

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION 7187 OF 2022

Mr. Niraj s/o. Krishnakumar Sharma,
Aged 32 years, Occ. Business,
R/o. 108, Building C, ayurvedic Layout,
NIT Complex, Sakardara, Nagpur

.....PETITIONER

...V E R S U S...

1. Nagpur Municipal Corporation,
Nagpur, through its Commissioner,
Civil Lines, Nagpur.

2. Chief Engineer,
Nagpur Municipal Corporation,
Civil Lines, Nagpur

3. The Dy. Commissioner,
Encroachment & Enforcement
Department, Nagpur Municipal
Corporation, Gandhibag Zone 6,
Mahal, Nagpur

4. The Assistant Commissioner
Gandhibagh Zone 6, Mahal Nagpur

5. Shri Balkrishna s/o. Ramnivas Sharma,
Aged 74 years, Occ. Business,

6. Shri Vipin s/o. Balkrishna Sharma,
Prop. R.R.K. Mens Wear,
Aged 36 years, Occ. Business,

Respondents 5&6 r/o. Flat No. 1103,
Tower F, Godrej Anandam,
Ganeshpeth, Nagpur 440 018

..RESPONDENTS

Mr. Mr. Anand Jaiswal, senior counsel

a/b Ms. Radhika Bajaj counsel for petitioner.
Mr. Abhay Sambre, counsel for respondents 1 to 4.
Mr. C.S. Captan, senior counsel
a/b Mr. S.S. Sharma, counsel for respondents 5 & 6.

CORAM:- ROHIT B. DEO & M.W. CHANDWANI, JJ.

DATE : 11.07.2023

JUDGMENT (Per: Rohit B. Deo, J.)

Petitioner is questioning the notice dated 16.11.2022, issued by the first respondent – Nagpur Municipal Corporation (“NMC”) in exercise of power under Section 264 of the Maharashtra Municipal Corporations Act, 1949 (“Act”), directing the petitioner to repair the front portion of the subject property consistent with Option-I suggested in the structural stability report dated 27.10.2022 submitted by Shri Ramdeobaba College of Engineering and Management, Nagpur.

2. BROAD FACTS:

2.1) Petitioner claims to be the absolute and exclusive owner of property assigned Sheet Number 223 and City Survey Number 179 of Mouza – Nagpur and the construction

assigned Corporation House Number 13, situated at Tilak Putla, Mahal, Nagpur (“subject property”).

2.2) Petitioner claims to have acquired the subject property by virtue of registered gift deed dated 23.12.2019 from recorded owners Mr. Ramprakash Sharma, Mr. Krishnakumar Sharma and Mrs. Latadevi Sharma.

2.3) Petitioner asserts that the fifth respondent and the six respondents, who are the uncle and the cousin brother of the petitioner, respectively, do not have any ownership right in the subject property. Petitioner relies on the property card and the corporation tax receipt which are annexed as annexure A-1 to substantiate the claim of absolute ownership.

2.4) The petitioner asserts that the construction of the subject property is more than 90 years old and is in dilapidated condition. The risk of the construction collapsing any time is

real, and the danger to the occupants, neighbours and passers by, is potent.

2.5) Petitioner states that in view of the grave and emergent situation due to the condition of the structure, he submitted complaints dated 2.1.2020 and 21.9.2020 to the first respondent and its officers. The officers of the first respondent visited the site on 13.1.2021 and asked the petitioner to obtain structure stability report from an architect empanelled with the NMC.

2.6) The structural consultant Mr. Sagar Balani inspected the structure and submitted report dated 18.1.2022 that the structure is in dilapidated condition and recommended demolition.

2.7) The third respondent issued notice dated 22.2.2021 in exercise of power under Section 264 of the Act, directing the petitioner to demolish the entire structure within seven days.

2.8) Petitioner states that the fifth and the sixth respondents are occupying portion of the structure and are carrying on business under the name and style “R&B Menswear”. Petitioner claims that while the fifth and sixth respondents are permitted to carry on business from the subject property due to the relationship, the fifth and the sixth respondents have instituted Special Civil Suit 266/2022 seeking decree of partition, separate possession, declaration and permanent injunction, in which suit, there is no interim order operating.

