

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9875 OF 2014

Mukesh K. Patel & Ors.	..	Petitioners
VS.		
Daman Municipal Council & Ors.	..	Respondents

WITH
WRIT PETITION NO. 10271 OF 2014

Shaukat Anwar Mithani & Ors.	..	Petitioners
VS.		
The Administrator, Union Territory of Daman and Diu & Ors.	..	Respondents

Mr. R. A. Thorat – Senior Advocate with Mr. Kishor Patil for
Petitioners in WP 9875 of 2014.
Mr. Bhavesh Parmar i/b. Devmani Shukla and Mr. Vijay Prakash
Yadav for Petitioner in WP 10271 of 2014.
Mr. Pradeep Jetley – Senior Advocate with S. S.Deshmukh and S.
V. Chaugule for Respondent Nos. 1 to 3 in both petitions.
Mr. M. S. Bhardwaj for Respondent No. 4 – UOI in WP 9875 of
2014.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 05 February 2015

Date of Pronouncing the Judgment : 10 February 2015

JUDGMENT :-

1] As common issues of law and fact arise in these two
petitions, they are being disposed of with a common order.

2] Accordingly, Rule in both the petitions. At the request of and
with the consent of the learned counsels for the parties, Rule is
disposed of finally.

3] Both these petitions challenge order dated 31 October 2014 made by the Administrator, Daman & Diu and Dadra & Nagar Haveli (Administrator) made under Section 298 of the Daman and Diu Municipalities (Amended) Regulation, 1994 ("said Act") dissolving the Daman Municipal Council ("impugned order").

4] The two petitions have been instituted mainly by the Councillors of the Council, because in terms of Section 298(2) of the said Act, when the Council is dissolved, all Councillors shall, on the date of dissolution, vacate their office as such Councillors.

5] The Administrator, issued a show cause notice dated 7 October 2014 to all the Councillors of the Council requiring them to individually, severally or collectively show cause as to why the Council should not be dissolved. The show cause notice made reference to report of the Director (Municipal Administration) which pointed out to a complete break-down in the administration of the Council, and report of the Finance Secretary indicating mal administration and financial mismanagement within the Council and on the said basis recorded a *prima facie* opinion that a situation has arisen in which the Council is no longer competent to perform the duties entrusted upon it under the said Act and that there is

persistent default in performance of duties entrusted to it under the said Act.

6] The show cause notice dated 7 October 2014, also 'suspended' the 'Municipal Council' with immediate effect and appointed Shri Ramesh Verma, IAS, Secretary (Education/Tourism) as the Administrator to perform routine function of the Municipal Council for the time being.

7] The petitioners submitted their interim response to the show cause notice denying the charges. The petitioners also requested the Administrator to furnish copies of the reports on basis of which the show cause notice came to be issued.

8] By communication dated 16 October 2014, the petitioners were furnished with the following material :

- (a) Inquiry Report of the Finance Secretary, DD & DNH dated 7 October 2014;
- (b) Inquiry Report of Smt. Madhu K. Garg, Former Secretary (SW), DD, dated 9 April 2014; and
- (c) Factual Note of the Director, Municipal Administration, Daman, dated 7 October 2014.

9] One group of Councillors, thereafter filed their final response on 22 October 2014. Another group applied for additional time to file final response. Such time was granted upto 30 October 2014. On the said date, one group of Councillors submitted an application for adjournment stating that their Advocate was unavailable due to death anniversary of his Bhabhi and the other group of Councillors made some submissions on the issue of aspect of suspension of the Council and applied for further time to submit a reply.

10] The Administrator declined to grant any further time and has made the impugned order dated 31 October 2014 dissolving the Municipal Council and directing process for conduct of fresh elections within period of four months.

11] On 3 November 2014, this Court issued notices and directed that till the next date, the Administrator appointed under the impugned order shall not take charge of the Council, if not already taken. It is the case of the Administrator that charge was taken, no sooner the impugned order dated 31 October 2014 was made, whereas it is the case of the Councillors that no such charge was ever taken from them. In view of the dispute, this Court on 10 November 2014, directed the parties to maintain *status quo* as obtaining on the said date.

