

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 17285/2021

Nirmal Kumar Pitaliya

----Petitioner

Versus

1. State Of Rajasthan, Through The Secretary, Local Self Government Department, Jaipur.
2. The Director Cum Special Secretary, Directorate, Local Self Government Department, Jaipur.
3. The District Collector, Chittorgarh.

----Respondents

For Petitioner(s) : Mr. Rajesh Joshi, Sr. Advocate with
Mr. Vineet R. Dave
Mr. C.S. Kotwani, through VC

For Respondent(s) : Mr. Sunil Beniwal, AAG
Mr. Vikas Balia, through VC

JUSTICE DINESH MEHTA

Judgment Reserved on ::: 21/01/2022

Judgment Pronounced on ::: 01/02/2022

Reportable

(1) The facts leading up to the present writ petition are that the petitioner was elected as a Councilor of Ward No.7 of Municipal Board Badi Sadri and thereafter elected as Chairperson of the said Municipal Board in the municipal election held on 07.02.2021.

(2) On 19.05.2021, on the basis of a complaint of one Vishnu Dutt Sharma, the Additional Superintendent of Police, Anti Corruption Bureau, Udaipur, apprehended Kush Sharma, brother-in-law of the petitioner while accepting a sum of Rs.2 lacs allegedly as a bribe on behalf of the petitioner. An FIR

No.157/2021 came to be lodged on 26.05.2021, in which the petitioner so also said Kush Sharma was implicated for demanding and accepting the bribe of Rs.2 lakhs.

(3) The Anti Corruption Department, in turn, sent an information to the State Government in this regard, acting whereupon, the petitioner was placed under suspension vide order dated 05.07.2021.

(4) The petitioner has called in question, the suspension order dated 05.07.2021 by way of instant writ petition, which came to be filed on 09.12.2021.

(5) On previous date(s) of hearing the Court expressed its concern about the stage of the proceedings and in response thereto an affidavit has been filed by Mr. Sunil Beniwal, learned Additional Advocate General who has put in appearance on behalf of the State. The said affidavit dated 19.01.2022 states that vide order dated 10.12.2021, the State Government has appointed an inquiry officer to conduct preliminary inquiry with specific reference to the FIR No.157/2021 dated 26.05.2021 sent by the Superintendent of Police, Anti-Corruption Bureau, Jaipur. An order dated 10.01.2022 has also been placed on record vide which the Deputy Director (Regional), Local Bodies, Udaipur, the officer, directed to conduct preliminary inquiry, has issued a notice to the petitioner asking for his explanation within three days.

(6) Mr. Rajesh Joshi, learned Senior Counsel, appearing for the petitioner, argued that the petitioner has been placed under suspension on 05.07.2021, merely on the basis of the fact that an FIR has been lodged, which shows that the State Government has not at all applied its mind to determine as to whether there was any requirement of placing the petitioner under suspension. It was

also argued that admittedly, at the time of placing the petitioner under suspension and till filing of the writ petition and even as late as on 17.01.2022, the petitioner has not been served with any notice from the State Government in relation to preliminary inquiry.

(7) Learned Senior Counsel argued that even from the documents placed on record by the State Government, it is apparent that the Deputy Director (Regional), Local Bodies, Udaipur has been asked to conduct preliminary inquiry against the petitioner vide order dated 10.12.2021, who in turn, has purportedly issued a notice on 11.01.2022. With these admitted facts he argued that as the preliminary inquiry itself had not commenced till 11.01.2022, the State Government could not have placed the petitioner under suspension, because for the purpose of sub-section (6), inquiry can be said to have commenced only after consideration of the preliminary inquiry report and when the State Government decides to hold judicial inquiry.

(8) The learned Senior Counsel read Section 39 of the Rajasthan Municipalities Act, 2009 (hereinafter referred to as 'the Act of 2009') in its entirety and explained the scheme of the Act to supply strength to his stand that an elected member of a municipality can be removed on the grounds mentioned in Clauses (a) to (d) and for which inquiry by an authorized officer or a Judicial Officer (as the case may be) under the proviso to sub-sections (1) and (4) of Section 39 of the Act of 2009 is necessary.

(9) Learned Senior Counsel submitted that the scheme of Section 39 of the Act of 2009 envisages two types of inquiries; (i) commonly known as preliminary inquiry in terms of first

proviso to sub-section (1) of Section 39 and (ii) judicial inquiry as prescribed under sub-section (3) of Section 39 of the Act of 2009.

(10) He submitted that power to suspend an elected representative is available to the State Government under sub-section (6) and accordingly, the State Government can put an elected member under suspension against whom proceedings have commenced under this Section. According to him, in the present case, proceedings had not commenced on 05.07.2021, when the petitioner was placed under suspension; because, the proceedings can be said to have commenced when preliminary inquiry report is submitted and the State Government, after applying its mind on the preliminary inquiry report, proceeds to refer the case for further inquiry to be held by a Judicial Officer in terms of sub-section (3) of Section 39 of the Act of 2009.

(11) It was argued that in the present case, till today no judicial inquiry has commenced and, therefore, the order dated 05.07.2021, placing the petitioner under suspension is clearly illegal and non-est. In support of his submissions aforesaid, learned Senior Counsel relied upon the following judgments:-

- (i) **Ugamsee Modi Vs. State of Rajasthan [1962 RLW 184]**
- (ii) **Mohan Lal Vs. State of Rajasthan [1963 RLW 463]**
- (iii) **Jan Mohd. Vs. State of Rajasthan [1992(2) WLC 463]**
- (iv) **Jagdish Narayan Sharma [AIR 1995 Raj. 155]**
- (v) **S.C. Singhal Vs. State of Raj. & Anr. [RLW 2005(3) Raj. 1611]**
- (vi) **Pradeep Hinger Vs. State of Raj. & Ors. [2008(1) WLC 294]**
- (vii) **The State of Raj. & Anr. Vs. Ashok Machhi & Anr. [D.B. SAW No.958/2008, decided on 12.11.2008]**

(viii) **Pinki Sahu Vs. State of Raj. & Ors. [SBCWP No.454/2017, decided on 24.05.2017]**

(12) Mr. Sunil Beniwal, learned Additional Advocate General, appearing for the respondent-State placed for perusal of the Court copy of the note-sheet and pointed out that the State Government had received information from the Anti-Corruption Bureau that an FIR No.157/2021 has been lodged against the petitioner, who has been accused of accepting bribe through his brother-in-law Kush Sharma and, therefore, the Director, Local Bodies proposed to take action against the petitioner under Section 39 read with Section 43(10) of the Act of 2009. And since it was a case of accepting bribe in relation to official discharge of duties, it was considered necessary to place the petitioner under suspension else he would have influenced the inquiry and record. He submitted that the said proposal was approved by the Secretary of the Department so also by the Minister of Local Self Government.

