



GAHC010153352021

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**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : WP(C)/5015/2021**

DILIP KUMAR BORAH AND ANR  
S/O- LT. PHULAI BORA, R/O- BIREN MAHANTA PATH, WARD NO. 10, DIST.-  
NAGAON, ASSAM

2: RAMANUJAN SOCIETY OF EDUCATION SOCIAL AND RURAL  
DEVELOPMENT  
HAVING ITS OFFICE AND PRINCIPAL PLACE OF BUSINESS AT BIREN  
MAHANTA PATH  
WARD NO. 10  
DIST.- NAGAON  
ASSAM AND IS REP. BY ITS SECY

VERSUS

THE STATE OF ASSAM AND 3 ORS  
REP. BY ITS COMM. AND SECY. DEPTT. OF MUNICIPAL ADMINISTRATION  
DISPUR, ASSAM

2: THE NAGAON MUNICIPAL BOARD  
REP. BY ITS CHAIRMAN  
NAGAON  
P.S. AND P.O. SADAR  
NAGAON  
PIN- 782001

3: THE EXECUTIVE OFFICERS  
NAGAON  
MUNICIPAL BOARD  
P.S. AND P.O. SADAR  
NAGAON  
PIN- 782001

4: DY. COMMISSIONER  
NAGAON



P.S. AND P.O. SADAR  
NAGAON  
PIN- 78200

For the Petitioner(s) : Mr. S. P. Roy, Advocate  
For the Respondent(s) : Ms. U. Das, Addl. Sr. GA  
: Mr. S. P. Khound, Standing Counsel

Date of hearing : 22.01.2024

Date of Judgment : 22.01.2024

**BEFORE  
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

**JUDGMENT AND ORDER (ORAL)**

Heard Mr. S. P. Roy, the learned counsel appearing on behalf of the Petitioners and Ms. U. Das, the learned Additional Senior Government Advocate appearing on behalf of the Respondent Nos. 1 and 4. I have also heard Mr. S. P. Khound, the learned Standing Counsel appearing on behalf of the Respondent Nos. 2 and 3.

2. The instant writ petition has been filed by the Petitioner challenging the demolition notices dated 30.06.2021, 20.07.2021 and 18.08.2021 issued by the Executive Officer. Be that as it may, there is no relief specifically sought for against the notice dated 03.09.2021 whereby demolition orders were issued. However, taking into account the contents of the writ petition, this Court finds it pertinent to deal with the notices dated 03.09.2021 and its legality and validity.

3. The facts of the instant case are that the Petitioner No.1 is the owner of

plots of land conjointly measuring 1 Bigha 2 katha 7 Lechas covered by Dag No.414, 403, 404 and 423 included in Patta No.152, 870, 396 and 96 respectively of village Town Nortom, Mouza-Sadar Town of Nagaon District. The Petitioner No.1 claims that he had formed a society under the Societies Registration Act, 1860 known as the Ramanujan Society of Education Social and Rural Development which have been registered bearing Registration No.RS/NG.254.F.47 of 2003-04. Subsequent thereto, the Petitioner No.1 also claims of leasing out the said land to the Petitioner No.2 vide a deed of lease bearing No. Deed No.509 dated 21.07.2009 and had also entered into an agreement for lease dated 06.05.2017. Thereupon, the Petitioner No.1 being the Secretary of the Petitioner No.2 obtained the building permission from the Nagaon Development Authority over the land measuring 2 Kathas 12 Lechas specifically stating that the house would be used for residential purpose. The said building permission was granted on 03.05.2010 and the same is enclosed as Annexure-2 to the writ petition. This Court finds it very pertinent to take note of that the land whereupon the Petitioner No.1 took permission for construction is covered by Dag No.404 of K.P. Patta No.396 of an area measuring 2 Kathas 12 Lechas. The Permission which was granted was for Ground Floor + 3 Floors. Each floor i.e. the first, second and third would be 3393 sq. ft. The said permission was granted by the Nagaon Development Authority.

4. Subsequent thereto, the Petitioner applied for permission from the Nagaon Municipal Board for construction of G+3 Floor over the land covered by Dag No.403 and included in Patta No.87. Annexure-3 is the said permission which shows that the Nagaon Municipal Board granted permission to the Petitioner No.1 for construction of a building for residential purpose on the land

covered by Dag No.403 of Periodic Patta No.87. It is relevant to mention that the sanction was granted for ground floor measuring 725 sq. ft (only for parking), first floor 773 sq. ft, second floor 773 sq. ft and third floor 773 sq. ft.