12] Mr. R. A. Thorat, the learned Senior Advocate for petitioners in writ petition no. 9875 of 2014 and Mr. Bhavesh Parmar, the learned counsel for the petitioners in writ petition no. 10271 of 2014, raised basically the following grounds in support of the petitions:

A) That the power to order dissolution of a democratically elected Councils ought not to be lightly exercised unless the jurisdictional parameters prescribed by Section 298 of the said Act were satisfied to the hilt. In the present case, it was submitted, that such power has been very casually exercised, without there being any material to make out a case of incompetence, persistent defaults, abuse of power or inability to carry out the functioning of the Council in accordance with the said Act ;

B) In any case, there is gross violation of principles of natural justice and fair play in the making of the impugned order. The show cause notice dated 7 October 2014 made reference to only two reports. Copies of three reports were furnished to the Councillors. However, the impugned order in all makes reference to five reports. With regard to at least two of the reports, which have been referred to and relied on in the impugned order, the Councillors were furnished with no notice whatsoever. Accordingly, adverse material, about which the Councillors had no notice, was made use of in making the impugned order. In this regard the reliance was placed upon the decisions of the Supreme Court in the cases of *Tarlochan*

*Dev Sharma vs. State of Punjab & Ors.*¹ and *Sharda Kailash Mittal vs. State of Madhya Pradesh & Ors.*²

C) That the impugned order contains no reasons particularly as to why the explanation furnished by the Councillors came to be rejected. In this regard reliance was placed upon the decisions of the Supreme Court in the cases of *Assistant Commissioner, Commercial Tax Department, Works Contract and Leasing, Kota vs. Shukla and Brothers*³ and of this Court in the case of *Pipe Arts India Pvt. Ltd. Sanaswadi vs. Gangadhar Nathuji Golamare*⁴.

13] Mr. Pradeep Jetley, the learned Senior Advocate for respondent nos. 1 to 3 in both the petitions submitted that from the material on record, it was more than apparent that the jurisdictional parameters necessary for exercise of powers under Section 298 of the said Act were complied with. Further, Mr. Jetley submitted that the so-called two additional reports referred to in the impugned order, were nothing but a summary of the three reports already furnished to the Councillors. Accordingly, Mr. Jetley submitted that there has been no breach in the compliance with the principles of natural justice and fair play. Finally, Mr. Jetley submitted that reasons have been indicated in the impugned order and the same are cogent and valid in the context of exercise of powers under

1 (2001) 6 SCC 260

2 (2010) 2 SCC 319

3 (2010) 4 SCC 785

4 2008 (6) Mh. L.J. 280

Section 298 of the said Act. For all these reasons, Mr. Jetley submitted that the two petitions be dismissed.

14] Although several contentions as aforesaid have been raised by the learned counsels for the parties, in my judgment, these petitions can be disposed of by adverting to the contention based upon infraction of the principles of natural justice and fair play.

15] There can be no dispute that the action of dissolution of a democratically elected Council is a serious one and would undoubtedly visit the Councillors with serious civil consequences. Accordingly, it is imperative that before the Administrator exercises such drastic powers, there has to be compliance with the principles of natural justice and fair play. The provision contained in Section 298 of the said Act also contemplates that the Council shall be given reasonable opportunity of being heard before its dissolution. The concept of '*reasonable opportunity*' is by now well established. One of the facets of such '*reasonable opportunity*' would be that the party which is proposed to be proceeded against, has to be furnished with all the adverse material, upon which reliance is proposed to be placed for the purposes of arriving at the impugned decision. Unless the party is made known to the adverse material proposed to be used against it, the party would be deprived of

reasonable opportunity to show cause against the same or to explain the same. Negatively stated that this principle means and implies that no adverse material of which the party has been given no notice ought to be used by the decision maker in making the impugned decision. In the present case, as shall be demonstrated hereafter, in making the impugned order, the Administrator has indeed made reference to and relied upon some adverse material against the Councillors and the Council, without the Councillors or the Council having effective opportunity to meet with the same.

16] As noted earlier, the show cause notice dated 7 October 2014 made reference only to the report of Director (Municipal Administration) and the report of the Finance Secretary. Along with the show cause notice, copies of said two reports were not furnished to the Councillors. Upon demand, the two reports were furnished to the Councillors on 16 October 2014. In addition to the two reports, yet another inquiry report made by Smt. Madhu K. Garg, Former Secretary (SW), DD, dated 9 April 2014 was also furnished to the Councillors. Based upon such material, at least one set of Councillors furnished their response to the show cause notice. The impugned order, which was made on 31 October 2014, however, makes reference to detailed report dated 6 January 2014 made by the Chief Officer of the Council to the Director (Municipal

Administration) pointing out specific cases of financial mismanagement and procedural irregularities relating to tendering, construction premises and other matters. In paragraph 7 of the impugned order dated 31 October 2014, the Administrator notes that he has *'carefully perused the material on record, including the report of the IO, FSR, report of Director (Municipal Administration) and report of Chief Officer, Municipal Council*'