(13) He pointed out from the note-sheet that on 02.07.2021, the concerned Minister approved the note prepared by the Director, Local Self Government and ordered to give charge of Chairman to the Vice-Chairman and consequently, the order under consideration came to be passed informing the petitioner that the State Government has decided to initiate proceedings against him under Sections 39 and 43(10) of the Act of 2009 and that he has been suspended in exercise of State's power under Section 39(6) of the Act of 2009.

(14) Learned Additional Advocate General contended that powers under sub-section (6) of Section 39 of the Act of 2009, enabling the State Government to place an elected member under

suspension is completely divorced of the State's decision to hold preliminary inquiry contemplated under the proviso to sub-section (1) of Section 39 of the Act of 2009 or judicial inquiry. He navigated the Court through Section 39(6) of the Act of 2009 to contend that without making any reference of the inquiry, the provision simply provides that the State Government may place a member under suspension against whom proceedings under this Section have commenced.

(15) Learned Additional Advocate General argued that the expression "commenced" is wide enough to include even the point at which the State Government decides to proceed against the petitioner under Section 39 of the Act of 2009 and argued that issuance of notice of preliminary inquiry or preparation or consideration of the report is inconsequential rather irrelevant, so far as State's power to suspend is concerned. He emphasized that for the purpose of invoking the powers under sub-section (6), even passing of a formal order authorizing an officer to conduct preliminary inquiry is not necessary much less issuance of notice by the inquiry officer with definite charges under sub-section (4) of Section 39 of the Act of 2009.

(16) Learned counsel tried to persuade the Court that the expression "commenced" has to be given its natural meaning. While maintaining that most of the judgments cited by learned Senior Counsel are not applicable in the facts of the present case, he argued that the judgments of this Court in the case of **Ugamsee Modi Vs. State [1963 RLW 184]** and **Mohan Lal Vs. State [1963 RLW 464]** have, in express terms, held that the proceedings under Section 63 of the Rajasthan Municipalities Act, 1959 (hereinafter referred to as 'the Act of 1959') which is pari-

materia to Section 39 of the Act of 2009 should be taken to commence when the State Government decides to initiate disciplinary inquiry against an elected representative.

(17) Learned Additional Advocate General pointed out that the basic question in the present case is, as to when the proceedings should be treated to have commenced? According to him, the fact that the officer to conduct preliminary inquiry came to be appointed on 10.12.2021 and further fact that the officer so appointed (Deputy Director) has first time issued notice to the petitioner on 10.01.2022 is of no consequence in the face of the sole relevant fact that the State Government has decided to initiate disciplinary proceedings against the petitioner on 02.07.2021.

(18) He argued that had the expression used in sub-section (4) been "initiated", perhaps the petitioner was justified in his contention that unless notice for preliminary inquiry is issued, no elected representative can be placed under suspension.

(19) Mr. Beniwal relied upon the two following judgments:-

(i) Ugamsee Modi Vs. State [1962 RLW 184]

(ii) Mohan Lal Vs. State [1963 RLW 463]

(20) Heard.

(21) A host of judgments have been cited by learned Senior Counsel, appearing on behalf of the petitioner and a few by learned Additional Advocate General. This Court deems it appropriate to deal with them in their chronological order – in the order of their pronouncement, so that evolution/development of law can be better understood.

(22) **Ugamsee Modi (04/08/1961)**

When this judgment was delivered by a Division Bench of this Court, the question of "commencement" came up for consideration of this Court, perhaps for the first time.

In this case, on the basis of complaint of demolition of encroachment, certain complaints were filed and the same were got inquired into by the Collector, Jalore, who submitted his report that the petitioner therein had abused his position as Chairman. Such being the position, the State Government being satisfied that the petitioner was guilty of misconduct in discharge of his duties, on 17.01.1961, issued a notice to the petitioner under sub-section (2) of Section 63 of the Act of 1959 asking him to show cause as to why action should not be taken against him. The petitioner therein did not respond to the said notice and in the meantime, the Collector, Jalore gave sanction to prosecute the petitioner on 14.02.1961, whereafter the State Government, on 12.05.1961 decided to suspend the petitioner.

Dealing with such factual backdrop, the Division Bench held that when the Government had called upon the petitioner to explain the allegation levelled against him, it can hardly be contended that the proceedings cannot be taken to have commenced against the petitioner within the meaning of sub-section (2) of Section 63 of the Act of 1959. The relevant extract of para No.5 of the judgment is being reproduced hereunder:-

"..... If these facts are correct that there were certain allegations of misconduct against the petitioner of his having abused his powers as a Chairman of the Municipality, that on those allegations there was some inquiry by certain officers and that on the report submitted by those officers the Government called upon the petitioner to explain the allegations made against him, it can hardly be contended that proceedings cannot be taken to have commenced against the petitioner within the meaning of sub-sec.

(2) of sec.63 of the Municipalities Act. It may be that the framing of the actual charges and the reference to the judicial officer concerned may take place later; but there was nothing to prevent the State Government from taking action to suspend him on those allegations under sub-sec.(4) of sec.63 of the Act."

