

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CWP No.492 of 2018 (O&M)

Date of decision : 15.02.2018

Kulwant Singh

.....Petitioner

Versus

State of Punjab and others

...Respondents

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. D. S. Patwalia, Senior Advocate with
Ms. Sukhmani T. Patwalia, Advocate for the petitioner.

Ms. Anu Chatrath, Additional A. G., Punjab and
Mr. Aditya Sharda, AAG, Punjab for respondents No.1 & 2.

Mr. Ramandeep Singh Pandher, Advocate for respondent No.3.

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DAYA CHAUDHARY, J.

Petitioner Kulwant Singh has approached this Court by way of filing the present writ petition under Articles 226/227 of the Constitution of India for quashing of impugned show cause notice dated 04.01.2018 (Annexure P-11), whereby he has been asked to submit reply before taking action on the proposal to remove him from the post of Councillor of the Municipal Corporation, SAS Nagar (Mohali) (hereinafter referred to as 'the Corporation') under Section 36 and its sub-clauses of the Punjab Municipal Corporation Act, 1976 (hereinafter referred to as 'the Act, 1976').

Briefly, the facts of the case as made out in the present petition are that the election for the post of Councillor in the Corporation was held

on 22.02.2015 and the petitioner was elected as Councillor from Ward No.49 of SAS Nagar (Mohali) on 26.02.2015. In the month of August 2015, after obtaining majority, he was elected as Mayor of the Corporation and took oath as such on 27.08.2015. A show cause notice dated 04.01.2018 (Annexure P-11) was issued to him by stating that there was a proposal to remove him from the post of Councillor of the Corporation under Section 36 and its sub-clauses of the Act, 1976. It has also been mentioned in said notice that before taking the proposed action of removal from the post of Councillor, in case any representation is to be made, the same be made within a period of seven days from the date of issuance of said show cause notice.

The petitioner required certain documents to furnish the reply of the show cause notice, but without filing any reply in absence of documents, he has approached this Court to challenge the show cause notice itself.

Learned Senior counsel for the petitioner submits that a Councillor can be removed only in case he has abused his position or remained negligent or by misconduct caused loss of money or property of the Corporation. He also submits that neither any finding nor reason has been recorded by the concerned authority in the show cause notice that any loss has been caused by any action of the petitioner. Even nowhere it has been mentioned as to how he has abused his position. Learned Senior counsel also submits that impugned show cause notice has been issued by the Secretary, Department of Local Government, who has no authority to

issue the same as the Corporation is an autonomous body to carry out its own working and functioning without any interference. Learned Senior counsel further submits that the Local Government Department has no power to issue the show cause notice as no decision was taken by the petitioner individually but it was an unanimous decision, taken collectively by all Councillors except one. It is also the argument of learned counsel for the petitioner that the action of the respondents in issuing show cause notice only to petitioner is not only arbitrary but violative of the principles of natural justice as no other Councillor has been issued show cause notice and no action has been taken against any other Councillors. He also submits that as per provisions of Section 36 (b) of the Act, 1976 a Councillor can only be removed, in case he has abused his position or because of any negligence or misconduct, loss has been caused which has resulted into misappropriation of money or property of the Corporation. No amount as to the loss caused has been mentioned in the show cause notice. Wrong facts have been mentioned in the impugned show cause notice stating that a single bid was there which is not permissible, whereas two bids were received. The bid which was found technically suitable, was accepted as the other did not fulfil the terms and conditions as required by notice inviting tender. The other bid was rejected. Learned Senior counsel further submits that the petitioner even did not participate in the bidding process and the decision was taken in the House, wherein all the Councillors except one were present and same was finalized by the Chief Engineer of the Department of Local Government after having technical sanction. The