17] From the aforesaid, it is very clear that the Administrator, in making the impugned order has not merely referred to the detailed report of the Chief Officer dated 6 January 2014, but also relied upon the same in the matter of exercise of powers under Section 298 of the said Act. Obviously, the report of the Chief Officer dated 6 January 2014 makes reference to specific cases of financial mismanagement and procedural irregularities relating to tendering construction premises and other matters. The Administrator, along with the return filed in this Court, has placed on record the report dated 6 January 2014. The report does contain material which is adverse to the Councillors and the Council, in the matter of its functioning. Mr. Jetley's contention that such report is nothing but a summary of the three reports which was furnished to the Councillors cannot be accepted. This is because the three reports furnished to the Councillors were dated 7 October 2014, 7 October 2014 and 9

April 2014, whereas the detailed report of the Chief Officer is dated 6 January 2014 i.e. before the three reports were even prepared. It is possible that there may be some overlapping in the contents of the Chief Officer's report dated 6 January 2014 and the other three reports. However, the fact remains that the Chief Officer's report dated 6 January 2014 does contain material adverse to the interests of the Councillors and the same was referred to and relied upon by the Administrator in making the impugned order, without disclosing to the Councillors that the same would be made use of and without furnish of copy of the same to them. This would amount to breach of principles of natural justice and fair play.

18] That apart, the impugned order dated 31 October 2014 makes reference to and relies upon the report of the current Administrator of the Municipal Council. As noted earlier, the show cause notice dated 7 October 2014 had also in the interim and till such time final order is made suspended the existing Municipal Council with immediate effect and appointed Shri Ramesh Verma as the Administrator upon the Council to perform routine functions of the Council. In such circumstances, there was no question of either reference to or reliance upon the report of said current Administrator of the Council, for the purpose of deciding whether or not the Council ought to be dissolved and the tenure of said Administrator

continued. In any case, such report was never furnished to the Councillors, even though the same has been taken into consideration by the Administrator in making the impugned order. Mr. Jetley, the learned senior counsel for the respondent nos. 1 to 3 however contended that report of the current Administrator is nothing but a summary of the reports which were already furnished to the Councillors and therefore there was no necessity to furnish such report to the Councillors. A perusal of the report of the current Administrator, which has been placed on record along with the reply does indicate that it is in the nature of a summary. However, upon summarizing, the current Administrator has expressed opinion that the Councillors have completely failed in discharging the duties and performing the functions of the Council as per laid down rules and regulations. It is further opined that the Council has violated provisions of the said Act on number of occasions and it is proven that the Council has exceeded and abused its powers. It is further opined that the Council failed to observe having prudence and has not implemented various projects which the Council had itself proposed and got the funds released from the Government for the said purposes. All this material, has been construed as vital input by the Administrator in making the impugned order. If this be so, then it was incumbent that such material is made available to the Councillors, before the same is relied upon for the purposes of

making an adverse order. This having not been done, there is breach of principles of natural justice and fair play.

19] The impugned order also makes reference to the letter dated 16 September 2014 made by six Councillors alleging favoritism, nepotism qua certain developers by citing specific instances. The letter makes reference to the Chief Officer not being permitted to perform his duty in the matter of issuance of construction premises and completion certificates. This letter and the contents thereof have been highlighted by the Administrator in the impugned order, implying that considerable stress has been given upon the same. Mr. Jetley submitted that since two petitions have been filed by two separate groups of Councillors, the letter dated 16 September 2014 must have been issued by one of the groups of six Councillors. There is accordingly no requirement to furnish to the Councillors such letter, which they may themselves have addressed to the Authorities. In the present case, the Council comprises fifteen Councillors. It was submitted that four Councillors belong to Congress Party, four Councillors belong to the Bhartiya Janata Party and seven Councillors are independents. The letter dated 16 September 2014 contains allegations from one set of Councillors against the other. By the impugned order, the entire Council has been dissolved and all the Councillors have had to vacate their

offices. In such circumstances, at least the Councillors against whom allegations have been made in the letter dated 16 September 2014 and which allegations have been taken into consideration by the Administrator in making the impugned order, ought to have been furnished with the copy of the letter dated 16 September 2014. Besides, if there was any proposal to take into consideration the letter dated 16 September 2014, then copy of the same ought to have been available to all the Councillors, so that they would have noticed that such material is intended to be used against them. The show cause notice also made no reference to such material in the form of the letter. In such circumstances, there is failure of natural justice and fair play in making the impugned order.

