IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1045 of 1998

From

SPECIAL CIVIL APPLICATION No 3530 of 1997

with

LETTERS PATENT APPEALS NOS. 1128 of 1998,

1066/1998, 1067/1998, 1068/1998,

1055/1998, 1057/1998, 1071/1998,

1074/1998, 1076/1998, 213/1999

AND 199/1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SHAKUNTALA P DEVLEKAR

Versus

SURAT MUNICIPAL CORPORATION

Appearance:

MR NIRAV K. MAJMUDAR, Advocate for Appellants in L.P.A. NOS. 1045/1998, 1055/1998, 1057/1998, 1074/1998, 1076/1998, 1071/1998 and 199/1999

MS. PAURAMI B. SHETH, Advocate for Appellant in L.P.A. No. 1128/1998

MRS. KETTY A. MEHTA, Advocate for Appellants in L.P.A. Nos. 1066/1998, 1067/1998 and 1068/1998.

MR.A.V.PRAJAPATI, Advocate for Appellants in L.P.A. No.213/1999

MR PRASHANT G DESAI for Respondents - Surat Municipal Corporation in all matters

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CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE KUNDAN SINGH

Date of decision: 30/04/2002

ORAL COMMON JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These Letters Patent Appeals have been directed against the common judgement and order dated 1st August 1989 passed by the learned Single Judge in a group of petitions in which the petitioners had challenged the orders of their dismisssal from service passed by the respondent Surat Municipal Corporation and the decision of the Standing Committee confirming the orders. Special Civil Application No. 7110 of 1997 was filed by the Surat Municipal Employees (Staff) Union and the other petitions were filed by individual employees amongst the members of the said Union.

2. Due to the outbreak of pneumonic plague in the city of Surat, the Municipal Commissioner, after getting appropriate sanction from the State Government to take

special measures, gave a call through public notices to the employees of the Municipal Corporation to report for work in view of the emergency situation created by the dangerous disease and issued a warning that defaulters will be dismissed. Some employees, however, did not heed and came to be dismissed on or around 29th September 1994. On 1st October 1994, the Municipal Commissioner issued orders that the defaulting employees who come to join duty after 30-9-1994 should be required to explain their absence and in cases where the explanation is found to be proper, they may be instructed to join. The explanations given by the petitioners - appellants who attempted to join after their dismissal orders were not found to be acceptable and their appeals came to be dismissed by individual orders made by the Administrator dealing with the grounds which were put forth by these employees for trying to explain their absence. The said Staff Union thereupon filed Special Civil Application No.12677 of 1994 challenging the termination of the employees. During those proceedings, by an interim direction issued on 11-7-1996, the respondent authorities were directed to consider the representations and contentions of these dismissed employees and take a decision in accordance with law in the matter.

2.1 Pursuant to that direction, a post-decisional hearing came to be given to the Union as well as each of the aggrieved employees who made the representations by accepting the direction of the Court for such post-decisional hearing. They were also given a personal hearing and ultimately, the Standing Committee, after considering their representations and contentions as well as the orders earlier made by the Administrator, found that there was no valid ground for interfering with the dismissal of these appellants - employees. In about four cases wherein the explanation given was found to be acceptable, the employees were allowed to resume duty. Thereafter, when the Special civil Application No. 12677 of 1994 came up for hearing on 7th April 1997, the learned Single Judge, observing that earlier by the interim order, the Court had accepted the arguments of the petitioner Union against their summarily dismissal made without being given an opportunity of being heard, but, instead of allowing the petition at that stage, granted an opportunity of post-decisional hearing before making final orders, held that, since the case of the petitioners was considered by the Corporation and was rejected by the Standing Committee, validity of the subsequent orders made after hearing the representations could not be decided in that petition. It was, therefore, held that the petitions had become infructuous

in view of the subsequent orders and leaving it open to the petitioners to seek remedy against the final orders before the appropriate forum, the petition was rejected. Thereupon, the petitioners filed a group of petitions, from which the present appeals arise.

2.2 The learned Single Judge, by his judgement and order dated 1st August 1998, holding that an appropriate post-decisional hearing was given to these employees and observing that, in the facts and circumstances of the case, it was not reasonably practicable to give each of them an opportunity of hearing or showing cause in view of the fact that, as announced by the public notice dated 25-9-1995, the situation was very grave and the sanctioned leave of all the employees who had taken it was cancelled and without any exception, the entire staff was required to resume duty, failing which their services were to be terminated, found that, in such a situation, when the administration was engaged in saving human life, it was not practicable to hold enquiry against persons who had no sense of duty. It was also held that the petitioners had accepted the post-decisional hearing by submitting their representations and having obtained orders on merit, they cannot now contend that pre-decisional hearing should have been given. Moreover, there was no illegality committed in the post-decisional hearing. The learned Single Judge took note of the fact that the Administrator had considered the representations of the employees in their appeals and reinstated four where he found the explanations to be acceptable. Thereafter, the matter was again considered by the Standing Committee pursuant to the Court direction where liberty was given to the petitioners to make written submissions. After considering all representations and after hearing the parties, the Standing Committee rejected the representations of the petitioners. The learned Single Judge then proceeded to consider each individual case of the petitioners and out of the group of petitions, allowed four petitions, directing the respondents to re-consider their case, while dismissing the other petitions. The learned Single Judge, after an elaborate analysis of the facts from the record, found that there was nothing objectionable against the decision taken by the Standing Committee confirming the orders of dismissal of the petitioners who are the present appellants.

