



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO.5123/2023

Arjun Raghunath Wankhede, Aged 72 years,]
Occupation Business, having his Office at Reno]
Footware, Jhansi Rani Square, Sitabuldi, Nagpur.].. **PETITIONER**

.....VERSUS.....

1. The Nagpur Improvement Trust, Having its Office]
at Civil Lines, Nagpur, Through its Chairman.]
]
2. The Divisional Officer (West Division), Nagpur]
Improvement Trust, having his Office at]
North Ambazari Road, Nagpur.]
]
3. City of Nagpur Corporation, Having its Office]
at Civil Lines, Nagpur, Through its Chairman.].. **RESPONDENTS**

ALONG WITH
WRIT PETITION NO. 5226/2023

Mohammed Zubair Ahsan S/o Mohammed Sohail Anwar,]
aged about 43, Occ Business, Off at 132, Abhyankar Road,]
Beside Haldiram Planet food, Sitabuldi, Nagpur.].. **PETITIONER**

.....VERSUS.....

1. Nagpur Improvement Trust (NIT), through its]
Divisional Officer (West), Off at North Ambazari]
Road, Nagpur 440 003.]
]
2. Nagpur Improvement Trust (NIT), through its]
Chairman, Off at Civil Lines, Nagpur.].. **RESPONDENTS**

ALONG WITH
WRIT PETITION NO. 5346/2023

1. Sachin S/o Madan Janbandhu, aged about 38,]
Occ Business, Off at 132, Abhyankar Road, Besides]
Haldiram Planet food, Sitabuldi, Nagpur.]
]
2. Ankit S/o Madan Janbandhu, aged about 35,]
Occ Business, Off at 132, Abhyankar Road, Besides]
Haldiram Planet food, Sitabuldi, Nagpur.].. **PETITIONERS**

.....VERSUS.....

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|--|---|---------------------------|
| 1. Nagpur Improvement Trust (NIT), through its |] | |
| Divisional Officer (West), Off at North Ambazari |] | |
| Road, Nagpur 440 003. |] | |
| |] | |
| 2. Nagpur Improvement Trust (NIT), through its |] | |
| Chairman, Off at Civil Lines, Nagpur. |] | <u>RESPONDENTS</u> |

Shri S.V. Bhutada, counsel for the petitioner Writ Petition No. 5123 of 2023.
Shri S.S. Sitani, counsel for the petitioners in Writ Petition Nos.5226 of 2023 and 5346 of 2023.
Shri G.A. Kunte, counsel for the respondent-Nagpur Improvement Trust.
Shri J.B. Kasat, counsel for the respondent-Nagpur Municipal Corporation.

CORAM : A.S. CHANDURKAR AND ABHAY J. MANTRI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : NOVEMBER 01, 2023

DATE ON WHICH JUDGMENT IS PRONOUNCED : JANUARY 05, 2024

JUDGMENT (PER : A.S. CHANDURKAR, J.)

1. The issue that arises for determination in these writ petitions is whether a statutory notice proposing an action of demolition becomes unexecutable if the said notice remains unimplemented for an unreasonable period despite there being no legal impediment for its execution.

2. **RULE.** Rule made returnable forthwith and heard the learned counsel for the parties. Since a similar challenge has been raised in these writ petitions, they are being decided together by this common judgment. For sake of convenience, the facts in Writ Petition No. 5123 of 2023 are being referred to.