(23) Mohanlal (14/12/1962)

The issue of commencement of the proceedings under Section 63 of the Act of 1959 has again been delved upon by another Division Bench of this Court, wherein the Division Bench has observed that though for the purpose of sub-section (1), a preliminary inquiry would be treated to have commenced no sooner cognizance of a complaint is taken by the State Government, yet for the purpose of sub-section (4) of Section 63 of the Act of 1959, the proceedings should be taken to be commenced when the authority makes up its mind to take the action. Relevant para No.10 of the judgment reads thus:-

"10. The issue therefore in short is whether the petitioner was suspended on commencement of the proceedings against him under sec.63. If so, the order of suspension cannot be held to be invalid. In Ugamsee Modi v. State of Rajasthan (1) a Division Bench of this Court consisting of the Chief Justice and Mr. Justice Shinghal held, "proceedings under sub-sec. (2) of sec.63 of the Act, must be taken to have commenced against the petitioner when on those allegations he was called upon to show cause and to explain his conduct." We are in agreement with the law laid down in that decision. After a complaint is received by the Government against a member or a chairman, a preliminary inquiry has to be undertaken to verify whether there is any substance in the allegations made against such person and after holding that inquiry as contemplated by proviso to sub-sec.(1) of sec. 63, if the Government decides to take action against such person, it may issue show cause notice to him and also take further action for conduct of an inquiry in accordance with the provision laid down under secs. ^3(2)(3)(4) and (5). Though for purposes of sub-sec. (1) of sec.63 a preliminary inquiry would be held to have commenced no sooner cognizance is taken of a complaint by the Government against such officer, yet proceedings should be taken

to commence in the meaning of the term under sub-sec. (4) to sec.63 only when proceeds in ordered to issue against such person, or when the authority makes up its mind to take action. At that stage, the Government makes up its mind whethr or not to take action and that, in our opinion, is the stage of commencement of proceedings for purposes of sec.63(4). Coming to the facts of the instant case, it may be noticed that the Assistant Director of Local Bodies submitted his interim report on the 22nd of October, 1962 to the Government and the record of the proceedings of the Government that has been submitted together with the reply shows that the Government applied its mind to the allegations and facts of the case and decided to take action against the petitioner and to suspend him even though it waited for sometime for the final report before ordering issue of a proper charge-sheet to him. In fact, no charge-sheet appears to have been drawn up till a final report was received against the petitioner from the Assistant Director of Local Bodies for although some facts were found established others still required further inquiry. After receipt of that final report, the Government issued show cause notice to the petitioner although it had decided to action already on the interim report. Thus even though show cause notice was in fact issued on the 1st of December, proceedings commenced against the petitioner on the 24th of October , 1962 when the Government took a decision to take action against him. The order of suspension in this case was made simultaneously with the order of inquiry. The crux of the matter is not the service of the show cause notice or the date on which it is issued, but the date of the determination of the competent authority that there was material for taking action for issuing process. In this view of the matter, the order of suspension of the petitioner cannot be held to be invalid having been made simultaneously with the order of institution of inquiry against him. Much stress has been laid on the following averments appearing in the reply of the Government : "after the explanation of the petitioner is received the Government will pass orders as may be appropriate to the case whether the case is a fit one to be proceeded further by setting out a statement of charge and ordering enquiry by a District Judge or not." It is contended that the Government has not yet made up its mind to remove the petitioner and the order of suspension is therefore premature. This contention is rather highly technical and is based on the loose language used in the reply to the writ petition. The intention of the Government can easily be gathered from the proceedings of the Government at page 36 of the paper-book and no assistance in that behalf need be taken from the aforesaid wordings of the reply. The

looseness om the language is due to the fact that it is always open to the Government to drop the enquiry if it so chooses and if it is satisfied that the allegations are not well founded, but that by itself cannot be said to be a good reason to think that no enquiry had been ordered by the Government prior to that stage. It is obvious, having regard to the facts and circumstances of the case that an inquiry had been ordered against the petitioner on the 24th October, 1962 and the order of suspension of the petitioner is therefore not invalid. The petition fails and is dismissed."

(24) **Jan Mohd. (12/05/1992)**

The judgment of Jan Mohd. rendered by the Division Bench on 12.05.1992 is being relied upon by all the counsel who appear for petitioners for all the years and the same has formed a basis for some of the Benches of this Court to take a view that unless preliminary inquiry report is submitted and the State Government applies its mind to the preliminary inquiry and then proceeds to hold judicial inquiry by serving definite charges, an elected representative cannot be placed under suspension. Hence, this judgment with its facts and exposition needs to be carefully gone into and dilated upon.

In the case of Jan Mohd., certain allegations were levelled against the elected Chairman claiming that he had cleared certain bills irregularly; certain illegal appointments had been made and encroachments were removed arbitrarily and further that he surreptitiously allowed certain trucks to pass without payment of octroi duty. The petitioner therein contended that his suspension was malafide and arbitrary. In that case, the preliminary inquiry was got conducted, whereafter he was placed under suspension and a show cause notice was issued as to why the charges may not be referred to Judicial Officer for inquiry. The question as to when the proceedings under the then Section 63 of the Act of 1959, pari materia to Section 39 of the Act of 2009 should be

deemed to commence had not come up before the Division Bench considering Jan Mohd.'s case.

The judgments of Division Bench in case of Ugamsee Modi (supra) and Mohanlal (supra) though were brought before the Division Bench, however, passing observation has been made by the Court that the proceedings against the Chairman and Member of the Municipal Board would be deemed to be commenced, when upon consideration of the preliminary inquiry report the State Government applies its mind to it and comes to the conclusion that further probe in the matter is essential. It will not be out of place to reproduce para No.64 of the judgment of Jan Mohd.:-

"64. In view of the aforesaid discussion, we are firmly of the view that the proceedings against a Chairman or Member of the Municipal Board commence when the preliminary enquiry report submitted to the Government is considered by the Government and the Government applies its mind to it and comes to the conclusion that a further probe in the matter is essential. For the removal of the holder of an elected public office that is Chairman or Member of the Municipal Board, if the Govt. decides to issue a notice to the incumbent under Section 63(2) of the Act to the delinquent Chairman or the Member of the Municipal Board to show cause why definite charges be not framed against him and be referred to a Judicial Officer, that is the stage where the proceedings start against the Chairman or the Member of the Municipal Board and the State Govt. has power to suspend the Chairman or a member of a Municipal Board simultaneously when it decides to issue him a notice of show cause under Section 63(2) of the Rajasthan Municipalities Act. The suspension of a Chairman or a Member of a Municipal Board pending enquiry being an interim measure the suspension does not result in civil or evil consequences and it is not penal in character. Enough safeguards have been provided in the Section so that no arbitrary, capricious or mala fide suspension may take place. However, we will like to add a word of caution that the holders of these elective public posts cannot be equated with Govt. servants and, therefore, before a holder of an elected post is suspended, the Government must have sufficient reasons to do so. Care should be taken that such suspensions should not be arbitrary and the

suspensions of such elected representatives should not be brought about for political motives or consideration."