3. Three learned counsel have addressed us on behalf of the appellants adopting each others arguments and the fourth adopted their arguments. It has been contended on behalf of the appellants that there was no pre-decisional

hearing given as required by the provisions of section 56(3) of the Bombay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as `the said Act') and the post-decisional hearing cannot cure that defect. It was argued that the provisions of clause (b) of the proviso to sub-section (3) of section 56 of the said Act were not attracted in the instant case, because, the competent authority had not recorded any satisfaction that it was not reasonably practicable to give an opportunity of showing cause to these employees. It was submitted that reasonable opportunity to show cause would imply a full-fledged hearing, for which such post-decisional consideration of representation cannot be a valid substitute. It was also argued that, from the circumstance of emergency, no such satisfaction can be inferred unless specifically recorded in writing. It was contended that the circular issued on 1-10-1994 was discriminatory since those who reported after 1-10-1994 were allowed to explain and join, while those who were already dismissed, were not permitted to join. It was argued that unless an employee became violent or lunatic, hearing could not be dispensed with under the said proviso to section 56(3) of the Act. It was further argued that, under proviso (b) of section 56(3) of the Act, the authority should make a mention in the order imposing punishment about the satisfaction that it was not possible or practicable to give an opportunity to show cause and therefore, a post-decisional opportunity could not cure that defect of non-recording the satisfaction in the dismissal order. It was submitted that the respondent had not shown from the record that any such satisfaction had been reached. Moreover, such satisfaction was required to be separately recorded in each case. It was then argued that, even after re-consideration of the representations in the so called post-decisional hearing, the respondent did not give any finding on the reasons put forth by the employees for their absence by giving any cogent ground and had just upheld the earlier dismissal orders, the defect of which could not get cured by such post-decisional hearing. It was submitted that even during the post-decisional hearing, no show cause notice was given setting out the charges against these employees and no material was pointed out to the employees on the basis of which they were required to answer the charges. Therefore, no effective post-decisional hearing was given to justify the summarily dismissal of these employees. It was contended that the declaration of emergency in the city under section 62 of the said Act could apply only to the services which were enumerated as essential services in the Rules and did not apply to all services of the

Municipal corporation. Therefore, the insistence on the employees to report to duty would apply only to those belonging to the enumerated essential services and not to the appellants.

3.1 In support of their contentions, the learned counsel for the appellants placed reliance on the following decisions :

[a] The decision of the Supreme court in Swadeshi Cotton Mills v. Union of India, reported in AIR 1981 SC 818 was cited for the proposition that the general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. It was observed that, in short, this rule of fairplay must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands, and that the Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise.

[b] The decision of the Supreme Court in Institute of Chartered Accountants of India v. L.K.Ratna, reported in AIR 1987 SC 71, was cited to point out that where allegation of misconduct against Chartered Accountant were made, it was held that

a member of the institute of the Chartered Accountant of India accused of misconduct was entitled to a hearing by the Council when, on receipt of the report of the Disciplinary Committee, it proceeds to find whether he is or is not guilty.

[c] The decision of the Supreme Court in K.I.Shephard v. Union of India, reported in AIR 1988 SC 686, being a case in which on amalgamation some of the employees of the banking company were intended to be excluded, was cited to point out that the Supreme Court held that there was no justification to hold that the rules of natural justice had been ousted by necessary implications because of the time frame prescribed under the Banking Regulation Act, and that there was no justification to think of a post-decisional hearing. It was held that there was no justification to throw such employees out of employment and then give them an opportunity of representation when the requirement was that they should have the opportunity as a condition precedent to action. It was observed that it is common experience that once a decision has been taken, there is a tendency to uphold it and the representation may not really yield any fruitful purpose.

[d] The decision of the Supreme Court in Jashwant Singh v. State of Punjab, reported in AIR 1991 SC 385 was cited for the proposition that the decision to dispense with the departmental inquiry cannot be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer.

[e] The decision of the Supreme Court in Union of India v. Tulsiram Patel, reported in AIR 1985 SC 1416 was cited for the proposition that, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the

condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry.

[f] The decision of the Supreme Court in K.C.Joshi v. Union of India, reported in AIR 1985 SC 1046 was cited for the proposition that, where an employee who was a protected workman and an active worker of the trade union, was removed from service on the ground of his unsatisfactory work and unsuitability without an inquiry in accordance with the principles of natural justice and it was found from the facts that, the charge of unsuitability was either cooked up or conjured up for a collateral purpose of doing away with the service of an active Trade Union worker, who because of his activities became an eye sore; it was held that the termination of services could not be said to be legal, valid or justified.

[g] The decision of the Supreme Court in Jai Shanker v. State of Rajasthan, reported in AIR 1966 SC 492 was cited to point out that, in a case where the Regulations involved a punishment for overstaying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause, the Supreme Court held that, though it is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his leave, it did not think that the Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed.

[h] The decision of the Supreme Court in Deokinandan Prasad v. The State of Bihar, reported in AIR 1971 SC 1409 was cited for the proposition that, though the service rule prescribed automatic termination of service for continuous absence for five years, an order passed to that effect without giving opportunity to Government servant offends Article 311 of the Constitution. It was noted in paragraph 25 of the judgement that the continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of the Pension Rules disentitling the said

officer to receive pension. It was admitted by the respondents that no opportunity was given to the petitioner to show cause against the order proposed. It was therefore held that the order was in clear violation of Article 311 of the Constitution and it was quashed even on that ground also. Earlier in paragraph 22 of the judgement, the Supreme Court found that the circumstances clearly showed that the petitioner could not be considered to have been continuously absent from duty for over five years during the period referred to therein and the order was quashed on that ground.

[i] The decision of the Supreme Court in C.L.Subramaniam v. The Collector of Customs, reported in AIR 1972 SC 2178 was cited for the proposition that the procedural guarantee under Article 311 of the Constitution was a valuable one and breach of that guarantee vitiates the inquiry.

[j] The decision of the Supreme court in Nepal Singh v. State of U.P. reported in AIR 1984 SC 84 was cited to point out that, in a case where termination of service of temporary Sub Inspector of Police was found to be on unsatisfactory and vague ground, the Court held that the order was liable to be quashed.