agenda placed before the Municipal Corporation House on 16.02.2016 for purchasing “Reach Mover-cum-Tree Pruning Machine”, was approved by the House, where 42 Councillors were present. Said resolution dated 16.02.2016 was approved by the Secretary Local Government, Punjab vide its approval dated 16.03.2016. At the end, learned counsel for the petitioner submits that the impugned show cause notice has been issued with *mala fide* intention, as intention of the authority concerned is apparent from the language of the show cause notice itself as the proposal was for removal of the petitioner from the post of Councillor, whereas the petitioner was one of the Councillors only. Neither any allegation of *mala fides* are there in purchasing the said machine nor it has been mentioned as to how much loss has been caused. In support of his arguments, learned counsel for the petitioner has relied upon judgments of Hon'ble the Apex Court in cases ***Oryx Fisheries Private Limited Vs. Union of India & Ors. 2010 (13) SCC 427, Siemens Ltd. Vs. State of Maharashtra & Ors. 2006(12) SCC 33, Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant & Ors. 2001 (1) SCC 18, Mariamma Roy Vs. Indian Bank & Ors. 2009 (16) SCC 187, Chandrama Tewari Vs. Union of India AIR 1988 (SC) 117, State Bank of Patiala Vs. S. K. Sharma 1996 (3) SCC 364, State of M. P. Vs. Chintaman Sadashiva Waishampayan AIR 1961 (SC) 1623, National Institute of Technology & Ors. Vs. Pannalal Choudhury & Ors. 2015 (11) SCC 669, Punjab University Vs. V. N. Tripathi 2001 (8) SCC 179 and Maharashtra State Mining Corporation Vs. Sunil S/o Pundikaro Pathak 2006 (5) SCC 96***, judgments of this Court in cases ***Mohinder Kumar, Lecturer, Sant***

Longowal Engineering & Technology Society, Longowal, Distt. Sangrur & Ors. Vs. The District Election Officer (Deputy Commissioner), Sangrur & Ors. AIR 1997 (P&H) 272, Meenakshi Yadav Vs. Indial Oil Corporation Ltd. & Anr. 2014(2) RCR (Civil) 107 and Subhash Bansal and others Vs. Income Tax Officer, Ward-6, Patiala and others 2008 (4) SCT 40 and judgment of Jharkhand High Court in case M/s TRF Limited, Sudhir Deoras and Nandan Kumar Sarkar Vs. The Commissioner, Central Excise & Service Tax & Ors. 2013 (3) AJR 118.

Reply on behalf of respondents No.1 and 2 by way of affidavit of under Secretary, Government of Punjab, Department of Local Government has been filed, which is on record.

Ms. Anu Chatrath, learned Additional Advocate General, Punjab, appearing for respondents No.1 and 2 has vehemently opposed the submissions made by learned Senior counsel for the petitioner. She has also raised preliminary objections stating that the present petition to challenge the show cause notice is not maintainable being pre-mature, as neither the reply has been filed nor any action has been taken against the petitioner in pursuance of show cause notice. Learned State counsel also submits that the petitioner has not approached this Court with clean hands as he has concealed certain material facts. The machine was purchased without verifying the comparative rates and while approving/purchasing, the proper procedure of tender and comparative estimate has not been followed. Learned Senior counsel also submits that the Corporation was not having full knowledge of various technical solutions as neither any study was

conducted nor any report was prepared for laying down the technical specifications of the machine keeping in view the type of work, which is required to be done. There is no document on record to show that any comparison of cost and quality was available with the House and how the mind was made up to purchase that machine. Learned Senior counsel also submits that the initiative was taken by the present petitioner being the Mayor and it cannot be said that show cause notice should have been issued to all the Councillors. Learned State counsel also submits that there is a gross violation of the rules and instructions during process of purchase and the estimate was prepared without approval of the Commissioner as the matter was kept pending for a long period of eight months and only after transfer of the Commissioner on 01.09.2016, a noting was prepared on 23.09.2016 stating that the Commissioner had forgotten to sign the estimate preparation file. When earlier Commissioner was transferred, the file was presented for signature before the new Commissioner. It was signed on 07.10.2016 with the counter signature of the petitioner. Learned State counsel submits that not only the procedure in purchase of the machine has not been followed but without having any technical opinion over the matter of purchase, a great financial loss has been caused to the Corporation. The petitioner was personally interested in purchase of that machine and everything has been managed at the cost of procedure which is required for purchase. By relying upon judgments of Hon'ble the Apex Court in cases ***State of Uttar Pradesh Vs. Brahm Datt Sharma & Anr. 1987(2) SCC 179,*** ***The Executive Engineer, Bihar State Housing Board Vs. Ramesh Kumar***

