

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

WP-LD-VC-78-2020

Prabhakar Tukaram Shinde )  
Councillor, Prabhag No.106, T-Ward, )  
Municipal Corporation of Greater Mumbai, )  
R/a 501 Amrutanuubhav CHS, Kesar Baug, )  
G.K. Gokhale Marg, Mulund (E), )  
Mumbai – 400 081. )... Petitioner

Versus

1. The State of Maharashtra, )  
Through its Secretary, )  
Urban Development Department, )  
Mantralaya, Mumbai – 32. )  
2. Municipal Corporation of Greater Mumbai, )  
Through its Commissioner )  
Municipal Head Office, )  
Mahapalika Marg, Dhobi Talao, )  
Chhatrapati Shivaji Maharaj Terminus, )  
Fort, Mumbai – 400 001. )  
3. The Mayor, )  
Municipal Corporation of Greater Mumbai )  
Mayor House, Veermata Jijabai Bhosale )  
Garden, E.S. Patanwala Road, Byculla (E), )  
Mumbai – 400 027. )  
4. Shri. Ravi Raja ) ... Respondents

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Dr. Birendra Saraf, Senior Advocate alongwith Mr. Hitesh Jain, Mr. Aseem Naphade, Mr. Chandansingh Shekhawat, Mr. Yashovardhan Deshmukh instructed by Parinam Law Associates for the Petitioner.

Mr. Kedar Dighe, AGP for the State.

Mr. A.Y. Sakhare, Senior Advocate alongwith Mrs. Oorja Dhond, Mrs. Pallavi Thaker and Ms. Sheetal Metakari instructed by Ms. Aruna Savla for Respondent No.2.

Mr. Ravi Kadam, Senior Advocate for Respondent No.3.

Mr. Aspi Chinoy, Senior Advocate alongwith Mr. Joel Carlos for Respondent No.4.

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**CORAM :**                   **S.J. KATHAWALLA &  
MADHAV J. JAMDAR, JJ.**

**RESERVED ON :**           **27<sup>th</sup> AUGUST, 2020**  
**PRONOUNCED ON :**      **21<sup>st</sup> SEPTEMBER, 2020**

#### **JUDGMENT ( PER S.J. KATHAWALLA, J.)**

1. The Petitioner – Prabhakar Tukaram Shinde who is a Councillor in the Municipal Corporation of Greater Mumbai ('MCGM') and has recently been appointed as the Group Leader of the Bhartiya Janata Party, has filed the above Writ Petition against the State of Maharashtra (Respondent No.1); the MCGM (Respondent No.2); the Mayor of MCGM (Respondent No.3); and Shri. Ravi Raja, the present Leader of the Opposition of the Municipal Corporation (Respondent No.4), for the following relief :

*“(a) That this Hon’ble Court be pleased to issue a Writ of Mandamus or any other appropriate Writ, Order or direction under Article 226 of the Constitution of India and after considering the legality, validity and propriety of the said Speaking Order dated 5<sup>th</sup> March, 2020 issued by the Respondent No.2 direct the Respondents to recognize the present Petitioner as the Leader of Opposition in the MCGM.”*

2. From the above prayer it is clear that primarily the Petitioner seeks a Writ of

Mandamus directing the Respondents to recognize him as the Leader of the Opposition of the MCGM.

3. The facts leading to the filing of the above Writ Petition are as under :

3.1 The elections for electing Councillors of the MCGM were conducted on 21<sup>st</sup> February, 2017, and the results declared, were as under :

Shiv Sena - 84;  
Bharatiya Janata Party (“BJP”) - 82;  
Indian National Congress (“INC”) - 31;  
Nationalist Congress Party - 9;  
Maharashtra Navnirman Sena - 7;  
Samajwadi Party - 6;  
All India Majlis-e-Ittehadul Muslimeen - 2; and  
Others - 6.

3.2 The aforesaid results indicate that Shivsena had secured the highest number of seats. The BJP was the largest party followed by the INC, which was the 2<sup>nd</sup> largest party, both in opposition to the Shiv Sena.

3.3 A meeting of all the above 82 elected Councillors of the BJP was held on 3<sup>rd</sup> March 2017, at which meeting it was unanimously decided that one Mr. Manoj Kotak would be the Group Leader of the BJP in the MCGM. Mr. Ashish Shelar, the then President of the BJP Mumbai, addressed a letter dated 3<sup>rd</sup> March, 2017 to the Divisional Commissioner, Municipal Administration informing him about the said meeting held on that day and about the decision appointing Mr. Manoj Kotak as the Group Leader of the BJP in MCGM.

3.4 The BJP decided to remain neutral in the MCGM and to play the role of a "*Paharekari*" i.e. to maintain surveillance.

3.5 In the General Body Meeting of the MCGM held on 30<sup>th</sup> March, 2017, Respondent No. 4 (Shri. Ravi Raja from the INC) demanded that the post of the Leader of Opposition be given to the BJP, considering that it is the largest Party in Opposition, and in case the BJP declines, then it be given to the INC being the 2<sup>nd</sup> largest Party in Opposition. This meeting was adjourned by the Mayor in order to seek a legal opinion from the Legal Department of the MCGM in this regard.

3.6 The Legal Department of the MCGM issued an Opinion dated 7<sup>th</sup> April, 2017, wherein it was opined that the post of Leader of Opposition should be offered by the Mayor to the second largest party i.e. the BJP and if the second largest party declines, it be offered to the third largest party i.e. the INC. This legal opinion *inter alia* took into consideration Section 371A of the Mumbai Municipal Corporation Act, 1888 ('the MMC Act').

3.7 A meeting of the MCGM was convened on 10<sup>th</sup> April, 2017, at which meeting, the Mayor informed all the members that the point raised by Respondent No. 4 about the appointment of the Leader of Opposition was valid.

3.8 Following the aforesaid, a meeting of the MCGM was convened on 11<sup>th</sup> April, 2017. At this meeting, Mr. Manoj Kotak, the Group Leader of the BJP was offered the

post of the Leader of Opposition. However, he informed the Mayor (Respondent No.3) that the BJP was not interested in occupying the post of Leader of Opposition. Since the BJP declined / refused to accept the post of Leader of Opposition, in compliance with the legal opinion obtained by the Mayor, the post of Leader of Opposition was offered by the Mayor to Respondent No. 4 of INC being the 2<sup>nd</sup> largest Party in Opposition. This proposal was accepted and as a result Respondent No. 4 of INC came to be appointed as Leader of Opposition in the MCGM.

3.9 In or around April-May 2019, Mr. Manoj Kotak contested and won the election from Mumbai North East Constituency and therefore, resigned from the post of Group Leader of BJP in the MCGM.

3.10 Subsequently, after a lapse of almost 3 years from the appointment of Respondent No.4 as Leader of Opposition, the incumbent President of the BJP, Mr. Mangal Prabhat Lodha addressed a letter dated 28<sup>th</sup> February, 2020 to the Mayor requesting that the Petitioner – Shri. Prabhakar Tukaram Shinde be recognized as the Group Leader of BJP and that he also be appointed as the Leader of Opposition.

3.11 In response to the aforesaid request, the Mayor passed the impugned decision dated 5<sup>th</sup> March, 2020, refusing to appoint the Petitioner as the Leader of Opposition on the ground that the Leader of Opposition was previously validly appointed under due process of law (**“Impugned Decision”**).

