be in conformity with some of the decisions cited above, it is not as if the BPT or for that matter any State instrumentality has been given complete freedom in the matter of rent chargeable and eviction of tenants and this is where I come to the purpose underlying grant of exemption from rent legislation to Government and local authorities vis-a-vis their properties.

12. In *Rampratap, Jaidayal v. Dominion of India* 54 Bom.L.R. 927, the Court was faced with a challenge to the vires of section 4(1) so far as it freed Government or local authorities owned tenements from the restraints placed upon landlords under the Rent Act. The then C.J. had this to say in justification of the exemption :-

"Now, it is clear that in this case the Legislature was not in any sense exempting the Government from the operation of the Act in order to permit the Government to do the very thing which the

Legislature was prohibiting in the case of landlords who were not a local authority or Central or State Government. It is not too much to assume, as the Legislature did in this case assume, that the very Government whose object was to protect the tenants and prevent rent being increased and prevent people being ejected, would not itself when it was the landlord do those very things which it sought to prohibit its people from doing, and, therefore, the underlying assumption of this exemption is that Government would not increase rents, and would not eject tenants unless it was absolutely necessary in public interest and unless a particular building was required for a public purpose."

The correctness of this assumption underlying section 4 was approved of by the Supreme Court in Baburao Shantaram More v. Bombay Housing Board, , when the Court said :-

"The Board (Housing Board), on the other hand, is an incorporated body brought into existence for the purpose of framing housing schemes to solve the problem of acute shortage of accommodation in Bombay. There are no shareholders interested in the distribution of any-profit. It is under the control of the Government and acts under the orders of the Government. In effect, it is a Government sponsored body not having any profit making motive. No material has been placed before us which may even remotely be regarded as suggesting, much less proving, that the Co-operative Housing Societies or their members stand similarly situated vis-a-vis the Board and its tenants It is the business of the Government to solve the accommodation problem and satisfy the public need of housing accommodation. It was for the purpose of achieving this object that the Board was incorporated and established. It is not to be expected that the Government or local authority or the Board would be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. Therefore, the tenants of the Government or local authority or the Board are not in need of such protection as the tenants of private landlords are."

The underlying assumption has been repeated in some more cases like Ashoka Marketing Ltd. v. Punjab National Bank & others, . Therein, the Court quoted with approval a passage from Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay, . The Marfatia case will be referred to in greater detail at the appropriate place. Counsel for the Board argues that the Supreme Court has taken a different view on these matters and the first case put forth by them in support of their contention is S. Kundaswamy chettiar v. State of Tamil Nadu and Another, . In that case what was under consideration was the grant of an exemption to religious and charitable public trusts by the State of Tamil Nadu vis-a-vis properties owned by the said trusts from the fetters of the corresponding Rent Control legislation. The exemption's validity was upheld and this was because, to quote the words used in the decision.---

"The legislature itself has made a rational classification of buildings belonging to Government and buildings belonging to religious charitable, educational and other public institutions and the different treatment accorded to such buildings obviously proceeds on the well-founded assumption that the Government as well as the landlords of such buildings are not expected to and would not indulge in rackrenting or unreasonable eviction."

The trusts had made representation that having regard to the statutory restraints on rent chargeable by them under the Rent Control legislation, they were not in a position to discharge their religious or charitable duties. To get over this limitation they sought for and obtained exemption. This exemption was sustained by the Court in these words :-

"It is obvious that if the Trustees of the public religious trusts and public charities are to be given freedom to charge the normal market rent, then to make that freedom effective it will be necessary to arm the trustees with the right to evict the tenants for non-payment of such market rent. The State Government on material before it came to the conclusion that the 'fair rent' fixed under the Act was unjust in case of such buildings and it was necessary to permit the trustees of such buildings to recover from their tenants reasonable market rent and if that be so, non-eviction when reasonable market rent is not paid it would be unreasonable, and if the market rent is paid by the tenants no trustee is going to evict them. It is therefore, clear that granting total exemption cannot be regarded as excessive or unwarranted."

Chettiar does not give an instrumentality of the State to charge whatever rent it seems proper. All that it says is that the exemption granted to public trusts was justified having regard to their grievance that the rent chargeable under the Rent Control legislation did not provide them with the wherewithal to execute duties they were expected to perform, as such public trusts. The Court however made it clear that the trustees were expected to behave. In other words, they were not to take advantage of the exemption conferred upon them to exact excessive rent or seek to evict their tenants without just cause. Counsel then relied upon *M.S. Shri Sitaram Sugar Co. Ltd. v. Union of India*, to contend that once the BPT is shown to have done what it could do to arrive at a proper conclusion, the Courts should not interfere. The view canvassed is stated in these words by the Supreme Court in *Shri Sitaram Sugar Co. Ltd.* (supra) :-