[k] The decision of the Supreme Court in The Managing Director, U.P. Warehousing Corporation v. Vijay Narayan Vajpayee, reported in AIR 1980 SC 840 was cited to point out that, in case of an employee of the Warehousing Corporation, the Supreme Court has held that the employment of the respondent employee was a public employment and the statutory body - the employer - could not terminate the services of its employee without due enquiry in accordance with the statutory Regulations, if any in force, or in the absence of such Regulations, in accordance with the rules of natural justice. It was held that the Court would presume the existence of a duty on the part of the dismissing authority to observe the rules of natural justice, and to act in accordance with the spirit of Regulation 16, which was then on the anvil and came into force shortly after the impugned dismissal. The rules of natural justice in the circumstances of the case, required that the respondent should be given a reasonable

opportunity to deny his guilt, to defend himself and to establish his innocence which means and includes an opportunity to cross-examine the witnesses relied upon by the Corporation, and an opportunity to lead evidence in defence of the charge, as also a show cause notice for the proposed punishment.

[l] The decision of the Supreme Court in Ravindra Kumar Mishra v. U.P. State Handloom Corporation Ltd., reported in 1987 (Supp) SCC 739 was cited to point out that, in a case where U.P. State Handloom Corporation was the employer, it was held by the Supreme Court that the employees of the Corporation are entitled to protection under Part III of the Constitution and hence, since the Corporation had made service rules on par with Article 311(2), its employees were entitled to the benefits of the principles underlying Article 311(2), as interpreted by Supreme Court in various decisions. It was held that the Rule 68 of the Corporation's Service Rules was almost on par with the protection contemplated by Article 311(1), and yet no inquiry as required by Rule 68 was made on merits. On merits, it was held the employee was a temporary servant and had no right to the post and the order challenged was an order of termination in innocuous terms and did not cast any stigma and was, therefore, not open to challenge.

[m] The decision of the Supreme Court in D.K. Yadav v. J.M.A. Industries Ltd., reported in XIII (2) G.L.H. 174 was cited to point out that, in a case where admittedly no opportunity was given to the appellant and no inquiry was held before terminating the services of the appellant, the Supreme Court held that there can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice, and that both are aimed at arriving at a just decision. The impugned termination was, therefore, held to be violative of the principles of natural justice.

[n] The decision of the Supreme Court in H.L.Trehan v. Union of India, reported in AIR 1989 SC 568 was cited for the proposition that, any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a Government servant will offend against the

provision of Article 14 of the Constitution. It was held that the post-decisional opportunity of hearing does not subserve the rules of natural justice. The authority who embarks upon a post-decisional hearing will naturally proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such post-decisional opportunity. In this case, the management of Caltex Oil Refining (India) Ltd. (CORIL) to which management of the Undertaking of Caltex (India) Ltd. had been transferred altered the conditions of service of the staff of the Caltex (India) Ltd. to their disadvantage without giving them an opportunity of being heard, and it was held that the order altering the conditions was liable to be set aside.

[o] The decision of the Supreme Court in S.L.Kapoor v. Jagmohan, reported in AIR 1981 SC 136 was referred to for the proposition that the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man. It was held that the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based, if it is furnished in a casual way or for some other purpose. The person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. That was a case of supersession of Municipal Committee under the provisions of the Punjab Municipal Act, and it was held that the opportunity should be given to Committee before an order of supersession is passed against it.

[p] The decision of this Court in Dr. S.C.Kaushik v. Union of India, reported in XXI G.L.R. 997 was cited to point out that, in a case where medical officer who was serving for more than five years was replaced by a fresh recruit and both had not passed the selection examination, it was held that the impugned termination was discriminatory and violative of Articles 14 and 16 of the Constitution and the rule of `last come first go'

should be observed.

[q] The decision in Mohd. Maqbool v. State of Jammu and Kashmir, reported in 1998 (4) SLR 114 was cited to point out that the learned Single Judge of the Jammu and Kashmir High Court has held that, it is well settled that the gravity of the activities of the delinquent did not furnish a justification for taking away for constitutional guarantee of enquiry for removing him from service. It was observed that that the severity or the gravity of the allegations against him may warrant removal from service. But, the gravity and seriousness of the allegations does not furnish basis for doing away with the constitutional guarantee of an inquiry.

4. The learned counsel appearing for the respondent Corporation, supporting the reasoning of the learned Single Judge, argued that there was no dispute over the fact that the appellants had remained absent during the crucial period when by public notices, the Municipal Corporation had called upon them to report for duty in view of the epidemic and therefore, there was no question of inquiring into the admitted fact of the absence of these appellants. The only question on which they could claim an opportunity of being heard was to justify their absence and on that aspect, the appellants were given ample opportunity to explain their absence earlier before the Administrator who made speaking orders in each case and found that the present appellants did not have any justifiable reason to remain absent. It was submitted that such appeal could be entertained under section 56(4) of the said Act against the order of dismissal and since, at the relevant time, the Administrator who was in power, he had exercised the appellate jurisdiction of the Standing committee and dismissed the appeals of these appellants. Thereafter, again, at the instance of this Court, these appellants had made their representations and written submissions before the Standing Committee and the Standing Committee, after giving them an opportunity of a personal hearing and considering their representations and the orders made earlier by the Administrator, found in cases of these appellants that there was no justification to interfere with the orders of their dismissal. It was argued that an effective post-decisional hearing was accordingly given and therefore, the appellants cannot complain against the dismissal orders on the ground that no pre-decisional hearing was given. It was also argued that, admittedly these appellants did not report pursuant to the public

notices repeatedly issued by the Municipal commissioner and no explanation was given by them before their orders of dismissal were issued. However, on the basis of the circular dated 1-10-1994, in cases where the explanations were found to be justifiable, the employees were allowed to resume. It was submitted that, that was a general circular applicable to all cases and there was no question of discrimination against those who were dismissed earlier. It was submitted that, in all cases, dismissal orders were already made on and prior to 30-9-1994 and the circular was applicable to all the employees who came thereafter and explained their absence to the satisfaction of the concerned authority. It was submitted that the learned Single Judge had considered the cases of each of these appellants and found that they had not put forth any justifiable ground for their absence and therefore, the Standing Committee's decision confirming the order of their dismissal after the post-decisional hearing warranted no interference in their cases. It was submitted that the contention on the basis of section 62 of the said Act was never raised before. In any event, it had no substance, because, not only a notification under section 62 of the Act was issued by the State Government declaring emergency in the city, but notification under section 319 of the said Act was also simultaneously issued, enabling the Municipal Commissioner to take special measures to cope up with the emergent situation that had arisen due to the spread of dangerous disease in the city.