5. The record further reveals that the Petitioner No.1 applied for another permission for construction from the Nagaon Municipal Board which was granted on 06.12.2019 and from the said permission which has been enclosed as Annexure-4, it reveals that the permission was granted for construction of a G+3 multistoried building for residential purpose upon the land covered by Dag No.413, 414 of Periodic Patta No.96, 152 near Natun Bazar Road. The ground floor area permitted 2000 sq. ft (parking); first floor, second floor and third floor of 2048 sq. ft. each. It is however pertinent herein to mention that from a perusal of the permissions enclosed as Annexure 3 and 4, it would be seen that the permission (Annexure-3) which was granted on 26.11.2014 was in Ward No.10 near J.S. Road whereas in respect of Annexure-4, it was Ward No.7, Natun Bazar Road.

6. Subsequent thereto, the Petitioner No.1 herein constructed two additional floors in respect to the building pertaining to Annexure-4 without obtaining any permission, for which the Executive Officer of the Nagaon Municipal Board had issued a notice on 30.06.2021 asking the Petitioner to submit a written reply as to why legal action should not be taken against the Petitioner No.1 for having constructed two additional floors.

7. The record reveals that the Petitioner No.1 submitted a reply on 05.07.2021 stating inter that although the permission was granted for G+3 floor in the land bearing Dag Nos. 413 and 414 of Patta No.96 and 152 in Ward No.7 near Pratap Sharma Path, there was provision for construction of two

additional floors. The Petitioner No.1 apologized for construction of two additional floors without the permission of the Municipal Board and thereby submitted that permission may be granted for construction of two additional floors.

8. On 20.07.2021, another notice was issued to the Petitioner No.1 to the effect that vide the permission dated 26.11.2014 (Annexure-3 herein), the Petitioner was permitted to build G+3 (residential) building near J.S. Path in Dag No.403 of Patta No.870 but the Petitioner No.1 had constructed a building of G+6 i.e. an additional three floors for which the Petitioner No.1 was asked to submit his explanation. The Petitioner No.1 submitted a similar reply on 23.07.2021 stating inter alia that he was sorry for constructing the additional floors without permission of the Municipal Board and therefore sought permission for the construction of the additional floors.

9. In addition to the above two notices and replies, the Petitioner was issued another notice on 18.08.2021 by the Executive Officer, Nagaon Municipal Corporation stating inter alia that the Petitioner was permitted to constructed G+3 (residential) building near Biren Mahanta Path (Dag No.404 of Patta No.396) and he had constructed a G+6 residential house and was running a Junior College thereby violating the municipal laws for which the Petitioner was directed to submit his reply. This building in question is in respect to the permission granted and enclosed as Annexure-2 to the writ petition. The Petitioner again submitted a reply on 19.08.2021 apologizing that he had constructed the G+6 floor without permission and stated that he would apply very soon seeking necessary permission for constructing the additional floors. It was also mentioned that the said plot and the building was leased to

Ramanujan Junior College for 20 years and based on the said lease, the Education Department of the Government of Assam and the Assam Higher Secondary Education Council provided necessary permission to continue the Ramanujan Junior College in the said building. It was also mentioned that the necessary permission was received from the Nagaon Municipal Board to continue the College.

10. Pursuant thereto, three separate orders/notice dated 03.09.2021 were passed/issued by the Executive Officer, Nagaon Municipal Board under Section 177 of the Assam Municipal Act, 1956 (for short "the Act of 1956) stating inter alia that as the Petitioner No.1 had constructed additional floors without permission and thereby having violated Section 171(1) of the Act of 1956. The Petitioner No.1 was asked to remove the unauthorized constructions within 30 days from the date of the said notice failing which the Board would be constrained to demolish the aforesaid unauthorized constructions made by the Petitioner No.1. As already aforesaid, these notices/orders dated 03.09.2021 are not a part of the relief sought for.

11. It further reveals that pursuant thereto, the Petitioner submitted a communication dated 06.09.2021 before the Deputy Commissioner, Nagaon stating inter alia that the college buildings are situated in the heart of Nagaon Town and during construction period, there were some compoundable violation on their part. It was further mentioned that the college buildings were constructed and these were temporary and the Petitioners were shifting to their new campus in Uppathori and arrangements were made. It was also mentioned that the Petitioner was ready to pay the penalty as per the rule and thereby requested that the Petitioner be allowed for submission of the same

and accept the penalty.

12. Thereupon, the record reveals that the Petitioner filed the instant writ petition on 21.09.2021 and this Court vide an order dated 28.09.2021 directed the Respondent Nagaon Municipal Board not to take any coercive action against the Petitioner with regard to those demolition notices dated 03.09.2021 issued by the Executive Officer, Nagaon Municipal Board under Section 177(1) of the Act of 1956. The record further reveals that on 01.10.2021 when the matter was listed, it was duly intimated to this Court that the Nagaon Municipal Board had become defunct and it was managed by the Executive Officer, i.e. the Respondent No.3 and its Chairman is the Deputy Commissioner, Nagaon who is the Respondent No.4. It was also brought to the attention of this Court that vide Notification No.TCP.31/2000/54 dated 12.06.2020 of the Town and Country Planning Department, Government of Assam published in the Assam Gazette Extraordinary on 16.12.2000, certain violations were compoundable whereas (i) use of building, (ii) addition of extra floor, (iii) parking norms and (iv) projection/encroachment of public land are non-compoundable items. On the basis thereof, this Court had issued notice vide the order dated 01.10.2021 and the interim order was directed to continue till the next date.