3.12 Aggrieved by the Impugned Decision, the Petitioner has filed this Writ Petition praying for the relief as reproduced hereinabove.

4. Appearing for the Petitioner, Mr. Birendra Saraf, Senior Advocate, submitted that :

(i) Admittedly, the BJP is the Party in Opposition having the greatest numerical strength and the Petitioner – Shri. Prabhakar Shinde, being recently appointed as the Leader of BJP is therefore entitled to ask the Mayor to recognize him as the Leader of Opposition.

(ii) It is only because the BJP was at the given time in 2017 not interested in occupying the post of Leader of Opposition, that Respondent No.4 of INC came to be appointed as the Leader of Opposition in the MCGM.

(iii) As a result of the recent change in leadership of the BJP, the BJP has now demanded that their Leader should occupy the post of Leader of Opposition.

(iv) The appointment of the Leader of Opposition is governed by Section 371A of the MMC Act.

(v) The use of the word “*shall*” in Section 371A of the MMC Act indicates that the provision is mandatory and that the use of the words “*for the time being*” indicate that the Leader of Opposition need not be permanent.

(vi) That his (Mr. Saraf’s) interpretation of Section 371A is supported by various

Judgments which are relied upon by him and amplified in his written submissions.

(vii) The decision of the Mayor is not '*final and conclusive*' in so far as recognition of Leader of Opposition is concerned.

(viii) The decision of a Mayor is not beyond judicial review and can be questioned.

(ix) The Mayor has proceeded on an *ex-facie* erroneous understanding and application of the legal position which has led to the perverse and illegal decision.

(x) If the Leader of the largest Opposition Party is willing to take up the responsibility, the law does not deny him the same, merely because he had initially expressed unwillingness to do so for various considerations.

(xi) There can be no waiver of a statutory right.

(xii) The Petitioner therefore ought to be appointed as the Leader of Opposition of the MCGM, in place of and instead of Respondent No.4 – Shri. Ravi Raja of INC.

5. Mr. Ravi Kadam, Senior Advocate, appearing for the Mayor of MCGM- Respondent No.3, submitted that :

(i) It is the Petitioner's own case that the BJP always was the single largest party in opposition and hence was entitled (post the 2017 Elections) to be recognised as the largest Party in Opposition and its leader recognised as the Leader of Opposition.

(ii) The Petitioner further admits that the BJP Leader was offered the post of

Leader of Opposition immediately after the 2017 elections, which admittedly was turned down by the BJP.

(iii) Thereafter, consequent upon taking a legal opinion, the post of the Leader of Opposition was offered to and accepted by the Leader of the 2<sup>nd</sup> largest Party in Opposition *viz.* the INC.

(iv) Therefore, the Petitioner and the BJP still accept and even then (i.e. immediately after the 2017 elections) accepted that they had themselves refused the post of the Leader of Opposition.

(v) This being so, there is now no warrant for changing this post, nor does law contemplate such a change, except in certain circumstances.

(vi) Admittedly, Respondent No. 4 has been validly appointed as Leader of Opposition after the BJP turned down the post.

(vii) Admittedly, the BJP's legal status as a Party in Opposition has been constant. It having passed on the post of Leader of Opposition, it cannot now ask for the post in the absence of a vacancy by death or resignation.

(viii) Law does not contemplate an important post to be occupied depending on the whims of any person or party.

(ix) The BJP has passed over its right to the post of Leader of Opposition and by following the due process of law, which process the BJP has also accepted, Respondent

No.4 of INC is performing the role of the Leader of Opposition since the last three years.

(x) Merely because the BJP wants to more actively oppose the ruling party, it is not entitled to stake a claim to a post which is not vacant.

(xi) There is no instance contemplated by the provisions of law, which permits a party to take a decision as to whether it will be more active or less active in opposition.

(xii) This Court cannot be called upon to adjudicate upon issues which are not legal issues. That the BJP has decided to "*take the role of opposition*" is neither here nor there.

In law there is no change in circumstances as contemplated by the statute. A lawfully and duly appointed Leader of Opposition cannot be removed merely because the BJP decides that it wants to be a more active opposition than it already is.

(xiii) By calling upon this Court to look at the changed political situation, the Petitioner is also asking this Court to take cognizance of and decide a political question.

(xiv) It is well settled that political questions cannot be decided by this Court in exercise of jurisdiction under Article 226 of Constitution.

6. Mr. Aspi Chinoy, Senior Advocate appearing for Respondent No.4 – Shri. Ravi Raja of INC, who as stated hereinabove is appointed as the Leader of Opposition and performing his role as such, submitted that :

- (i) In the year 2017, there was admittedly no pre-poll or post-poll alliance or aghadi between the BJP and the Shiv Sena.
- (ii) As a result, the BJP as a "*party in opposition having the greatest numerical strength*" had been specifically offered the post of the Leader of Opposition.
- (iii) The BJP refused to accept the post of Leader of Opposition and accordingly, after seeking legal advice, the Mayor appointed Respondent No 4 as the Leader of Opposition.
- (iv) This decision of the Mayor has not been faulted by the Petitioner nor challenged in the Petition.
- (v) The course of action / procedure adopted (to appoint Respondent No.4 as the Leader of Opposition) was in consonance with the decisions of this Court.
- (vi) The BJP was a Party in Opposition in 2017 and continues to be a Party in Opposition today. There has been no change in the legal position. In these circumstances, the BJP which had refused to accept the post of the Leader of Opposition in 2017, cannot now in 2020, seek its Leader to be appointed as Leader of Opposition, merely on the ground that it has changed its mind/ its earlier decision, to refuse the post.
- (vii) Reliance by the Petitioners on the words, "*for the time being*" in Section 371A(1) of the MMC Act does not support the Petitioner's case. Those words refer to the

possibility of a change in the "*leader of the party in opposition*" in the event of a change in the legal position, i.e. a change in Party in Opposition, or in its numerical strength.

(viii) In the present case. there has been no such change in the legal position. Those words cannot and do not cover, a mere change of mind / volition / decision of the Party in Opposition which had earlier refused to accept the post of Leader of Opposition. A mere change of mind / volition, cannot be covered by these words in Section 371A(1) of the MMC Act, otherwise it would lead to the absurd / uncertain position, that every time a Party changed its mind, the Leader of Opposition would have to be changed.

(ix) The Writ Petition, therefore ought to be dismissed.

7. We have considered the submissions (oral as well as written) of the Advocates for the Parties as well as the case-law relied upon by them. Before dealing with the same, we feel it necessary to set-out the relevant statutory provision, germane to this Writ Petition *viz.* Section 371A of the MMC Act, which reads thus :

*“Leader of Opposition. - (1) An elected Councillor who is, for the time being, the leader of the party in opposition, having greatest numerical strength and recognised as such by the Mayor; shall, be the Leader of the Opposition.*

*Explanation. - Where there are two or more parties in the opposition, having the same numerical strength, the Mayor shall, having regard to the status of the party, recognise any one of the leaders of such parties as a*

*Leader of the Opposition for the purposes of this Act and such recognition shall be final and conclusive.*

*(2) There shall be paid to the Leader of the Opposition such honoraria and allowances and other facilities as may be provided by regulations made in this behalf by the Corporation.”*