4.1 In support of his contentions, the learned counsel for the respondent - Corporation cited the following decisions :-

[a] The decision in Olga Tellis v. Bombay Municipal Corporation, reported in (1985) 3 SCC 545 was cited to point out that since an opportunity to the petitioners to show cause why encroachments were committed by them on the pavements should not be removed, which was denied by the Commissioner was granted by the Court in an ample measure, and both the sides had made their contentions elaborately on facts as well as on law, the Court did not direct the Municipal Commissioner to afford such opportunity to the petitioners again.

[b] The decision of the Supreme Court in Union of India v. Tulsiram Patel, reported in (1985) 3 SCC 398 was cited for the proposition that the second proviso to Article 311(2) was based on

public policy and was in public interest and for public good. It was held that the audi alteram partem rule of natural justice having been expressly excluded under Article 311(2), there is no scope for re-introducing it by a side door to provide once again the same inquiry which the constitutional provision had expressly prohibited.

[c] The decision of the Supreme Court in Jayantilal Ratanchand Shah v. Reserve Bank of India, reported in (1996) 9 SCC 650 was cited to point out that the Supreme Court in paragraph 16 of its judgement held that, even if it proceeded on the assumption that such an opportunity of personal hearing was imperative to comply with the rules of natural justice, the petitioner cannot raise any grievance on that score for the appellate authority gave them such an opportunity before dismissing the appeal.

[d] The decision of the Supreme Court in Syndicate Bank v. General Secretary, Syndicate Bank Staff Association, reported in AIR 2000 SC 2198 was cited to point out that, in a case where notice was sent on the correct address of delinquent, but was refused as per the postal endorsement, the Supreme Court held that a clear presumption arose in favour of the employer and against the delinquent. This decision was perhaps referred to because of the argument that some of the petitioners were not personally served with the notice which was given to their relatives in the house.

[e] The decision of the Supreme Court in Liberty Oil Mills v. Union of India, reported in (1984) 3 SCC 465 was cited for the proposition that an opportunity to be heard may necessarily have to be post-decisional where the danger to be averted or the act to be prevented is imminent or where the action to be taken can brook no delay.

5. The Collector of Surat, on the basis of the report of the Municipal Commissioner dated 22nd September 1994, by his Notification No. 407/9/94 dated 23rd September 1994, had declared the municipal area of the city of Surat prone to pneumonic plague. On the basis of further information, the Collector, in exercise of powers under the Epidemic Diseases Act, 1897, declared the entire area of the Surat Municipal Corporation as

affected by plague and the declaration was to be effective till 30-11-1994. This declaration was published in the newspapers on 25th September 1994. Under section 2 of the Epidemic Diseases Act, 1897, when at any time the State Government is satisfied that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

6. In the public notice dated 23rd September 1994 appearing in the local newspapers dated 24-9-1994, the Municipal Commissioner informed the officers / employees of the Municipal Corporation that, on 24-9-1994 and 25-9-1994, though holidays, all the offices / departments of the Municipal Corporation would be open in connection with the work relating to the epidemic situation. All the officers / employees were called upon to remain present for duty and were warned that action will be taken against officer / employee who did not report.

7. The Municipal Commissioner, Surat, by his notice dated 24-9-1994 published on 25-9-1994 in the newspapers drawing specifically the attention of the officers and employees of the Municipal Corporation notified that, in the context of the plague which was spreading in the city of Surat, the municipal services were declared as essential services with immediate effect. All the employees who had not reported for duty till then, were strictly instructed to report for their duties. They were warned that severe punitive action including dismissal will be taken against the defaulters.

8. Again by public notice dated 25th September 1994 published on 26th September 1994, the employees of the Corporation were called upon to immediately report for their duties without fear since adequate arrangements were made for their safety. This notice was issued jointly by the Municipal Commissioner, President of the Surat Municipal Corporation, and the President and Vice President of the Surat Municipal Majdoor Union.

9. The State Government, on 25th September 1994, on the proposal of the Municipal Commissioner contained in his letter dated 24-9-1994 to declare the services of the municipal employees as essential services due to outbreak of plague in the city, was of the opinion that the stoppage or the cessation of the performance of any of the municipal services mentioned in Chapter IV of Schedule A of the said Act will be prejudicial to the safety or health and the maintenance of such services essential to the life of the community in the city, declared under section 62 that, "emergency exists in the city of Surat" and that, in consequence, no member of the essential service and all types of service under the said Act shall for 90 days beginning from 25-9-1994, notwithstanding any law for the time being in force or any agreement, withdraw or absent himself from the duties except in case of illness or accident disabling him from the discharge of his duties, or neglect or refuse to perform his duties or willfully perform in an inefficient manner.