13. An additional affidavit was filed by the Petitioner on 01.10.2021 wherein it was mentioned that on 29.09.2021, the Petitioner filed applications before the Respondent No.3 along with all structural drawing, architectural drawings as well as an annexure for building restructure in respect to the three buildings which have been enclosed as Annexure-1 (series), Annexure-2 (series) and Annexure-3 (series) respectively. It was mentioned that there was every possibility that the unauthorized would be approved after proper scrutiny. This

Court however finds it relevant to observe that these applications were filed pursuant to the filing of the instant writ petition and obtaining the interim order.

14. On 08.09.2023, the Respondent Nos. 2 and 3 filed an affidavit-in-opposition. In the said affidavit-in-opposition, it was mentioned that the tenure of the Nagaon Municipal Board had expired on 04.04.2020 and the election to constitute the new Municipal Board have not been held till date. It was mentioned that from a perusal of Annexure-1 to the writ petition, it would show that there was no land which was leased out to the Petitioner No.2 rather it was a multi storied building situated at B.M. Road, Amolapatty, Nagaon. It was further mentioned that the Petitioner No.1 in his individual capacity had applied for permission for construction of a building to be used for residential purpose and not for establishment of the present institution and the Nagaon Municipal Authority as well as the Nagaon Municipal Board had only granted permission to the Petitioner No.1 for the construction of G+3 floor building for residential purpose and the Petitioner was illegally running an educational institution over the said land and building. It was mentioned that in respect to the notice dated 18.08.2021, it was inadvertently mentioned that the Petitioner constructed G+6 which ought to have been G+4. Be that as it may, the Petitioner's permission was only for G+3 that too for residential purpose but the Petitioner was using for educational institution without permission. It was further mentioned that in terms with Rule 32(1) of the Assam Notified Urban Area (Other than Guwahati) Building Rules, 2014, it empowered the authority to seal the premises in case of unauthorized construction. It was further mentioned that the Petitioner has duly admitted in the reply to the show cause notice that the Petitioner had constructed additional floors beyond the



permission so granted. It was also mentioned that till the filing of the instant writ petition, the Petitioner did not file any application for permission. Further to that, it was also mentioned that as per Rule 32(3) of the Assam Notified Urban Area (Other than Guwahati) Building Rules, 2014, tolerance in case of dimensional error is permitted up to 0.15 meters. The additional floors of the 3 buildings of the Petitioner which were constructed without sanction of the Board are much more than the aforesaid tolerable limit. Further to that, reference was also made to the Zoning Regulations adopted by the State Government under Section 10(2) of the Assam Country and Town Planning Act, 1959 whereby in Regulation 9.2.1, it was categorically mandated that the use of the building and addition of extra floors was not compoundable. It was further mentioned that the Memo of Appeal enclosed as Annexure-14 to the writ petition was misconceived as there was no condition precedent for exercise of power under Section 296 of the Act of 1956. Moreover the Petitioner No.1 had duly admitted that he had constructed additional floors beyond permitted floor without permission from the Municipal Board.

15. To the said affidavit-in-opposition, an affidavit-in-reply was filed by the Petitioner No.1 stating inter alia that the tenure of the Nagaon Municipal Board expired on 04.04.2020 and there has been no new Municipal Board constituted till the date of filing of the affidavit-in-opposition on 07.09.2023. Reference was made to the insertion of Sub-Clause (5) to Section 26 of the Act of 1956 by the Assam Municipal (Amendment) Act, 2020 which stipulates that the Deputy Commissioner or the Sub-Divisional Officer (Civil) or an Officer nominated by the Deputy Commissioner or the Sub-Divisional Officer (Civil) to perform the functions of the Municipal Board for 12 months in case the Office of the Commissioners expires and the election cannot be held for any exceptional