8. The aforesaid legal provision and certain other *pari materia* provisions have fallen for consideration before this Court from time to time. We propose to refer to some of these decisions which will aid the adjudication of this Writ Petition. We therefore first rely upon the very illustrative and elaborate decision of this Court in *Vishnu Shivram Mehere vs. City of Akola Municipal Corporation*<sup>1</sup> (“**Vishnu**”), wherein this Court has interpreted Section 191AA of the Bombay Provincial Municipal Corporation Act, 1949 (“BPMC Act”), which is identical to Section 371 of the MMC Act. All contesting parties have laid great emphasis on the findings in this decision, for it dealt with an instance where the largest Party in Opposition declined the post of Leader of Opposition and the post was thereafter offered to the 2<sup>nd</sup> largest Party in Opposition. The relevant extracts from this decision read as under:

*“2. The petitioner is challenging the decision of Respondent No. 2, dated 22nd August, 2003 recognising the respondent No. 3 as the Leader of Opposition in the Municipal Corporation of Akola, the respondent No. 1 (‘the Corporation’ for short).*

*23. ....*

*Section 19-1(AA) can be analysed as follows:*

*In order to recognise a person as a leader of opposition:*

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1 2003 (5) Mh.L.J. 522

- (a) *He must be an elected Councillor for the time being;*
- (b) *He should be a leader of the party in opposition;*
- (c) *Said party in opposition is having greatest numerical strength and;*
- (d) *recognised as such by the Mayor.*

*In case of two or more parties in opposition having the same numerical strength, the Mayor shall recognise a leader of opposition having regard to the status of the party in opposition.*

*24. In order to recognise a person as a Leader of Opposition, he must belong to a party in opposition and if the numerical strength of the said party in opposition is the greatest one, then the leader of said opposition party is to be recognised as a Leader of Opposition. The phraseology and the language used in the said section clearly shows that the Councillor of a party in opposition and who is a leader of the said party, if the said party is having greatest numerical strength has to be recognised by the Mayor, as a Leader of Opposition. In case of unequal strength of the party in opposition, the Mayor has no other option but to recognise the Councillor of a party having greatest numerical strength as a Leader of Opposition.*

***The Issues:***

*30. The substantive issues on the pleadings and rival contentions as between the parties are as follows:*

*(A) Whether under section 19-1AA, the Mayor has a power to recognise an elected councillor, who is, for the time being Leader of the Party in opposition having next highest numerical strength in the event of refusal by an elected councillor who is for the time being the Leader of the Party in opposition, having greatest numerical strength?*

*(Emphasis supplied)*

*(B).....*

***CONSIDERATION:***

*.....*

*39. The issue arising from the factual matrix of the case poses a legal question as to when an elected councillor, who is, for the time being, the leader of the Party in opposition, having greatest numerical strength, refuses to be nominated and recognised as leader of opposition, in that event, what steps the Mayor of the Corporation should take. Is it open for him/her to recognise an elected councillor from the next Party in opposition, having next highest numerical strength. To this plain*

*question, plain answer on the text of section 19-1AA is not available, if one reads the said section textually or literally, that is; by giving to the words used by the legislature their ordinary, natural and grammatical meaning. Literal reading of the section may lead to absurd situation. The office of the Leader of Opposition in that event may have to be kept vacant so long as the councillor who is, for the time being, the Leader of the Party in opposition, having greatest numerical strength does not come forward to accept the responsibilities of the office of Leader of the Opposition. We do not think that the legislature intended that such an important office of the Leader of Opposition should remain vacant. In order to find solution to this question it would be necessary to interpret section 19-1AA of the Bombay Provincial Municipal Corporation Act. However, before restoring to this mode of interpretation, let us turn to the settled principles of interpretation of statutes.*

**40.** *In the case of Jugalkishor Saraf v. Raw Cotton Co. Ltd., AIR 1955 SC 376, the Apex Court has observed as under:*

*“The cardinal rule of construction of statutes is to read the statute literally, that is, by giving to the words used by the legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation.”*

**41.** *The interpretation, which is an interpretation according to the intent departs from the letter of the law and goes behind the language used in the statute for the ascertainment of its meaning when grammatical interpretation leads to some absurdity or inconsistency. In such cases, it is the duty of the Court to discover and give effect to the true intention of the legislature.*

**42.** *In order to ascertain the exact meaning of what the Legislature has actually said, Denning, L.J. went so far as to observe that “we sit here to find out the intention of Parliament and Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.” [Magor & St. Mellus Rural District Council v. Newport Corporation, (1950) 2 All E.R. 1226, 1236].*

**43.** *The golden rule of interpretation is that a construction which creates anomalous situation, should, if possible, be avoided. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational construction. The task of interpretation of a statutory provision is an attempt to discover the intention of the legislature from the language used. It is*

*necessary to remember that language is at best imperfect, instrument for the expression of human intention. It is well to remember the warning administered by Judge Learned Hand that one should not make a fortress out of dictionary but remember that statutes always have some purpose of object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning as observed by the Supreme Court in Commissioner of Income-tax, Bangalore v. J.H. Gotla, AIR 1985 SC 1698.*

44. *The statute as well known must be interpreted having regard to the purport and object which it seeks to achieve. The Court while interpreting provisions of statute, although, is not entitled to re-write the statute itself, is not debarred from, “ironing out the crease”. The Court should always interpret the section in such a manner which would make it workable. The statute as well known must be interpreted having regard to the text and context thereof. Mischief rule may also be applied in a given case. While construing the statute the object of the Act must be taken into consideration as held by the Apex Court in the case of Killick Nixon Ltd. v. Dy. Commissioner of Income-tax, (2003) 1 SCC 145. The object of the section is to provide a Leader of Opposition to the House of the Corporation and not to keep the said office vacant. Why the office of the Leader cannot be kept vacant is another question which needs to be answered. To answer this question, one has to consider the importance of the office of the Leader of Opposition and Legislative intent behind it.*

45. *It will be useful to make reference to the case of Ld. Col. Prithi Pal Singh Bedi v. Union of India, AIR 1982 SC 1413, wherein it is observed by the Supreme Court as under:*

*“The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not led to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in the provision. If there is none, it would mean the language used, speaks the mind of Parliament and there is no need to look somewhere else to discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be restored to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to observe and the authority by which the rule is framed.”*

46. *For this external aid, one can turn to the Ershine May's Treatise on the Law of Privileges, Proceedings and Usage of Parliament (22nd Edn.). In this, recognised*

*centre-piece of Parliamentary Literature, while dealing with “the official opposition”, enunciated the role of Leader of the Opposition as under:—*

### *THE OFFICIAL OPPOSITION*

*The importance of the Opposition in the system of parliamentary government has long received practical recognition in the procedure of Parliament. Even before the first Reform Act the phrase ‘His Majesty’s Opposition’, had been coined by John Cam Hobhouse. In 1937 statutory recognition was accorded through the grant of salary to the Leader of Opposition. The prevalence (on the whole) of the two party system has usually obviated any uncertainty as to which party has the right to be called the ‘Official Opposition’; it is the largest minority party which is prepared, in the event of the resignation of the Government, to assume office. The Leader of the Opposition and some of his principal colleagues in both Houses form a group, popularly known as ‘the Shadow Cabinet’, each member of which is given a particular range of activities on which it is his task to direct criticism of the Government’s policy and administration and to outline alternative policies. Since the strength of modern party discipline makes a Ministry largely invulnerable to direct attack in the House of Commons, the criticism of the Opposition is primarily directed towards the electorate, with a view to the next election, or with the aim of influencing Government policy through the pressure of public opinion. The floor of the House of Commons provides the Opposition with their main instrument for this purpose. Accordingly, the Opposition has acquired the right to exercise the initiative in selecting the subject of debate on a certain number of days in each session and on such occasions as the debate or; the address in reply to the Queen’s Speech or from time to time by putting down motions of censure. The Leader of the Opposition is by custom accorded certain rights in asking questions of Ministers (see p. 336), and members of the Shadow Cabinet and other official Opposition spokesmen are also given some precedence in asking questions and in debate.*

