

Civil Misc. Writ Petition No. 62427 of 2008

Hafiz Ataullah Ansari vs. State of UP and another

Hon'ble Yatindra Singh, J

Hon'ble Rajes Kumar, J

Hon'ble Krishna Murari, J

(Delivered by Justice Yatindra Singh)

1. A president of a municipality can be removed for misconduct under section 48 of the UP Municipalities Act, 1916 (the Municipalities Act). He ceases to exercise, perform, and discharge the financial and administrative powers and functions (in short 'ceases to exercise financial and administrative powers') the moment a show cause notice is issued against him satisfying the conditions under proviso to sub-section 2 of section 48 {Section 48(2)} of the Municipalities Act. The main question involved in this reference revolves around the right of the president before such a notice is issued against him:

Is he entitled to an opportunity, before issuing such a show cause notice?

If it is necessary then, what is its extent?

THE FACTS

2. The nagar panchayats in our State are governed under the Municipalities Act. The petitioner was elected Chairman/ president of Nagar Panchayat Dasna, district- Ghaziabad (the Nagar Panchayat) on 31.10.2006.

3. The bye-laws of the Nagar Panchayat for collection of parking fees were already proposed on 31.12.2001. They were approved and notified on 21.3.2007 after the petitioner was elected its president.

4. The auction notice for collection of parking fee was published on 23.5.2007. It was published by the beat of drums on 23.5.2007 and was also published in the Hindi daily newspaper Rashtriya Sahara on 1.6.2007.

5. The auction in pursuance of notice was held on 8.6.2007 and one Chaudhary Usman was the highest bidder. His bid of ₹36,000 was accepted and approved on 8.6.2007 itself.

6. Chaudhary Usman made a complaint that he was not being permitted to collect

the parking fee by the unauthorised persons. It was referred to the District Magistrate, Ghaziabad (the DM) by the executive officer (the EO) of the Nagar Panchayat.

7. The DM wrote to the police authorities for providing help in collection of parking fee.

8. In the meantime, one Mohd. Arif filed an application before the DM on 7.7.2007 that he was prepared to take auction for ₹50,000/- as against the highest bid of ₹36,000/-.

9. On the aforesaid complaint, the District Magistrate asked for the comments from Sub-Divisional Magistrate Sadar, Ghaziabad (the SDM). He submitted his report to the DM on 12.7.2007 and Mohd Arif deposited ₹50,000. The DM;

Cancelled the auction in favour of Chaudhary Usman on 17.7.2007; and
Ordered for holding fresh auction for the parking fee.

10. The fresh auction was held on 4.8.2007. In this auction Chaudhary Usman was again the highest bidder but this time his bid was of ₹7,00,000 against his previous highest bid of ₹36,000 only.

11. One Asgar Teli sent a complaint before the Principal Secretary, Nagar Vikas Vibhag, Uttar Pradesh against the petitioner that;

The petitioner was committing financial irregularities;
On the earlier occasion auction for parking fee was for ₹36,000; whereas, subsequently auction for the same was for ₹7,00,000.

12. In pursuance of the aforesaid complaint, the SDM by his letter dated 20.11.2007 asked an explanation from the EO directing him to send the original file relating to the auction dated 8.6.2007 along with his report within three days. The EO sent his reply along with the original records on 6.12.2007.

13. A copy of the aforesaid letter of the SDM dated 20.11.2007 was also sent to the President, asking him to show cause as to how he had approved the auction without there being any report from the Executive Officer. In pursuance of this query, the petitioner sent his reply on 28.11.2007.

14. The SDM submitted his report to the DM on 22.2.2008. This report was sent to the State Government by the DM on 29.2.2008.

15. Thereafter the impugned notice dated 24.10.2008 was issued against the petitioner. In the notice, there is only one charge. It related to the auction dated 8.6.2007 to the effect that:

The auction on 8.6.2007 was done secretly for ₹36,000 and was illegally approved on the same day;

Subsequently, the same auction was taken by the same person for ₹7,00,000;

Had the earlier auction not been cancelled, it would have caused financial loss.

Thus, the petitioner has acted adversely to the interest of the Nagar Panchayat.

16. In the notice, apart from the charge, the following facts were also mentioned:

The letters of the DM dated 29.2.2008 and the SDM dated 22.2.2008 as evidence; and

The cessation of the financial and administrative powers of the petitioner till he was exonerated of the charge mentioned in the notice.

17. The petitioner sent his reply on 8.11.2008 and filed the present writ petition against the impugned notice/ order dated 24.10.2008 ceasing his financial and administrative powers.

QUESTIONS REFERRED

18. The writ petition was entertained and an interim order was granted on 19.12.2008 staying the operation of the notice dated 24.10.2008 so far it restrained the petitioner from exercising the financial and administrative powers under the proviso of sub-section (2) of Section 48 of the Municipalities Act.

19. The bench by a separate order, also referred the following three questions to larger bench for decision.

- (i) Whether the State Government in proceedings initiated for removal under section 48(2) of the UP Municipalities Act, 1916 is required to give any opportunity at the stage of invoking the powers in the first proviso before restraining the president from exercising his financial and administrative powers and as to whether any such preliminary

inquiry is permissible to be read the aforesaid proviso?

- (ii) Whether the State Government has to record a subjective satisfaction separately for invoking the said powers even if the material for the issuance of the show cause notice and the invoking of such powers is the same?
- (iii) Whether the views expressed by this Court in the decisions of *Imran Masood vs. State of UP and others*, 2007 (1) ADJ 350 (DB), and in the case of *Rekha (Kinner) vs. State of UP and others*, 2008 (3) ADJ 315 (DB), require reconsideration in the light of the observations as contained in *Smt. Vimla vs. State of UP and others*, 2008 (1) ADJ 128 (DB) (LB), for an authoritative pronouncement on issue number-1 and 2?

20. During pendency of the writ petition before the full bench (FB), the writ petition was amended and the petitioner was permitted to raise the question of constitutionality of section 48(2) of the Municipalities Act.

21. Before we proceed further, it would be appropriate to mention the historical background of the local bodies and notice legislative history of the Municipalities Act as well as similar other enactment namely UP Panchayat Raj Act, 1947 (the Panchayat Raj Act) and UP Kshettra and Zila Panchayat Adhiniyam, 1961 (the Kshettra-Zila Panchayat Act). These two statutes are jointly referred to as the Rural-Areas Enactment in this judgement.

HISTORICAL BACKGROUND

Local Bodies: Constitutional Status

22. India that is Bharat, is union of States. Its territory consists of territories of the States and the Union. Geographically, they are divided into districts. A district consists of urban and rural areas. These areas are governed by the bodies that are part of local self government.

23. Panchayats, Municipalities, the institutions of Local self Government, were referred to in the constitution but were given only statutory status. Their functioning was not happy. These institutions were not able to acquire the status and dignity of viable and responsive people's bodies due to a number of reasons including absence of regular elections, prolonged suppressions, insufficient representation of weaker sections like scheduled castes, scheduled

Tribes and women, inadequate devolution of powers, and lack of financial resources. It was considered necessary that some basic and essential features of Panchayati Raj Institutions and Local Self Government be enshrined in the Constitution to impart certainty, continuity and strength to them. Accordingly 'Part IX' and 'IX-A' relating to Panchayats and Municipalities were added in the Constitution by 73rd and 74th Constitutional Amendment Acts.

Rural Area

24. Seventy-third Constitutional amendment relates to panchayt raj institutions of the rural areas. Article 243B in part IX envisages three tier system of panchayats at village, district, and at intermediate level between the two. In our State, rural areas of a district are divided into Blocks that in turn consist of villages. The three levels of panchayats as envisaged by The Article 243B were already in existence.

25. A gram panchayat is a local body governing a village; it could comprise more than one village as well. It is governed by the Panchayat Raj Act.

26. Kshettra panchayat governs a block (intermediate level) and zila panchayat a district. They are governed by the Kshettra-Zila Panchayat Act.