circumstances. It was stated in the affidavit-in-reply that in the present case, as the tenure of the Board expired on 04.04.2020, no elections having been held even after the expiry of more than three years and as such the Respondent No.2 i.e. the Executive Officer, Nagaon Municipal Board had no authority to issue the impugned demolition notices dated 03.09.2021 since the power to perform the functions of the Board ceased on 03.04.2021 and as such, the Executive Officer, Nagaon Municipal Board had exceeded its jurisdiction and acted in contravention of Section 26(5) of the Act of 1956 while issuing the impugned demolition notices dated 03.09.2021. It was also mentioned that vide a subsequent notarized Lease Deed dated 06.05.2017, a plot of land 3 Kathas 19 Lechas covered by Dag No.134 of P.P. No.115 and a plot of land measuring 1 Katha 9 Lechas covered by Dag No.408 of P.P. No.215 in total 1 Bigha 8 Lechas was leased out by the Petitioner No.1 to the Petitioner No.2 in the name of Ramanujan Junior College. It was also mentioned that the terms of use of building constructed over Dag No.404, Patta No.396 vide building permission dated 03.05.2010 is covered by Lease Deed dated 21.03.2009 and 06.05.2017 and there is no express bar in the aforesaid lease deed for construction of educational institutions and moreover, the Petitioner No.1 vide a letter dated 29.12.2018 had obtained Trade Permission from the Nagaon Municipal Board for running educational institution over the above mentioned plot of land and the said Trade Permission Letter has been renewed till 31.03.2023 vide Trade Permission Letter dated 23.05.2022. It was further stated that the Health Officer, Sub-Divisional Medical and Health Officer, District Nagaon had issued a certificate dated 09.02.2009 certifying therein that the Ramanujan Junior College situated in B.M. Road, Amolapatty, Nagaon, Assam had sufficient sanitary arrangement and the said sanitary arrangement have

been found to be satisfactory on inspection by the aforesaid officer. It was further mentioned that the Respondent No.3 had not offered any comment as regards the appeal preferred before the Deputy Commissioner, Nagaon on 06.09.2021 and the Deputy Commissioner, Nagaon was therefore bound to fix a date for hearing of the said appeal but the opportunity had been denied by the Deputy Commissioner, Nagaon to the Petitioner No.1 which has caused failure of justice and violation of mandatory provisions of the Act of 1956. It was also mentioned that the condition precedent for exercise of jurisdiction under Section 296 of the Act of 1956 was duly present taking into account that the demolition of the building would infringe upon the right to life of the students as well as the right to carry on trade or business. It was also mentioned that the impugned orders were contrary to Section 53 of the Act of 1956 inasmuch as the power of the Executive Officer can be exercised to sign every order or instrument with the approval of the Chairman, Municipal Board/Town Committee. However, in the instant case, as the impugned orders clearly show that the copy was marked to the P.A. of the Deputy Commissioner, Nagaon for kind appraisal, the same clearly shows that the impugned demolition notices dated 03.09.2021 were not approved either by the Chairman of the Nagaon Municipal Board or the Deputy Commissioner, Nagaon before being issued to the Petitioner and as such, the said demolition notices do not confirm to the mandatory condition precedent as stipulated in Section 53(3)(ii) of the Act of 1956.

16. In the backdrop of the above pleadings, let this Court take note of the submissions made by the learned counsels appearing on behalf of the parties.

17. Mr. S. P. Roy, the learned counsel appearing on behalf of the Petitioners

has submitted that the impugned notices dated 03.09.2021 was issued by the Executive Officer, Nagaon Municipal Board without authority and jurisdiction inasmuch as the Nagaon Municipal Board stood dissolved w.e.f. 04.04.2020 and as such in view of Sub-Section (5) of Section 26 of the Act of 1956, neither the Deputy Commissioner nor the Executive Officer could have issued the said impugned notices dated 03.09.2021. It was further submitted that the Executive Officer could not have issued the said impugned notices without taking the approval of Deputy Commissioner even assuming for argument sake, the Deputy Commissioner is exercising the powers in terms with Section 26(5) of the Act of 1956 and as such the impugned notices dated 03.09.2021 are without jurisdiction.

18. The learned counsel for the Petitioners further submitted that the Petitioner duly accepts that the Petitioners had made mistakes by constructing the additional floors without taking permission but in view of the second proviso to Section 177 of the Act of 1956, the Board at a meeting may instead of requiring alteration/demolition of such building accept by way of composition such sum as it may deem reasonable and therefore submitted that when the Petitioners had duly applied for the permissions after the filing of the writ petition, the Respondent Authorities more particularly the Respondent Nos. 2 and 4 are required to consider the applications seeking permission and thereupon by accepting the composition of such sum as it may deemed to be reasonable ought not to take any further steps for demolition of buildings in question.

19. The learned counsel for the Petitioners further submitted that though it was alleged that the Petitioners are using the building, not as per the

permission so granted but the Nagaon Municipal Board having permitted the Petitioner to carry on the educational institution by issuance of a trade permission and having extended the said trade permission from time to time cannot now be permitted to take the stand that the Petitioners had changed the use of the building in question.

20. He further submitted that the power is conferred upon the authorities in terms with Section 296 of the Act of 1956 and invoking the said powers, the Petitioner had approached the Deputy Commissioner, Nagaon i.e. the Respondent No.4 by filing an appeal however, the said Respondent No.4 had not taken any steps in that regard thereby violating the rights of the Petitioners.