10. It is significant to note that, on 25-9-1994, the Government simultaneously with the notification under section 62 of the said Act issued another order (No. SMC-1894-1560-P dated 25-9-1994), taking note of the fact that the Municipal commissioner for the city of Surat was of the opinion that the ordinary provisions of the Bombay Provincial Municipal Corporation Act, 1949 and the Rules made thereunder, or any other law for the time being in force were insufficient for the purpose of preventing an outbreak of plague, and acting in exercise of the powers conferred under sub-section (1) of section 319 read with sections 316, 317 and 318 of the said Act, authorised the Municipal commissioner to take such special measures and pass temporary orders as are specified in Rule 53 of Chapter XIV in Schedule A to the said Act, as he shall deem necessary to prevent an outbreak of the said decease and to issue direction to the hospitals including private hospitals to keep the hospitals / dispensaries / nursing homes etc. open and to treat persons seeking medical help. The above sanction was granted in favour of the Municipal Commissioner and was to remain in force upto 31st October 1994. The Commissioner was thus fully armed to take all the suitable measures for prevention and spread of the disease in the city of Surat.

11. On issuance of the notification under section 62 of the Act, declaring that emergency exists in the city of Surat due to outbreak of plague and the aforesaid notification issued under section 319 of the said Act empowering Municipal Commissioner to take special

measures to prevent the spread of the epidemic, a public notice was issued on 27th September 1994 by the Municipal Commissioner in the newspapers referring to the notifications and warning the employees who had not reported despite the earlier requisitions that, if they did not now report, they will have to be dismissed from service.

12. As provided by section 67(3) of the said Act, the entire executive power for the purpose of carrying out the provisions of the said Act and of any other Act for the time being in force which imposes any duty or confers any power on the Corporation vests in the Commissioner, subject to the provisions of the said Act. Therefore, the Municipal Commissioner in discharge of the obligatory duties of the Corporation can issue executive direction cancelling leave of the employees and requiring them to immediately report for duty, in the drive of the Corporation to prevent the disease from spreading and to provide medical relief to the public of the city. The employees had sufficient notice through the media that the leave of all employees, who had got it sanctioned, was cancelled and that every employee was required to report to duty in view of the emergency notified, and that failure to do so would entail dismissal from service. Therefore, the employees had a fair opportunity to respond immediately to the executive directions of the Municipal Commissioner and they knew that failure to report would entail their dismissal. It is not possible to accept the contention that these appellants were not aware of these public announcements which were issued in three newspapers, as stated by learned counsel appearing for both the sides. It would be reasonable to assume that such announcements would also have been carried as news in the media. In any event, individual notices could not have been issued in such situation of such emergency where all the absent employees were required to be ordered to duty.

13. It will also be seen from the provisions of sections 315 to 319 of the said Act that the Commissioner has been invested with wide powers to cope up with the situation of outbreak of any dangerous disease. Under section 319 of the Act, it is provided that, in the event of the city being at any time visited or threatened with an outbreak of any dangerous disease, or in the event of any infectious disease breaking out or being likely to be introduced into the city amongst cattle, including under this expression sheep and goats, the Commissioner, if he thinks that the ordinary provisions of this Act and the Rules or of any other law at the time in force are

insufficient for the purpose, may, with the sanction of the State Government - (a) take such special measures, and (b) by public notice prescribe such temporary orders to be observed by the public or by any person or class of persons, as are specified in the rules and as he shall deem necessary to prevent the outbreak of such disease or the spread thereof. Rule 53 of Chapter XIV in Schedule A to the said Act provides that the special measures to be taken and temporary regulations to be made by the Commissioner under section 319 may include any of the matters enumerated thereunder in sub-clauses (a) to (j), which include medical examination of persons. These provisions, apart from section 62 of the said Act, clearly empowered the Municipal Commissioner by the sanction of the State Government which, as noted above, was given in the present case by a separate notification dated 25-9-1994 of the State Government, to compel the employees to report to duty as that was obviously necessary to prevent the spread of the dangerous disease which was assuming epidemic form. This power stands independent of section 62 of the said Act and the argument on the basis of the notification under section 62 ignoring the other notification issued by the State Government under section 319 read with Rule 53 of Chapter XIV in Schedule A to the Act, is misleading and misconceived.

14. The contention that section 319 of the Act empowers the Municipal Commissioner to take measures only to prevent the dangerous disease amongst the cattle including sheep and goats, which was seriously urged by the learned counsel for the appellants, is not at all warranted by the wordings of section 319. The use of disjunctive `or' shows that the Commissioner can take special measure on outbreak of any dangerous disease or in the event of any infectious disease breaking out in the city. There is no reason why humans and cattle cannot co-exist in a statutory provision which aims at taking measures to prevent outbreak of spread of infectious disease in the city. Merely because there is also mention of disease likely to be introduced into the city amongst cattle including sheep and goats, one cannot jump to the conclusion that the provision is intended to prevent disease amongst the cattle only and not amongst the inhabitants of the city. The opening words of section 319, "In the event of the city being at any time visited or threatened with an outbreak of any dangerous disease, or in the event of any infectious disease breaking out .....", clearly refer to the outbreak of the disease amongst the inhabitants of the city, and not cattle of the city referred in the third disjunctive "or

being likely to be introduced into the city amongst cattle" which only means that special measures may be taken by the Municipal Commissioner not only to deal with the threatened outbreak of any dangerous disease or any infectious disease breaking out, but he may also take measures to prevent spread of such infectious disease which is likely to be introduced amongst cattle in the city. The emphasis of the provision is on taking all measures to prevent outbreak of dangerous disease in the city and to prevent infectious disease from spreading, and not on sheep and goats, who may also be protected from the dangerous disease which may be likely to be introduced in the city cattle. The special measures of the nature indicated in Rule 53 of Chapter XIV of Schedule A read with section 319 of the Act exposes the hollowness of the contention of the learned counsel for the appellants that the special measures under section 319 of the Act are meant for cattle only, and not for human beings.