*47. In this behalf one may also turn to the book “Practice and Procedure of Parliament Vol. I” by M.N. Kaul and S.L. Shakdhar. In the Chapter of Parliamentary Functionaries, while dealing with “Leader of Opposition” on page 115, enunciated the role of Leader of Opposition in the following words:*

*“The Leader of the Opposition is the official spokesman of the minority or minorities and to that end he zealously watches any encroachment on their rights. His task, though not so difficult as that of the Prime Minister, is of sufficiently great public importance because he has to maintain a team — a ‘shadow Cabinet’ — ready to take over administration. In performing his*

*duties and obligations, the Leader of the Opposition has to take into account not only what he is today but what he hopes to be tomorrow.”*

*48. The aforesaid extracted portions from leading books of the recognised authors on the subject in unequivocal terms recognize the important role of the Leader of Opposition. The House of the Corporation can be termed as mini-parliament. The role of the Leader of the Opposition in the House of the Corporation cannot be underestimated. The office of the Leader of Opposition cannot be kept vacant. If the object of the statute is to provide Leader of Opposition in the Corporation via section 19-1AA, then the purposive interpretation will have to be adopted to meet the contingency faced by the unusual situation created by the denial to hold office of Leader of the Opposition by the parties in opposition; one after another, having greatest numerical strength in the House of the Corporation.*

*49. The Leader of Opposition must be a person, who is willing to discharge obligations of that office. The party in opposition to which a Leader of Opposition belongs must be prepared to shoulder the responsibilities of that office. Unwilling person or party cannot be trusted with the responsibility of the office of the Leader of Opposition. The Leader of the Opposition has a right to participate in framing agenda of the meetings. He has a right to exercise initiative in selecting the subjects of debate. He has a right to address in reply. He has a right to focus public opinion in the house against the policy of the ruling party. He has right to move motions of censure. The Leader of Opposition has a right to ask certain questions to the ruling group or parties and he is also given precedence in asking questions and in debate. The Leader of Opposition has to push policies or political ideology of his political party or group in the House of the Corporation, All that his participation or working must reflect the ideology of the political party to which he belongs. It is thus necessary that the party in opposition or person belonging to such political party must be prepared and willing to discharge the obligations, duties and responsibilities attached to the office of Leader of Opposition.*

*50. The Leader of Opposition is given financial assistance from public funds to discharge his parliamentary duties. The history for statutory recognition to such financial assistance for the first time appears to have been accorded through the grant of salary to the Leader of Opposition in the House of Commons in 1937. The salary was first granted to the Leader of Opposition by the Ministers of Crown Act, 1937 enacted in the said year. Now the Members who are Officers of House of Commons, Ministers of Crown, Leaders of Opposition, Opposition Whips are entitled of salary under the Ministerial and Other Salaries Act, 1975. The Indian Parliament considering the statutory recognition accorded to the Leader of Opposition in United Kingdom, Australia and Canada and, taking into account parliamentary democracy and important role, the Leaders of Opposition have to play, accorded statutory*

*recognition and given salary and certain other facilities and amenities to enable them to discharge their functions in the parliament through the enactment known as Salary and Allowances of Leader of Opposition in Parliament Act, 1977.*

*51. In India, number of States have also started giving facilities and amenities to the Leader of Opposition in the State Legislative Assemblies. In Maharashtra, since 1970, provisions have already been made in the Bombay Legislature Members Salaries and Allowances Act, 1976 to give to the Leader of Opposition in two Houses of the State Legislature the salary, residential accommodation and certain facilities and amenities as are ordinarily given to the Ministers of Government. But in the other respects, these leaders are governed by the provisions of the said Act which are applicable to any other members of the legislature.*

*52. Having regard to the important role of the Leaders of Opposition in the parliamentary democracy, it was considered that they should be accorded a separate statutory recognition and given the salary, allowance, facilities and other amenities suitable for their status as are necessary to enable them to discharge their functions properly. The Leaders of Opposition in Maharashtra Legislature Salaries and Allowances Act, 1978 mainly seeks to achieve above object in self-contained code for the Leaders of Opposition and to make consequential amendment in the Bombay Legislature Members Salaries and Allowances Act, 1956 so that the Leader of Opposition may seek to govern by the said Act. The similar provision is to be found under the provisions of sub-section (2) of section 19-1AA of the Bombay Provincial Corporations Act, 1949 which reads as under:*

*“(2) There shall be paid to the Leader of the Opposition such honoraria and allowances and other facilities as may be provided by the regulations made in this behalf by the Corporation.”*

*53. The cumulative reading of the aforesaid legislation would unequivocally demonstrate important role of the Leader of Opposition not only recognised by the State Legislation but also by the Indian Parliament. Such an important office, by no stretch of imagination, can be allowed to be kept vacant in any house. It is, therefore, necessary to read down the provision of section 19-1AA of the Act to meet the situational requirement.*

*54. At this juncture, it will not be out of place to mention that in James v. Commonwealth of Australia, 1930 (2) All England Reports 1449 at pages 1456 and 1464 (IV/36), it has been held by the Privy Council that “..... Further, in construing Constitution of a growing country, some breadth of interpretation is permissible. At page 1464 it has been observed that one has to see to the terms of the instruments by which affirmatively, the legislative power were created, and by which, negatively, they are restricted. The Apex Court in Indira Sawhney v. Union of India, 1992 Supp (3)*

*SCC 217 para 398/502 observed that the Constitution being essentially a political document, has to be interpreted to meet the felt necessities of the time.*

*55. The aforesaid principles can well be applied even to the State legislation dealing with the functioning of the democratic institutions which are expected to function exclusively on the basis of Parliamentary System. In the circumstances, we have no hesitation in reading down the said section 19-1AA to hold that the said section contemplates recognition of a “willing Leader” of the party in opposition, having highest numerical strength as a Leader of the Opposition. (Emphasis supplied)*

*56. In the above view of the matter, in our opinion, respondent No. 2 was perfectly justified in recognizing respondent No. 3 as Leader of Opposition, especially, when the parties having larger numerical strength in the house refused to accept the responsibility of the Leader of Opposition. In no circumstance, the office of the Leader of Opposition in the Corporation could have been kept vacant by respondent No. 2. Therefore, no fault can be found with the procedure adopted by respondent No. 2, rather the said procedure finds our approval. (Emphasis supplied)*

*As to Issue-B:*

*.....”*

We are in agreement with the elaborate and detailed discussion of the law undertaken in the aforesaid decision. The aforesaid decision duly recognizes the importance of the post of a Leader of Opposition and provides for a mechanism to deal with a situation where the leader of the largest party in opposition, declines the said post. This Court came to the conclusion that there was nothing wrong in recognizing a Corporator belonging to the party having the 2<sup>nd</sup> highest strength as the Leader of the Opposition in the circumstances where the largest party refuses to shoulder the said responsibility. This is exactly what was done in 2017 in the present matter, when Respondent No.4 was appointed Leader of the Opposition after the BJP’s refusal.