. The petitioner claims to be inducted as a tenant in the premises located at Khasra Number 317, Mouza Sitabuldi, Nagpur. On 15.10.2010, the Nagpur Improvement Trust – NIT constituted under the Nagpur Improvement Trust Act, 1936 (for short, ‘the Act of 1936’) issued a notice under Section 286(2) of the City of Nagpur Corporation Act, 1948 (for short, ‘the Act of 1948’) read with Section 52 of the Act of 1936 to the owner of the premises as well as its occupier, the petitioner. In the said notice it was stated that a tin-shed constructed at the site was without obtaining permission of the NIT and hence the same was required to be removed within a period of twenty eight days from receipt of the said notice. The notice was issued by the Divisional Officer (West) on behalf of the Chairman, NIT. Neither the owner of the premises nor the petitioner raised any challenge to the said notice nor did they take any steps to comply with the same. The NIT also did not take steps to execute the said notice. In the meanwhile, on 21.08.2012 the Act of 1948 was repealed and the field was thereafter occupied by the provisions of the Maharashtra Municipal Corporations Act, 1949. Even thereafter no steps were taken to implement the notice dated 15.10.2010. On 17.07.2023 the NIT through its Divisional Officer (West) issued a communication to the owner of the premises and the petitioner stating therein that despite issuance of the notice dated 15.10.2010, the unauthorized construction had not been removed. It was directed that within a period of seven days from receipt

of the said communication the offending construction be removed failing which the NIT would take steps to remove the same. Being aggrieved, the petitioner has challenged the said communication dated 17.07.2023 alongwith the initial notice dated 15.10.2010 issued by the NIT in this writ petition filed under Article 226 of the Constitution of India.

3. Shri S.V. Bhutada, learned counsel for the petitioner raised threefold contentions:-

(a) The provisions of Section 52 of the Act of 1936 had been mentioned in the said notice alongwith the provisions of Section 286(2) of the Act of 1948. With the repeal of the Act of 1948, the notice as issued on 15.10.2010 was not saved since Section 8(f) of the Bombay Provincial Municipal Corporations (Amendment) and the City of Nagpur Corporation (Repeal) Act, 2011 (for short, 'the Repeal Act') did not save the statutory notice issued under the Act of 1948. Since the said statutory notice was not saved, it was not permissible to execute the same after Repeal Act under which it was issued. In that regard, the learned counsel placed reliance on the decision in *Shree Bhagwati Steel*

Rolling Mills Versus Commissioner of Central Excise & Another [(2016) 3 SCC 643].

(b) The Divisional Officer of the NIT had no jurisdiction to take any steps to implement and execute the notice issued on 15.10.2010. Under Section 52(1) of the Act of 1936 resort can be taken to the provisions of the Act of 1948 as indicated. As per the proviso to Section 52(1) the NIT is empowered to delegate to the Chairman or any Officer of the Trust all or any of the powers conferred by Section 52(1) of the Act of 1936. Under Section 24(1) of the Act of 1936 it is open for the Chairman by general or special order in writing to delegate to any Officer of the Trust the Chairman's powers, duties or functions under the Act of 1936 or any Rule or Regulation made thereunder. According to the learned counsel, the Chairman could delegate only those functions, powers or duties that were conferred on the Chairman and not those powers that were delegated to the Chairman by the Trust. Referring to the provisions of Section 24 of the Act of 1936 it was submitted that the task of issuing notice under Section 286(2) of the Act of 1948 could not have been delegated by the

Chairman to the Divisional Officer who had then issued the impugned notice dated 15.10.2010. In other words, it was submitted that this amounted to sub-delegation by the Chairman and as no such power had been conferred on the Chairman to sub-delegate a matter that was delegated to him, the issuance of the impugned notice was without jurisdiction. In that regard, the learned counsel referred to the decisions in *Marathwada University Versus Seshrao Balwant Rao Chavan* [(1989) 3 SCC 132], *M. Chandru Versus Member-Secretary, Chennai Metropolitan Development Authority & Another* [(2009) 4 SCC 72], *S. Samuel, M.D. Harrisons Malayalam & Another Versus Union of India & Others* [(2004) 1 SCC 256] and *Sahni Silk Mills (P) Ltd. & Another Versus Employees' State Insurance Corporation* [(1994) 5 SCC 346]. Thus, the impugned notice as had been issued was a nullity.