2.9) Petitioner preferred an application to the office of the first respondent on 1.4.2022, seeking action pursuant to the notice issued which was followed up by reminder communication dated 29.4.2022.

2.10) In view of the inaction of the NMC, the petitioner approached the High Court in Writ Petition 3230/2022, while the fifth and sixth respondents challenged the notice

dated 22.2.2021 in Writ Petition 4011/2022. Petitioner states that in both the petitions, the third respondent filed affidavit admitting that the subject property is in dilapidated condition.

2.11) The High Court, vide order dated 29.9.2022, disposed of Writ Petition 3230/2022 and Writ Petition 4011/2022 in terms infra.

“3. Shri Anand Jaiswal, learned Senior Advocate, appearing for the petitioner in Writ Petition No.3230 of 2022, submits that the impugned notice of demolition dated 22-2-2021 is very clear and it is based not only on the report of the Structural Auditor, but also on the report of the Inspection Officer of the Nagpur Municipal Corporation and, therefore, the said notice is required to be implemented, and in any case, once the subjective satisfaction is reached by the Officer of the Corporation regarding dilapidated state of the building, this Court cannot sit in appeal, is the law well-settled long back. We accept the submission of the learned Senior Advocate on the question of the law on the point raised by him having been settled long back, but for that matter, there has to be a firm foundation provided by the facts of the case. In the present case, the foundation of the facts, as seen from the impugned notice of demolition dated 22-2-2021, is absent. This conclusion is also supported by what we have noted after going through the inspection report made available by the Corporation for our perusal today. Even the inspection report is identical with the statements made in the impugned notice of

demolition. It also states that the dilapidated portion of the building has an area of 14 x 4 square meters, which is equivalent to 56 square meters of the total area of the building in question, which is about 99.10 square meters. The inspection report does not identify as to which of the portions of the entire building has become dilapidated and which requires immediate demolition. One of the parties obtained subsequently another structural audit report from another Structural Engineer and this report is not consistent with the report submitted by the earlier Structural Engineer, on whose report the petitioner in Writ Petition No.3230 of 2022 is placing reliance. In such a case, therefore, it is better that a structural stability report from a reputed Structural Engineer is obtained and thereafter a fresh decision is taken by the Corporation regarding demolition of the structure. The entire exercise can be directed to be completed in a time-bound manner.

4. Accordingly, we quash the impugned notice of demolition dated 22-2-2021 and direct the Nagpur Municipal Corporation to conduct structural stability audit of the structure in question from the reputed Structural Engineer.

5. The Head of the Department in Civil Engineering Branch in Shri Ramdeobaba College of Engineering and Management, Nagpur, is appointed by consent of rival parties, as the Structural Auditor with a request to him to conduct structural stability audit of the property bearing House No.13, situated at Ward No.29, Circle No.7/12A Division No.2, Tilak Road, Near Abhyankar Statue, Mahal, Nagpur, with a further request to submit his structural stability report to the Nagpur Municipal Corporation within a period of fifteen days from the date of inspection of the building. The inspection of the building may be done by him in the presence of the rival parties

and for this purpose, the rival parties shall provide all assistance to the Structural Auditor so appointed by this Court.

6. The remuneration to be paid to the Structural Auditor and the expenses of the inspection and the report shall be equally borne by the petitioners in both these petitions.

7. We direct the Nagpur Municipal Corporation to take an appropriate decision regarding the issue involved in these petitions within a period of seven days from the date of receipt of the report of the structural stability report.

8. We also direct that the entire exercise be completed within a period of four weeks from the date of the order.

9. With the above directions, both these petitions are disposed of. Rule accordingly. No costs.”

2.12) In terms of the direction issued by the High Court Shri Ramdeobaba College of Engineering and Management, Nagpur submitted the structural stability report. The petitioner has extracted the conclusions in the said report thus:

8.0 CONCLUSION AND RECOMMENDATIONS

8.1 Part – 1 (Front part of the property : Annexure : 1) *This part is not structurally sound. It is showing signs of distressed condition. The risk involved is high in keeping the space*

occupied and in sustained commercial use. This may lead to failure in the event occurrence of any critical combination of loading scenario at any unknown point of time.