(25) Jagdish Narayan Sharma (04/05/1994)

In this case, the question under consideration has been dealt with in para No.18 of the judgment, where this Court has observed that no preliminary inquiry has been ordered to be conducted and hence, it cannot be said that proceedings have commenced within the meaning of Section 63(4) of the Act of 1959.

This judgment also heavily relies upon the judgment of Jan Mohd. (supra), while making a reference of judgments rendered in the cases of Ugamsee Modi and Mohanlal (supra).

Even in this case, the Coordinate Bench has followed the law laid down in Jan Mohd.'s case (supra), which, in a way, deviated from the earlier Division Bench judgment rendered in the case of Ugamsee Modi. (supra) Paras Nos.15 and 18 of the judgment in the case of Jagdish Narayan Sharma (supra) need specific mention, hence, the same are being reproduced hereinbelow:-

"15. In Jan Mohd.'s case (cited supra), this Court has also held that sub-section (4) of section 63 is neither unfair nor unreasonable nor unjust nor arbitrary nor ultra-vires of the provisions of Articles 14, 16 & 21 of the Constitution and specifically over-ruled the law laid down in Ajmer Singh Yadav vs. State of Raj., 1986 R.L.R. 16, wherein it was held that 'proceedings to have commenced' used in section 63(4) of the Act contemplated that such proceedings commence only after the report of enquiry under proviso to section 63(1) has been received and the delinquent member has been afforded opportunity of explanation and the State Government has applied its mind and has decided to proceed u/s.63 of the Act.

18. In the instant case, admittedly neither any preliminary enquiry was ordered nor conducted nor any report of the enquiry officer was placed before the State Government. Hence it cannot be held by any

stretch of imagination that 'proceedings had been commenced' within the meaning of section 63(4) of the Act against the petitioners when the impugned suspension order Anx.7 was passed. Moreover there was total non-application of mind on the part of the State Government before suspending the petitioner. Therefore, on this count alone the impugned suspension order Annexure-7 cannot be sustained."

(26) **Suresh Chandra Singhal (13/05/2005)**

In this case, a Division Bench of this Court had occasion of dealing with somewhat similar situation and while relying upon judgment of this Court in the case of Jan Mohd. (supra), the Court proceeded to hold that the order of suspension has to be passed only after the preliminary inquiry report is placed before the State Government and the State Government, thereafter, passes an order for initiation of inquiry. The Division Bench held that in the facts and circumstances of the case, suspension was warranted but on the date when it was passed, i.e. 09.06.2004, it could not have been passed, as preliminary inquiry report did not even exist on that date, much less being considered by the State Government.

A careful reading of the above judgment, in particular para Nos.13 and 15, reveals that the Division Bench has heavily relied upon the Division Bench judgment in the case of **Jan Mohd.** without even referring to earlier Division Bench judgment in the case of **Ugamsee Modi** and has held that without there being a preliminary inquiry, the State Government cannot place an elected representative under suspension; whereas the law, as laid down in the case of **Ugamsee Modi**, is otherwise.

(27) **State of Rajasthan Vs. Ashok Machhi (12/11/2008)**

This Division Bench judgment essentially deals with a peculiar factual matrix, in which it has found the initiation of

inquiry so also the suspension to be ill founded and arbitrary. In this case, the Division Bench found that the preliminary inquiry was got conducted by a person who was not competent, hence, the inquiry report was held non-est and proceedings in furtherance thereof too were held to be without any legal basis.

It is to be noted that the preliminary inquiry report in that case was furnished by the S.D.O., whereas according to the order of the State Government, the District Collector was supposed to furnish the preliminary inquiry report. On the principles of *deligatus non potest deligare*, the Division Bench quashed the preliminary inquiry report and in this context, following observation was made:-

"As held above, the requirement of preliminary inquiry being sine qua non, and since the same has been found absent, per force language of Section 63(2), no further action could be taken nor Annex.8 could be issued."

(28) **Pradeep Hinger (16/08/2007)**

In this case, this Court had quashed the suspension order but the facts and issue involved in the said case were entirely different. In the said case, on facts, the Court found that there existed no reason for suspension of the petitioner therein. The Court held that mere fact that an FIR has been lodged against the petitioner, cannot be a reason to place an elected Chairman of the Municipal Council under suspension.

As against this, the facts of the case in hands are different. Where a case under various provisions of Prevention of Anti-Corruption Act has been registered against the petitioner and on receipt of the information, if the State deems it appropriate to place the petitioner under suspension, in the opinion of this Court,

such information constitutes a valid reason. That apart, the High Court in exercise of its supervisory jurisdiction cannot look into “the sufficiency of reason; it can only ensure the existence of reason”.

(29) **Pinki Sahu (24/05/2017)**

In this case, a Coordinate Bench of this Court while relying upon the judgment in the case of Jan Mohd. (supra) quashed the suspension of the petitioner therein. A perusal of the facts involved in the case of Pinki Sahu (supra) reveals that said Pinki Sahu had been placed under suspension merely on account of the fact that she had remained behind bars for more than 48 hours. Interpreting the provisions of sub-section (6) of Section 39 of the Act of 2009, this Court has held that the factum of registration of FIR or a person remaining behind the bars for more than 48 hours, per-se does not ipso-facto result in suspension of an elected representative, unlike in the case of a government employee where the suspension is automatic. While observing that a provision similar to Rule 13(2) of Rajasthan Civil Services (Classification, Control and Appeals) Rules, does not exist under the Act of 2009, the order of suspension dated 19.12.2016 was held illegal.