Singh & Ors. 1996 (1) SCC 327, The Special Director & Anr. Vs. Mohd.Ghulam Ghouse & Anr. 2004(3) SCC 440, Union of India & Anr. Vs. Kunisetty Satyanarayana 2006(12) SCC 28, State of Orissa & Anr. Vs. Sangram Keshari Misra & Anr. Civil Appeal Nos.8509-8510 of 2003 decided on 19.10.2010, Secretary, Ministry of Defence & Ors. Vs. Prabhash Chandra Mirdha 2012 (11) SCC 565 and Ulagappa & Ors. Vs. Divisional Commissioner, Mysore & Ors. 2001(10) SCC 639, judgments of this Court in cases *M/s Kiran House Vs. Union of India 1992(2) RCR (Civil) 383, Urmila Sorout Vs. State of Haryana & Ors. 2013(4) SCT 598* and *Subhash Chander Vs. State of Haryana & Ors. 2017(1) SCT 275* and of Delhi High Court in case *Subha Kumar Dash Vs. The University of Delhi & Ors. WP(C)No.943/2015 decided on 30.01.2015*, learned State counsel submits that the writ petition against a show cause notice is not maintainable being premature and is liable to be dismissed.

Learned counsel for respondent-Corporation has reiterated the submissions made by learned counsel for the State. He submits that the order passed by the State is an administrative order and not judicial or quasi judicial order. In case of abuse of position by the petitioner, it can form a reason/ground for his removal from both posts *i.e.* Mayor as well as Councillor. In support of his arguments, learned counsel for respondent No.3 has relied upon Full Bench judgment of this Court in case *Joginder Singh Vs. State of Punjab and another 1963 PLR 267*.

Heard arguments of learned counsel for the parties and have also perused the documents available on record including the impugned

show cause notice.

Facts relating to issuance of show cause notice to the petitioner, who is Mayor of the Corporation, before passing of order of removal under Section 36 and its sub-clauses of the Act, 1976, on the basis of proposal, on the allegations that he has misused his position and caused financial loss to the respondent-Corporation, are not disputed.

Admittedly, the petitioner did not file reply to the show cause notice and has approached this Court to challenge the impugned show cause notice by raising grounds that the action of the respondent-authority in issuing show cause notice is discriminatory, *mala fide* and violative of principles of natural justice. The show cause notice has been issued by the Secretary, Department of Local Government, who is not competent and has no power to issue the show cause notice as the Corporation is independent and autonomous body in carrying out its working and functioning without any interference. The decision has been taken collectively by all the Councillors with majority but no other Councilor has been issued show cause notice like the petitioner, which shows the *mala fide* intention of the respondents. It is the argument of learned counsel for the petitioner that as per provisions of Section 36(b) of the Act, 1976, the petitioner being Councillor can be removed only under the circumstances when he has abused his position or has caused loss of money or property of the Corporation. Neither any reason or finding has been given in the show cause notice nor any preliminary inquiry has been conducted. It has also not been mentioned as to how loss has been caused and how the petitioner has

misused his position.

On perusal of documents available on record especially the show cause notice as well as allegations against the petitioner, it is not disputed that an unanimous resolution has been passed by all the Councillors of the Municipal Corporation, except one, for purchasing the machine which was approved upto the level of the concerned department. In case there is any violation of the procedure or some loss has been caused, the action is to be taken against all the Councillors and not against the petitioner alone being the unanimous decision. The Mayor of the Municipal Corporation is an elected functionary and in democracy, the provision for removing an elected functionary is to be strictly construed. An elected person cannot be removed by the order of executive authority unless there is clear cut case of flagrant and gross misconduct that such removal is resorted to.