(c) The impugned notice was sought to be executed after a period of almost thirteen years of its issuance. Thus being a stale action, the same could not be implemented especially when there was no legal impediment in proceeding with execution of the said notice either

under the Act of 1948 till its repeal or under the Act of 1936 which continued to operate for all this period. In absence of any justifiable reason, the NIT could not be permitted to execute the impugned notice in such a manner. To substantiate this contention, the learned counsel placed reliance on the decisions in *State of Madhya Pradesh Versus Bani Singh & Another* [1990 Supp. SCC 738], *M/s Dehri Rohtas Light Railway Company Limited Versus District Board, Bhojpur & Others* [(1992) 2 SCC 598] and *Basanti Prasad Versus Chairman, Bihar School Examination Board & Others* [(2009) 6 SCC 791]. It was also urged that since the notice under challenge had been issued without any jurisdiction, the principles of estoppel, waiver and acquiescence had no application whatsoever and the petitioner would not be precluded from raising a legal challenge to the same when such notice was sought to be executed. For the said contention, reliance was placed on the decision in *Hasham Abbas Sayyad Versus Usman Abbas Sayyad & Others* [(2007) 2 SCC 355].

. On aforesaid grounds, it was submitted that the prayers made in the writ petition ought to be granted.

4. Shri S.S. Sitani, learned counsel for the petitioners in Writ Petition Nos.5226 of 2023 and 5346 of 2023 adopted the aforesaid submissions and prayed for grant of similar relief.

5. Shri G.A. Kunte, learned counsel appearing for the NIT opposed the aforesaid submissions. According to him, there was no case made out to interfere in exercise of writ jurisdiction for the following reasons :-

(a) Since the impugned notice had been issued under the provisions of Section 286(2) of the Act of 1948 read with the provisions of Section 52(1) of the Act of 1936, the said notice could be executed notwithstanding the repeal of the Act of 1948. Under Section 52(1) of the Act of 1936, the NIT was empowered to implement the impugned notice since the Act of 1936 continued to operate. Without prejudice to the said contention, it was submitted that in view of the provisions of Section 8(a) and (e) of the Repeal Act, the impugned notice had been saved. Since the legal action initiated under the Act of

1948 had been saved by the aforesaid provisions, notwithstanding repeal of the Act of 1948, the notice in question could be executed even today.

(b) The notice issued on 15.10.2010 was lawfully issued and the same could not be treated as a nullity. In view of the Regulations published in the Gazette on 17.12.1937, the Chairman, NIT was empowered to delegate to any Officer of the Trust any powers conferred upon him by Section 52(1) of the Act of 1936. In exercise of such powers, the impugned notice had been issued by the Divisional Officer under Section 52 of the Act of 1936. The learned counsel also referred to the provisions of Section 24, 52 and Section 90(d) of the Act of 1936 in that regard.

(c) There was no legal bar for the NIT to execute the notice dated 15.10.2010 by issuing communication dated 17.07.2023. The aspect of delay would not enure to the benefit of the petitioner since the structure in question itself was unauthorized. The NIT was seeking to enforce the provisions of law by initiating action against such unauthorized structures and the same could not be defeated by relying upon the aspect of delay. Though it

was true that there was no legal impediment in executing the notice dated 15.10.2010 the same was not implemented in view of pendency of litigation with regard to the adjoining structures. The occupiers of the adjoining structures had sought to challenge such similar notices and as the litigation in that regard was pending the NIT deemed it fit not to execute the said notice in the meanwhile. It was submitted that pursuant to the liberty granted to issue a fresh notice by virtue of the judgment in **Writ Petition No. 2800 of 2010** [*Jayant @ Sudhir Ganpatrao Buty Versus Nagpur Improvement Trust*] decided on 20.09.2010, the said notice was issued. Reference was also made to the order dated 28.08.2019 that was passed at the Principal Seat in **Public Interest Litigation No. 67 of 2017** [*Tushar Guru Salian Versus State of Maharashtra & Others*]. Reliance was also placed on the decisions in *Seema Arshad Zaheer & Others Versus Municipal Corpn. Of Greater Mumbai & Others* [(2006) 5 SCC 282], *State of Madhya Pradesh & Another Versus Bhailal Bhai & Others* [AIR 1964 SC 1006] and *Siemens Limited Versus The State of Maharashtra & Others* [2023(4) ABR 230] to contend

that the NIT could not be precluded from acting in accordance with law notwithstanding the fact that such action was initiated after almost thirteen years.