9. In *Sanjay Mahlkar vs. Divisional Commissioner, Nagpur*<sup>2</sup> this Court held as under:

*“48. Thus, a leader of party in opposition having greatest numerical strength and recognised as such by Mayor becomes Leader of Opposition for the purposes of this provision. Fact that Congress Municipal Party has such greatest numerical strength is not in dispute. Fact that it is party in opposition is also not in dispute. The only question is out of its 29 Corporators, who should be the Leader of that party. The Leader of Congress Municipal Party is to be recognised by Mayor as Leader of Opposition. Note submitted to Mayor by office of respondent no. 2 Municipal Corporation contains all relevant facts & shows necessary consideration in this respect. Order of respondent no. 1 conferring status as Group Leader on respondent no. 3 Tanaji on 19.5.2017 is also mentioned. Then provisions of Section 19-1AA and the need of recognising the changed Group Leader because of language therein is also pointed out. Accordingly, the note has been placed before the respondent no. 4 Mayor and this has been approved by him. It cannot be said that respondent no. 4 Mayor, therefore, has acted mechanically. Application of mind necessary for the purposes of Section 19-1AA is apparent in the matter.*

*52. This position emerging on record has been acted upon and implemented by respondent no. 4 and respondent no. 2 by conferring status as Leader of Opposition on respondent no. 3 Tanaji. Section 19-1AA itself uses the words “for the time being”. Thus, it accepts & provides for a possibility of change in party in opposition or numerical strength in it, which is inherent in democracy. If such change is brought out legally, Section 19-1AA obliges Mayor to take its cognizance and to execute it. Language employed itself supports the change as per desire of majority not only in leader of opposition but also in largest municipal party. Factors therein like “for the time being” or “the Leader of the Party in opposition” or “having greatest numerical strength”, indicate the use of events carrying intrinsic potential to change as parameters. No law has been pointed out which prohibits or condemns any change in any one or more of these factors. Hence, the determination of leader of opposition in a vibrant democracy has to be with reference to these dynamic events. This Section calls for an attention to a state of affairs prevailing at a given time & need to construe it in consonance with such “point of time”, when the exercise is being undertaken by the Mayor.”*

The aforesaid decision is instructive, insofar as the interpretation of the words “for the

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*time being*” contained in Section 371A of the MMC Act is concerned. Evidently, the said Section is a dynamic provision. However, such dynamicity is to be interpreted in context of the intent and object of the provision itself. As held in the aforesaid decision, the said Section factors potential changes in parameters such as the possibility of change in the party in opposition or its numerical strength. Both these factors are inherent in democracy and have therefore been rightly considered as decisive factors whilst construing Section 371A of the MMC Act.

10. The scope of judicial review under Article 226 of the Constitution of India, whilst deciding a challenge to the Mayor’s decision, is decided by this Court in the case of *Sunil vs. State of Maharashtra*<sup>3</sup>, the relevant paragraphs of which are reproduced hereunder :

*“24.....The scope of judicial review under Art. 226 of the Constitution of India, to judge the action of Mayor, this Court is concerned with reviewing not the merit of the decision in support, of which the petition for judicial review is made, but decision making process itself. Thus, the jurisdiction of this Court is confined to:*

- (i) Whether Mayor exceeded his power?*
- (ii) has committed an error of law;*
- (iii) reached a decision which no reasonable person would have reached;*
- (iv) Whether he has abused his powers.*

*Applying these parameters to the case at hand, we do not think that the Mayor has acted beyond his powers conferred on him by section 19(I-AA) in recognizing*

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<sup>3</sup> 2005 (4) Mh.L.J. 375

*respondent No. 4 as leader of Opposition. He has reached to that decision on the basis of material before him. Once the Court finds that the decision is taken after considering the relevant circumstances which are brought on record and if the Mayor exercises his discretion properly then it is not for this Court to sit over his decision as the Court of appeal and take a different view of the matter. We have found that the Mayor has power and authority conferred on him under section 19(I-AA) to recognize the Councillor as the Leader of the Opposition and if this power is exercised by him properly and the decision is taken then this Court in its jurisdiction under Art. 226 judicial review, cannot re-appreciate material and take a different view of the matter. Therefore, we are of the view that the decision to recognize the respondent No. 4 as Leader of Opposition being just and proper, no interference is required.*

*32. .... In our view, considering the record which is produced, before us and the limited judicial review available to this Court, under Art. 226 of the Constitution, we have to consider as to whether the exercise of power by Mayor is based on wholly irrelevant consideration, whether it is irrational, whether it is discriminatory, mala fide or perverse. In our opinion, the petitioners have utterly failed to establish all these aspects and from the scanty material produced on record by the petitioners, it is not possible to accept the contention of Shri Dhorde that the order passed by the Mayor is tainted with mala fides, as held by this Court in Vishnu Mehere's case (supra). This Court cannot go and test the political issues as such we find that there is no substance in the petition. Petition requires to be dismissed. ”*

The aforesaid decision lays down that whilst dealing with a challenge to a Mayor's decision, this Court's scope of judicial review under Article 226 of the Constitution of India is limited to the decision making process itself and does not extend to sitting in appeal over the merits of the decision so made by the Mayor. Thus, the extent of this Court's judicial review is confined to ascertaining :

- (i) whether Mayor exceeded his power ?*
- (ii) has committed an error of law;*
- (iii) reached a decision which no reasonable person would have reached;*
- (iv) whether he has abused his powers.*

The aforesaid parameters are of significance, and the Impugned Decision has to be tested on the touchstone of the said parameters.

11. This Court in its decision in *Databhau vs. State of Maharashtra*<sup>4</sup>, has interalia held that though the office of the leader of opposition is co-terminus with the term of the elected body of the Corporation, there appears to be logically nothing wrong in an act of recognizing any other leader in place of the existing leader whenever the balance of numerical strength supporting a particular Corporator changes. The Court has, in the instant case, applied the political question doctrine and also held that the Courts exercising the writ jurisdiction would be slow in entertaining questions having political overtones. The relevant observations of the Court are as follows :

*“11..... The contentions advanced by the learned Counsel for the petitioner that the term ‘Leader of Opposition’ is co-terminus with the period of elected body of the Corporation, cannot be a matter of dispute. However, the further argument advanced relying on the analogy that as the petitioner who was once recognized as Leader of Opposition by the respondent No. 3 on 8-5-2006 is deemed to be continued until the completion of the term of the elected body of the Corporation cannot be accepted. The argument has inherent flaws in itself as the petitioner himself has accepted that on 3-5-2005 one Shri Tarvindersingh Dhillon was declared as Leader of opposition and at a later point of time the petitioner wielded the support of 10 Councillors out of 19 elected members of the Congress (I) Party, he staked his claim for the post of Leader of Opposition and as such was recognized as Leader of Opposition by order dated 8-5-2006. These facts itself contradicts the argument advanced by the learned Counsel for the petitioner. If the analogy put forth by the petitioner is to be accepted, the petitioner could not have been recognized as Leader of Opposition by the respondent No. 3 on 8-5-2006. There is no legal bar to recognize any other Corporator as Leader of Opposition whenever change in numerical strength of the Councillors supporting a particular leader takes place. The office of the leader of opposition is co-terminus with the term of the elected body of the Corporation. It*