(30) Upon wading through the above referred judgments, this Court is of the view that the judgments of this Court rendered in the case of Mohanlal (supra) and Ugamsee Modi (supra) are exactly on the point which has come up for consideration of this Court – as to whether the inquiry should be treated to have commenced and whether an elected representative can be placed under suspension even before a preliminary inquiry has commenced.

(31) Before embarking upon the statutory provisions and precedents, it would be appropriate to briefly advert to the jurisprudence on suspension pending enquiry to understand the legislative intent while enacting section 39(6). The Division Bench of this Court in the case of **Jan Mohd.** (supra) has held as under:

"61. ...The principle of acting fairly is undoubtedly an essence of good and considerate admission in a democratic set up. But some times urgent action is necessary on the ground of public policy, public health or safety or with a view to prevent a person from continuing any activities injurious to the society or prejudicial to public Interest. In such cases, the normal presumption that a hearing must be given is rebutted by the urgency of the situation. Even in cases not involving urgency, when it is necessary to prevent a person from doing any mischief or continuing to indulge in acts harmful to the society or a section thereof or where prior warning would frustrate the very object, action may be taken without a pre-decisional hearing..".

Hon'ble the Supreme Court in the case of **Liberty Oil Mills vs. Union of India** reported in **AIR 1984 SC 1271** has held as under:

"20. ...We, however, take care to say that we do not mean to suggest that natural justice is not attracted when orders of suspension or like orders of an interim nature are made. Some orders of that nature, intended to prevent further mischief of one kind may themselves be productive of greater mischief of another kind. An interim order of stay or suspension which has the effect of preventing a person, however, temporarily say from pursuing his profession or line of business may have substantial serious, and even disastrous consequences to him and may expose him to grave risk and hazard. Therefore, we say that there must be observed some modicum of residual, core natural justice, sufficient to enable the affected person to make an adequate representation..."

Lord Denning M.R. in **Lewis vs. Heffer** reported in **(1978)**

All ER 354 has held as under:

"These words, apply, no doubt, the suspensions which are inflicted by way of punishment, as for instance when a member of the Bar is suspended from practice for six months, or when a solicitor is suspended from practice. But they do not apply to suspension which are made as a holding operation, pending enquiries. Very often irregularities are disclosed in a Govt. Department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the department of the office is being affected by rumours and suspicion. The other will not trust the man. In order to get back proper work, the man is suspended. At that stage, the rules of natural justice do not apply."

(32) Upon perusal of the abovementioned cases, the jurisprudence appears to be that though the concerned authority must observe principles of natural justice while issuing ad-interim suspensions or pre-decisional suspensions, such an order would however not be illegal simply by virtue of it being a pre-decisional or ad-interim order without hearing the concerned person. This Court does not deem it proper to indulge into a scrutiny of the wisdom of legislature while enacting sections 39(1) and 39(6) so as to answer the question of whether the grounds mentioned in section 39(1) are such that they warrant a pre-decisional suspension.

(33) Before dealing with the judgments cited at the Bar, this Court deems it appropriate to outline the import and scheme of section

39. It would not be out of place to reproduce sections 39(1), 39(2), 39(3), 39(4) and 39(6) of the Act of 2009:-

"39. Removal of member. - (1) The State Government may, subject to the provisions of sub-Sections (3) and (4), remove a member of a Municipality on any of the following grounds, namely:-

(a) that he has absented himself for more than three consecutive general meetings, without leave of the Municipality:

Provided that the period during which such member was a jail as an under trial prisoner or as a detainee or as a political prisoner shall not be taken into account

(b) that he has failed to comply with the provisions of Section 37,

(c) that after his election he has incurred any of the disqualification mentioned in Section 14 or Section 24 or has ceased to fulfil the requirements of Section 21,

(d) that he has

- (i) deliberately neglected or avoided performance of his duties as a member, or
- (ii) been guilty of misconduct in the discharge of his duties, or
- (iii) been guilty of any disgraceful conduct, or
- (iv) become incapable of performing his duties as a member, or
- (v) been disqualified for being chosen as member under the provisions of this Act, or
- (vi) otherwise abused in any manner his position as such member:

Provided that an order of removal shall be passed by the State Government after such inquiry as it considers necessary to make either itself or through such existing or retired officer not below the rank of State level services or authority as it may direct and after the member concerned has been afforded an opportunity of explanation.

(2) *The power conferred by sub-Section (1) may be exercised by the State Government of its own motion or upon the receipt of a report from the Municipality in that behalf or upon the facts otherwise coming to the knowledge of the State Government:*

Provided *that, until a member is removed from office by an order of the State Government under this Section, he shall not vacate his office and shall, subject to the provisions contained in sub-Section (6), continue to act as, and exercise all the powers and perform all the duties of, a member and shall as such be entitled to all the rights and be subject to all the liabilities, of a member under this Act.*

(3) *Notwithstanding anything contained in sub-Section (1) where it is proposed to remove a member on any of the grounds specified in clause (c) or clause (d) of sub-Section (1), as a result of the inquiry referred to in the proviso to that sub-Section and after hearing the explanation of the member concerned, the State Government shall draw up a statement setting out distinctly the charge against the member and shall send the same for enquiry and findings by Judicial Officer of the rank of a District Judge to be appointed by the State Government for the purpose.*

(4) *The Judicial Officer so appointed shall proceed to inquire into the charge, hear the member concerned, if he makes appearance, record his findings on each matter embodied in the statement as well as on every other matter he considers relevant to the charge and send the record along with such findings to the State Government, which shall thereupon either order for re-inquiry, for reasons to be recorded in writing, or pass final order.*

xxx xxx xxx

(6) *Notwithstanding the foregoing provisions of this Section, the State Government may place under suspension a member against whom proceedings have been commenced under this Section until the conclusion of the inquiry and the passing of the final order and the member so suspended shall not be*

entitled to take part in any proceedings of the Municipality or otherwise perform the duties of a member thereof."