. It was thus submitted that the writ petitions did not warrant any consideration and the same were liable to be rejected.

6. The petitioner by amending the writ petition has sought to raise a challenge to the proviso to the Regulations published in the Gazette on 17.12.1937 by contending that since the power of sub-delegation was not conferred on the Chairman under the Act of 1936, the Regulations permitting such sub-delegation travelled beyond the Act of 1936. Since the same were excessive in nature, the Regulations to that extent were liable to be set aside.

. This challenge was opposed by the NIT by contending that the Regulations empowered the Chairman to exercise powers or discharge such duties and functions as conferred on the Chairman by virtue of Section 24(1) of the Act of 1936. The Regulations were thus *intra vires* the Act of 1936 and the same had the force of law.

7. We have heard the learned counsel for the parties at length and with their assistance we have also perused the documents on record. We have thereafter given due consideration to their respective submissions. The challenge to the impugned notice issued on 15.10.2010 is principally on the ground of lack of jurisdiction on the part of the NIT in initiating such action through its Divisional Officer on the premise that sub-delegation by the Chairman to issue said notice is impermissible, the fact that the Act of 1948 has since been repealed and also on the ground that the notice issued in the year 2010 is sought to be belatedly executed after about thirteen years.

8. We propose to deal with the aspect of delay in seeking to implement the impugned notice dated 15.10.2010 at the outset. Undisputedly the NIT in exercise of the powers conferred by Section 286(2) of the Act of 1948 read with Section 52 of the Act of 1936 has issued the subject notice on 15.10.2010 through its Divisional Officer. Neither the land owner nor the petitioners as occupiers raised any legal challenge to the issuance of this notice. As a result, there was no legal impediment confronting the NIT to go ahead and execute the said notice dated 15.10.2010 and take action as was indicated in the said notice. As per Clause 3 of the said notice, the property owner/occupier was called

upon to demolish the unauthorized structure within a period of twenty eight days from receipt of that notice. No steps whatsoever were taken either by the land owner or by the occupier to remove the same. Despite there being no legal impediment with the NIT which fact has been admitted by the NIT in paragraph 3 of its affidavit-in-reply (Page 26 of Writ Petition No. 5123 of 2023), it did not proceed further to execute the said notice. In the meanwhile, the Act of 1948 was repealed with effect from 21.08.2012. Notwithstanding the fact that the impugned notice was issued also under Section 52 of the Act of 1936, the same was not implemented even after the repeal of the Act of 1948. It is only on 17.07.2023 that the Divisional Officer (West) issued a communication requiring the land owner and/or occupier to act in accordance with the notice dated 15.10.2010 and remove the unauthorized structure. Thus after a period of almost thirteen years, the notice dated 15.10.2010 is sought to be implemented.

9. In this regard, the question that requires determination is whether after such a long lapse the subject notice could be sought to be executed in the absence of any legal impediment in executing the same after its issuance. This aspect is being dealt with at the outset for the reason that if it is held that the subject notice is sought to be executed after the reasonable period within which it is intended to be executed by

the statute, then the other issues regarding absence of jurisdiction and repeal of the Act of 1948 would become academic in the facts of the present case.

10. The impugned notice dated 15.10.2010 has been issued under Section 286(2) of the Act of 1948, read with Section 52 of the Act of 1936. In the said notice, it is stated that the petitioner has undertaken unauthorized erection of a tin shed without obtaining any prior permission. The petitioner has been called upon to demolish the said structure within a period of twenty-eight days from the receipt of the said notices. In this context, it would be necessary to refer to the provisions of Section 286(2) of the Act of 1948. Section 286 is reproduced as under :-

“286. Power to require removal or alteration of work not conformity with bye-laws of any scheme or any other requirement.