Considering safety of property users – owners, employees, visitors and customers – on priority, following two options are recommended.

OPTION – 1

Immediately device a structured plan of strengthening and retrofitting of all structural members, fulfilling the requirements of latest relevant IS codes, guidelines and serviceability requirements from an experienced consultant who has successfully planned, designed and executed rehabilitation and retrofitting works. And subsequently, undertake this work as per the design under the strict supervision of the consultant as early as possible but within a year and before the start of next rainy seasons.

OPTION – 2

Demolish the structure as early as possible.

8.2 Part – 2 (Rear Part of the property : Annexure I shown hatched)

The analysis of visual observations, examination of site condition, possibility of occurrence of critical loading conditions, and investigation using sounding technics supported by disintegrating structural materials makes us opine unanimously that this part (Part-2 :Rear part of the property) is structurally very weak, highly unstable and cannot sustain any kind of load. It is highly distressed condition, completely dilapidated and can collapsed at any

point of time on experiencing even moderately changed loading condition.

The risk involved is very high, and hence, it is recommended to demolish this part (Part-2) immediately while taking every care as demolition of this part of the structure may cause severe damage to part – 1.”

2.13) During the course of hearing, the learned senior counsel Mr. Anand Jaiswal submitted that Part – 2 referred to in paragraph 8.2 is demolished, and the issue involved in the petition is restricted to Part – 1 which is the front part of the subject property.

2.14) Petitioner asserts that as the absolute owner of the property, he has unfettered right to decide which option is to be chosen and that the petitioner has opted to exercise Option-2 which is the demolition of the structure, as early as possible. Petitioner states that he issued communications dated 31.1.2022 and 3.11.2022 to the first and the second respondents expressing willingness to demolish the property. The petitioner states that despite the unwillingness of the

petitioner to opt for Option – 1, the notice impugned is issued which directs the petitioner to carry out the repairs in terms of Option – 1.

2.15) Petitioner avers that the NMC and its officers failed to appreciate the report dated 28.12.2022 in the proper perspective and the impugned notice is vague. Petitioner submits that the notice is issued by the second respondent, who is not the designated officer in terms of Section 264 of the Act, and in the early round of litigation, it was the third respondent, who filed affidavit in the capacity of designated officer.

2.16) Petitioner states that taking undue advantage of the notice impugned, the fifth and the sixth respondent started construction activity by erecting columns of steel bars and concrete for load bearing structure, which is not in conformity with the provisions of the Unified Development Control and Promotion Regulations, 2020 (“Development

Regulations”). The petitioner has referred to certain provisions of the regulations in the body of the petition.

2.17) Petitioner asserts that the fifth and the sixth respondents have carried out the repairs without the consent of the petitioner, taking shelter of the notice impugned and the petitioner has lodged complaint dated 17.11.2022 at Police Station, Kotwali.

2.18) Petitioner asserts that the repairs, if at all, could have been carried out only by the petitioner as the owner of the subject property, and not by the occupants, and that collusion between the occupants and the NMC officers is writ large.

2.19) These are the broad facts which is edifice of the challenge to the impugned notice.

3. The first respondent NMC and its officers have filed affidavit in response dated 17-12-2022, and we may cull out

the stand of the said respondents as is discernible from paragraphs 6 to 15.

“6) It is most humbly and respectfully submitted that as per the directions of this Hon’ble Court the Head of the Department in Civil Engineering Branch in Shri Ramdeobaba College of Engineering and Management conducted the structural stability audit of the property subject matter of the instant petition and submitted its Report on 28/10/2022 as annexed at Annexure No. A-7 of the petition.

7) It is most humbly and respectfully submitted that as per the Report dated 28/10/2022 two options were given in respect of Part I of the property -

“OPTION-1 :

Immediately devise a structured plan of strengthening and retrofitting of all structural members, fulfilling the requirements of latest relevant IS codes, guidelines and serviceability requirements from an experienced consultant who has successfully planned, designed and executed rehabilitation and retrofitting works. And subsequently, undertake this work as per the design under the strict supervision of the consultant as early as possible but within a year and before the start of next rainy seasons.