15. There can be no dispute about the fact that the situation in the city of Surat was very grave due to the outbreak of plague and it demanded immediate attention. It is an obligatory duty of the Municipal Commissioner under section 63(21) of the Act to make reasonable and adequate provision, by any means or measures which it is lawfully competent to use or to take, for preventing and checking the spread of dangerous disease, and, under section 63(24) to fulfill any obligation imposed by or under this Act or any other law. Under section 63(6) of the Act, it is equally obligatory on the part of the Corporation to construct or acquire and maintain public hospitals and dispensaries, including hospitals for the isolation and treatment of persons suffering or suspected to be infected with a contagious or infectious disease and carry out other measures necessary for public medical relief. The Municipal Corporation, by its very nature of corporate personality, has to exercise this obligatory function through its officers and employees. The obligations of the Corporation are the duties of the officers and employees who are engaged to discharge these functions. Therefore, the power to command the officers and employees to discharge the obligatory functions of providing public medical relief, maintaining public hospitals and dispensaries and taking all steps for preventing and checking spread of a dangerous disease, is implicit in the obligatory duties of the Corporation which can be effectively discharged only by commanding the officers and employees entrusted with such duties to do their work. In the emergency situation of the outbreak of epidemic, it becomes the duty of the

Corporation to ensure presence of the staff for fulfillment of its statutory obligations towards citizens and other persons who are in its territorial limits. Therefore, the contention that since the "essential services" referred in Chapter V of the Act are only those which are enumerated in Chapter IV of Schedule A to the Act, and that these employees could not therefore have been dismissed on the ground of absence on the basis of the notification under section 62 of the Act, is wholly misconceived. The alarming situation that had arisen due to the outbreak of plague in the city warranted special measures including those enumerated in Rule 53 of Chapter XIV in Schedule A to the Act under the notification issued by the State Government under section 319 of the Act on 25-4-1994 by which the proposal of the Municipal Corporation was sanctioned, as a result of which, all municipal services became essential services as a special measure taken under section 319 read with Rule 53 of the said Act. When epidemic breaks out and the fundamental duty of the Corporation is to prevent and check the spread of dangerous disease and to provide public medical relief, maintain hospitals and dispensaries, it becomes the basic duty of each officer and employee of the Corporation to answer the call of duty and report for work. In blatant disregard of such basic official duty and ignoring the commands of the Municipal commissioner to report immediately, these appellants abstained from work in a situation where they were needed most and then, after the dust started settling, slowly emerged with lame excuses of illness like malaria fever with which many of them were suddenly afflicted, and so many of them, at the same time, started suffering from bronchitis and typhoid, as per their version. All these cases have been scrutinised more than once and found to be just simple excuses for the grossest dereliction of duties in a situation so grave. No institution can function if in such trying moments the officers and employees manning it run away from their duties despite the frantic commands issued to them to resume work. They should be happy with their dismissal and remain secured in the safety of their house rather than betray the municipal institution and the people whom it is intended to serve. Having abandoned their work and alienated the institution despite repeated public warnings to them to report for duty, which constituted a fair chance to them to report and avoid penalty, they deliberately abstained, justify their dismissal from service. Any liberal approach on the quantum of punishment would, in the circumstances, amount to grossly undermining the public interest which the Corporation was obliged to look after under section 63(6) and 63(21) of the said Act and will be a glaring

instance of misplaced sympathy at the cost of interest of the public, emboldening such public employees to ignore their duties in the hour of crisis and shield themselves behind such judicial precedent.

16. Thus, the Municipal Corporation, even apart from the notification under section 62 was fully empowered to ordering the absentee officers and employees to report to duty or face dismissal, as a special measure to deal with the outbreak of plague and keep the municipal hospitals and dispensaries working and provide public medical relief which was the obligatory function of the Corporation under the provisions of the said Act exercisable by the Municipal Commissioner, who is vested with the entire executive power for the purposes of carrying out the provisions of the said Act, under section 67(3) thereof.

17. In the above background, the contention that the post-decisional hearing against the dismissal of these employees could not cure the defect of denial of pre-decisional hearing may now be considered. Section 56 of the said Act relates to imposition of penalty. The relevant provision of sub-section (3) of section 56 reads as under :-

"56. (1) A competent authority may subject to the provisions of this Act impose any of the penalties specified in sub-section (2) on a municipal officer or servant if such authority is satisfied that such officer or servant is guilty of a breach of departmental rules or discipline or of carelessness, neglect of duty or other misconduct or is incompetent :

Provided that -

xxxxx

xxxxx

(3) No officer or servant shall be reduced to a lower port or removed or dismissed from service under this section unless he has been given a reasonable opportunity of showing cause against such reduction, removal or dismissal:

Provided that this sub-section shall not apply-

[a] where a person is reduced, removed or

dismissed on the ground of conduct which has led to his conviction on a criminal charge; or

[b] where the competent authority is satisfied that, for reasons to be recorded in writing by such authority, it is not reasonably practicable to give that person an opportunity of showing cause."

17.1 It was argued that the statutory requirement of section 56(3) was that, no officer or servant shall be imposed punishment of dismissal, removal or reduction in rank unless he was given reasonable opportunity of showing cause against such punitive action. It was contended that since there was no satisfaction recorded by the competent authority that it was not reasonably practicable to give the concerned employee an opportunity of showing cause, the giving of pre-decisional hearing was absolutely mandatory in the present case, since the proviso to sub-section (3) of section 56 was not invoked by the competent authority which has to record reasons in writing for reaching such conclusion. It was argued that the post-decisional hearing was confined to the validity of the orders of dismissal made on or around 29th September 1994 by which the employees were dismissed without hearing due to absence from duty. Since those very orders were confirmed even after the post-decisional hearing, the initial defect of non-recording of satisfaction for dispensing with the hearing as per the said proviso persisted even when the subsequent orders were made by the Standing Committee, after hearing, by which the earlier dismissal orders were confirmed. This contention overlooks the fact that when post-decisional hearing is given, the question why pre-decisional hearing was not given in absence of satisfaction being reached for dispensing with it, becomes redundant. When a case squarely falls in the proviso (b) to sub-section (3) of section 56 and the authority has recorded in writing reasons as to why it is not reasonably practicable to give that person an opportunity to show cause, there can arise no question of giving any post-decisional hearing. The said proviso in a case where valid reason is recorded as contemplated therein, will have the effect of statutorily excluding any hearing. It is precisely because no satisfaction was recorded in writing before making of the dismissal orders, as required by proviso (b) to section 56(3) of the Act, that the question of post-decisional hearing could arise; and in the present case, it was readily accepted by the appellants in the