21. On the other hand, Mr. S. P. Khound, the learned counsel appearing on behalf of the Respondent Nos. 2 and 3 submitted that the perusal of Sub-Section (5) of Section 26 of the Act of 1956 would clearly show that the powers conferred upon the Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be of the respective jurisdiction is not only limited for 12 months from the date of expiry of the terms of the Office of the Commissioners but also all the powers and duties of the Board can be exercised till such time a new Board is not reconstituted after the election of the Commissioner. He therefore submitted that as no new Board has been constituted, the Deputy Commissioner, Nagaon continues to exercise the powers in terms with Sub-Section (5) of Section 26 of the Act of 1956. The learned Standing counsel further submitted that the Executive Officer who is appointed under Section 53 of the Act of 1956 by the State Government continues to exercise his powers and therefore the issuance of the notices on

03.09.2021 to the Petitioners in respect to the three buildings in question was well within the jurisdiction of the Executive Officer. He further submitted that the plea so taken by the Petitioners in terms with Section 53(3)(ii) of the Act of 1956 was not taken in the writ petition and it was for the first time taken in the affidavit-in-reply. Be that as it may, the Executive Officer i.e. the Respondent No.2 had exercised its powers with the due approval of the Deputy Commissioner and having done so had duly intimated the Deputy Commissioner by marking of copy of the notices dated 03.09.2021 to the Personal Assistant of the Deputy Commissioner for due information.

22. The learned counsel further submitted that from a perusal of the materials on record, it would be seen that the Petitioners obtained three permissions in three different plots of land for construction of G+3 storied building and specifically for residential use. Admittedly, the Petitioner No.1 had not taken any permission for making construction of additional floors which the Petitioners have duly admitted in their reply and under such circumstances there is no error on the part of the Respondent Authorities more particularly the Respondent No.2 in issuance of the notices dated 03.09.2021. The learned counsel further submitted that a perusal of the relief(s) so sought for in the writ petition would also show that no relief have been sought for against the notices dated 03.09.2021.

23. On the question of non-exercise of the jurisdiction by the Deputy Commissioner, Nagaon in terms with Section 296 of the Act of 1956, the learned counsel submitted that as the Deputy Commissioner was exercising the powers of the Board and on his approval, the notices dated 03.09.2021 were issued, the Deputy Commissioner could not have exercised the jurisdiction in

terms with Section 296 of the Act of 1956. Further to that, Section 296 of the Act of 1956 would only be applicable in respect to orders passed by the Board and not on the basis of any order passed with due approval of the Deputy Commissioner. Further to that, the learned counsel also submitted that a perusal of Annexure-14 which the Petitioners claim to be an appeal, under no circumstances can be categorized as a Memo of Appeal. Apart from that, the learned counsel also submitted that when there has been a clear infraction and violation to the provisions of the Act of 1956 more particularly Section 171 of the Act of 1956, the question of exercising any revisional jurisdiction do not arise.

24. The learned counsel further submitted that the second proviso to Section 177 would only be applicable in the circumstances where violation can be compoundable. However, in terms with Regulation 9.2.1 of the Zoning Regulations, use of the building as well as construction of additional floors are non-compoundable items. The learned counsel for the Respondent Nos. 2 and 3 therefore submitted that in the instant case, the Petitioner No.1 had constructed additional floors in all the three buildings without any permission and had also changed the use of the building from residential to commercial and have been running an educational institution which under no circumstances can be compounded in view of the Zoning Regulations.

25. On the aspect of the trade permission so granted, it was submitted that the said trade permission so granted does not regularize the illegal constructions and use of the building inasmuch as the said trade permission is only granted for the purpose of collection of revenue and would not have any bearing on the illegal construction so made and illegal use of the building in

question.

26. I have also heard Ms. U. Das, the learned Additional Senior Government Advocate appearing on behalf of the Respondent Nos. 1 and 4 and submitted that the Deputy Commissioner, Nagaon had the power to exercise and perform the duties of the Board till a new Board is reconstituted after elections of the Commissioners in terms with Section 26(5) of the Act of 1956. She submits that the Executive Officer so appointed under Section 53 of the Act of 1956 by the State Government continues to exercise the powers till his appointment is not terminated by the State Government. The learned Additional Senior Government Advocate therefore submitted that taking into account that the Petitioners herein had violated Section 171 of the Act of 1956, the Executive Officer i.e. the Respondent No.2 had properly exercised his jurisdiction with due approval of the Respondent No.4. The learned Additional Senior Government Advocate further submitted that the perusal of Annexure-14 under no circumstances can be said to be an appeal/revision in terms with Section 296 of the Act of 1956. Be that as it may, the Nagaon Municipal Board had already been dissolved and the Deputy Commissioner, Nagaon is exercising the powers of the Board in terms with Section 26(5) of the Act of 1956 and with his approval, the notices dated 03.09.2021 have been issued, therefore the question of entertaining the appeal/revision by the Respondent No.4 does not arise.