OPTION-2 :

Demolish the structure as early as possible.”

8) *It is most humbly and respectfully submitted that in respect of Part 2 of the property, the Report opined to demolish this part of the property while taking care of Part 1.*

9) *It is, therefore, most humbly and respectfully submitted that in view of the Report dated 28/10/2022 and Inspection dated 04/11/2022, the answering Respondents had issued notice u/Sec. 264 and 265-A of the Maharashtra Municipal Corporation Act on 16/11/2022 to the petitioner and Respondent No. 5 & 6, directed to carry out strengthening and retrofitting works in part 1 of the property as per option 1 of the opinion and demolish Part 2 of the property.*

10) *It is submitted that NMC is also sensitive to such matters as the life and property of the public at large are at stake if such a building is collapsed or any untoward incident may take place. It is therefore most humbly and respectfully submitted that this decision is taken by the answering Respondents only after considering the Structural Stability Report dated 28/10/2022 and inspection dated 04/11/2022. It is therefore submitted that the decision of the answering Respondents is lawful and proper.*

11) *It is further most humbly and respectfully submitted that Sec. 264 of the Maharashtra Municipal Corporation Act, 1949 provides for ‘the Removal of structures, etc., which are in ruins or likely to fall’. Sub-sec. (1) provides that ‘if it shall at*

*any time appear to the Designated Officer that any structure... is in ruinous condition or likely to fall, or in any way dangerous to any person... the designated officer may, by written notice, require the **owner or occupier of such structure to pull down, secure, remove or repair such structure or thing or to do one or more of such things and to prevent all cause of danger therefrom.***

12) *It is most humbly and respectfully submitted that as per Sec. 264(1) whether the structure needs to be pulled down or it needs to be repaired is to be decided by the Designated Officer and the owner or occupier shall be required to do what the Designated Officer has sought of them in the notice. A plain reading of Sec. 264 shows that the decision as to what is to happen to the structure is not to be taken by the owner or occupier but by the Designated Officer.*

13) *It is further most humbly and respectfully submitted that Sub-Sec. (4) Sec. 265-A of the Maharashtra Municipal Corporation Act, 1949 provides that – ‘If the Structural Engineer recommends any corrective repairs for securing the structural stability of the building, **such corrective repairs shall be carried out by the owner or occupier of a building to the satisfaction of the Commissioner.***

14) *It is most humbly and respectfully submitted that the phrase ‘shall be carried out by the owner or occupier’ in Sec. 265-A (4) shows that the owner or occupier has no choice as to whether they wish to repair or not repair, if it is sought of them to*

repair then they are so bound to repair the structure and that to 'to the satisfaction of the Commissioner'.

15) It is most humbly and respectfully submitted that the scheme of Sec. 264 and 265-A of the Maharashtra Municipal Corporation Act, 1949 provides that the owner or occupier has no say as to whether the structure needs to be pulled down or repaired but the same is to be decided by the Designated Officer and Structural Engineer and the owner or occupier shall merely follow as is sought of them. It is therefore submitted that the petitioner cannot deny carrying out repairs of Part 1 of the property as is sought from him as the legislation does not confer any such choice on the petitioner."

4. The fifth respondent and the sixth respondents have filed affidavit in response dated 11-1-2023. Broadly, the fifth and the sixth respondents question the absolute title of the petitioner and refer to the proceedings of the pending civil suit and contend that the insistence of the petitioner that the subject property be demolished is a ruse to evict the fifth and sixth respondents. It is also contended that the notice impugned is complied with and the fifth and the sixth respondents have carried out the necessary repairs. We extract the relevant portion of the affidavit in response dated

11-1-2023 filed by the fifth and the sixth respondents.