No doubt the State Government has power to take action against the Mayor or the Councillor in case there are allegations of misconduct in discharging duties. However, this provision cannot be construed to mean that the Mayor/Councilor can be removed for any kind of misconduct in the discharge of his duties. He cannot be removed or ousted on some slight or technical misconduct. In case the allegations of any illegality or irregularity in purchase of the machine in dispute are there for which the resolution of House of Councillors has been passed and action has been taken against the petitioner who is Mayor of the Corporation, how he has been singled out, the reasons have not been mentioned. Nothing has

come on record as to what loss has been caused to the respondent-Corporation or how the petitioner is guilty in making a ground of removal. Had there been any inquiry to prove the allegations against him, the action could have been taken, in case he was the only person who was responsible and managed the show by having the approval/consent of other Councillors but neither any such document is there on record nor such allegations are there.

The phrase 'abuse of powers' has not been defined in the Act. Black's Law Dictionary (Seventh Edition, 1999) gives the meaning of 'abuse' as “to depart from legal or reasonable use in dealing with (a person or thing)”, “to injure (a person) physically or mentally”, “to damage (a thing)”. In Corpus Juris Secundum (Vol.1, P.402) it is so stated : -

“Abuse.

As Noun- It has been said that the word is not a term of art in the law and that its every day popular sense is well known; but that its proper signification when employed depends upon the context and subject-matter. In its largest sense, ill use or improper treatment of another; misuse. In the plural as used with reference to the authority of governmental commissions to correct “abuses”, the word has been held to mean a disregard of duty imposed by law; any improper use of a right or privilege.”

The word 'abuse' as occurring in Section 5(1) (d) of Prevention of Corruption Act, 1947 came up for consideration of this court in ***M. Narayanan Nambiar Vs. State of Kerala, AIR 1963 SC 1116***. This court observed :-

“Abuse” means misuse *i.e.* using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has

wide connotation and if no limitation is placed on it, the words 'corrupt', 'illegal', and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say, something savouring of dishonest act on his part. The contention of the learned counsel that if the clause is widely constructed even a recommendation made by a public servant for securing a job for another may come within the clause and that could not have been the intention of the Legislature. But in our view such innocuous acts will not be covered by the said clause. The juxtaposition of the word 'otherwise' with the words 'corrupt or illegal means', and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause."

The expression 'abuse of powers' in the present case cannot be said to be wilful abuse or an intentional wrong. An honest erroneous exercise of power or an indecision cannot be said to be abuse of power. A decision, action or instruction may be inconvenient to the person affected but it cannot be said to be an abuse of power. It must be such an abuse of power which would render a Councilor unworthy of holding the office of Mayor. The abuse of power would entail adverse civil consequences. A singular aberration in exercise of power is not enough to prove that the position has been misused.

The requirement of principles of natural justice is that reasons for the proposed removal are necessary 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 person who is going to be affected by such action should be made aware of the precise charge and the authority taking decision must apply its mind by considering the explanation furnished by the persons proceeded against which should appear from the show cause notice. In the present case, there is nothing in the show cause notice to show as to how the act of the petitioner is against the interest of the Corporation and how he has misused his position by causing loss to the respondent-Corporation.

Ordinarily, a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same appears to be without jurisdiction as has been held by Hon'ble Apex Court in some decisions including ***State of Uttar Pradesh Vs. Brahm Datt Sharma and Anr.*** (supra), ***Special Director and Another Vs. Mohd. Ghulam Ghouse and Another*** (supra) and ***Union of India and Another Vs. Kunisetty Satyanarayana*** (supra).

It is apparent from the show cause notice that the respondent-authority has already made up its mind to remove the petitioner. Same view was taken by Hon'ble the Apex Court in case ***V.C., Banaras Hindu University and Ors. Vs. Shrikant 2006 (6) SCALE 66.***

No doubt, in some of the cases while issuing show cause notice the words used normally are “*prima facie*” and “appears” suggesting that the conclusion is only tentative but not final or conclusive, but the over all

impression one gets from reading the impugned show cause notice is that respondent-authority has predetermined the issue.