27. There in another bunch of writ petitions that was heard along with this case. That bunch related to similar questions regarding *pradhan* of a gram panchayat. In that bunch of the writ petitions, we are answering the questions today. We have treated WP 36881 of 2008, Vivekanand Yadav vs. state of UP (the Vivekananad Case) as leading case in that bunch because it is the earliest of the four WPs, where questions were referred. The historical point of view of *panchayati raj* system is dealt in greater detail in that decision.

Urban Area

28. Seventy-fourth Constitutional amendment deals with the municipalities namely the urban areas of a district. This is broadly dealt at two levels:

- (i) Rural area in transition to becoming urban area—it was earlier known as Town Area now designated as Nagar Panchayt; and
- (ii) Urban areas, depending on its size, are known as Municipality (smaller urban area) or Municipal Corporation (larger urban area).

29. The rural areas in transition of becoming urban areas were governed by UP

Town Area Act and the smaller urban area by the Act. However after the 74th Constitutional amendment Act UP Town Area Act has been repealed and now both such areas are governed by the Municipalities Act.

30. The larger urban areas were and are still governed by the Municipal Corporation Act.

LEGISLATIVE HISTORY

31. Section 48 of the Municipalities Act is titled as 'Removal of President'. It provides procedure as well as ground on which a President can be removed. This section was amended by UP Municipalities (Amendment) Act, 1964 (the UP Act No. 26 of 1964). By this amendment;

Section 48(2) providing grounds for removing the president were substituted;

Sub-section 2A to section 48 {section 48(2A)} was inserted. It empowered the State Government to remove the President for the reasons to be recorded in writing after considering his explanation under section 48(2) of the Municipalities Act. This sub-section had a proviso that provided that instead of removing the president he could be given only a warning;

Sub-section 3 of section 48 {Section 48(3)} was substituted. The newly substituted section empowered the State Government to suspend a president, in case he was asked to show cause in respect of some of the grounds mentioned in section 48(2) of the Municipalities Act.

Sections 48(2A) and 48(3) of the Act as amended by UP Act No. 26 of 1964 are given in **Appendix-2**; whereas **Appendix-1** is the index of appendices and includes abbreviations used in the judgement.

32. UP Urban Local Self Government Laws (Amendment) Act, 1994 (the UP Act No. 12 of 1994) was enacted to amend the laws relating to local self government in order to bring them in tune with 73rd and 74th Constitutional Amendment Act. By this Act Section 48(3) was omitted. This meant that there was no power to suspend the president of a municipality during the pendency of proceeding for his removal.

33. The Municipalities Act was again amended by the UP Municipalities (Amendment) Act 2001 (UP Act No. 22 of 2001). Among others, it amended section 48(2-A) of the Act. It deleted the proviso that empowered the State to give a warning instead of removal.

34. The aforesaid position continued for some years. However, UP Municipalities (Amendment) Act, 2004 (UP Act No. 6 of 2004) was enacted. By this amending Act another sub section 2-A was inserted in section 48. This sub section provided that:

If a President or vice President was prima facie found to be guilty on any of the ground referred to in section 48(2) on an inquiry by a person and under the procedure as might be prescribed; and

A show cause notice was issued to him containing the charges; then

The president would cease to exercise the financial and administrative powers till he was exonerated in the inquiry.

Section 48(2-A) as added by UP Act No.6 of 2004 is detailed in **Appendix-2**.

35. Sub-section 2A of Section 48 was already inserted by UP Act No. 26 of 1964. By UP Act no. 6 of 2004, it was again inserted. This was a mistake. This was also explained by a division bench (see below)¹ of our court.

36. The aforesaid mistake was realised by the legislature and UP Municipalities (Amendment) Act, 2005 (UP Act No. 2 of 2005) was enacted to rectify it. By this amending Act, sub-section 2A to section 48 as inserted by UP Act No. 6 of 2004 was omitted and in its place the proviso was added in sub-section 2. This proviso is still in force and we have to interpret the same. The relevant part of section 48 as in existence at the time of issuance of show cause notice is detailed **Appendix-3**.

37. Section 95(1)(g) of the Panchayat Raj Act as well as sections 16(1) and 29(1) of Kheshttra-Zila Panchayat Act *also* provide removal of a *pradhan* of a gram panchayat, *pramukh* of a kshettra panchayat and *adykshya* of a zila panchayat. Provisos to these sections also provide cessation of financial and administrative powers on issuance of show cause notice. However, under these provisos, the show cause notice can be issued only on they being prima facie found to have committed financial and other irregularities in an enquiry (preliminary or fact finding) by such person and such procedure as may be prescribed. Section 48(2A) of the Municipalities Act that was inserted by UP Act no. 6 of 2004, was similar to these provisos.

38. By this decision, apart from the other questions, we are also deciding the question whether any opportunity is required before issuing any notice under proviso to section 48(2) of the Municipalities Act or before passing any order

¹ Girish Chandra Srivastava vs. State of UP: 2007 (4) ALJ 268.

ceasing financial and administrative powers. It is similar to the question relating to opportunity to *pradhan* under the Panchayat Raj Act referred in the Vivekanand case. This question relating to *pradhan* under the Panchayat Raj Act is being decided in this decision. In both decisions, we are referring to the president of a municipality, *adhyaksh* of a zila panchayat, *pramukh* of kshetra panchayat, and *pradhan* of a gram panchayat as heads of the local bodies.

POINTS FOR DETERMINATION

39. We have heard Sri SMA Kazami, Senior Advocate and Sri Ashwani Mishra counsel for the petitioners; Sri SG Hasnain Additional Advocate General and Sri AK Sinha for the Respondents.²

40. The division bench has referred three questions. They are mentioned under the heading 'QUESTIONS REFERRED'. For convenience, we have reformulated them into the following points for determination and have added preliminary objection of the respondent as the first point.

- (i) Whether the reference should be sent back unanswered;
- (ii) Can there be proceeding for removal of a president under section 48(2) of the Municipalities Act, without ceasing his financial and administrative powers;
- (iii) Whether any separate or specific order is required under proviso to section 48(2) of the Municipalities Act for ceasing financial and administrative power.
- (iv) If the notice purported be given under proviso to Section 48(2) of the Municipalities Act does not comply with it then what is the consequence;
- (v) What are the condition precedent (other than mentioned in the next point) for ceasing financial and administrative powers under proviso to section 48(2) of the Municipalities Act;
- (vi) Whether any opportunity is also required to be afforded before ceasing financial and administrative powers;
- (vii) In case opportunity is required to be afforded then what is its extent;

² We are thankful to the counsel appearing in the case for correcting the part of the judgement under the heading 'THE FACTS', 'QUESTIONS REFERRED', 'HISTORICAL BACKGROUND', 'LEGISLATIVE HISTORY', 'POINTS FOR DETERMINATION', and 'Appendices'. However, if there are any mistakes, they are ours.

1st POINT: PRELIMINARY OBJECTION—NO MERIT

41. The counsel for the respondents submitted that:

Rekha (Kinner) vs. State of UP: 2008 (3) ADJ 315 (the Rekha case) and Imran Masood vs. State of UP: 2007 (10) ADJ 350 (the Imran case) had held that no opportunity was required before issuing a show cause notice under proviso to section 48(2) of the Municipalities Act;

In Smt. Vimla vs. State of UP and others: 2008 (10) ADJ 128 (the Vimla case), the aforesaid cases were neither doubted nor could they be as the question of opportunity was not involved there;

There is no conflict of decisions;

The reference is incompetent and should be returned unanswered;

The Rekha and Imran Case

42. In the Rekha case, the court had held (paragraphs 5 and 6):

'The proviso to sub-section (2) of Section 48 ... has been brought in as an interim arrangement during the pendency of the proceedings for removal of the President. A bare reading of proviso clearly demonstrates that the proviso does not contemplate any enquiry, much less a preliminary enquiry ... before passing of the order of cessation of financial and administrative power ...