“5. The Respondent nos. 5 and 6 on 07.11.2022 filed an application to the Nagpur Municipal Corporation Authorities for grant of permission to carry out repairs and not to demolish entire house as there was no imminent threat of collapse of Part-1 i.e. the front portion of the property and copy of said Application is filed herewith as ANNEXURE-R5-D. These respondents alongwith said application has also submitted the Repair Methodology prepared by Shri Mangesh Saiwala, the Structural Engineer on the Panel of N.M.C. and Map. The copy of Repair Methodology and Map is collectively filed herewith as ANNEXURE-R5-E. That, thereafter, notice dated 16.11.2022 was issued by Nagpur Municipal Corporation to repair part 1 and to demolish part 2 portion of the property and copy of the same has already been filed as Annexure-A9 with the petition. These respondents have thereafter, carried out repairs and demolished the rear portion as per notice Annexure-A9. The answering respondents submitted a letter dated 13.12.2022 to the Nagpur Municipal Corporation Authorities about completion of repair work which letter is filed herewith as ANNEXURE-R5-F. Alongwith said letter of intimation, the repair methodology of panel engineer Shri. Mangesh Saiwala and completion/stability issued by Shri. Priyadarshan Nagpurkar dated 12.12.2022 was enclosed. The copy of repair methodology of panel engineer Shri. Mangesh Saiwala and completion/stability issued by Shri. Priyadarshan Nagpurkar

dated 12.12.2022 is annexed herewith as ANNEXURE-R5-G and ANNEXURE-R5-H respectively. These respondents have made a complaint to the Kotwali Police Station, Nagpur about obstruction in repairing by present petitioner on 17.11.2022 and copy of the same is filed herewith as ANNEXURE-R5-I.

6. Hence, notice dated 16.11.2022 Annexure-A9 has been complied with and there is no question of quashing and setting aside the same as asked by the petitioner. These respondents submit that the petitioner is not the absolute owner and the question of his ownership will be decided in the Civil Suit, which is pending and these respondents being in possession also are equally affected by the manner in which the structure is being maintained and have accordingly carried repairs from their own expenses. The rear portion which was considered dangerous has already been demolished and the front portion has been repaired and as such, there is no question of any loss to the life and property, as the structure is now not in a dilapidated condition. The petitioner, should not be allowed to evict and dispossess these respondents on the pretext that the structure is in dilapidated condition, particularly when he himself is today also doing business in the said premises.

7. It is, submitted that though the premises is in good condition, the petitioner is falsely claiming it to be dangerous and seeks its demolition to seek eviction of the respondents. The premises is in good and habitable condition, as could be seen from the fact, that the petitioner himself is conducting

business from the same premises.”

5. Petitioner then filed rejoinder dated 1-3-2023 stating that by order dated 22-11-2022, the fifth and sixth respondents were put to notice that any further steps taken pursuant to the notice impugned, shall be subject to the orders of the Court and no equity shall be claimed. The further endeavour is to demonstrate that the repairs which are carried out by the fifth and sixth respondents are contrary to the building rules and regulations and are otherwise illegal.

6. The fifth and the sixth respondents filed additional affidavit dated 21-3-2023. We need not dilate on the said affidavit in the context of the question which arises for determination. Similarly, further affidavit dated 9-4-2023 filed by the fifth and the six respondents is by and large repetitive and need not detain us.

7. **SUBMISSIONS:**

7.1) Mr. Anand Jaiswal would submit that as the owner of

the subject property, it is the sole prerogative of the petitioner whether to opt for the option for carrying out repairs or demolishing the entire structure, and by depriving the petitioner of the right to exercise the option, the notice impugned violates the provisions of Article 300-A of the Constitution of India.

7.2) Mr. Anand Jaiswal would submit that the mandate of Article 300-A is that no person can be deprived of property save by authority of law. Mr. Anand Jaiswal submits that while the provisions of Section 264 and 265 of the Act are indeed law within the meaning of Article 300-A of the Constitution of India, the notice impugned is not in conformity with the statutory provisions. Elaborating the said submission, Mr. Anand Jaiswal submits that the authority was obligated to record reasons for insisting that the structure be repaired. It is submitted that no reasons are recorded in the notice impugned as would disclose the thinking process of the authority or the rationale underlying

the insistence on Option – 1.