(1) If any building is erected or re-erected in contravention of any town planning scheme mentioned under Section 271 or any building bye-laws made under Section 415, the Commissioner without prejudice to his right to take proceedings for a fine in respect of the

contravention, may by notice require the owner either to pull down or remove the work or, if he so elects, to effect such alterations therein as may be necessary to make it comply with the said scheme or bye-laws.

- (2) If a building is erected or re-erected -
- (a) without any sanction as required by Section 273(1), or
 - (b) when sanction has been refused, or
 - (c) in contravention of the terms of any sanction granted, or
 - (d) when the sanction has lapsed under Section 279,
- the Commissioner may by notice require the owner or owners to alter or demolish the building within such reasonable time as the Commissioner may think fit.
- (3) If a person to whom a notice has been given under the foregoing provisions of this section fails to comply with the notice before the expiry to twenty-eight days, or such longer period as the District Court, Nagpur, may on

his application allow, the Commissioner may pull down or remove the work in question, or effect such alteration therein as he deems necessary and may recover from him the expenses reasonably incurred by the Commissioner in so doing.” (*emphasis supplied*)

11. Perusal of the aforesaid provision indicates that the Commissioner is required to give a reasonable period to the concerned noticee to remove an unauthorized structure. On failure on the part of the noticee to remove such structure, further action of its removal is required to be taken by the Commissioner. Since the notice dated 15.10.2010 is sought to be implemented after a period of almost thirteen years, it would be necessary to examine whether such implementation is being undertaken within reasonable time. In this context, we may refer to the settled legal position that while determining what would be reasonable time in the given context, the Court has to take into consideration the facts and circumstances of the case, nature of the statute, prejudice caused etc., as has been observed by the Hon’ble Supreme Court in paragraph 41 of its decision in ***Madras Aluminium Company Ltd. Vs. Tamil Nadu Electricity Board and Anr.***, (2023) 8 SCC 240. Reference in the said

decision has also been made to the earlier decision in *Mansaram Vs. S.P Pathak & Ors.*, (1984) 1 SCC 125. It has been held by the Hon'ble Supreme Court, in paragraph 12, as under :-

“12. To slightly differently formulate the proposition, could the initial unauthorised entry, if there be any, permit a House Allotment Officer, 22 years after the entry, to evict the appellant on the short ground that he entered the premises in contravention of Clause 22(2)? Undoubtedly, power is conferred on the Collector to see that the provisions of the Rent Control Order which disclosed a public policy are effectively implemented and if the Collector therefore, comes across information that there is a contravention, he is clothed with adequate power to set right the contravention by ejecting anyone who comes into the premises in contravention of the provisions. But when the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner. Exercise of power in a reasonable manner inheres the concept of its exercise within a reasonable time.”

. From the aforesaid observations, it becomes clear that when power is conferred on the Municipal Commissioner to ensure that no unauthorised construction continues to stand, the power of removing the same has to be exercised in a reasonable manner which would include exercising such power within reasonable time.

12. The provisions of Section 286(2) of the Act of 1948 contemplate grant of reasonable time to the noticee to remove such construction. This would indicate that on failure on the part of the noticee to remove such construction, it is implied that the Commissioner would act within a further reasonable time to have such unauthorized structure removed considering the fact that the power to remove the same has been conferred on the Commissioner with a view to ensure that systematic and planned activities of construction take place. While holding so, the object behind the provisions of Section 286 of the Act of 1948 has to be kept in mind. Thus, exercise of power in this regard has to be undertaken within a reasonable time.