20] In the case of *Tarlochan Dev Sharma* (supra), the Supreme Court was concerned with the removal of President of Municipal Council on the ground of abuse of his powers or of habitual failure to perform his duties. The provision which permitted such removal, also contemplated satisfaction with requirements of natural justice. In this context, the Supreme Court has held that one of the requirements of principles of natural justice is that the reasons for the proposed removal have to be communicated to the person proceeded against. The purpose of such communication is to enable him to furnish an explanation of his conduct or his act or

omission which is likely to be construed as an abuse of power. The facts constituting gravamen of charge have to be communicated. It follows as a necessary corollary therefrom that what has not been communicated or not relied on in the show cause notice as a ground providing reason for the proposed removal cannot be relied upon as furnishing basis for the order of removal. The person proceeded against, has to be made aware of the precise charge which is required to meet and therefore he must be apprised of the exact content of the abuse of power attributed to him. The authority taking the decision must apply its mind also to the explanation furnished by the person proceeded against and this must appear from the order made.

21] The Supreme Court, in the case of *Tarlochan Dev Sharma* (supra) further went on observing that in a democracy governed by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected, unless his election is set aside by a prescribed procedure known to law. The removal from such office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Accordingly, a singular or a casual

aberration or failure in exercise of power is not enough. A course of conduct or plurality of aberration or failure in exercise of power and that too involving dishonest intention is necessary. The legislature could not have intended that the occupant of an elective office, seated by popular verdict, to be shown exit for a single innocuous action or error of decision.

22] In the case of *Sharda Kailash Mittal* (supra), the Supreme Court, again in the context of removal of president of a Nagar Palika has held that reasonable opportunity of hearing has to be afforded to the office bearer proceeded against. Further, keeping in view the nature of the power and the consequences that flow on its exercise, it has to be held that such power can be invoked by the State Government only for very strong and weighty reasons. Such a power is not to be exercised for minor irregularities in the discharge of duties by the holder of the elected post. The provision has to be construed in a strict manner because a holder of office occupies it by election and he / she is deprived of the office by an executive order in which the electorate has no chance of participation.

23] Applying the aforesaid principles, there is no option, than to hold that there has been a failure of natural justice and fair play in making of the impugned order. The impugned order, will accordingly have to be set aside. Looking however to

circumstances, to which reference shall be made a little latter, liberty shall have to be reserved to the Administrator to decide afresh where there is necessity to exercise powers under Section 298 of the said Act. In case the Administrator chooses to exercise such liberty, then the Administrator shall have to ensure that a fresh show cause notice or a modified show cause notice shall have to be issued to the Council and the Councillors along with all the material, which the Administrator may propose to refer to and rely upon for the proposed action. Further, the Administrator shall be bound to consider the cause shown by the Council and the Councillors and only thereafter arrive at a reasoned decision in the matter. The requirement of recording reasons is also one of the facets of natural justice. Reason is the very life of law. When the reason of law once ceases, the law itself generally ceases, such is the significance of the reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoid uncertainty and helps in observance of law of precedent. When reasons are announced and can be weighed, the public can have assurance that the process of correction is in place and working . Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice dispensation system. (*Shukla Brothers*). This is not to say that the impugned order in the present case is bereft of reasons. However,

there is necessary to communicate, howsoever briefly the reasons which made the decision maker to reject the explanation furnished. Further, the application of mind to the explanation furnished must appear from the order itself.

24] The Council or the Councillors are also required to respond to show cause notice under Section 298 of the said Act with utmost despatch and seriousness. In matters of this nature, a Council or councillors are not expected to adopt any dilatory approach. For instance, in the present case, the Administrator did adjourn the matter from time to time at the instance of the two groups of Councillors. However, ultimately on the date appointed for the hearing, one set of Councillors made submissions only on the aspect of interim suspension without filing any final reply and the other set of Councillors applied for adjournment, on the ground that their Advocate has to attend the first death anniversary of his Bhabhi. All this, despite the fact that this date had been fixed on 22 October 2014 itself. It cannot be the case that the date of first death anniversary was not known earlier. Such approach on the part of the Councillors is not to be appreciated, particularly in light of at least the undisputed facts and circumstances of the present case. Different set of Councillors, depending upon their political affiliations may be entitled to show cause differently. However, this should not

be used as some stratagem to unduly delay or obstruct the proceedings under Section 298 of the said Act. Ultimately, it must be remembered that the very constitution of the Council is not merely for the sake of the Councillors, the same is for the benefit of the members of the public, whose interests Council and the Councillors are expected to further and serve.