(34) Upon perusal of the aforementioned provisions, following appears to be the scheme of Section 39:-

Section 39(1)

Sub-section (1) of section 39 provides 9 grounds on which the State Government can remove a member.

The proviso to sub-section (1) states that the State Government itself or through an authorised officer or its authority will have to conduct an inquiry and afford the concerned member an opportunity of hearing before passing an order for removal. For all the grounds mentioned in sub-section (1) of section 39 for which the State Government intends to remove a member, a preliminary inquiry and an opportunity of hearing is a prerequisite.

Section 39(2)

Sub-section (2) of section 39 provides that the State Government can exercise its power of removal of a member either by taking suo motu cognizance or upon receipt of a complaint or otherwise being aware of a fact. The proviso to sub-section (2) states that subject to sub-section (6), until a member is removed from office he/she may continue to perform his/her duties as the office bearer.

Section 39(3)

Sub-section (3) of section 39 provides that where the grounds for removal are ones contained in clauses (a) and (b) of sub-section (1), the State Government shall frame the charges against the member based on the preliminary inquiry, a personal

hearing shall be provided to the member and after considering his reply, if deemed necessary, charges would be framed and sent to a Judicial Officer for further enquiry.

Section 39(4)

Sub-section (4) states that the Judicial Officer on receipt of the charges mentioned in sub-section (3) shall inquire into charges, hear the concerned member, record his own findings and send the same to the State Government. The State Government upon receipt of the findings of the Judicial Officer can either order a re-enquiry or pass a final order.

Section 39(6)

Sub-section (6) is a non-obstante clause. It states that the State Government may place a member under suspension upon commencement of the proceedings under section 39. Since it begins with a non-obstante clause, it overrides any other provision contained in section 39 and assumes a superior position in case of any conflict with another portion of the section.

(35) Therefore, upon a reading of the bare text of the abovementioned sub-sections (1) and (2) of section 39, where grounds for removal of member are as contained in clauses (a) and (b) of sub-section (1), the procedure to be adopted is required to be in the following order:

- (i) Receipt of allegation/Suo motu cognizance/On receipt of information
- (ii) Preliminary inquiry
- (iii) Opportunity of hearing
- (iv) Removal

(36) Whereas, if the grounds for removal of member are as contained in clauses (c) and (d) of sub-section (1), the procedure has to be in the following order:

- (i) Receipt of allegation/Suo motu cognizance/On receipt of information
- (ii) Preliminary inquiry
- (iii) Opportunity of hearing
- (iv) Reference of matter to Judicial Officer (v) Enquiry by Judicial Officer
- (vi) Based on findings of the Judicial Officer State Government orders re-enquiry or passes a final order for removal/non-removal of member.

(37) Having outlined the scheme of Section 39, it would now be appropriate to deal with the relevant case laws involved in the instant case. Though the counsel for the petitioner has relied upon a number of judgments, they all are in one way or the other based on the law laid down in the cases of Ugamsee Modi, Mohanlal and Jan Mohd. Therefore, at the risk of repetition, but for the sake of clarity, this Court deems it expedient to deal with these three judgments for proper adjudication of the issue at hand.

(38) UGAMSEE MODI VS. STATE OF RAJASTHAN

In this case while acting on certain complaints of misconduct against the petitioner the State Government suspended the petitioner after having issued show cause notices to him. The petitioner challenged the action of the Government on the ground that he was suspended merely after issuance of show cause notice and at that stage 'proceedings' (as envisaged under section 63(4)) cannot be said to have been initiated against him.

(39) The Court turning down Petitioner's reasoning held that 'proceedings' as envisaged under section 63(4) can be said to

have been initiated upon issuance of show cause notice. The relevant portion of the said judgment is reproduced hereunder:

"5. ...The facts indicate that there were certain complaints made against the petitioner, apart from the charges on which an inquiry had been made earlier by the Legal Remembrancer. Those complaints appear to have been prima facie, inquired into by the Collector and by the Inspector General of Police, who asked Government to accord sanction for the prosecution of the petitioner; and the Government after applying its mind to those reports thought that action was called for. It appears that the Government sent notices to the petitioner to show cause why action should not be taken against him...

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...If these facts are correct that there were certain allegations of misconduct against the petitioner of his having abused his powers as a Chairman of the Municipality, that on those allegations there was some inquiry by certain officers and that on the report submitted by those officers the Government called upon the petitioner to explain the allegations made against him, it can hardly be contended that proceedings cannot be taken to have commenced against the petitioner within the meaning of sub-sec. (2) of sec. 63 of the Municipalities Act. It may be that the framing of the actual charges and the reference to the judicial officer concerned may take place later; but there was nothing to prevent the State Government from taking action to suspend him on those allegations under sub- sec. (4) of sec. 63 of the Act...

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...There can be no doubt that on the facts stated here, proceedings under sub-section (2) of section 63 of the Act, must be taken to have commenced against the petitioner when on those allegations he was called upon to show cause and to explain his conduct. We are, therefore, unable to agree with the contention of the petitioner that the order of suspension is without jurisdiction..."

In this case while acting on certain complaints of misconduct against the petitioner the State Government suspended the petitioner after having conducted preliminary inquiry and granting opportunity of hearing to the petitioner. The petitioner challenged the action of the State Government on the ground that he was suspended merely after preliminary inquiry and personal hearing and at that stage 'proceedings' (as envisaged under section 63(4)) cannot be said to have been initiated against him since the State Government at such stage cannot be said to have made up its mind on removal of the petitioner.