first round of litigation (Special Civil Application No. 12677 of 1994), in which by the interim order dated 11th July 1996, the Single Judge, after observing that no provision was pointed out under which, for violation of section 62 of the said Act, an employee could be summarily dismissed without an opportunity of being heard and further observing that the details of individual cases showing justification for absence, such as, maternity leave, could not be gone into by the Court, held that it was for the petitioners to point out to the respondent authority all the relevant facts to show that there has been no violation of section 62 and also to show that the consequence of summarily dismissal did not follow. A direction was, therefore, issued that the authorities will consider this aspect of the matter and take into consideration all the particulars that may be placed before them by the petitioners' staff union. It was also directed that such particulars and contentions will be placed before the concerned authority of the Corporation within two weeks and on that being done, the competent authority will take a decision in the matter expeditiously and place it on record of the petition.

18. The events that followed clearly show that the Union and the individual employees put their representations / written submissions on record containing the grounds why dismissal orders should not be operated against them. There was no dispute over the fact that these employees had not worked during the crucial period before their dismissal orders were made on or about 29-9-1994 and had made no effort before that to report for duty despite several public notices and warnings issued by the Municipal Commissioner. Therefore, the only material question over which the employees were required to be heard, was as to whether there was any justification for their absence. This is why in their representations they came out with the reasons for their absence which were illness, such as, malaria - fever in many cases and stomach pain, mother's illness, bronchitis in others. It appears from the record that the Standing Committee of the Corporation, after affording an adequate opportunity of personal hearing and taking into consideration each and every representation of these employees about the grounds of their absence at the hearings held on 8th August 1996 and again on 12th August 1996, passed the resolution No. 1580 of 1996 giving reasoned finding in case of each of these appellants that there was no reasonable ground shown by them for their absence. The orders of dismissal were, therefore, confirmed in their cases.

19. The Standing Committee was the appellate authority, immediately superior to the Municipal Commissioner, as contemplated by sub-section (4) of section 56, before which the appeals against the orders of dismissal issued by the Municipal Commissioner could be preferred. When the appellants availed of the reasonable opportunity of hearing against their dismissal due to abstaining from work during epidemic though ordered to report for duty, in which they put up their reasons for justifying absence, and their representations containing such reasons were duly considered and they were given an opportunity of personal hearing, it cannot now be contended by them that non-recording of satisfaction to dispense with hearing under proviso (b) to sub-section (3) of section 56 of the Act was still a live issue notwithstanding the fact that they had now availed of the reasonable opportunity to show cause before the Standing committee pursuant to the directions of the Court. Proviso (b) to sub-section (3) of section 56 had the effect of excluding hearing and is totally irrelevant when post-decisional hearing has been in fact given and availed of by these appellants. The contention that even the order confirming dismissal of these employees now made by the Standing Committee after hearing them, is bad, since the proviso (b) to sub-section (3) of section 56 of the Act was not invoked before making the initial dismissal, is therefore wholly misconceived.

20. The right to a fair hearing may be excluded by the nature of the subject matter itself or by providing a special exception. The right may be excluded by the very nature of power, such as, when urgent action must be taken to safeguard public health. In the present case, the action of dismissal was taken after putting to notice the employees that if they did not report to duty, in view of the outbreak of plague, they would be dismissed. This power arose from the very nature of the obligation of the Corporation to act swiftly in the interest of public health. None of these employees responded to the orders, nor did they immediately show cause why they could not report on issuance of the public notices which required the employees to report or face dismissal orders. A fair opportunity was provided to them to report since all leaves were cancelled and the work was of urgent nature requiring their presence in view of the emergency situation in the city. The purpose of issuing an ultimatum which was given to the employees was to give them an opportunity to reflect on their conduct of not reporting on duty and to decide whether to heed to the ultimatum or not. These employees had an opportunity to

immediately respond to such ultimatum by showing cause for their not being able to report as per the directions of the Municipal Commissioner. If sickness was genuine and of such a magnitude as would have disabled the employee from working, the concerned employee would surely have informed about it to the competent authority soon after the public notices. The fact that they waited till dismissal orders were issued, creates a justifiable doubt over their sickness. Providing repeated opportunities to the employees to report and putting them to alert that, if they did not report, they will be dismissed, was sufficient observance of principles of fair-play in the background of the nature of the situation which was to be dealt with and the need to exercise the powers swiftly for discharging the basic obligations of the Corporation towards safeguarding public health of the inhabitants of the city. Even the initial dismissal without a formal hearing was, therefore, not arbitrary especially when an opportunity to such dismissed employees was promptly given by the circular dated 1st October 1994 to explain regarding their absence and in cases where explanation was found proper, they were to be instructed to join. Accordingly, several dismissed employees who gave valid explanation were allowed to join. The others had an opportunity to appeal under section 56(4) of the Act which they availed of and the Administrator exercising the powers of the Standing Committee studiously considered and decided each case and issued separate orders giving reasons for his decision. The Administrator's orders dismissing the appeals are speaking orders and these were re-considered by the regular Standing Committee after the Court directed these employees to raise their contentions against dismissal before the concerned authority which was required to consider the same and take a decision in accordance with law. The Standing Committee accordingly again considered the grounds put forth by the employees and found no valid reason to take a different view of the matter than the one taken by the Administrator while dismissing the appeals of these employees.