25] Ordinarily, once the impugned order of dissolution is set aside, the Council and its Councillors would stand restored with its full powers. Mr. Jetley, the learned Senior Advocate for the Administrator however contended that if the impugned order is to be interfered with, only on the grounds of breach of principles of natural justice, then the interim suspension of the Council ought to revive. In writ petition no. 9875 of 2014 there is no challenge *per se* to the interim suspension of the Council pending the show cause notice dated 7 October 2014. In writ petition no. 10271 of 2014, there is some challenge on this aspect, though the same has not been elaborated upon. In the facts and circumstances of this case, there is no necessity to decide upon the larger issue as to whether the Administrator can, in the interim, suspend of Council or its Councillors. This is because, in the facts and circumstances of the present case, even though the impugned order of dissolution is liable to be set aside for failure of natural justice, nevertheless,

some restrictions have to be placed upon the Council and the Councillors, in the matter of exercise of powers pending fresh decision under Section 298 of the said Act. As noted earlier, the reasons for adoption of such course of action is indicated briefly hereafter.

26] The present Council was constituted on 25 January 2011 and the first president took office on 3 February 2011. From this date, till the making of the impugned order, there have been no less than eight presidents with tenures ranging from 36 days to about 9 months. Similar is the position with regard to Vice Presidents. This is as a result of frequent no confidence motions, politicking and defections. The learned counsels for the petitioners submit this is an indication of vibrant democracy and the resultant instability notwithstanding, this is no ground to invoke powers under Section 298 of the said Act. This is missing the woods for the trees. The submission, perhaps misses the point that the council is not merely for the Councillors but the Council is to serve and further the interests of the members of the public. Vibrant municipal administration is undoubtedly more important than a vibrant democracy. There is allegation that during the period 2011 and 2014 only 4 and 3 meetings were held respectively to transact business, even though Section 78 of the said Act provides that there shall be 6 ordinary meetings in each year. There is allegation that

the Council and the Councillors insist on interference with the issuance of construction permissions or completion certificates, even though such matters pertain to the domain of the Chief Officer. There are allegations with regard to regularization of services of staff members, in breach of proper procedures. There are allegations that the Chief Officer was obstructed from functioning and that the Councillors went to the extent of locking the chamber of the Chief Officer. There are allegations that leases of municipal properties came to be renewed in breach of provisions of section 88 of the said Act. There are allegations that for the financial years 2011-12, 2012-13 and 2013-14, no budget was prepared or passed. There are allegations in the matter of unauthorised use of municipal funds and other financial irregularities. There are allegations with regard to failure to implement projects and failure to make use of the executed projects. True, most of these are, at the present stage, mere allegations. However, looking to the allegations, it may not be conducive in public interest if the Councillors or the Councils are restored with their entire powers pending fresh decision under Section 298 of the said Act.

27] Accordingly, in the facts and circumstances of the present case, the impugned order dated 31 October 2014 is quashed and set aside. The Council and its Councillors stand restored. Specific liberty is granted to the Administrator to take fresh proceedings

under Section 298 of the said Act, if necessary by issuing the fresh show cause notice or modifying the existing show cause notice. In the proceedings that follow, the Administrator shall ensure that there is no failure of natural justice. The proceedings shall be completed expeditiously i.e. within a period of two months from the date of this order. The Council and the Councillors shall also cooperate in the matter of expeditious disposal of the proceedings. Pending such proceedings, the Council and the Councillors shall be entitled to attend to the routine business only. The Council and the Councillors, during this period shall not taken any major decisions, particularly involving financial matters without the leave of the Administrator who has issued the show cause notice under Section 298 of the said Act. In case it is noticed that the Council or Councillors are adopting any dilatory strategies for the disposal of proceedings under Section 298 of the said Act, then it shall be open to the Administrator to make appropriate orders, including by way of interim suspension. This shall of course be without prejudice to the rights of the Councillors to contend before the appropriate forum that such a course is impermissible in law or on facts. The said issue, is kept specifically open.

28] It is clarified that nothing in this judgment and order shall be construed as intended to affect the merits and demerits of the case

of the respective parties. The observations made in this judgment and order, except on the aspect of compliances with principles of natural justice, are only *prima facie* and recorded for the purposes of the final order made in the present petitions. The Administrator shall proceed to dispose of proceedings under Section 298 of the said Act in accordance with law and with expedition, as directed.

29] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

30] All parties to act on the basis of an authenticated copy of this order.

(M. S. SONAK, J.)

Chandka