The aforesaid Scheme clearly demonstrates that power under the proviso is only an interim arrangement pending finalization of the proceedings ... once proceedings have been initiated under subsection (2) of Section 48, the consequences are seizure of financial and administrative power.'

43. In the Imran case, the show cause notice was challenged on the ground that it is malafide and without jurisdiction. The court held (paragraph 8) that:

'At first we say that complexity of service jurisprudence and revenue jurisprudence are quite distinct from each other ... When the law itself says that show cause notice can be issued by the State if it has reason to believe that the allegations do not appear to be groundless, it requires lowest level of sufficiency.'

The Vimla Case

44. It is correct that in the Vimla case (paragraphs 18 and 19) the court had clarified that it was not considering the question of opportunity at the stage of issuing notice as the writ petition was being allowed on the other question.

However, the reference has not been referred to the full bench because of the contrary view in the Vimla case but because of the observations contained therein as well as the opinion of the bench referring the case.

45. In the Vimla case, the court quashed the notice under proviso to section 48(2) of the Municipalities Act (paragraph 49 of the judgement) on the finding that:

In the inquiry report, the president was not found prima facie guilty of any of the charges; and

Depriving president from exercising financial and administrative functions was arbitrary exercise of power.

46. The respondent in the Vimla case had raised the plea that the petition should not be entertained as there would be ample opportunity, while submitting reply to the show cause notice. This plea was negated on the finding (paragraph 50 of the judgement) that:

The notice was not a simple show cause notice;

The president was deprived of administrative and financial powers;

It had adverse civil consequence of taking away the statutory rights and functions.

47. Needless to say, in case the order of issuing notice has adverse civil consequences, then opportunity has to be afforded. These are some of the observations in the Vimla case that imply that opportunity is required to be given.

48. Apart from above, the bench in referring order referred to the words used in the proviso to section 48(2) of the Municipalities Act namely 'reason to believe', 'groundless', as well as 'shall' and held that minimal allegation for cessation of financial and administrative powers as suggested in the Imran case might not be enough. The bench observed:

'This ... may require even a summary procedure to be followed associating the concerned person by at least allowing him to afford an explanation for the purpose of his continuing to discharge the administrative and financial powers. This would also eliminate any element of possibility of abuse of power and criticism of the order as political victimisation.'

49. It is clear that the bench while referring this case had expressed its doubts about the Vimla and Imran cases. The reference is proper; it is not incompetent

and cannot be sent back. We consequently proceed to answer the questions referred.

**2nd to 4th POINT: THERE CAN BE PROCEEDING WITHOUT
CEASING POWER**

Intention of Legislature—Serious and Non-serious Case

50. Section 48 of the Act provides for removal of the president. Its sub-section (2) provides the grounds on which proceeding for removal of a president can be taken. It provides that if the State Government has reason to believe that there has been failure on the part of the president in performing his duties or the president has committed misconduct mentioned in sub-clauses (i) to (xvii) of clause (b) of sub-section 2 of Section 48 then he could be called upon to show cause why he be not removed from the office.

51. Section 48(2A) provides that the State government after considering explanation of the president and after recording reasons can remove the president.

52. A joint reading of Section 48(2) and 48(2A) ensures that before a president can be removed, the following conditions must be satisfied:

- (i) Opportunity must be afforded to the president;
- (ii) His explanation has to be considered; and
- (iii) In case of removal, the order has to be reasoned or speaking order.

53. The proviso to section 48(2) provides cessation of financial and administrative powers under specified conditions mentioned therein. These are discussed, while deciding points-5 to 7. Suffice to say, right to exercise financial and administrative powers does not cease merely on issue of notice under section 48(2) of the Act unless the conditions mentioned in the proviso to section 48(2) are also satisfied.

54. The intention of the legislature is clear from the language of the provision. It envisages two kinds of proceedings under section 48(2) of the Municipalities Act:

One, simpliciter where financial and administrative powers of the president do not cease;

The other, where his financial and administrative powers cease. This can happen only if the conditions under proviso to section 48(2) are satisfied.

55. The proviso to section 48(2) is meant to apply in the serious situation where it

is expedient to cease the financial and administrative powers of the president. It is not to apply in every case. It is for this reason that extra precautions have been provided in the proviso to section 48(2) of the Municipalities Act.

56. In case, the charges are not such so as to warrant cessation of financial and administrative powers during the enquiry for removal, then the action may be taken only under section 48(2) of the Municipalities Act without resorting to the proviso. In such a case the proceeding will go on and opportunity will be given and ultimately the final order may be passed.

57. Even in a case, where at the beginning it was not necessary to cease the financial and administrative powers but at the later stage if it appears to the State government that it is necessary to do so, then it may be done by complying with the conditions mentioned in the proviso to section 48(2) of the Municipalities Act.

58. At this stage, we would also like to point out that the Supreme Court in two cases arising out in similar enactments from the other States have observed (see below)³ that an elected head is not liable to be removed for—casual or singular failure or mere irregularities: he could be removed only for grave illegality. However, this point is not referred to us and we leave it open.

Not Necessary to Record the Reasons Separately

59. The president ceases to exercise the financial and administrative powers as soon as a show cause notice under section 48(2) satisfying the conditions of the proviso to section 48(2) or a valid show cause notice under proviso to section 48(2) of the Municipalities Act is issued. The cessation of power is automatic: it is so contemplated in the proviso itself.

60. Once, a valid notice under proviso to section 48(2) of the Municipalities Act is issued, then even if it is not mentioned that the financial and administrative powers of the president have ceased, it does not mean that he can still exercise them. The cessation of the president's power is automatic and necessary consequence of issuance of the valid notice complying with the conditions under the proviso.

61. In view of above, it is not necessary that order ceasing the right to exercise

³ See *Tarlochan Sharma vs. State of Punjab* 2001 (6) SCC 260 (paragraph 11); and *Sharda Kailash Mittal vs. state of MP* 319 (paragraph 27).

financial and administrative powers should be mentioned in the separate order or in the show cause notice itself but what is necessary is that the notice should be valid; it should comply with the conditions of the proviso to section 48(2) of the Municipalities Act.

**Notice Under Proviso Or Order Ceasing Power—Invalid
Proceeding for Removal U/S 48(2) to Continue**

62. Under the sub-heading 'Intention of Legislature—Serious and non-serious case', we have indicated that not in every case financial and administrative power ceases. It is only in those cases where it is expedient to do so that it is to be done.

63. In the case, where it is expedient to do so, the notice under section 48(2) may itself comply with the conditions under the proviso or it may be a notice simpliciter under section 48(2) of the Municipalities Act and thereafter another notice complying/ satisfying the condition of the proviso is given—resulting in cessation of financial and administrative powers.

64. Let's consider the reverse case. Suppose a notice purporting to be satisfying the conditions of the proviso is given,

Stating that right to exercise financial and administrative powers is ceased;
or

Treating that financial and administrative powers have ceased.

However, if in fact the notice did not comply with conditions or in other words, it is an invalid notice under the proviso to section 48(2) of the Municipalities Act and is also so held by the court then, what is the consequence:

- (i) Does it only invalidate the order or effect of the notice to cease financial and administrative power; or
- (ii) It voids the proceeding for removal also?

65. In our opinion, as there can be proceeding simpliciter to remove a president, the first of the aforementioned consequence ensues. In such a situation,

- (i) The right to exercise financial and administrative power does not go away;
and
- (ii) It becomes a proceeding simpliciter for removal of the president; and
- (iii) The proceeding for removal of the president will continue. They are not wiped out.

66. The proceeding for removal under section 48(2) can only be quashed at the stage of issuing notice, if the charges on the face of it or even if they are presumed to be proved, do not make out a case of any of the grounds under section 48(2) of the Municipalities Act.

Position in the Rural-Areas Enactment—Similar

67. The Kshettra-Zila Panchayat Act, and Panchayat Raj Act also provide for removal of the heads of the local bodies under section 16, 29 and 95(1)(g) of the Rural-Areas Enactments. These provisions are similar to section 48 of the Act except the grounds for removal as well as conditions under the proviso for ceasing financial and administrative power. The relevant parts of the sections dealing with cessation of financial and administrative powers are given in **Appendix-4**.