20.1 The learned Single Judge examined the individual cases and had seen the reasons given by the Administrator in the orders dismissing the appeals of these employees and upheld the decision of the Standing Committee which confirmed the dismissal orders after considering the cases of the petitioners and giving personal hearing to them. In the circumstances, there remains no valid ground for challenge against the dismissal of these employees on the ground of denial of fair hearing. It will be unreasonable to expect a full trial type hearing

in the very nature of the power exercised by the Municipal Corporation to deal with the emergency situation. The situation was extraordinary and had to be dealt with in a special way. As observed by Lord Reid in Ridge v. Baldwin reported in (1964) A.C. 40 at 79 - if an officer or body realises that it had acted hastily and re-considered the whole matter afresh after affording to the person affected a proper opportunity to present his case, then its later decision will be valid.

21. The hearing before the Standing Committee was not just an empty public relations exercise. It was held pursuant to the directions of the court which enabled the employees to put forth their reasons and contentions against their dismissal made on the ground of not reporting on duty during the plague period. In the emergency situation in which the Corporation was under an obligation to take measures for prevention of plague which was a very dangerous disease and to provide immediately public medical relief, abstention from duty despite repeated calls publicly announced, warranted swift action by the Corporation of issuing orders of dismissal after the warnings were not heeded to by these employees. In such situation of urgency when public interest was paramount, such preemptive action was a strategic necessity and the subsequent hearing effectively satisfied the principles of natural justice. The rule of audi alteram partem is "a flexible, malleable and adaptable concept of natural justice" as held by the Supreme Court in Swadeshi Cotton Mills v. Union of India, reported in (1981) 1 SSC 664, To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. The provision of section 319 read with Rule 53 are designed as a special measure on outbreak of any dangerous disease and come into play when the Commissioner thinks that the ordinary provisions of the Act and the Rules or any other law at the time in force are insufficient for the purpose. This would obviously give an edge to these special provisions over the ordinary provisions of undergoing a detailed hearing procedure contemplated by section 56 which would result in the epidemic situation to deteriorate due to prolonged absence of the employees who may not remain duty conscious due to their valuing personal interest above the public interest for which they are engaged and towards which they are duty bound in law in light of the statutory obligations of the Corporation which have to be discharged through such officers and employees. The opportunity to be heard may not be pre-decisional and may

necessarily have to be post-decisional where the danger to be averted or the act to be prevented is imminent or where the action to be taken can brook no delay as in the present case. As held by the Supreme Court in Liberty Oil Mills v. Union of India, reported in (1984) 3 SCC 465, if there is an outbreak of an epidemic, we may presume one does not have to issue show cause notices to requisition beds in hospitals, public or private. The special measures which may include the matters specified in Rule 53 of Chapter XIV in Schedule A to the Act such as compulsory vaccination or preventive inocculation of persons entering, residing in or living in specified areas, the examination by a medical officer of persons residing in a specified area, restriction on movements of persons exposed to infection from a dangerous disease or likely to infect other persons, restrictions on export and import of goods, examination of consignments, closure of markets etc., will obviously require the services of the municipal staff not only of health but of all other departments of the Corporation. The mandate issued by the Municipal Commissioner to the officers and servants of the Corporation to immediately report for duty in view of the spread of plague in the city and informing them that if they did not turn up, they will have to be dismissed from service, was in fact as observed above, a fair opportunity given to them to report and the order of dismissal was a necessary and proper consequence to enforce their attendance. Those who came thereafter and showed valid cause were allowed to join as per the announcement made in the letter dated 1-10-1994 of the Municipal commissioner. Thus, the post-decisional hearing was soon announced by that letter dated 1-10-1994. Thereafter, their appeals were decided by the Administrator. Those who approached the Court earlier, including these appellants, were given elaborate personal hearing by the Standing Committee which considered the contentions raised in their representations and in four cases, where satisfactory grounds existed, the employees were restored to service, while dismissal orders of others whose reasons for absence were not found to be genuine, so as to disable them from attending, were confirmed by the Standing Committee as reflected from the resolution of the Standing committee. As held by the Supreme court in Union of India v. Tulsiram Patel, reported in (1985) 3 SCC 398, it would be a sufficient compliance with the requirements of natural justice where the employee has the opportunity to show in appeal filed by him that the charges made against him are not true where the second proviso to Article 311 applies. It was also held that the remedy by way of judicial review is also open to the aggrieved government servant. In Olga

Tellis v. Bombay Municipal Corporation, reported in (1985) 3 SCC 545, the Supreme court held that where the party had sufficient opportunity of hearing before the Court, the authority need not be directed to afford hearing to the party again.

21.1 In the present case, the learned Single Judge, in the impugned judgement and order, has bestowed his attention to each case and come to a finding that there was no justification to interfere with the decision of the Standing Committee so far as the dismissal of these appellants were concerned. In four cases where he found that the decision required interference, he, for valid reasons, allowed their petitions and directed the Standing Committee to re-consider their cases. We have been taken through the findings of the Standing Committee in case of each of these appellants and the relevant record including the reasoned orders of the Administrator which were earlier made and the representations of these appeals, which were all considered by the Standing Committee and also through the detailed appraisal of each case made by the learned Single Judge and we are fully satisfied that the dismissal of these appellants was confirmed by the Standing Committee on valid grounds and there is no element of arbitrariness or discrimination in any of the conclusions reached by the Standing Committee which have been for cogent reasons affirmed by the learned Single Judge in a well reasoned judgement.

22. For the above reasons, all the contentions raised on behalf of the appellants fail and all these appeals are dismissed with no order as to costs.

APRIL 30, 2002 [R.K.ABICHANDANI, J.]

[KUNDAN SINGH, J.]

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