It is settled principle of law that a quasi judicial authority while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating the show cause proceedings. A show cause notice is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicating in the notice. At this stage, the authority while issuing show cause notice cannot instead of telling him the charges, confront him with definite conclusions of his alleged guilt. In case it is done as it has been done in the present case, the entire proceedings initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceedings become an idle ceremony.

Hon'ble Supreme Court in the case of ***Oryx Fisheries Private Limited Vs. Union of India & others*** (supra) has made it clear that if on a reasonable reading of a show cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony or formality and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence. In this case, the authority failed to keep an open mind and has shown his closed mind to the petitioner and it is a clear case where the "principle of natural justice must

not only be done but it must eminently appear to be done" has been violated. It was violated by the language used in the impugned show cause notice and thereafter the situation further aggravated by the averments made in the counter-affidavit. We are conscious of the fact that the authority while exercising quasi-judicial jurisdiction is not bound by even the reply filed by the officer-in-charge of the Department on the question of law and otherwise also, there cannot be estoppel against law but once an impression is created by the executing authority itself by its own communication that it has not only formed prima facie opinion but it has finally formed opinion, in that situation, if the notice is accepted to be only show cause notice, then that will be absolutely unfair to the person drawing the inference that the decision has already been taken. If this assumption of the assessee is there and thereafter, the issues are decided by the same authority, that will make only the assessee understand that it was nothing but a predetermined decision being taken by the authority.

The petitioner individually as Mayor of the Municipal Corporation has not misused his office or power and what has been done by him is on the basis of resolution of the Councillors that too with the concurrence of the Commissioner in accordance with the provisions of the statute. It is the case of the petitioner that there is no allegation against him that he has worked against the public interest and is incapable in performing his duties or has acted against the provisions of the statute. The only allegation against him is that he has misused all statutory powers and has caused loss to the respondent-Corporation. It is the case of the petitioner

that there is nothing on record on the basis of which action can be taken against him.

In the present case a collective decision has been taken in the matter. Even in case it is said to be detrimental to the interest of the Corporation, it cannot be attributed solely to the petitioner. It would have been totally a different case altogether in case the individual role of the petitioner in purchasing that particular machine is proved. Some motive has to be attributed to his conduct. The petitioner has not done anything independently. What transpires from the record is that the resolution was passed by the Councillors. In case the Councillors were of the opinion that there is deficiency in the procedure, they could have passed a resolution rejecting the offer. This Court cannot appreciate the fact that for the collective responsibility of the petitioner being Mayor/Councillor, the petitioner is singled out for action is warranted. It could have been done only if there was enough material on record to indicate that the petitioner somehow or the other was instrument in getting the resolution passed by misrepresenting or by misusing his office but no such document is on record. The only allegation against him is that he has acted in contravention of the Rules but from the record it is clear that the petitioner in his individual capacity has not done anything in the matter. There is nothing on record to indicate that the petitioner had tried to misuse his office for getting some undue benefit to any person. Even nothing is on record to show as to whether any inquiry was conducted to show comparative price of the machine or any other machine was available in the market on cheaper

rates.

From the facts as mentioned above, I am of the considered view that it is a case of discrimination when petitioner has been singled out individually from number of persons similarly situated for hostile treatment. In case some irregularities have been committed in respect of functioning such as supervision and control of administration of Municipal Corporation, the petitioner alone cannot be blamed but the concerned officer who is technical hand is directly concerned with the day to day administration in respect of such functions or supervision and control of Municipal administration is equally to be blamed. In absence of dishonesty, malfeasance or non-feasance of grave nature there was no material for initiating action against the petitioner.

Accordingly, the present petition is allowed. Impugned show cause notice dated 04.01.2018 (Annexure P-11) is quashed.

However, the respondents are at liberty to proceed against after following the due procedure and after conducting inquiry in accordance with law, if any.

15.02.2018

sunil yadav

**(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No