7.3) In rebuttal, the learned senior counsel Mr. C.S. Captan would submit that the judgment of the High Court dated 29.9.2022, in Writ Petitions 2330/2022 and 4011/2022 has attained finality. The High Court, with consent of the parties, appointed the Head of the Department of Civil Engineering, Shri Ramdeobaba College of Engineering and Management, Nagpur as the structural auditor with the mandate of conducting structural stability audit. Mr. C.S. Captan would submit that the appointed structural auditor submitted report dated 27.10.2022 and articulated 2 Options. In view of the direction issued by the High Court to the NMC to take an appropriate decision, the petitioner, as the owner, and the fifth and sixth respondents, as the occupants, were directed by the notice impugned to carry out repairs. Mr. C.S. Captan would refer to the provisions of Sub-section(1) 264 of the Act and submit that the statutory scheme is that the owner or the occupant of a structure which is in a ruinous condition or

likely to fall or poses danger to the occupants or passers by, may be directed to either pull down the structure or to repair the structure. Mr. C.S. Captan submits, that the notice impugned has worked itself out since the occupants have carried out the repairs, and in any event, the exercise of power to direct repairs, is in accordance with the statutory scheme.

7.4) Mr. C.S. Captan would submit that the pulling down of the structure must be last resort. If the danger which is posed is nullified by carrying out repairs, such option must be explored and exercised, which is what is precisely done and that too in consonance with the recommendations of the appointed structural auditor. Mr. C.S. Captan would submit that the expression “in accordance with law” in Article 300-A of the Constitution of India must be understood as an exercise of power which can be traced to law and if the exercise of power is traceable to law, the provisions of Article 300-A cannot be invoked on the premise that the order

impugned is flawed on merit or that sufficient reasons are not recorded.

7.5) The learned counsel for NMC Mr. Abhay Sambre would adopt the submissions canvased by learned senior counsel Mr. C.S. Captan.

8.DISCUSSION

8.1) The submissions canvased by learned senior counsel Mr. Anand Jaiswal on the touchstone of the provisions of Article 300-A of the Constitution inevitably necessitates noticing the legislative interventions and the consequential amendments to the Constitution of India.

8.2) Article 300 – A of the Constitution reads thus:

300-A. Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law.

8.3) Article 300-A is inserted by the Constitution (*Forty-Fourth Amendment*) Act, 1978. Prior to the amendment,

right to property was guaranteed by Article 31 which read thus:

Right to Property:

31. (1) No person shall be deprived of his property save by authority of law.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash;

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of Article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.]

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.]

[(2B) Nothing in sub-clause (f) of clause (1) of

Article 19 shall affect any such law as is referred to in clause (2).]

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2)

(5) Nothing in clause (2) shall affect -

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make -

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this Article or has contravened the provisions of subsection (2) of section 299 of the Government of India Act 1935.

8.4) While clause (2) of Article 31 dealing with compulsory acquisition of the property was repealed, clause (1) was shifted from Part III, to Article 300-A, with the result that right to hold property ceased to be a fundamental right.

8.5) By the same *Forty Fourth Amendment Act*, Sub-clause (f) of clause (1) of Article 19 which guaranteed the right to acquire and hold property was omitted.

8.6) Article 300-A protects a person from deprivation of the property save by authority of law. While Mr. Anand Jaiswal would argue, that the right of the owner of the property to

exercise the option of pulling down the structure rather than carrying out the repairs is absolute, and the insistence of the authority that the structure be repaired deprives the owner of the right of choice, and falls foul of the mandate of Article 300-A, we are not convinced that directing the land owner to carry out the repairs of the property, can be equated with deprivation of the property.

8.7) Article 300-A is identically worded with clause (1) of Article 31 which is omitted and introduced Article 300-A in Part IV of the Constitution of India. The decisions rendered by the Apex Court on the touchstone of clause (1) of Article 31 provide the beacon light in construing the expression “deprivation of property”.

8.8) The Constitution Bench decision of the Apex Court in *State of West Bengal vs. Subodh Gopal Bose and others*¹, construing the word “deprived” in Clause (1) of Article 31. *Patnjali Sastri C.J.* held that the word “deprived” in clause

1 AIR 1954 SC 92

(1) of Article 31 cannot be narrowly construed and no cut and dry test can be formulated as to whether in a given case the owner is deprived of his property. ***Patanjali Sastri C.J.*** articulated that broadly speaking an abridgment which is so substantial, as would deprive the owner of the possession and enjoyment of the property or materially reduce the value, is deprivation of property. ***S.R. Das, J.***, as his lordship then was, held that clause (1) and (2) of Article 31 deal with the topic of “eminent domain” and the expressions “taken possession of” or “acquired” employed in clause (2) have the same meaning which is attributable to the word “deprived” used in Clause (1). ***S.R. Das, J.*** further observed that deprivation is specifically referable to acquisition or requisition and not for any and every kind of deprivation.