68. The reason why the conditions under the provisos are different are indicated while discussing the points-5 to 7 but the only point we wish to state at this stage is that those provisions also envisage similar interpretation so far as points-2 to 4 under discussion are concerned. There is no difference in the interpretation. The same reasoning applies there as well.

69. In our opinion, section 48 of the Municipalities Act, and section 95(1)(g) of the Panchayat Raj Act contemplate,

(i) Two kinds of proceedings:

One, simpliciter without cessation of financial and administrative powers;

The other, where the right to exercise financial and administrative powers also ceases;

(ii) A notice purporting to satisfy the condition of the relevant proviso, if held invalid, then it ends up voiding the order or effect of cessation of financial and administrative power, but does not void the removal proceeding unless the charges, even, on the face, or if presumed to be proved do not make out a case for removal.

70. Let's consider the conditions that are necessary to comply before financial and administrative powers can be ceased.

5th POINT: CONDITIONS UNDER THE PROVISIO

71. Section 48(2) of the Municipalities Act is titled as 'Removal of President'. It provides grounds on which president can be removed.

72. Section 48(2A) of the Municipalities Act provides that the president can be removed, after,

- Considering his explanation; and
- Conducting such inquiry as may be necessary; and
- Recording reasons for his removal.

73. The proviso to section 48(2) of the Municipalities Act prescribes conditions that have to be fulfilled before the right of a president to exercise financial and administrative powers can cease. It states that:

(i) The State Government should have reasons to believe that:

- The allegations do not appear to be groundless; and
- The president is prima facie guilty of any of the grounds mentioned in section 48(2) of the Municipalities Act.

(ii) The State government should also issue show cause notice for removal under section 48(2) of the Municipalities Act and it must contain charges.

74. The phrase 'reasons to believe' is often used in statutes and has been repeatedly held by the courts (for citation of the rulings see below)⁴ to mean that reasons for the formation of the belief must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material and formation of the belief.

75. The 'reason to believe' or the satisfaction of the State government under the proviso is not a subjective but is an objective satisfaction based on the relevant material; the satisfaction is of reasonable man and has to be based on material: it cannot be based on mere suspicion, gossip, rumour or just a complaint.

⁴ Joti Parshad v. State of Haryana, 1993 Supp (2) SCC 497: AIR 1993 SC 1167; Pratap Singh (Dr) v. Director of Enforcement, (1985) 3 SCC 72: 1985 SCC(Cri) 312: AIR 1985 SC 989; Jai Shanker v. State of HP, (1973) 3 SCC 83: AIR 1972 SC 2267; Sheo Nath Singh v. Appellate CIT, (1972) 3 SCC 234: AIR 1971 SC 2451; S Narayanappa v. CIT, AIR 1967 SC 523; ITO v. Lakhmani Mewal Das, (1976) 3 SCC 757: 1976 SCC (Tax) 402: AIR 1976 SC 1753; CST v. Bhagwan Industries (P) Ltd., (1973) 3 SCC 265: 1973 SCC (tax) 177: AIR 1973 SC 370.

76. The only time similar words were held to have subjective satisfaction was in *Liversidge vs. Anderson*: 1941 (3) AllER 338 over famous dissent of Lord Atkin but did not last long—it was soon overruled (see below)⁵.

77. What is the benefit of having relevant material unless the effected person is informed about it. In our opinion, the relevant material should also be mentioned in the notice/ order on the basis of which satisfaction of the State government is reached. The president must know what had led the State government to form the opinion against him.

78. The court cannot go into the question of sufficiency of the material but it can always see:

Whether there is any material or not; and

Whether it is relevant for arriving at the objective satisfaction.

This may not be possible unless the material on which this objective satisfaction is based is also indicated in the notice/ order.

79. The notice that results in ceasing the financial and administrative powers under the proviso to section 48(2) of the Municipalities Act is not a simple show cause notice—it must contain the charges as well. It is only when the show cause notice contains the charges that the cessation of the financial and administrative power takes place.

5 In *Liversidge Vs Anderson* 1941 (3) AllER 338 interpretation of Defence Regulation 18-B was involved that used the words 'If the secretary of state has reasonable cause to believe'. The question was, was the satisfaction of the secretary of state subjective or objective?

The majority held it to be subjective over the strong and classic dissent of Lord Atkin, who held it to be objective. In his judgement, he observed,

'I know of only one authority which might justify the suggested method of construction. "When I use a word" Humpty Dumpty said in rather scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is" said Alice, "whether you can make words mean different things". "The question is", said Humpty Dumpty, "which is to be master that's all"... [T]he question is whether the words "If a man has" can mean "If a man thinks he has", I am of the opinion that they cannot, and the case should be decided accordingly.'

The view of Lord Atkin holding it to be objective has been justified by not only by CK Allen in 'Law and Order' and in Wade's Administrative Law, but also by the later decisions in England {see *Nakkuda Ali Vs Jayaratne* 1951 AC 66; *R Vs Brixton Prison Governor* (1969) 2 AllER 347; *Registrar of Trading Vs. WH Smith* (1969) AllER 1065}. Lord Diplock, in *ITC Vs. Rossminster* 1980 (1) AllER 80 said,

'I think the time has come to acknowledge openly that the majority of this House in *Liversidge Vs. Anderson* was expediently and at that time perhaps excusably wrong; and the dissenting speech by Lord Atkin was right'.

80. The mere indication of the charges are meaningless, unless the evidence is also indicated by which they are to be proved. The show cause notice should also mention evidence from which charges are to be proved. It is another question that in most of the cases the material relied upon by the State government for arriving at the objective satisfaction and evidence by which the charges are to be proved are the same.

81. Indication of relevant material and evidence by which charges are to be proved is not only necessary to judge whether the power was validly exercised but also reduces arbitrary exercise of power—a point that we would elaborate under the sub-headings 'Natural Justice—Not a Rule of Thumb' and 'Brings About Fairness' in the discussion regarding points-6 & 7.

82. The proviso to Section 16(1) as well 29(1) of the Kshettra-Zila Panchayat Act and proviso to section 95(1)(g) of the Panchayat Raj Act (see Appendix-4) have different conditions. Unlike the proviso to Section 48(2) of the Municipalities Act, they contemplate a preliminary enquiry to be conducted by such person and such procedure as may be prescribed. The government has also framed separate rules under those Acts providing for the enquiry officer as well as the procedure. It is only on being prima facie satisfied on the preliminary report in the enquiry that a valid notice can be issued under those provisos.

83. The condition under proviso to section 48(2) of the Municipalities Act are more rigorous than the conditions in the relevant proviso under the Rural-Areas Enactment. Perhaps, the reason is the basis on which the notices are issued under the different Acts:

Under the Municipalities Act the conditions have to be satisfied on the basis of material;

Whereas under the other Acts, the conditions are on the prima facie finding of the preliminary enquiry.

Needless to say an enquiry—even if it is a preliminary enquiry—is more rigorous than having reasons to believe. This is the reason why under the Municipalities Act the conditions are more rigorous than the Rural-Areas Enactment relating to rural areas. The conditions under the provisos in the Rural-Areas Enactment are discussed in the decision of the Vivekanand case.

84. In our opinion, the cessation of financial and administrative power can take

place only if the power under the proviso to section 48(2) of the Municipalities Act is rightly exercised. It is rightly exercised only if atleast the following conditions are satisfied in the notice/ order:

- (i) There should be objective satisfaction of the State government that:
 - The allegations do not appear to be groundless; and
 - The president is prima facie guilty of the ground that have to be indicated under section 48(2) of the Municipalities Act.
- (ii) The show cause notice should contain the charges;
- (iii) The show cause notice should not only indicates the material on which the reason to believe or objective satisfaction is based, but the evidence by which charges are to be proved should also mentioned. However, in most of the cases they might be the same and there would not be any point in repeating them.