(41) The Court while turning down petitioner's reasoning and relying upon the decision rendered in the case of Ugamsee Modi held that the 'proceedings' as envisaged under section 63(4) can be said to have been initiated when the government makes up its mind on taking action on the complaints received against the concerned member. The relevant portion of the said judgment from 1962 SCC OnLine Raj 142, is reproduced hereunder:

"10. The issue therefore in short is whether the petitioner was suspended on commencement of the proceedings against him under sec. 63. If so., the order of suspension cannot be held to be invalid. In Ugamsee Modi Vs. State of Rajasthan (1962 RLW, 184 : ILR 1961 11, Raj., 892) a Division Bench of this Court consisting of the Chief Justice and Mr. Justice Shanghai held, "proceedings under sub-sec. (2) of sec. 63 of the Act, must be taken to have commenced against the petitioner when on those allegations he was called upon to show cause and to explain his conduct." We are in agreement with the law laid down in that decision. After a complaint is received by the Government against a member or a chairman, a preliminary inquiry has to be undertaken to verify whether there is any substance

in the allegations made against such person and after holding that inquiry as contemplated by proviso to sub-sec. (1) of sec. 63, if the Government decides to take action against such person, it may issue show cause notice to him and also take further action for conduct of an inquiry in accordance with the provision laid down under secs. 63(2)(3)(4) and (5). Though for purposes of sub-sec. (1) of sec. 63 a preliminary inquiry would be held to have commenced no sooner cognizance is taken of a complaint by the Government against such officer, yet proceedings should be taken to commence in the meaning of the term under sub-sec. (4) to sec. 63 only when process is ordered to issue against such person, or when the authority makes up its mind to take action. At that stage the Government makes up its mind whether or not to take action and that, in our opinion, is the stage of commencement of proceedings for purposes of sec. 63(4)...

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Thus even though show cause notice was in fact issued on the 1st of December, proceedings commenced against the petitioner on the 24th of October, 1962 when the Government took a decision to take action against him. The order of suspension in this case was made simultaneously with the order of inquiry. The crux of the matter is not the service of the show cause notice or the date on which it is issued, but the date of the determination of the competent authority that there was material for taking action for issuing process..."

(42) A perusal of the above quoted para No.10 of the judgment in the case of Mohanlal, reveals that the Division Bench, while deciding this case, had concurred with the view taken by the earlier Division Bench in the case of Ugamsee Modi. However, in later part of the same para, has made certain observations, which gives an impression that Mohanlal's case holds that the commencement of proceedings for the purpose of suspension in terms of sub-section (4) of Section 63 of the Act of 1959, would be deemed to have commenced when process is issued to an

elected representative or when the authority makes up its mind to take action.

(43) If the facts of Mohanlal's case are considered, it is clear that the question as to when the proceedings would be deemed to have commenced, was not involved in the case inasmuch as, the preliminary inquiry was got conducted and its report was submitted on 22.10.1962 and the petitioner was suspended on 24.10.1962, while show cause notice was issued on 01.12.1962.

(44) The argument advanced in that case was that the State Government could not have suspended the petitioner before it had issued a show cause notice (01.12.1962), and then, in those facts, the Division Bench, while dismissing the writ petition held that the proceedings for the purpose of sub-section (4) commences when the State Government makes up its mind to take action. If such observation is applied on the facts of the present case, then, it can be conveniently said that the proceedings have commenced when the State has made up its mind to take action, i.e., 02.07.2021.

(45) Petitioner's contention that proceedings as envisaged under Section 39(6) cannot be said to have been initiated until the State Government has applied its mind to the preliminary inquiry report provided under the proviso to section 39(1) is based on the judgments rendered by the Division Bench of this Court in the cases of Jan Mohd. vs. State of Rajasthan.

(46) **JAN MOHD. VS. STATE OF RAJASTHAN**

In this case the respondents argued that proceedings can be said to have commenced against the petitioner from the date when show cause notice was issued to him regarding the charges

levelled against him. Per contra the petitioner argued that non-grant of pre-decisional hearing (suspension u/s 63(4) without providing opportunity of hearing) is violative of principles of natural justice.

(47) The Court held that for invoking section 63(4) the State Government must peruse the preliminary inquiry report and after application of its mind on such report it can invoke 63(4).

The relevant portion of the said judgment is reproduced hereunder:

55. *Now, we address ourselves on the most important question, that has been raised in these writ petitions i.e. when it should be held that the proceedings have commenced against the Chairman or the Member of the Municipal Board and whether this interim measure of suspension results in evil and civil consequences and whether it is penal in character and whether enough safeguards are not provided in the Act for the exercise of powers by the State Govt. and if left at that, whether these provisions are unfair, unreasonable, unjust and hence arbitrary.*

58. *...Thus, in Ugamsee Modi's case which came up for consideration in Mohanlal's case (supra), the Division Bench of this Court has categorically held that before suspending a Member/Chairman of the Municipal Board/ Council, what is essential is that the preliminary enquiry report should be considered and after application of mind on the preliminary enquiry report, if the State Government considers it fit that the matter needs further enquiry, then a show cause notice has to be issued to such Member/Chairman of the Municipal Board/Council why specific charges be not framed against him and they be referred to the Judicial Officer and simultaneously, the suspension order can be issued because as soon as there is application of mind on the report that has been submitted by the Enquiry Officer, when the Government decides what action has to be taken and that is the stage when the proceedings commence against the petitioner. Prior to that, this is the stage of holding of preliminary*

enquiry. The Division Bench has not held that obtaining of the explanation and its consideration is a condition precedent for suspending a Member/Chairman of the Municipal Board/Council..."

(48) In the opinion of this Court, Hon'ble the Division Bench in the cases of Mohan Lal and Jan Mohd. although followed the judgment rendered in the case of Ugamsee Modi, but have slightly deviated from the view taken by the Division Bench in Ugamsee Modi. In the case of Ugamsee Modi, it was unequivocally held that the proceedings as envisaged under Section 39(6) [erstwhile section 63(4)] can be said to have commenced when the accused based on the allegations levelled against him is called upon to show cause and explain his conduct. However, in light of the observations made in latter part of para 10 of the judgment in case of Mohan Lal, the Division Bench deciding Mohanlal's case proceeded to hold that the proceedings would be said to have commenced, when the State Government applies its mind to the preliminary report and makes up its mind to proceed further under Section 39 of the Act of 2009.