27. On the basis of hearing the learned counsels for the parties, the following points for determination arises:

(a) Whether the Petitioners have violated the provisions of Section 171 of the Act of 1956 ?



(b) Whether the Executive Officer, Nagaon Municipal Board had the jurisdiction to issue the notices dated 03.09.2021 ?

(c) Whether the Respondent Authorities can exercise the powers conferred under the second proviso to Section 177(1) of the Act of 1956 thereby compounding the violations pertaining to the use of the building as well as the constructions of additional floors ?

(d) Whether the Respondent Authorities more particularly the Respondent No.4 was bound to decide the appeal filed by the Petitioners under Section 296 of the Act of 1956 ?

28. The facts above narrated makes it apparently clear that the Petitioner No.1 herein had applied for construction of three buildings in three different plots of land for residential purpose. The same would be apparent from a perusal of Annexure 2, 3 and 4. The permission which was granted was for G+3 and for residential purpose only. However, the Petitioner No.1 knowing fully well the same, had raised constructions of additional floors and has also changed the use of the buildings in question.

29. In the backdrop of the above, let this Court take note of Section 171 of the Act of 1956. In terms with Sub-Section (1) of Section 171 of the Act of 1956, no person shall erect, materially alter or re-erect, commence to erect materially, alter or re-erect any building without the sanction of the Board. In terms with Sub-Section (2) of Section 171, every person who intends to erect, materially alter or re-erect any building shall give notice in writing to the Board of such intention. As the Petitioners admitted that they did not do so and did not obtain any sanction from the Nagaon Municipal Board, this Court opines

that the Petitioners had violated the provisions of Section 171(1) and 171(2) of the Act of 1956.

30. At this stage, it is relevant to take note of Section 177 of the Act of 1956 which stipulates the power of the Board in the case of disobedience. In terms with Sub-Section (1) of Section 177, if a building has begun, materially altered or erected without the sanction as required under Section 171(1) or without notice as required by Section 171(2), the Board may by notice to be delivered within a reasonable time, require the building to be altered or demolished as it may deem necessary, within the space of thirty days from the date of service of such notice. The second proviso to Section 177(1) of the Act of 1956 stipulates that the Board may at a meeting instead of requiring alteration or demolition of any such building accept by way of composition such sum as it may deem reasonable. The learned counsel for the Petitioners had harped on this proviso and submitted that the Petitioners' buildings instead of being altered or demolished, the Board should accept by way of composition such sum as it may deem reasonable. The question therefore arises as to whether the said proviso can be made applicable to the facts of the instant case. This Court would deal with this aspect of the matter at a subsequent stage of the instant judgment but before that, let this Court first take note of the second point for determination as to whether the Executive Officer, Nagaon Municipal Board had the jurisdiction to issue the notices dated 03.09.2021 inasmuch as the said point of determination touches on the jurisdiction of the Authority concerned.

31. The fact that the Petitioner No.1 had violated the provisions of Sub-Section (1) and (2) of Section 171 is not in dispute. Be that as it may, this

Court finds it very pertinent to take note of Section 53 of the Act of 1956 which stipulates the Appointment of the Executive Officer and the powers and functions. The said Section being relevant is quoted hereinbelow:

**“53. Appointment of Executive Officer.—***(1) The State Government shall appoint an Executive Officer for each and every Municipal Board and Town Committee and shall bear the expenditure in respect of pay and allowances of such Executive Officers. In the Municipalities having a population of one Lakh or more, an Officer of the level of Additional Deputy Commissioner shall be posted as Executive Officer and in all other cases, an Officer not below the rank of a Revenue Circle Officer shall be posted as an Executive Officer. The Government may put one Executive Officer in the charge of more than one Municipal Board or a Town Committee, if contiguously situated in the same District or Sub-Division, provided that the distance of the two should not be more than twenty kilometers.*

*(2) The Executive Officer shall function under the overall control of the Board and under the direct supervision of the Chairman. He shall be further subject to the directions issued to him by the Director or the State Government. All financial matters, particularly those relating to the implementation of schemes by the Municipality funded by the Government of India or the State Government, shall invariably be routed through him after due scrutiny and he shall remain responsible for any act of omission or commission. So far as the functions under the provisions of the Act are concerned, the Executive Officer shall render all assistance to the Chairman and the Board.*

**“(3) (i)** *Every order or instrument of the Municipal Board or the Town Committee shall be expressed to be made in the name of the Municipal Board or the Town Committee concerned, as the case may be.*

*(ii) Save in cases where an Officer has been specifically empowered to sign an order or an instrument of the Municipal Board or the Town Committee, every order or instrument shall be signed by the Executive Officer with approval of the Chairman,*