"Judicial review is not concerned with matters of economic policy. The Court does not substitute its judgement for that of the legislature or its agent as to matters within the province of either. The Court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegated power to an agent, it may empower the agent to make findings of fact which are conclusive provided that such findings satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact was reasonably based on evidence and whether such findings are consistent with the laws of the land. Price fixation is not within the province of the Courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority." (Underlings mine.) The words underlined should suffice to disabuse the mind of the Court giving a carte blanche to a local authority to devise any scheme for what it considers to be its legitimate dues. Counsel contends that profit is not a dirty word and that the Supreme Court has in proper cases allowed such enterprises to cross the cost-plus barrier. They rely upon relevant excerpts appearing in the *Oil and Natural Gas Commission v. Association of Natural Gas Consuming Industries of Gujarat*, . A three-member Bench of the Supreme Court speaking through Ranganathan J., reversed the High Court's decision striking down the price fixed by the O.N.G.C. to charge a particular class of consumers for the gas supplied by it. But there also, the O.N.G.C.'s Counsel accepted the limitation that his client did not have complete freedom to do what it wanted.

His position before the Court was stated thus by Ranganathan, J.

"Shri B. Sen, who appeared for the ONGC, made it clear at the outset that he was not disputing the proposition (a) that the ONGC is 'State' within the meaning of Article 12 of the Constitution; and (b) that it has a duty to act reasonably and fairly so as not to infringe the provision of Articles 14 and 19 and also in consonance with the directive principles of State policy set out, inter alia, in Articles 38 and 39(b) of the constitution."

The judgement refers to a number of works on the subject and the following is a passage appearing in a study prepared in collaboration with the Institute of Chartered Accountants of India :

"Costs alone do not determine the prices. Cost is only one of the many complex factors which together determine prices. The only general principle that can be stated is that in the end there must be some margin in prices over total costs, if capital is to be unimpaired and production maximised by the utilisation of internal surpluses while the cost plus pricing method is the most common, it may be argued that it is not the best available method because it ignores demand or fails to adequately reflect competition or is based upon a concept of cost which is not solely relevant for pricing decision in all cases. What is essential is not so much of current or past costs but a forecast of future cost with accuracy Generally pricing should be such as to increase production and sales and secure an adequate return on capital employed."

Again, the Court quoted with approval a passage on 'Public Enterprises' prepared by the Indian Institute of Public Administration and reading as follows :-

"A growing source of governmental revenue in many countries is the profits of public undertakings. In under-developed countries public enterprises fostered on public revenues are expected to play a more positive role in financing the countries' development than similar enterprises do in developed economies. In determining the price policies of these undertaking considerations of maximising revenue will not play as important a part as profits do in private enterprises, but within the limits set by the necessity to foster economic development, their price policies are designed to bring in some profits to the countries' general revenues. Public enterprises in the under-developed areas are to break ground in projects which are to be financed on an increasing scale, the price policies have to be so designed that significant surpluses are left within the projects to be employed either for their own expansion or for financing the expansion of other projects. In other words, there should be an element of profit in the prices of their products or in the cost of their services to the public."

Good as all this be in the matter of prices, what should not be forgotten is the reason for enactment of legislation to curb charging of excessive rent and other freedom given to landlords under the old laws to induct and oust tenants at will. This has been explained in Chettiar's case (supra) in the following words :-

"Unquestionably it is a piece of beneficial legislation intended to remedy, the two evils of rack-renting (exaction of exorbitant rent) and unreasonable eviction generated by a large scale influx of population to big cities and urban areas in the post. Second World War period creating

acute shortage of accommodation in such areas and the enactment avowedly protects the rights of tenants in occupation of buildings in such area from being charge unreasonable rents and from being unreasonably evicted therefrom."

The decision most apposite to the subject under consideration, and, to which I now turn is Marfatia (supra).

13. The case arose out of a judgement delivered by me and the landlords were the BPT. A tenant was sought to be evicted and that tenant's plea was that the notice terminating its tenancy, was, for reasons other than those which could said to be fair and reasonable or in public interest. In fact, the allegation was that the BPT was seeking to favour another person at its expense. This contention was negated by me and if memory serves me right, what I said was that the BPT had absolute liberty to determine any tenant's tenancy and that its motives for so doing were totally irrelevant to the legality of the action taken. The tenant went to the Supreme Court by way of an appeal after obtaining special leave. The late Chief Justice who spoke for the Court sustained Marfatia's contention that the BPT was subject to the constraints of fairness and reasonableness. Speaking of the Court he made the following observations :---

"When the State, the local bodies and public authorities which are `State' within the meaning of Article 12 are exempted from purview of Rent Control legislation, the basis of exemption is that such bodies would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. They would not act for their own purpose as private landlords do, but must act for a public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being hide-bound by the requirements of the Rent Act must act for public benefit Being a public body even in respect of its dealing with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction.....Every activity of a public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities (like BPT) in respect dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords, must be judged by that standard. If the governmental policy or action even in contractual matters fails to satisfy the test of reasonableness, it would be unconstitutional."