13. For determining what would be the reasonable time in the facts of the present case, it can be seen from the notice dated 15.10.2010 that the petitioner was called upon to remove the unauthorized work within a period of twenty-eight days from receiving said notice. According to the Divisional Officer who issued the said notice, the period of twenty-eight days was treated as “reasonable period” that is envisaged by Section 286(2)(d) of the Act of 1948. This would imply that on failure of the noticee to remove the said structure, the power to act further ought to have been exercised; say, within a period of three months at the highest. This is for the reason that permitting an unauthorized structure to

continue existing despite issuance of statutory notice and in the absence of any legal impediment would have the effect of frustrating the statutory provisions under which such notice was issued. The Commissioner thus was duty-bound under the said statutory provisions to have acted within a reasonable time and exercised the power conferred by the said provisions.

14. In the present case, it is to be noted that after issuance of the impugned notice, there was no legal impediment for the Municipal Corporation to have the said notice implemented. It is not the case of the Municipal Corporation that by virtue of any prohibitory order, it was precluded from taking action that was indicated in the impugned notice. It is further not the case of the Municipal Corporation that though it sought to execute the said notice, it could not do so for any justifiable reason. The failure to have the unauthorized work removed is sought to be attributed to the fact that the structure in question was abutting another unauthorized structure, whose occupier had approached the Court for challenging such action taken by the Municipal Corporation. Except for a bare statement in that regard, there is no material placed on record that would warrant acceptance of this stand. It is not even urged by the Municipal Corporation that it attempted to execute the notice dated 15.10.2010, but, as it was faced with such difficulties, the same could not be executed. It is only after a period of almost thirteen years and after a

lapse of about eleven years from the repeal of the Act of 1948 that the said notice is now sought to be implemented by issuing the communication dated 17.07.2023.

. In the facts of the present case and considering the object behind enacting Section 286 in the Act of 1948, it becomes clear that the Municipal Corporation failed to implement the notice dated 15.10.2010 within a reasonable period despite the absence of any legal impediment which prohibited it from executing such notice. We, therefore, find that the notice dated 15.10.2010 cannot be permitted to be executed much after lapse of reasonable period, that too in the absence of any legal or factual justification whatsoever.

15. Since we have found that the Municipal Corporation cannot be permitted to execute the notice dated 15.10.2010 after a lapse of almost thirteen years which is much beyond the reasonable period in the context of Section 286(2) of the Act of 1948, it is not necessary to examine further challenge to the said notice on the ground of lack of jurisdiction on the part of the Divisional Officer in issuing the same. Instead, while holding that it would not be permissible for the Municipal Corporation to execute the notice dated 15.10.2010 after a lapse of reasonable period, liberty can be reserved in its favour to take further steps against the unauthorized

construction in accordance with law. This is for the reason that the petitioner cannot be permitted to contend that no action whatsoever should be permitted to be taken against the unauthorized construction. It is not the case of the petitioner that the said work has been undertaken after obtaining due permission or that steps for regularizing the same had been undertaken. While the power on the part of the Planning Authority to act against an unauthorized structure cannot be doubted, at the same time, it has to exercise such power within reasonable time of issuing a statutory notice.

16. For all the aforesaid reasons, we have arrived at the following conclusions :-

- (a) The notice dated 15.10.2010 issued by the Nagpur Improvement Trust to the petitioner cannot be permitted to be executed after a period of almost thirteen years in the absence of any legal impediment.
- (b) It would be open for the Nagpur Improvement Trust to take such steps as are permissible in law to seek removal of the unauthorized work, which is the subject matter of the notice dated 15.10.2010.
- (c) It is clarified that since the impugned notice has been held to be unexecutable in view of the unreasonable time

taken to execute the same, we have not gone into the question of the jurisdiction of the Divisional Officer, Nagpur Improvement Trust to issue the subject notice as well as the effect of repeal of the Act of 1948 on the said notice. The said issues are kept expressly open for being raised as and when the occasion arises.

(d) The Writ Petitions are partly allowed in aforesaid terms, leaving the parties to bear their own costs. Rule accordingly.

(ABHAY J. MANTRI, J.)

(A.S. CHANDURKAR, J.)