*Municipal Board/Town Committee and such signature shall be deemed to be proper authentication of such order.*

*(iii) The Executive Officer shall sign any Notification of the Municipal Board or Town Committee on behalf of the Municipal Board or Town Committee with approval of the Chairman, Municipal Board/Town Committee for publication in the Official Gazette."*

32. From a perusal of the above Section, it would be seen that the State Government shall appoint an Executive Officer for each and every Municipal Board and Town Committee and shall bear the expenditure in respect of the pay and allowances of such Executive Officers. Therefore, Sub-Section (1) of Section 53 makes it clear that the appointment of the Executive Officer would be by the State Government and his appointment is at the pleasure of the State Government. At this stage, if Section 10 of the Act of 1956 is taken note of, it would show that the Municipal Board has perpetual succession and is not dependent on the terms of the Commissioners. Further, the pay and other emoluments of the Executive Officer is determined and paid by the State Government. In terms with Sub-Section (2) of Section 53, the Executive Officer shall function under the overall control of the Board and under the direct supervision of the Chairman and is also further required to act subject to the directions issued to him by the Director of Municipal Administration or the State Government. Sub-Section (3) of Section 53 of the Act of 1956 was added by the Assam Municipal (Amendment) Act, 2015. It stipulates in terms with Clause (i) that every order or instrument of the Municipal Board or the Town Committee shall be expressed to be made in the name of the Municipal Board or the Town Committee concerned as the case may be. In terms with Clause (ii) of Sub-Section 3 of Section 53, every order or instrument shall be signed by

the Executive Officer with the approval of the Chairman, Municipal Board/Town Committee and such signature shall be deemed to be proper authentication of such order. Clause (iii) of Sub-Section 3 of Section 53 of the Act of 1956 further empowers the Executive Officer to sign any notification of the Municipal Board or the Town Committee on behalf of the Municipal Board or the Town Committee with the approval of the Chairman, Municipal Board/Town Committee for publication in the Official Gazette. Therefore, from the above, it is clear that the appointment of the Executive Officer is made by the State Government and he discharges his functions at the pleasure of the State Government. Further to that, it is the Executive Officer who has to sign every order or instrument however, with the approval of the Chairman, Municipal Board/Town Committee.

33. This Court further finds it relevant at this stage to take note of that on 04.04.2020, the tenure of the Nagaon Municipal Board had expired in terms with Sub-Section (1) of Section 26. The resultant affect of the expiry of the tenure is that the State Government has to direct the Deputy Commissioner or the Sub-Divisional Officer as the case may be of the respective jurisdiction to take over the charge of the Board for a period not exceeding 12 months from the date of expiry of the term of the Office of the Commissioners and all powers and duties under the Act of 1956 which are exercised and performed by the Board, whether at a meeting or otherwise, shall be performed by the Deputy Commissioner or the Sub-Divisional Officer (Civil) or by the Officer nominated by the Deputy Commissioner or the Sub-Divisional Officer (Civil) until a new board is constituted after the election of the Commissioners. This is the mandate of Sub-Section (5) of Section 26 of the Act of 1956. This provision makes it clear that the Deputy Commissioner or the Sub-Divisional Officer

(Civil) or the person duly nominated would continue to exercise and perform the powers and duties till a new Board is not constituted.

34. Therefore, in the present facts so admitted, it transpires that the Deputy Commissioner, Nagaon stepped into the shoes of the Board to exercise the powers and perform the duties of the Nagaon Municipal Board. Under such circumstances, a conjoint reading of Section 53(3)(ii) with Sub-Section (5) of Section 26 of the Act of 1956 would show that if the term of the Municipality had expired, then in that case, the approval which is required to be taken by the Executive Officer, Nagaon Municipal Board, for issuance of any order/instrument has to be done with the approval of the concerned Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be. In that view of the matter, this Court is of the opinion that the Executive Officer, Nagaon Municipal Board had the jurisdiction to issue the impugned notices as well as the notices dated 03.09.2021. This therefore answers the second point for determination.

35. The third point for determination is as to whether the second proviso to Section 177 of the Act of 1956 can be put to use for compounding the violations pertaining to the use of the building as well as the construction of the additional floors. This Court had duly taken note of the Zoning Regulations which were published vide notification No.TCP.31/2000/54 dated 12.06.2000. It categorically mandated as to what items are compoundable and what are non-compoundable items. Clause 9.2.1 of the said Zoning Regulations is very pertinent and the same is quoted hereinunder:

**“9.2.1.** *All provision of zoning regulations/bye-laws except items given below shall not be compounded/regularized and shall have to be rectified by*

*alteration/demolition at the risk and cost of owner.*

***Compoundable item:***

1. *Coverage ---- Maximum of 15%*
2. *FAR --- Maximum of 10%*
3. *Set back --- Up to 2 feet 6 inches*
4. *Open Space --- Maximum 10% reduction*
5. *Total height of building – 1.5%*