True, the Court did say that where the authorities constituted had taken a decision which could be said to be reasonable, the Court could not substitute that decision by another because of its view that it was a better one. It is in the light of the foregoing that the issue arising in this petition has to be resolved. What the BPT did was to appoint Consultants to draw up a report on the market value of the land owned by it. The terms of reference themselves suggested to the consultants that the BPT laboured under a belief that its lands were not yielding the proper revenue. The experts were into the subject and came out with the mystical figure of Rs. 521/- crores said to represent the value of the real estate in the possession of the tenants. The tenants did not include only people like the petitioners, who for the sake of convenience should be described as the non-service category, but

also its officers and employees in the occupation of service quarters. The expenses said to be incurred by the BPT for the maintenance of its real estate was so high that it was getting a return less than the insignificant. The money factor which went into the valuation made by the Kirloskar Consultants was by applying the present market value of the land in the occupation of the service also the non-service tenants. Is the BPT entitled to adopt this method as a base for revising the rents payable by only one set of tenants ? I agree that any untoward increases in the licence fee or occupation charges payable by the service-tenants would have to be compensated by the BPT by an increase in the pay, allowances, and possibly perquisites admissible to them. Therefore, an increase in the fees chargeable to service licensees or tenants would be self-defeating, and, in due course rebound on the BPT itself. But the entire load of expenses cannot be shifted to the non-service tenants. When the BPT seeks to exact rent which will correspond to the present day market value of the land, it is violating the basic assumption underlying the Rent Control legislation, Mr. Chinoy for one set of petitioners, argues, and rightly so, that rent legislation has been enacted on the basis of a public policy which may be stated thus :-

(i) The land owner/landlord is entitled to a reasonable return of his investment/cost.

(ii) The landlord/owner is not entitled to profiteer/take advantage of increase in land prices by seeking an increased return demanding higher rent computed on the basis of such increase in land prices."

Thus, though the underpinnings of the Rent Act may not apply in the strict sense to the BPT or any other local body exempted under section 4(1) of the Rent Act, the BPT, as Marfatia says is not expected to behave as an ordinary landlord would. An ordinary landlord tries to exact the best possible profit which he can from his holding. That is why the legislature had to intervene-and this was done in the public interest-and make laws to prevent landlords from exploiting tenants by seeking exorbitant rent or else face eviction. It is not open to an ordinary landlord to claim the benefits of appreciation in prices where this be based on the getting scarce of a limited resource viz. land, in the context of demand. The BPT may be entitled to get protection against an erosion in the rental as a result of inflationary trends; but no more. The BPT may be said to be acting reasonably and in fairness, if, and when, it demands an increase in the rent provided the said increase corresponds to the inflationary spiral. But when it seeks to demand more than that, in other words, tries to take advantage of its position as the owner of a scare and limited resource, it is stepping into forbidden territory, for, it is then not acting reasonably and fairly. This would be the position despite the statutory obligations it has to fulfil. There is of course a way out and that would be for the legislature to give complete freedom to State instrumentalities from all manner of letters, whether it be in respect of rent or prices so that resources for public needs of the State can be met from out of the income generated by public enterprises inclusive of scare resources in their possession. But democratic India governed by the Constitution of 1950 is not General Pinochet's Chile and as long as the Constitution prevails, Government and local authorities like the BPT, will have to go by the constraints underpinning standards of reasonableness and fairness inherent in rent control legislation. Regard being had to the authorities noted above, can it be said that the BPT has acted as would an instrumentality of the State enjoined to observe canons of reasonableness and fairness ? The precedents give a latitude to the State by exempting it from the full rigour of the Rent Act. This

does not however permit it to act in violation of principles which led to the enactment of rent and tenancy legislations. The spirit of such legislation applies for that is what the precedents say while justifying the exemption. The exempted categories have to conform to the expected behaviour which entitled them to the exemption. It has not been shown that the rental revenue of the BPT is such as inhibit it in the performance of its duties much less maintenance of its real estate. The attempt to pass on the entire liability of the maintenance expenditure on the non-service tenants is impermissible. This is no doubt that the BPT like all local authorities and public enterprises, can do with an increase in revenue. The benefits of such an increase can be passed on to the citizenry in the shape of improved services if not a reduction in taxes - direct or indirect. That however cannot be a reason for permitting it to fix the market value of its land in terms of the law of demand and supply and based there upon, charge also-called reasonable return. Tested thus, the increases proposed by the BPT are anything, but reasonable or fair. A mere look at the figures given above and the rents chargeable would show that the increase is astronomical. That cannot be permitted, for it is clearly arbitrary and capricious being based upon an inapplicable measure. What would be the reasonable rent that the BPT to evolve and so far as the present petitions are concerned, all that is necessary to be done, is, to give a declaration that the demanded increases coupled with termination of tenancies are violative of the rights of the petitioners. For that reason, they are unenforceable. Rule in these terms made absolute, with parties being left to bear their own costs. Rent being paid by the petitioners under an interim order passed by the Court shall continue as shall the Bank Guarantees, for a period of 16 weeks as from today.