85. Should there be another condition of affording opportunity to the president before issuing notice and in case opportunity is to be afforded then of what is the value of the same, if the president's explanation is not considered. This will be considered in the next point.

6th & 7th POINT: PRESIDENT'S EXPLANATION SHOULD BE SEEN

Not Necessary to Involve in Collection of Material/ Evidence

86. Section 48(2-A) inserted by UP Act no. 6 of 2004 (see Appendix-2) was to effect that whether a president is prima facie guilty or not was to be found out by an enquiry. In fact, it was in the nature of fact finding or preliminary enquiry. This was similar to the provisions in the Rural-Areas Enactments. However, section 48(2-A) as inserted by UP Act no. 6 of 2004 was deleted and the present proviso to section 48(1) has been inserted.

87. Section 48 (2-A) as inserted by UP Act No. 6 of 2004 and proviso inserted in its place by UP Act No. 2 of 2005 broadly provide cessation of the financial and administrative powers of the President till completion of the final inquiry for removal of the president under section 48 of the Municipalities Act, but there is some difference:

Under sub-section 2A of section 48 this could be done on his being prima facie found to be guilty on the basis of an enquiry (preliminary or fact finding) held by such person and in such manner as might have been prescribed;

However, under the existing proviso, the State Government should have reasons to believe that the allegations do not appear to be groundless and the President is *prima facie* guilty.

88. The words, requiring holding of a preliminary enquiry by such person, in such a manner as prescribed, are no longer there. Nonetheless the State Government can only have reasons to believe not merely on the basis of any complaint but on the relevant material. The material has to be collected. It can be done by adopting any one of the following methods:

It could be done by a fact finding inquiry or preliminary inquiry: such an inquiry can still be done as it is not prohibited under the proviso; or

The State government could collect the material itself; or

The material could be supplied to it by someone; or

The State government could come into possession of it by any other means.

89. Nevertheless, irrespective of how the relevant material comes in the hands of the State government, the question is, in absence of any specific provision,

Should the president be associated with its collection;

Should the principles of natural justice be read into it?

90. The position for removal of *pradhan* of a *gram panchayat* under section 95(1) (g) is similar to the president of a municipality except instead of 'reason to believe' there is provision for the preliminary enquiry. Both are heads of the local bodies. In the Vivekanand case, we have held that proviso to section 95(1) providing reasonable opportunity in removal proceeding is not applicable to proviso under section 95(1)(g) providing preliminary enquiry. There is neither any specific provision for providing opportunity in the preliminary enquiry, nor before passing order ceasing the right to exercise financial and administrative powers. The only question there, like this case, is,

'Whether, the opportunity should be provided to the *pradhan* as adverse order is being passed.'

This question is common in the both cases and is being dealt with in this decision.

If Exonerated—Loss is Irreparable

91. The counsel for the respondents submitted that:

- (i) The present proceeding is akin to,
Suspension of a government employees in the departmental

proceeding; or

Suspension of a licence during cancellation proceeding; or

Proceeding to start reassessment in a taxing statute; and

In the aforesaid instances, the person effected is not afforded any opportunity at the stage of issuing notice;

- (ii) The words 'reasons to believe' are quite common in taxing statute where proceeding for reassessment can be undertaken if the authority has reason to believe. In such a situation, the only requirement is that there should be material to take such action. There is no necessity to provide opportunity before issuing show cause notice;

92. The institutions of Local Self Government—be it for the rural area or for the urban area—have become part of the constitution. We have mentioned their transition under the heading 'HISTORICAL BACKGROUND'. They are no longer statutory but, after 73rd and 74th constitutional amendments, have acquired the Constitutional status.

93. Under our Constitution, a head of local body is entitled to continue for his entire term unless he is unseated in an election petition. However, as there is no provision that he cannot be removed even if he is guilty of misconduct, a law can always be enacted to provide his,

Removal on his committing irregularities; or

Suspension or cessation of financial and administrative powers during pendency of removal proceeding.

This has been done so far as head of local bodies of smaller urban areas and rural areas are concerned. However, in the bigger urban area (Municipal Corporation) removal cannot be done by any inquiry: it can be done only on a motion of no confidence.

94. A head of a local body is an elected person; he is not a government servant: it would improper to compare these proceeding with the departmental proceeding in service jurisprudence. We are not alone in saying this but are in company of the Supreme Court and another full bench of our court (see below)⁶.

6. See SDO Faizabad vs. SN Singh: AIR 1970 SC 140 (paragraph 5); Swami Prasad vs. Hargovind Saha: AIR 1970 Allahabad 251 (FB) (paragraph 13).

95. The office of a local body is an elected office of a constitutional democratic institution. He is not merely head of a society or an organisation. He is entitled to hold office for the term that he was elected. It is not only his right but also that of his constituency or the electoral college that he represents. The curtailment of his rights is a serious matter. Here also, we are in company of the Supreme Court (see below)⁷.

96. These proceedings are also not like reassessment proceedings under taxing statutes: they are incomparable. The present proceedings are more serious. There is also fundamental difference between service or taxing or other proceeding cited by the respondents on one and this proceeding on the other hand:

In service jurisprudence if an employee is suspended and later-on is exonerated then he gets his salary and is reinstated with all consequential benefits;

Normally, whenever a license is granted, it is renewed from year to year. In case it is suspended during cancellation proceeding, then after dropping of the cancellation proceeding, the license is renewed. The license holder continues to enjoy privilege year to year as it is not for a fixed term;

In case the license is for the fixed period then it is not unusual to extend the same for the period the licensee could not work;

In taxing statutes, normally no final decision is taken by start of the reassessment proceeding: it is merely initiation of the proceeding. Whether any higher tax is to be imposed or not, is to be decided thereafter in the proceeding.

However, this is not the case here.

97. A head of a local body is elected for a limited term. His term comes to end after five years. If during the removal proceeding, he is denuded from exercising financial and administrative powers then even if he is exonerated in the enquiry, the time spent during enquiry is lost: he does not get his period extended.

98. The situation in case of a head of a local body is much more drastic than the instances cited by the counsel for the respondent. There is no such irreparable loss: the law or principles applicable there cannot apply to a head of a local body

7. See *Tarlochan Dev Sharma vs. State of Punjab* 2001 (6) SCC 260 (paragraph 7) and *Sharad Kailash Mittal vs State of MP* 2010 SCC 319 (paragraph 27), where the observations of the earlier case were approved.

who is deprived of exercising financial and administrative powers.

99. The case here, is an example. The facts of this case are as follows:

The petitioner submitted his reply to the notice dated 20.11.2007 by the SDM on 28.11.2007;

He also submitted his reply to the show cause notice dated 24.10.2008 by the State government on 8.11.2008;

Both replies were submitted without any delay;

There is no interim order prohibiting the State from deciding the proceeding; yet

About two years have elapsed, since submission of the reply to the State government, the proceeding have not been finalised.

100. Had the court not stayed that part of the order ceasing the petitioner's right to exercise financial and administrative powers then the petitioner would have been deprived to exercise it.

101. We would like to point out that there is no order restraining the state government from completing the removal proceeding. Yet, it has not been finalised. We had asked the Additional Advocate General the reason as to why the State government had not yet concluded the proceeding but there was no reply from his side: his silence was more eloquent than his submissions.

Natural Justice—May Apply at Interim Stage

102. There is no specific provision of affording opportunity before issuing notice under proviso to section 48(2) of the Municipalities Act. In the Vivekanand case, we have held the position to be same under proviso to the relevant sections of the Rural-Areas Enactments. Nevertheless,

Do the principles of natural justice apply to the situation as loss is irreparable;

In case they do apply then, what is their extent?