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4 2007 (3) Mh.L.J. 76

*does not mean that a particular Corporator or an individual cannot be displaced as a Leader of Opposition even though some change takes place in relation to the numerical strength of the Councillors supporting him. The rule of majority is the cardinal principle governing all democratic institutions. As the Rule of majority applies in relation to the other elected offices as provided under the Municipal Corporations Act, the same principle needs to be applied also in the matter of recognition of the Leader of Opposition. There appears to be logically nothing wrong in an act of recognizing any other leader in place of the existing leader whenever the balance of numerical strength supporting a particular Corporator changes. In the instant case, as the respondent No. 4 mustered the support of 14 Councillors out of 19 Councillors belonging to Congress (I) Party which is the largest group amongst the opposition parties in the Corporation, the decision taken by the Mayor in recognizing him (respondent No. 4) cannot be faulted as the said decision is in accordance with the principle of rule of majority governing all democratic institutions.*

*13. Reliance is placed on the judgment of this Court in the matter of (i) Sunil Ramdas Kotkar v. State of Maharashtra, 2005 (4) Mh. L.J. 375 : 2005 (3) All MR 143, (ii) Vishnu Shivram Mehere v. City of Akola Municipal Corporation 2003 (5) Mh. L.J. 522 : 2004 (3) All MR 151 and Abdul Rashid s/o Abdul Sattar v. Vikas Jain, 2003 (2) Mh. L.J. 902. In Vishnu Mehere's case (supra) the question that was posed before the Court was whether on refusal by the party having greatest numerical strength in the Corporation to shoulder the responsibility of the leader of opposition, whether the party having next higher numerical strength in the house could be permitted to set up their candidate for the post of Leader of Opposition. This Court came to the conclusion that there was nothing wrong in recognizing a Corporator belonging to a party having next higher numerical strength as a Leader of opposition in the circumstances where the party having greatest numerical strength in the house refuses to shoulder the responsibility. The Court while determining the issue has dealt with the political question doctrine. In para No. 32 of the judgment, the Court has observed thus:*

*“32. As already noticed hereinabove, it is now well settled that the Courts are expected to decline jurisdiction over all “political questions”. One of the important corollary of Court's refusal to exercise judicial powers is the doctrine of “political questions”. In exercise of its powers of its judicial review; time and again it has been pointed out by the various courts that certain powers are vested in the legislative of executive departments of the Government to be exercised in a purely discretionary manner, and that whether they have been constitutionally exercised or not is a “political question” which the Court is not expected to undertake to decide, [see Luther v. Borden, 7 Harward 1 : 12 Ed. 581) (1849).]*

*“33. The political question doctrine limits the exercise, not the existence, of*

*judicial power, thus even though a dispute may constitutionally be subject to judicial power, if a political question is present, a Court should decline to reach the merits....”*

*14. In the instant case, applying the political question doctrine the Courts exercising the writ jurisdiction would be slow in entertaining the questions having the political overtones. Although the Courts are not precluded from determining the questions where neither of the conflicting political branches has clear and unequivocal title and it is or may be possible to establish an effective judicial settlement. In view of the facts presented in the instant case before us, we do not feel it appropriate to enter into the political questions-presented for determination in the petition.*

*16. As stated above, the petitioner has failed to point out infraction of any legal provisions which calls for interference at the hands of this Court in exercising of extraordinary powers conferred by Article 226 of the Constitution of India.*

*.....”*

As can be seen from the aforesaid decision, this Court’s jurisdiction is admittedly limited when it comes to exercising its writ jurisdiction in matters containing political overtones.

12. A perusal of all of the above Judgements broadly reflects the following legal position:

*(i) Under Section 371A of the MMC Act, the Leader of Opposition has to be (i) an elected Councillor; and (ii) one who is for the time being, the leader of the party in opposition, having greatest numerical strength and recognised as such by the Mayor;*

*(ii) If the largest party in opposition declines the post of Leader of Opposition, the said post should be offered to the 2<sup>nd</sup> largest party in opposition;*

*(iii) The use of the words “for the time being” are indicative of the dynamic nature of this*

*provision. The Legislature, whilst incorporating these words would be presumed to have taken into account the dynamic nature of politics and elections themselves and has therefore accounted for a change in circumstances which may result in re-visiting the said provision from time to time. The judicially recognized circumstances which would warrant such re-visitation are parameters such as change in the party in opposition, or its numerical strength ;*

*(iv) Any decision of the Mayor, whether original or upon such re-visitation, is amenable to judicial review within the narrow recognized grounds noted above ; and*

*(v) Courts are expected to decline jurisdiction over “political questions”.*

13. With the aforesaid legislative and judicial background, we shall now analyse the case put forward by the Petitioner before us.

14. Firstly, it is the Petitioner’s own stated case that at the relevant time i.e. post the 2017 Corporation Election, the BJP was the single largest Party in Opposition and was therefore entitled to be recognized as the largest Party in Opposition and its Leader recognized as the Leader of the Opposition. The Petitioner has admitted that the BJP turned down the post of the Leader of the Opposition. MCGM thereafter procured a legal opinion dated 7<sup>th</sup> April, 2017 wherein it was opined that in the event of refusal to accept the post of Leader of Opposition by the largest party in opposition (*BJP*), the post shall be offered by the Mayor to the second largest party (*INC*). This

opinion took into account Section 371A of the MMC Act as analysed hereinabove. Further, at the General Body Meeting held on 10<sup>th</sup> April, 2017, the said legal opinion was duly placed for consideration. Following the aforesaid, on 11<sup>th</sup> April, 2017 at the meeting of the MCGM, the BJP's Group Leader Mr. Kotak informed Respondent No.3 that the BJP "*was not interested in occupying the post of Leader of the Opposition.*" It is the Petitioner's further stated case that as a result of this refusal, Respondent No.4 of the INC came to be appointed as Leader of Opposition. No grievance in respect of this procedure adopted has been raised.

15. The aforesaid narration reflects two critical facts; (i) the BJP expressly declined to accept the post of Leader of Opposition when offered to them; and (ii) resultantly, in compliance with the legal opinion, the post was offered to Respondent No.4 and he came to be recognized as such. Therefore, Respondent No.4 is, as on date the Leader of Opposition duly appointed in accordance with law on 11<sup>th</sup> April, 2017 and which appointment has not been set-aside till date. Infact, the BJP has accepted the same, and in the present Writ Petition filed on 10<sup>th</sup> June, 2020, there is no challenge to the said decision dated 11<sup>th</sup> April, 2017, appointing Respondent No.4 as the Leader of Opposition. This position has now remained unaltered for over 3 years and continues to remain so even as on date.

16. Following the aforesaid lapse of around three years, on 28<sup>th</sup> February, 2020 the President of the BJP has now decided to address a letter to the Mayor calling upon her

to note that it is the Petitioner who is now the Leader of the Party in MCGM ( in place of Mr. Kotak) and to also recognize the Petitioner as Leader of the Opposition in place of and instead of Respondent No.4 – Shri Ravi Raja of the INC. The reason for doing so as pleaded by the Petitioner is, *“though BJP has earlier decided not to be active in opposition, due to changed political equations, BJP has now decided to discharge the role of an effective and active opposition party.”* The question therefore that we are to decide is whether a mere change of mind / volition / decision by a Party, wherein the said Party now intends to discharge the role of an effective and active opposition party, would be sufficient to dislodge and remove an existing Leader of Opposition who came to be appointed due to the largest party’s refusal to previously accept the post ?