(49) This view, in the opinion of this Court, is contrary to law laid down in case of Ugamsee Modi and in conflict with the express provisions contained in Section 39. As explained in the earlier paras of the judgment, the very first action that the State Government must mandatorily undertake to commence proceedings under Section 39 is, a preliminary inquiry and therefore, the proceedings commence when the State Government decides to issue show cause notice and conduct preliminary enquiry on the basis of allegations levelled against the concerned

member. It is the decision to issue notice and not the very issuance of notice.

(50) According to this Court, commencement of proceedings is the point of time, when the State Government decides to take action against an elected representative. Such decision to take action, naturally would entail a fact finding inquiry or preliminary inquiry, as contemplated under the first proviso to Section 39 of the Act of 2009, followed by a judicial inquiry to be conducted under sub-sections (3) and (4) of Section 39 of the Act of 2009.

(51) But then, sub-section (6) of Section 39 of the Act of 2009, does not make any reference of any sort of inquiry, preliminary or judicial. The provision simply mentions that in case proceedings have been commenced under this Section, a member can be placed under suspension. This Court is firmly of the view that the expression "proceedings have been commenced" coupled with the expression "under this Section" is wide enough to include within its fold not only the issuance of notice for preliminary inquiry and service of charge-sheet, but even the situation and cases, when the State Government decides to get an inquiry conducted through any authorized officer. The moment, the State chooses to take action against an elected representative with or without simultaneously referring the matter to the competent authority for inquiry in terms of proviso to sub-section (1), the proceedings stand commenced.

(52) It is noteworthy that the expression used in sub-section (6) is "proceedings" and not "inquiry". The expression "proceedings" includes the decision to initiate inquiry, issuance of notice etc. and, therefore, in the opinion of this Court, in the present factual

matrix, on 02.07.2021, when the State Government had decided to commence disciplinary proceedings against the petitioner and had made up its mind to do so, the proceedings had commenced.

(53) If the term 'proceedings' is to be interpreted as proposed by Mr. Rajesh Joshi then section 39(6) would be rendered redundant in case(s) when action is taken pursuant to any allegation under clauses (a) and (b) of sub-section (1) of Section 39, because unlike the procedure of removal of a member under clauses (c) and (d) of sub-section (1) of Section 39 where, after having conducted a preliminary inquiry and granting an opportunity of hearing, the State Government has to further refer the matter to a Judicial Officer, the procedure of removal of a member under clauses (a) and (b) of sub-section (1) of Section 39 only requires the State Government to decide removal/non-removal of the member after having conducted a preliminary inquiry and granting an opportunity of hearing to the accused member.

(54) Therefore, the State Government would be unable to suspend a member during pendency of its decision of removal when his case falls under clauses (a) and (b) of sub-section (1). Whereas sub-section (6) provides that suspension can take place if proceedings have been commenced under Section 39 of the Act of 2009. Unquestionably, sub-section (6) is applicable to all the nine contingencies mentioned in clauses (a) to (d) of sub-section (1). If the petitioner's argument is accepted then sub-section (4), which has been specifically made applicable to the entire Section 39 would be restricted to cases covered by clauses (c) and (d) of sub-section (1) only. Such interpretation would frustrate the very purpose of the provision and hence, the same cannot be accepted.

(55) Therefore, for the reasons discussed hereinabove and the law laid down in the case of Ugamsee Modi (supra), this Court holds that the 'proceeding' as envisaged under section 39(6) can be said to have commenced upon issuance of a preliminary inquiry/show cause notice based on the allegations levelled against the accused under section 39(1).

(56) Since the proceedings for the purpose of triggering the action against the petitioner under Section 39 of the Act 2009 had commenced on 02.07.2021, it cannot be said that the State Government could not place the petitioner under suspension on 05.07.2021.

(57) This Court is therefore of the considered view that the State's action of placing the petitioner under suspension is in accordance with the scheme of the Act and in tune with the Division Bench judgment in the case of Ugamsee Modi (supra).

(58) Then comes the question, as to whether the impugned suspension order is without application of mind as alleged by the petitioner. In the opinion of this Court, mere lodging of an F.I.R. or the State's opinion that a case against an elected member is made out to proceed against him under clauses (a) to (d) of sub-section (1) of section 39 cannot ipso facto entail suspension under sub-section (6) of section 39. The use of word "may" in sub-section (6) enjoins upon the State to apply its mind about the necessity of suspension.

(59) In the instant case, the allegation against the petitioner is acceptance of bribe, in discharge of his official duties, through his brother-in-law for clearing the bills of the complainant. The order of suspension states that if the petitioner is not suspended there is likelihood of him influencing the inquiry and the evidence. The said

reason spelt out in the order of suspension is not only indicative of application of mind but also fulfils the requirement of recording reasons. According to this Court, the reason given thereunder is sufficient to justify the suspension of the petitioner.

(60) The writ petition is, therefore, dismissed.

(61) The stay application also stands disposed of accordingly.

(62) As a parting remark, this Court would hasten to add that the State had placed the petitioner under suspension on 05.07.2021 and till recently (up to 11.01.2022), even the notice of the Deputy Director (Regional), Local Bodies, Udaipur for preliminary inquiry has not been served upon the petitioner. This reflects badly on the State. On account of lackadaisical attitude of the respondents, the petitioner has remained under suspension for more than six months and even preliminary inquiry has not been initiated against the petitioner, much less concluded. Such laid back attitude of the State machinery qua an elected Chairman of the Municipal Board cannot be countenanced.

(63) Hence, though the writ petition is dismissed on merit, however, a direction is issued to the respondents/competent authority to ensure that preliminary inquiry be concluded within a period of one month from today. In case, after conclusion of preliminary inquiry, the State feels that judicial inquiry is necessary, process thereof be expedited and all endeavors be made to ensure that the same is concluded as early as possible, preferably within six months from the date of referring the matter to the Judicial Officer.

(DINESH MEHTA),J