103. The counsel for the respondent submitted that:

The show cause notice under proviso to section 48(2) of the Municipalities Act or the proviso to the relevant sections of the Rural-Areas Enactments and the cessation of right to exercise financial and administrative powers is merely a step in the finalisation of removal proceeding;

There is no question of affording any opportunity to a head of a local body at the stage of issuing notice. Their case would be seen in the final inquiry, where the question of their removal is to be considered and the reasonable opportunity would be afforded at that time;

The principles of natural justice do not apply at this stage;

104. The cessation of exercise of financial and administrative power is a step in finalisation of removal proceeding but this does not mean that principles of natural justice would not apply. Depending on the circumstances, the order in a step to finalisation of a proceedings may also attract principles of natural justice. The principles of natural justice apply at interim stage too; it depends on the consequences.

105. Section 142(2-A) of the Income Tax Act, 1961 (the Income Tax Act) empowers an assessing officer to order a special audit under specified conditions. The order of special audit is a step in the assessment proceeding. A question arose whether the assesses should be heard before passing the order or not. Yet the Supreme Court in *Rajesh Kumar vs. Dy CIT*: 2007 (2) SCC 181 (The *RajeshKumar* case) held that opportunity should be given.

106. The law laid down by the *RajeshKumar* case was doubted and matter was referred to the larger bench. The Supreme Court in *Sahara India (Firm) vs. CIT* 2008 (14) SCC 151 (the *Sahara* case) approved the same. The court in the *Sahara* case noticed the objection of the Income Tax Department (paragraph 28) as follows:

'The order of special audit is only a step towards assessment and being in the nature of an inquiry before assessment, is purely an administrative act giving rise to no [adverse] civil consequence and, therefore, at that stage a pre-decisional hearing is not required.'

107. Nevertheless, it was rejected by the Supreme Court observing;

'The growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice.

... The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations

and non-pecuniary damages. Anything which affects a citizen in his civil life comes under its wide umbrella...

We are also unable to persuade ourselves to agree with the proposition canvassed by learned counsel for the Revenue that since a post-decisional hearing in terms of sub-section (3) of section 142 is contemplated, the requirement of natural justice is fully met.

.... It is well settled that the principle audi alteram partem can be excluded only when a statute contemplates a post-decisional hearing amounting to a full review of the original order on merit.'

108. In the case, where a head of a local body is deprived to exercise financial and administrative power, and ultimately the proceeding for removal are dropped then in such an event his loss can never be compensated. A post decisional hearing cannot cure the harm/ damage done to him.

109. In some of the cases cited before us, these proceedings have been placed on the same footing as departmental proceeding and this has been compared as suspension during departmental proceeding or suspension during cancellation of licence proceeding. In some cases, the principles of natural justice have been made inapplicable on the ground that they are a step in the final proceedings. With due respect, we are unable to agree with them. In our opinion, the Imran case and the Rekha case mentioned in the referring order do require reconsideration.

110. This brings up the question, as to what extent do the principles of natural justice—affording opportunity—should apply?

Natural Justice – Not a Rule of Thumb

111. It has been held that the principles of natural justice are not rigid rules but vary according to the circumstance:

Lord Denning⁸ remarked,

'It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and their extent. Everything depends on the subject matter.'

8 This was in R Vs Gaming Board 1970(2) All ER 528. This in turn was based on off quoted dictum of Tucker LJ in Russell Vs. Duke of Norfolk; 1964(1) ALL ER 109 and Durayappah Vs Fernando; 1967(2) ALL ER 152.

Halsbury's laws of England 4th edition volume 1 (paragraph 74) states,

'The presumption in favour of importing the rule [Audi alteram partem] may be partly or wholly displaced: ... where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.'

So does the Garner's Administrative Law (page 256),

The question that needs to be considered is not the very general one "what does audi alteram partem require?", but rather "what in particular situations may audi alteram partem be held to require?" To predict the operation of the audi alteram partem principle requires judgement of context rather than mere knowledge of 'black-letter' rules.'

112. The proposition—that the principles of natural justice are not carved on stone and are flexible—is part of our jurisprudence too. The Supreme Court observes,

'The applicability of the principles of natural justice is not a rule of thumb or a straitjacket formula as an abstract proposition law.' {Maharashtra State Board of HS Education Vs S. Gandhi 1991 (2) SCC 716 (22)}.

'[They] are not rigid rules... [but] are flexible and their application depends upon the setting.' {RS Dass vs Union of India AIR 1987 SC 593 (24) and Sarat Kumar Das Vs Biswajit Patnaik 1995 (Supp) 1 SCC 434 (11)}

'What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case. (AK Karipak Vs. Union of India; AIR 1970 SC 150)

113. The question—to what extent do the principles of natural justice apply—require consideration of fairness.

Fairness—the Ultimate Aim of Jurisprudence

114. It is often said that laws themselves are neither good nor bad: it is the people executing them make it good or bad. Lord Acton said it in his own way,

'Power tends to corrupt and absolute power corrupts absolutely.'

115. Article 14 of the Constitution is antithesis of arbitrary exercise of power. It strikes at its root cause. This brings up the question regarding fairness: the ultimate aim of every jurisprudence.

116. While interpreting a statute, many have emphasised it, in their own way.

'The courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.' {Lloyd Vs. Mc Mahaon (1987) A.C.625, 702-3}

'The test today of whether to supplement statutory procedure is no longer whether the statutory procedure alone could result in manifest unfairness. The preferable view is that fairness tout court [French words meaning without nothing added or simply] must be attained ... Under either test factors ... likely to be relevant [are]: the comprehensiveness of the code, the degree of deviation from the statutory procedure required, and the overall fairness of the procedures to the individual concerned.' (Judicial Review of Administrative Action – De Smith Vth Ed. 409)

'If it can be demonstrated ... that the ... procedure ... followed ... has represented a genuine attempt, reasonable in all the circumstances, ... it is unlikely the court will intervene through judicial review and to strike [it] down.' {Waite Jin R Vs. Norfolk Country Council, ex p M (1989) 2 All ER 359 at 367}

117. The courts have evolved different principles to ensure fairness. May it be: the promissory estoppel, or the legitimate expectation, or the principles of the natural justice, or the Wednesbury principle, or any other ground (bad faith, irrelevant consideration, acting under dictation etc.) on which judicial review is permissible. These are different tools to ensure that the proceeding and the end result is fair. These tools, or principles will (if not already) merge into one – fairness. The World of Physics has yet to find its Theory of Everything (TOE)⁹ but

9 There are four fundamental forces governing our Universe. They are known as

- Strong Nuclear force.
- Electromagnetic force.
- Gravitational force.
- Weak interaction force.

the jurisprudence has already found its TOE¹⁰, its ultimate aim, in fairness. It is on this yardstick that every action is to be judged.

118. To sum up, the relevant question is, 'But, is it fair'¹¹ If, the procedure is fair, the end result is fair; then it is not only sufficient compliance of the principles of natural justice but is an end of the matter. Fairness, and not the blind application of the principles of natural justice, is the end result. Let's consider what is fair in the case of cessation of financial and administrative powers of a head of a local body.

Fairness—Reference to Head of a Local Body

119. The issuance of notice satisfying conditions under relevant proviso (see Appendix 2 & 3) dealing with the heads of the different local bodies result into ceasing of right to exercise the financial and administrative powers, till they are exonerated of the charges mentioned in the show cause notice.

120. The main enquiry is for removal of the head of the local body. That is yet to be conducted. It is only on the basis of the main inquiry—where reasonable opportunity is to be given—that the heads of different local bodies can be removed. In case full length opportunity is afforded at the stage of issuing notice then what is the point in conducting the final enquiry at the later stage and giving similar opportunity. That would be futile exercise.

121. The reasons for depriving a president from exercising financial and administrative functions were mentioned in 'Statements of Objects and Reasons' of UP Act no. 6 of 2004 by which section 48(2-A) was introduced. It indicated that,

'Most of the Presidents used to delay the proceedings by not replying the show-cause notice in time and they continue to misuse their financial powers. It has, therefore, been decided to amend the said Act to cease the financial powers of such President or a Vice-President during the pendency

The ultimate aim of physics is to unite these forces together – Theory of Everything (TOE). But will it ever unite, is a question troubling all. Albert Einstein worked on it but could not succeed. Many thought this could be done by the end of this century. But it has not happened. It may happen in the next (21st) century

¹⁰ Administrative jurisprudence, the World over, are moving in this direction. Indian courts are also repeatedly using this concept to judge the validity of the administrative actions.