17. At the relevant time, i.e. in 2017, none of the parties before us appear to have contested the fact that BJP was the *“party in opposition having the greatest numerical strength”*. As a result, in compliance with the mandate of Section 317A, the post of Leader of Opposition was duly offered to the Leader of BJP. However, for reasons best known to them, the BJP and its Leader expressly declined to accept the post. As a result, Respondent No.4 came to be appointed as the Leader of Opposition in compliance with the mandate of Section 371A and the principles enunciated in this Court’s decision in Vishnu. In one sense, therefore, the appointment of Respondent No.4 attained finality in the facts and circumstances then prevalent. The appointment of Respondent No.4 is today sought to be unsettled on the ground of a mere change of

mind by the BJP, as there is no other judicially recognized circumstance canvassed before us, such as change in the party in opposition, or its numerical strength, which are some of the accepted parameters for re-visiting the decision to change the post of the Leader of Opposition.

18. In the backdrop of the aforesaid, in our opinion, the BJP, which had expressly refused to accept the post of Leader of Opposition in 2017, cannot now in 2020, seek to be appointed as Leader of Opposition, merely on the ground that it has changed its mind / its earlier decision to refuse the post. Whilst we agree that Section 371A is a dynamic provision, reliance by the Petitioner on the words "*for the time being*" in Section 371A(1) does not support the Petitioner's case to the extent that it seeks to stretch its interpretation. Those words refer to the possibility of a legal change i.e. a change in the Party in Opposition or in its numerical strength. This legal position, has been laid down by this Court in the case of *Sanjay s/o Madhukarrao vs. The Divisional Commissioner (supra)*, and specifically the following observations: "*Section 19-1AA itself uses the words "for the time being". **Thus it accepts & provides the possibility of change in the party in opposition or numerical strength in it**, which is inherent in democracy. If such change is brought out legally, section 19-1AA obliges the Mayor to take cognizance and to execute it.*" In the present case, there has been no such legal change. Those words cannot and do not cover a mere change of mind / volition / decision of the Party in Opposition which had earlier expressly refused to accept the post of

Leader of Opposition. A mere change of mind / volition, cannot be covered by these words in Section 371A(1). If we allow such change of mind / volition, it would lead to absurd results in as much as the Leader of the Opposition would have to be changed every time a party changed its mind. Whilst the subject Section certainly calls for attention to a state of affairs prevailing at a given time, a mere change in mindset or volition would not be sufficient to overturn a previous appointment. Admittedly, the BJP's legal status as a Party in Opposition has been constant. In our opinion, the law does not contemplate an important post such as that of Leader of Opposition to be occupied temporarily on the whims of any person or party. We do not think that a mere averment *viz.* "*Subsequently, due to changing political circumstances, the BJP decided to take the role of opposition in the MCGM.*" would permit the BJP to overthrow the current Leader of Opposition. There is nothing in the provision of Section 371A which permits alteration in the post of the Leader of Opposition depending on whether a party will be more active or less active in opposition, especially after having declined the post at the first instance.

19. The BJP once having declined to accept the post of the Leader of Opposition and having allowed the House to act on a legal opinion, by appointing Respondent No.4 as the Leader of Opposition, now also cannot be allowed to contend that only because the Leader of the Party has changed, they ought to be allowed to claim the post of the Leader of Opposition. The decision to decline the post of Leader of

Opposition, originally conveyed to the Mayor, cannot be termed as a decision of an individual, who was appointed Leader of the Party ; the decision was of the Party ; and any change in such decision is a change of mind on the part of the Party, which as we have noted above, is no legal change within the meaning of Section 371A. It is, in the premises, immaterial that there has been a change in the leadership of the party.

20. We may hasten to add that a change in the Leader of the largest Opposition Party may come within the legal changes referred to in this context; but that is only in a case where the original leader of the largest Opposition Party, who was already holding the post of leadership of opposition, does not any longer hold leadership of the Party. In such case, if the Party were to convey to the Mayor the change in its leadership and its new leader's willingness to accept the post of Leader of Opposition, that would be a legal change which the Mayor is bound to act upon. However, when the largest Opposition Party declines in the first place, the post of Leader of Opposition and allows the leader of the party of the next best numerical strength to accept the post, a change in the leadership of the former party ( i.e. the Opposition Party of the largest strength) cannot be described as a legal change warranting the Mayor to act.

21. Further, we are also unable to accept the Petitioner's interpretation of the decision in Vishnu that upon refusal to accept the position of Leader of Opposition, it is offered to the next largest party only temporarily and until such time that the

unwilling party has a change of heart and later till it shows readiness and willingness to shoulder such responsibility. In support of its interpretation, the Petitioner laid great emphasis on the following observation from paragraph no.46 of Vishnu: “*The office of the Leader of Opposition in that event may have to be kept vacant **so long as** the councillor who is, for the time being, the Leader of the Party in opposition, having greatest numerical strength **does not come forward** to accept the responsibilities of the office of Leader of the Opposition.*” We disagree with such interpretation. In fact, the Petitioner appears to have omitted reference to the very next sentence where this Court disagrees with the aforesaid stipulation relied upon by the Petitioner and states, “*We do **not** think that the legislature intended that such an important office of the Leader of Opposition should remain vacant.*” In any event, the findings relied upon by the Petitioner do not refer to a situation where (i) the leader of a party having greatest numerical strength has previously expressly refused to accept such position; (ii) the leader of the party having 2<sup>nd</sup> largest strength has been appointed as Leader of Opposition in accordance with law; and (iii) the party which first expressly refused to accept such position, has a change of heart and stakes a claim to the post by overthrowing the incumbent Leader of Opposition . Therefore, the Petitioner’s reliance on Vishnu is wholly misplaced.

22. During the course of arguments, the Petitioner has been unable to bring to our notice any judgment and/or provision of law which would support his argument that the post of Leader of Opposition (*held by the leader of the 2<sup>nd</sup> largest party in opposition*)

is only to be held temporarily till such time that the leader of the largest party in opposition has a change of heart and decides to accept the post having previously expressly rejected acceptance thereof. What such wide and extensive judicial interpretation would mean is that the duly appointed Leader of Opposition (*the leader of the 2<sup>nd</sup> largest party in opposition*) despite being appointed with everybody's consent (*including the largest party in opposition*) and despite being appointed in accordance with law (*Section 371A read with the decision in Vishnu*) can be removed / overthrown on any given day merely as a result of the largest party in opposition deciding to do a *volte-face*. In our opinion, this could certainly not be the intent, objective and purpose of Section 371A. On the contrary, such interpretation would result in misuse and mischief causing volatility in such important democratic position. It is trite law that interpretation in aid of mischief, misuse and/or absurdities ought not to be permitted. Most importantly, we do not deem it just that the rights of an incumbent Leader of Opposition can be violated in such a manner for no fault of the incumbent, or in the absence of any legal change. Needless to state, this Court has repeatedly recognized the importance and significance of the post of Leader of Opposition.