8.9) In ***Dwarkadas Shrinivas vs. The Sholapur Spinning & weaving Co. Ltd and Others***². ***Mahajan J.*** similarly held that the word “deprived” in clause (1) of Article 31 and “acquisition and taking possession” in clause (2) have the

same meaning.

8.10) We are inclined to hold that deprivation of property within the meaning of Article 300-A of the Constitution of India, can be inferred only in situations akin to acquisition or requisition or demolition of the structure or any coercive action which substantially affects the right of the owner to possession or enjoyment of the property or which substantially reduces the value of the property. Illustratively, a direction that the structure be pulled down or demolished may perhaps bring into play the provisions of Article 300-A if the direction is without authority of law. In *Nathubhai Dhulaji a firm and others..vs.. The Municipal Corporation, Bombay and Others*³ (“*Nathubhai Dhulaji*”) a Five Judge Bench of this Court considered challenge to the notice issued under section 354 of the Bombay Municipal Corporation Act which directed the owner and the occupant to pull down the subject property. The challenge was on the touchstone of Article 19(1)(f) of the Constitution. The question which was

3 AIR 1959 BOMBAY 332

considered by the Five Judge Bench was whether Article 19(1)(f) would apply or whether Article 31 would govern the situation. The Five Judge Bench held that if the property owner is substantially deprived of his property, the statutory provision under which the order is issued shall be governed by Article 31 and not Article 19(1)(f). We extract the relevant observations in ***Nathubhai Dhulaji***:

“In the face of this authority, therefore, there can be no question, in view of the fact that the property has been ordered to be pulled down, that the case is one of deprivation of property and inasmuch as after the property is pulled down, the property cannot be enjoyed, Article 19(1)(f) cannot clearly apply because the question of the applicability of Article 19(5) would arise only in case where the applicability of Article 19(1)(f) would arise. In point of fact, Article 19(1)(f) is controlled by Article 19(5). The question, therefore, would arise only if there is immediate property to hold in which case, of course, the question of reasonableness of restrictions or otherwise would arise. This is the view taken by a Court of co-ordinate jurisdiction and, apart from anything else,

good sense and respect for the decision of a Court of co-ordinate jurisdiction require that it should be followed. We must, therefore hold that Article 19(1)(f) has no application and that Article 31 would apply.

9. In our considered view, the direction to carry out repairs is not a deprivation of property within the meaning of Article 300-A of the Constitution of India. Assuming *arguendo*, that Article 300-A governs the situation, the action is traceable to power conferred by the statutory provisions of the Act.

10. We are not suggesting for a moment, that the notice impugned is not susceptible to judicial scrutiny. We are, however, not inclined to delve deeper in the submissions canvassed by Mr. Anand Jaiswal on the touchstone of the mode of exercise of power. The statutory power is exercised by the authority in the backdrop and context of the directions issued by the High Court. The authority had the benefit of the structural audit report of the expert appointed by the

High Court with the consent of the parties. The expert suggested two options. Option-1 was carrying out repairs and Option -2 was the demolition. The authority did have the power to either direct demolition or order repairs. We are not impressed by the submission canvased by Mr. Anand Jaiswal that the authority was obligated to record reasons for ordering repairs in preference to demolition. In a reverse situation, if the authority directs demolition of a structure which can be retained with repairs, perhaps the authority will have to explain the rationale.

11. Given a choice between demolishing a structure and retaining the structure with the repairs which the structural auditor has recommended, there can be no gain saying, that every attempt must be made to retain the structure by carrying out the necessary repairs, where the structure is occupied not only by the owners but by others who are carrying on business therefrom. In this view of the matter, we decline to interfere in writ jurisdiction.

12. The petition is dismissed.

belkhede (M.W. Chandwani, J.)

(Rohit B. Deo, J.)