¹¹ Chief Justice Earl Warren, born on March 19, 1891, was the 14th Chief Justice of the United States of America (1953-69). 'But, is it fair' was a question that most of the lawyers appearing before him had to answer. It was on this touchstone that he tested all state actions. And this may well be the question to ask so far as administrative law is concerned.

of the inquiry and his financial powers and functions will be exercised and performed by the District Magistrate until he is exonerated of the charges.'

This sub-section was deleted and re-introduced as proviso to section 48(2) by UP Act 2 of 2005 in the slightly modified form.

122. In the Rural-Areas Enactment, no object and reason is mentioned for the relevant provisios but the aforesaid reason appears to be the ground for the same.

123. The reason to deprive the heads of the local bodies from exercising financial and administrative function is that they used to delay the proceeding and abuse the powers during the inquiry. This may be correct. The facts in the present case may not negate the general trend as stated in the aforesaid object and reason.

124. Considering the object and reason, there is no justification to involve the heads of the local bodies at every step of collection of material or in the preliminary enquiry. The principles of natural justice or the yardstick of fairness would be met if the explanation of the effected head of the local body or his point of view or version is considered before recording the satisfaction or finding of prima facie guilt before issuing notice and passing order for ceasing financial and administrative powers.

125. Affording opportunity to submit explanation of the head or considering it, is not to be as detailed as in the regular inquiry or to the extent of permitting cross-examination of any witness, who might be examined in the preliminary enquiry. It is in the sense of getting his point of view or version to the charges before being so satisfied. But what is the point in affording the opportunity if the explanation is not considered. It has to be considered too: there has to be application of mind.

126. In our opinion, getting explanation or point of view or version of a head of a local body regarding charges and considering them before issuing show cause notice under relevant provisos, not only strikes at the arbitrary exercise of power but brings about fairness in the procedure; in the circumstances, it is also sufficient compliance of the principles of natural justice.

127. However, it will depend from case to case, whether the opportunity to submit

explanation or point of view or version has been given in a particular case or not: this will depend on the facts of each case. We would like to explain it, with reference to the facts of this case.

128. In the present case, there is only one charge. The SDM had asked the president to submit his explanation to it. In this case, the requirement of getting explanation of the petitioner has been met. The impugned notice/ order cannot be invalidated on this ground. However, we wish to clarify that we have not examined the question the petitioner's explanation was considered or not.

129. The counsel for the petitioner submitted that:

The decision to issue notice and to cease the financial and administrative powers was taken by the State Government on the basis of the letter of the SDM and the DM;

These letters were not given to him;

The explanation the petitioner ought to have been taken after the copies of the aforesaid letter were given to him.

130. The petitioner was asked to give his explanation regarding his conduct in giving out *theka* for ₹36,000 on 8.6.2007. He has given his reply in detail about the same. The letters of the SDM and DM are also in respect of the same incident. It is in respect this incident that the report of the EO was sought by the SDM. These letters are merely material for considering whether there is any reason to believe that the petitioner was *prima facie* guilty or not. It was not necessary to hand over the aforementioned letters at the stage of asking his explanation or point of view to the allegation. These copies would be given to him at the stage of final enquiry where reasonable opportunity has to be afforded to the petitioner.

131. In case these letters were not supplied to the petitioners then he can ask for the same and they must be given to him as without handing them over it cannot be said that reasonable opportunity was afforded as contemplated in section 48(2) of the Municipalities Act. However, the show cause notice issued by the state government cannot be invalidated on the ground that these letters were not given to the petitioner before issuing notice to him or requiring him to submit his point of view.

132. In our opinion,

It is not necessary to involve a head of a local body in the process of

collecting material or in the preliminary inquiry or supply them copy of preliminary report. However, it is necessary to ask and consider his explanation, or point of view or version regarding charges before issuing notice under the relevant provisos under the different enactment;

In this case, the explanation of the petitioner to the charges was asked for. The order cannot be invalidated on this ground. However, the second aspect whether his explanation was considered or not was not examined by us. It may, along with other submissions of the petitioner, be examined by the appropriate bench.

CONCLUSIONS

133. Our conclusions are as follows:

- (a) There can be proceeding for removal of president under section 48(2) of the Municipalities Act without ceasing his financial and administrative power under its proviso;
- (b) The following conditions must be satisfied before cessation of financial and administrative powers of a president of a Municipality can take place:
 - (i) The explanation or point of view or the version of the affected president should be obtained regarding charges and should be considered before recording satisfaction and issuing notice/ order under proviso to section 48(2) of the Municipalities Act;
 - (ii) The State government should be objectively satisfied on the basis of relevant material that:
 - The allegations do not appear to be groundless; and
 - The president is prima facie guilty of any of the grounds under section 48(2) of the Municipalities Act.
 - (iii) The show cause notice must contain the charges against the president;
 - (iv) The show cause notice should also indicate the material on which the objective satisfaction for reason to believe is based as well as the evidence by which charges against the president are to be proved. Though in most of the cases they may be the same;
- (c) It is not necessary to pass separate order under proviso to section 48(2) of the Municipalities Act. It could be included in the notice satisfying the other conditions under proviso to section 48(2). In fact it is not even necessary. It comes into operation by the Statute itself on issuance of a valid notice under proviso to Section 48(2) of the Municipalities Act.

- (d) In case a notice/ order ceasing financial and administrative powers is held to be invalid on any ground then this does not mean that the proceeding of removal are also invalid. They have to continue and taken to their logical end. The proceeding to remove can come to an end only if the charges on the their face or even taken to be proved do not make out a case for removal under section 48(2) of the Municipalities Act.
- (e) It is not necessary to involve the president with the process of collecting material or give president the copies of the material before asking his explanation or point of view or version of the president to the charges.
- (f) In the present case, the impugned notice/ order cannot be invalidated on the following ground that:
 - (i) The explanation or point of view of the petitioner to the charge was not obtained (as it was asked). However, we have not considered, whether his explanation was considered or not;
 - (ii) The letters of the SDM and DM were not given to the petitioner before obtaining petitioner's explanation or his point of view to the charges as this was unnecessary at that stage. In case these copies were not given along with show cause notice by the State government, it is open to the petitioner to ask for the same and then file an additional reply.

134. Our conclusions mentioned in the preceding paragraph also answer the questions referred to the FB. Let the papers of this case and other connected cases be placed before the appropriate division bench dealing with such cases for deciding them on merit.

Date: 26.10.2010

BBL

Appendix-1

Index of all other appendixes and the words used in the judgement

- Appendix-1:** Index of all other appendixes and the words used in the judgement
- Appendix-2:** Section 48(2A) and 48(3) of the Act as amended by UP Act No. 26 of 1964 as well as Section 48(2-A) as added by UP Act No. 6 of 2004 in the Municipalities Act.
- Appendix-3:** The relevant part of section 48(2) of the Municipalities Act at the time when the notice was issued to the petitioner.
- Appendix-4:** The relevant parts of the -sections of the Rural-Areas Enactments providing cessation of financial and administrative powers.