***Non-compoundable item:***

1. *Use of building*
2. *Addition of extra floor*
3. *Parking norms*
4. *Projection/encroachment of public land"*

36. From the above quoted Regulation, it would be seen that all provisions of the zoning regulations/bye-laws except items given in the said Regulation shall not be compounded/regularized and shall have to be rectified by alteration/demolition at the risk and cost of the owner. The non-compoundable items includes the use of the building and the addition of extra floors amongst others. Under such circumstances, it is the opinion of this Court that the Nagaon Municipal Board or even the Deputy Commissioner, Nagaon while exercising the powers and functions of the Board cannot exercise the powers stipulated in the second proviso to Section 177(1) to compound the illegal

construction of additional floors as well as also the use of the building in question.

37. In addition to the above, this Court finds it very pertinent to take note of Rule 32 of the Assam Notified Urban Area (Other than Guwahati) Building Rules, 2014 which deals with unauthorized constructions. The said Rule is quoted hereinbelow:

**“32. Un-authorised Construction.—**

(1) *In case of unauthorized construction, the Authority shall take suitable action, which may include demolition of unauthorized works and sealing of premises.*

(i) *It shall be lawful for the Authority to demolish the construction carried out in excess of the approval plan or not in conformity with the provisions of these rules. The Authority shall make an order of such demolition.*

(ii) *It shall be lawful for the Authority to proceed for sealing of the building that has been constructed without a sanction plan or the construction undertaken is in deviation of the approved plan. The Authority shall make an order of such sealing.*

(2) *When any erection of work or building has been sealed, the Authority for the purpose of rectification of the deviation or for the purpose of demolishing, may order the seal to be removed. No person shall be allowed to remove the seal, except under an order by the authority.*

(3) *Any deviation from approved plan shall be corrected by demolition of the unauthorized part of the construction except that if a building or part thereof has been constructed without obtaining the required building permit from the Authority but in conformity with Building Byelaws. Tolerance in case of dimensional errors shall be permitted up to 0.15m.”*



The above quoted Rule and more particularly Sub-Rule (1) of Rule 32 would show that in the case of unauthorized constructions, the Authority as defined under Rule 2(5) would take suitable actions which would include demolition of unauthorized works and sealing of the premises. Sub-Rule (3) of Rule 32 of the said Rules of 2014 though permits any construction, if otherwise in conformity with the building byelaws but the tolerance in case of dimensional errors can only be permitted upto 0.15 m which corresponds to only 0.49 ft. Therefore, in the opinion of this Court, the second proviso to Section 177 of the Act of 1956 cannot permit either the Municipal Board or the Deputy Commissioner to compound the violations pertaining to use of the building and the construction of the additional floors beyond the permission granted.

38. This Court further finds it relevant at this stage to deal with the contention of the learned counsel for the Petitioner as to the effect of granting of the Trade Permission by the Nagaon Municipal Board and as to whether the same amounts to regularizing the use of the building in question. In the opinion of this Court, the said submission is misconceived inasmuch as the trade permission so granted on yearly basis is in the nature of tax on trades, profession, callings and employment which has no relation to the use of the building for which the permission was granted. A perusal of the Assam Notified Urban Areas (Other than Guwahati) Building Rules, 2014 clearly shows that the requirement for a residential use building and an institutional use building are very different. For example, the road access in terms with Rule 36 of the Rules of 2014 shows that minimum road width for residential and institutional is 3.60 meter and 9 meter respectively. Under such circumstances also, in the opinion of this Court, the use of the buildings in question cannot be allowed to change



by regularization or compounding.

39. The fourth point for determination pertains to as to whether the Respondent Authorities more particularly the Respondent No.4 was bound to decide the appeal/revision filed by the Petitioners under Section 296 of the Act of 1956. This Court have duly taken note of the fact that post 04.04.2020, the powers and functions of the Board is being exercised by the Deputy Commissioner, Nagaon which is an admitted case and as such, the question of Deputy Commissioner, Nagaon to exercise the powers under Section 296 of the Act of 1956 does not arise inasmuch as all orders and instruments issued by the Executive Officer on behalf of the Nagaon Municipal Board as already held post 04.04.2020 has been done so with the approval of the Deputy Commissioner, Nagaon. Under such circumstances, the question of concerned Deputy Commissioner deciding the appeal/revision does not arise.

40. Taking into account the above discussions and the determinations so made, this Court is of the opinion that this is not a fit case for issuance of a writ in the nature of certiorari for setting aside the impugned notices including the notices dated 03.09.2021 issued by the Executive Officer, Nagaon Municipal Board. Consequently, the instant writ petition therefore stands dismissed and the interim order so passed earlier stands vacated. No costs.

**JUDGE**

**Comparing Assistant**