23. In addition to all of the aforesaid factors, it is also important to note that we are today testing the legality of the Impugned Decision on judicially established and recognized narrow parameters. The aforesaid narrated Judgments have repeatedly held that a Mayor's decision can be subject to judicial challenge on the following

grounds :

*(i) whether Mayor exceeded his power?*

*(ii) has committed an error of law;*

*(iii) reached a decision which no reasonable person would have reached; and*

*(iv) whether he has abused his powers.*

24. Applying the aforesaid parameters to the case at hand, we do not think that the Mayor, whilst passing the Impugned Decision, has either exceeded her power, committed an error of law, reached a decision which no reasonable person would have reached or has abused her power. It is now settled that if the Mayor exercises discretion properly and legally, it is not open for this Court to sit in appeal over such decision and take a different view of the matter. Therefore, we are of the view that the Impugned Decision being just and proper, no interference is required. In respect of the Impugned Decision, the Petitioner has argued that, *“apart from stating that the Leader of Opposition was validly appointed in 2017 does not spell out any other reason for rejecting the Petitioner’s appointment to the said post.”* We fail to understand what further and other ground the Mayor was required to state in order to reject the BJP’s request. We do not subscribe to the argument that the Mayor has demonstrated a complete erroneous understanding or application of Section 371A. On the contrary, Respondent No.4’s appointment as Leader of Opposition was in due compliance and upon a correct application of Section 371A, as interpreted by this very Court. In addition,

Respondent No.4's appointment was duly accepted by the BJP and was in fact a result of the BJP's refusal to accept the post of Leader of Opposition. We are in complete agreement with the view adopted by the Mayor.

25. Whilst the parties before us have argued on the doctrine of waiver, we do not deem it necessary to tread that path, for the simple reason that the BJP had not passively waived / abandoned the post of Leader of Opposition. Instead, the BJP had expressly **refused** to accept the post as reflected in the record of proceedings of the General Body Meeting of MCGM held on 30<sup>th</sup> March, 2017, the relevant portion of which is reproduced herein :

“श्री.मनोज कोटक — आम्ही या सभागृहांमध्ये मुंबईकरांच्या हिताचा विचार करतो. मा.मुख्यमंत्र्यांनी जाहीर केले आहे कि, आम्हाला विरोधी पक्षनेतेपद नको अथवा कोणतेही पद नको. भारतीय जनता पक्षाला कशामध्येही स्वारस्य नाही. कोणाच्या मेहरबानीवर आम्ही निवडून आलेलो नाही. महापौर ठरवतील आणि कायदानुसार जी कार्यवाही होईल ते आम्हाला मान्य आहे. भारतीय जनता पक्षाला विरोधी पक्षनेतेपद नको आहे.”

(Emphasis supplied)

The above quote implies that Mr. Manoj Kotak (Leader of BJP in MCGM) stated in the said General Body Meeting that – “We in this house consider the interest of Mumbaikars. Hon'ble Chief Minister (Shri Devendra Fadanvis) has declared that we do not want the post of Leader of Opposition or any other post. Bhartiya Janta Party (BJP) is not interested in any office. We have not been elected due to anyone's obligation. The Mayor will decide and as per law whatever procedure is adopted is

acceptable to us. Bhartiya Janta Party is not wanting the post of the Leader of the Opposition.” (emphasis supplied)

26. Such express, unequivocal and unconditional refusal, in our opinion, stands at a much higher footing than a Party who may merely passively waive its right, statutory or otherwise, by an act or omission. We stand fortified in our view by the previous decision of this Court in Vishnu. At the cost of repetition, we deem it necessary to reproduce the dicta from the said decision which reads as :

***“49. The Leader of Opposition must be a person, who is willing to discharge obligations of that office. The party in opposition to which a Leader of Opposition belongs must be prepared to shoulder the responsibilities of that office. Unwilling person or party cannot be trusted with the responsibility of the office of the Leader of Opposition. The Leader of the Opposition has a right to participate in framing agenda of the meetings. He has a right to exercise initiative in selecting the subjects of debate. He has a right to address in reply. He has a right to focus public opinion in the house against the policy of the ruling party. He has right to move motions of censure. The Leader of Opposition has a right to ask certain questions to the ruling group or parties and he is also given precedence in asking questions and in debate. The Leader of Opposition has to push policies or political ideology of his political party or group in the House of the Corporation, All that his participation or working must reflect the ideology of the political party to which he belongs. It is thus necessary that the party in opposition or person belonging to such political party must be prepared and willing to discharge the obligations, duties and responsibilities attached to the office of Leader of Opposition.***

***50. The Leader of Opposition is given financial assistance from public funds to discharge his parliamentary duties. The history for statutory recognition to such financial assistance for the first time appears to have been accorded through the grant of salary to the Leader of Opposition in the House of Commons in 1937. The salary was first granted to the Leader of Opposition by the Ministers of Crown Act, 1937 enacted in the said year. Now the Members who are Officers of House of Commons, Ministers of Crown, Leaders of Opposition, Opposition Whips are entitled of salary under the Ministerial and Other Salaries Act, 1975. The Indian Parliament considering the statutory recognition accorded to the Leader of Opposition in United***

*Kingdom, Australia and Canada and, taking into account parliamentary democracy and important role, the Leaders of Opposition have to play, accorded statutory recognition and given salary and certain other facilities and amenities to enable them to discharge their functions in the parliament through the enactment known as Salary and Allowances of Leader of Opposition in Parliament Act, 1977.*

*53. The cumulative reading of the aforesaid legislation would unequivocally demonstrate important role of the Leader of Opposition not only recognised by the State Legislation but also by the Indian Parliament. Such an important office, by no stretch of imagination, can be allowed to be kept vacant in any house. It is, therefore, necessary to read down the provision of section 19-1AA of the Act to meet the situational requirement.*

*56. In the above view of the matter, in our opinion, respondent No. 2 was perfectly justified in recognizing respondent No. 3 as Leader of Opposition, especially, when the parties having larger numerical strength in the house refused to accept the responsibility of the Leader of Opposition. In no circumstance, the office of the Leader of Opposition in the Corporation could have been kept vacant by respondent No. 2. Therefore, no fault can be found with the procedure adopted by respondent No. 2, rather the said procedure finds our approval.”*

*(emphasis supplied)*

27. We are of the considered opinion that the aforesaid findings are squarely applicable to the facts of the present case. The BJP was admittedly not willing to discharge the obligations and duties of the Office of Leader of Opposition at the relevant time. We are in respectful agreement with the aforesaid finding of this Court that an “*Unwilling person or party cannot be trusted with the responsibility of the office of the Leader of Opposition.*” This being the law, a mere *volte-face* or change of heart or decision to increase one’s extent of participation whilst in opposition, cannot justify the removal of an incumbent Leader of Opposition who was otherwise duly appointed in accordance with law (*and as a result of the BJP’s express refusal to accept the post*).

28. In so far as the argument canvassed in relation to whether or not there was an alliance between the Shiv Sena and the BJP considering that in their final submissions, all contesting Respondents have themselves conceded that the BJP is the single largest opposition, we do not deem it necessary to delve into this issue. In so far as the alliance between the Shiv Sena and INC is concerned, the Petitioner has himself argued that he does not want this Court to go into the changed political equations or acknowledge the same. The limited change, if any, that the Petitioner intends for this Court to consider is that, *“though BJP has earlier decided not to be active in opposition, due to changed political equations, BJP has now decided to discharge the role of an effective and active opposition party.”* Further, the Petitioner has also stated, *“What is relevant is that BJP now seeks to do so and the Petitioner does not invite the Court to rule upon the rationale of its decision to do so.”* In view of such submissions, there is no occasion to consider any pre or post poll alliance.

29. For all the aforesaid reasons, this Writ Petition is dismissed. In the circumstances, there shall be no order as to costs.

30. This Order will be digitally signed by the PA/PS of this Court. All concerned will act on production by fax or email of a digitally signed copy of this Order.

**( MADHAV J. JAMDAR, J. )**

**( S.J. KATHAWALLA, J. )**