Words and Abbreviations

Abbreviation	Words
Ceases to exercise financial and administrative powers	Ceases to exercise, perform, and discharge the financial and administrative powers and functions
Heads of the local bodies	President or a chairman of a Municipality, <i>Adhyaksh</i> of a Zila Panchayat, <i>Pramukh</i> of Kshettra Panchayat, and <i>Pradhan</i> of a Gram Panchayt
The DM	District Magistrate, Ghaziabad
The EO	Executive Officer Nagar Panchayat Dasna, Ghaziabad
The Kshetra-Zila Panchayat Act	UP Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961
The Municipalities Act	UP Municipalities Act, 1916
The Nagar Panchayat	Nagar Panchayat Dasna, Ghaziabad
The Rural-Areas Enactment	The Panchayat Raj Act and the Kshetra-Zila Panchayat Act
The Panchayat Raj Act	UP Panchayat Act, 1947
The SDM	Sub Divisional Magistrate Sadar, Ghaziabad

Appendix-2

1. Sub-section (2-A) and (3) of Section 48 of the Act as inserted by the UP Municipalities (Amendment) Act, 1964 (UP Act 26 of 1964) was as follows:

(2-A) After considering any explanation that may be offered by the President and making such enquiry as sit may consider necessary, the State Government may for reasons to be recorded in writing, remove the President from his office:

Provided that in a case where the State Government has issued notice in respect of any ground mentioned in clause (a) or sub-clause (ii), (iii), (iv), (vi), (vii) or (viii) of clause (b) of sub-section it may instead of removing him give him a warning.

(3) The State Government may place under suspension a President who is called upon to show cause in respect of any ground mentioned in clause (a) or sub-clause (vi), (vii) or (viii) of clause (b) of sub-section (2) or against whom a prosecution for an offence which in the opinion of the State Government involves moral turpitude is commenced until the conclusion of the enquiry or the prosecution, as the case may be, and where a President has been so suspended he shall not, for so long as the order of suspension continues, be entitled—

- (a) to exercise the powers or perform the duties of a President conferred or imposed upon him by or under this Act or any other enactment for the time being in force, or
- (b) to take part in any proceedings of the board.

2. Sub-section (2-A) to Section 48 of the Act as inserted by UP Municipalities (Amendment) Act, 2004 (UP Act No. 6 of 2004) was as follows:

(2-A) Where in an inquiry held by such person and in such manner as may be prescribed, if a President or a Vice President is prima facie found to be guilty on any of the grounds referred to in sub-section (2), he shall cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President or the Vice-President, as the case may be, which shall, until he is exonerated of the charges mentioned in the show-cause notice issued to him under sub-section (2), be exercised and performed by the District Magistrate or by an officer nominated by him not below the rank of the Deputy Collector.

Appendix-3

The relevant part of section 48(2) of the Municipalities Act at the time when notice was issued is as follows:

48. Removal of President. (1) ...

- (2) Where the State Government has, at any time, reason to believe that,—
- (a) there has been a failure on the part of the President in performing his duties; or
 - (b) the President has—
 - (i) incurred any of the disqualifications mentioned in Sections 12-D and 43-AA; or
 - (ii) within the meaning of Section 82 knowingly acquired or continued to have, directly or indirectly or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with by or on behalf of the Municipality; or
 - (iii) knowingly acted as a President or as a member in a matter other than a matter referred to in clauses (a) to (g) of sub-section (2) of Section 32, in which he has, directly or indirectly, or by a partner, any share or interest whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person; or
 - (iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the Municipality or against the State Government in respect of nazul land entrusted to the management of the Municipality or against the State Government in respect of nazul land entrusted to the management of the Municipality, or acted or appeared for or on behalf of any person against whom a criminal proceeding has been instituted by or on behalf of the Municipality; or
 - (v) abandoned his ordinary place of residence in the municipal area concerned; or
 - (vi) been guilty of misconduct in the discharge of his duties; or
 - (vii) during the current or the last preceding term of the Municipality, acting as President or as Chairman of a Committee, or as member or in any other capacity whatsoever, whether before or after the commencement of the Uttar Pradesh Urban Local Self- Government Laws (Amendment) act, 1976, so flagrantly abused his position, or so wilfully contravened any of the provisions of this Act or any rule, regulation or bye-law, or caused such loss or damage to fund or property of the Municipality as to render him unfit to continue to be President; or
 - (viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local self Government Laws (Amendment) Act, 1976 whether as President or as exercising the powers of President, or as member; or
 - (ix) caused loss or damage to any property of the municipality;
 - (x) misappropriated or misused of Municipal fund; or
 - (xi) acted against the interest of the municipality; or

- (xii) contravened the provisions of this Act or the rules made thereunder; or
- (xiii) created an obstacle in a meeting of the municipality in such manner that it becomes impossible for the municipality to conduct its business in the meeting or instigated someone to do so; or
- (xiv) wilfully contravened any order or direction of the State Government given under this Act; or
- (xv) misbehaved without any lawful justification with the officers or employees of the municipality; or
- (xvi) disposed of any property belonging to the municipality at a price less than its market value; or
- (xvii) encroached, or assisted or instigated any other person to encroach upon the land, building or any other immovable property of the municipality;

It may call upon him to show cause within the time to be specified in the notice why he should not be removed from office.

Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima facie guilty on any of the grounds of this sub-section resulting in the issuance of the show-cause notice and proceedings under this sub-section he shall, from the date of issuance of the show-cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show-cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2-A) and the said powers, functions and duties of the President during the period of such ceasing shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector.

(2-A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may for reasons to be recorded in writing, remove the President from his office:

(2-B) An order passed by the State Government under sub-section (2-A) shall be final and shall not be questioned in any court.

(3) ... [Omitted by UP Act No. 12 of 1994.]

(4) A President removed under sub-section (2-A) shall also cease to be a member of the Municipality and in case of removal on any of the grounds mentioned in clause (a) or sub-clause (vi), (vii) or (viii) of clause (b) of sub-section (2) shall not be eligible for re-election as President or member for a period of five years from the date of his removal.

Appendix-4

The relevant part of the sections of the Rural-Areas Enactments providing cessation of financial and administrative powers

1. Section 95(1)(g) of Panchayat Raj Act is as follows:

95. Inspection- (1) The State Government may—

...

(f)...

(g) remove a Pradhan, Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he—

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings.

(ii) refuses to act or becomes incapable of acting for any reason whatsoever or he is accused of or charged for an offence involving moral turpitude,

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

(iii-a) has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be.

(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A:

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or UP-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or UP-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.

(gg) Deleted by UP Act no 9 of 1994

(h) Deleted by UP Act no 9 of 1994

Provided that

(i) No action shall be taken under Clause (f), Clause (g) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed;

...

2. Section 16 of the Kshettra-Zila Panchayat Act deals with removal of Pramukh (head) of a Kshettra Panchayat. It is as follows:

16. Removal of Pramukh - (1) If in the opinion of the State Government the Pramukh or any of a Kshettra Panchayat wilfully omits or refuses to perform his duties and functions under this act, or abuses the powers vested in him or is found to be guilty of misconduct in the discharge of his duties or becomes physically or mentally incapacitated for performing his duties, the State Government may, after giving the Pramukh or such as the case may be, a reasonable opportunity for explanation and after consulting the Adhyaksha of the Zila Panchayat at concerned in the matter and taking into consideration his opinion, if received within thirty days from the date of the despatch of the communication for such consultation, by order, remove such Pramukh or as the case may be, from office, and such order shall be final and not open to the question in a Court of law:

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pramukh or is prima facie found to have committed financial and other irregularities, such Pramukh or shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three elected members of the Kshettra Panchayat appointed in this behalf by the State Government.

(2) A Pramukh or , removed from his office under this section, shall not be eligible for re-election as Pramukh or for a period of three years from the date of his removal.

3. Section 29 of the Kshettra-Zila Panchayat Act deals with removal of Adhyaksha (head) of a Zila Panchayat. It is as follows:

29. Removal of Adhyaksha or- (1) If in the opinion of the State Government the Adhyaksha or the while acting in place of Adhyaksha wilfully omits or refuses to perform his duties or functions under this Act or abuses the powers vested in him or is found to be guilty of misconduct in the discharge of his duties, or because physically or mentally incapacitated for performing his duties the State Government, after giving the Adhyaksha or as the case may be, a reasonable opportunity for explanation may by order remove him from office and such order shall be final and not open to be questioned in a court of law.

Provided that where in an enquiry held by such person and in such manner as may be prescribed, an Adhyaksha or Upadhyaksha is prima facie found to have committed financial and other irregularities such Adhyaksha or Upadhyaksha shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three elected members of the Zila Panchayat appointed in this behalf by the State Government.