GAHC010036782024

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

Case No. : WA/67/2024

DILIP KUMAR BORAH AND ANR.
S/O- LT. PHULAI BORA, R/O- BIREN MAHANTA PATH, WARD NO. 10, DIST.- NAGAON, ASSAM 782001

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 Appellant(s) : Mr. S.P. Roy, Advocate
Mr. J. Das, Advocate

For the respondent(s) : Mr. D.K. Sarmah,
Addl. Sr. GA, Assam

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE SUMAN SHYAM

Date of Hearing : 27.02.2024
Date of Judgment : 07.03.2024

JUDGMENT & ORDER
(CAV)

(Vijay Bishnoi, CJ)

1. Heard Mr. S.P. Roy, learned counsel appearing for the appellants and Mr. D.K. Sarmah, learned Additional Senior Government Advocate, Assam, appearing for the respondents.

2. This intra-court writ appeal is filed by the appellants being aggrieved with the judgment and order dated 22.01.2024, passed by the learned Single Judge in WP(C) No. 5015/2021, whereby the writ petition filed by the writ petitioners/appellants has been dismissed.

3. The brief facts of the case are that the appellant No. 1 had applied before the Nagaon Municipal Board seeking permission for construction of three buildings in different plots of land for residential purpose and same was granted by the Nagaon Municipal Board.

4. The details of the plots, the dates of applications filed by the appellant No. 1 seeking permission to construct the buildings for residential purpose on the said plots and the subsequent permission granted by the Nagaon Municipal board have already been noted by the learned Single Judge in detail in the impugned judgment and order and, therefore, we are not repeating the same here.

5. The Executive Officer, Nagaon Municipal Board issued three notices to the appellants, i.e. on 30.06.2021, 20.07.2021 and 18.08.2021 stating that appellant No. 1 had been granted permission by the Municipal Board to build a G+3 residential building, but he had constructed a G+6 residential house and was running a Junior College in it and, therefore, the appellant No. 1 was asked to show cause. The appellant No. 1 replied to all the three notices wherein he admitted that though permissions were granted for constructing G+3 building, however, construction was raised of G+6 building. In the reply to the show cause notices, the appellant prayed for regularising the additional floors raised by him in violation of the permission granted by the Municipal Board. The Executive Officer, Nagaon Municipal Board thereafter issued three separate orders/notices dated 03.09.2021 while exercising powers under section 177 of the Assam Municipal Act, 1956 (hereinafter referred to as "Act of 1956") and the appellant No. 1 was asked to remove the unauthorised construction within thirty days with a caution that if the appellant No. 1 failed to remove the unauthorised constructions within the stipulated time, the Board would be constrained to demolish the unauthorised constructions.

6. It is noticed that in the writ petition the appellants/petitioners challenged the demolition notices dated 30.06.2021, 20.07.2021 and 18.08.2021, but did not challenge the orders/notices dated 03.09.2021 whereby the appellant No. 1

was asked to remove the unauthorised constructions. However, the learned Single Judge proceeded to examine the legality and validity of the orders/notices dated 03.09.2021 and, in our opinion, rightly so.

7. The appellants/petitioners before the learned Single Judge argued that the Executive Officer of the Nagaon Municipal Board had no jurisdiction to issue the orders/notices dated 03.09.2021 as the term of the Nagaon Municipal Board had expired on 04.04.2020 and, therefore, 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 orders/notices dated 03.09.2021.

8. Dealing with the said contention of the learned counsel for the appellants/petitioners, the learned Single Judge has concluded that the Executive Officer, Nagaon Municipal Board had the jurisdiction to issue the impugned orders/notices dated 03.09.2021. While coming to the said conclusion, the learned Single Judge has observed as under:

> "*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 Boad, 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."

9. Having gone through the provisions of the Act of 1956, on which the learned Single Judge has placed reliance, we are of the view that the learned Single Judge has rightly held that the Executive Officer of the Nagaon Municipal Board had the jurisdiction to issue the impugned orders/notices dated 03.09.2021.

10. It was also argued on behalf of the appellants/ petitioners before the learned Single Judge that under the powers conferred by the 2nd proviso to section 177(1) of the Act of 1956, the Municipal Board had the power to compound the violations pertaining to the use of the building as well as the construction of the additional floors. The learned Single Judge, while rejecting the said contention, has concluded that the 2nd proviso to Section 177(1) of the Act of 1956 does not permit either the Municipal Board or the Deputy Commissioner to compound the violations pertaining to the use of the building as well as the construction of the additional floors beyond the permission granted. While dealing with the said contention of the learned counsel for the appellants/ petitioners, the learned Single Judge has observed as under:

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 herein-under:

> "*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."

11. Having gone through the provisions of section 177, specifically the 2nd proviso to section 177 and the provisions of the Assam Notified Urban Area (Other than Guwahati) Building Rules, 2014 (hereinafter referred to as "Building Rules of 2014") as well as the Zoning Regulations published in the Notification dated 12.06.2000, we are of the opinion that the learned Single Judge has not committed any illegality in holding that the Municipal Board or the Deputy Commissioner cannot compound the violations pertaining to the use of building and the construction of the additional floors in violation of the permission granted.

12. Learned counsel appearing for the appellants has argued that the learned Single Judge has failed to take into consideration that as per Point (vi) of Schedule VIII of the Building Rules of 2014, the Muncipal Board can regularise an unauthorised construction by charging the fee as provided under the Building Rules of 2014. It is contended that the learned Single Judge has altogether ignored this aspect of the matter and has illegally held that the Municipal Board has no power to compound the unauthorised construction.

13. It is noticed that no such argument referring to point No. (vi) of Schedule-VIII of the Building Rules, 2014 was advanced before the learned Single Judge, nor was it specifically pleaded in the writ petition and, in such circumstances, there was no occasion for the learned Single Judge to consider the argument of the learned counsel for the petitioners on this aspect. Be that as it may, we have considered the said argument of the learned counsel for the appellants, but for rejection only.

14. Schedule-VIII of the Building Rules of 2014 relates to Rule 18 of the Building Rules of 2014. Rule 18 of the said Rules provides for payment of fees for various permissions for any development or sale of land. It speaks about the rates of application fees for erection of new residential building (including group housing, institutional building, religious, cultural etc.) and also speaks about application fees for re-erection, addition or alteration of an existing building. In Schedule-VIII different rates are prescribed for erection of new residential building or non-residential building, cinema, fuel station etc. It also provides the rates of application fees for obtaining NOC for sale/transfer/sub-division of land and for other purposes. However, point No. (vi) of Schedule-VIII provides that if a building or a part of the building has been constructed unauthorisedly, i.e. without obtaining required building permission from the authority as required by these Rules, the same shall be compounded at the rates prescribed, provided that the construction otherwise in conformity with the provisions of these Rules.

15. After carefully going through the Building Rules, 2014, it can be gathered that there is no provision for regularising any unauthorised construction except regularisation of unauthorised constructions which are being carried out up to tolerance in case of dimensional errors. As per definition of "unauthorised construction", as provided in Rule 2(122) of the Building Rules, 2014, it means

erection or re-erection, addition or alterations which is not approved or sanctioned. There is no provision under the Building Rules, 2014, which authorises the Municipal Board to regularise any constructions raised in violation of the construction permission, such as construction of a commercial building in place of residential building.

16. To our understanding, the expression "unauthorised construction" used in point No. (vi) is in reference to only those unauthorised constructions which are being carried out up to the tolerance in case of dimensional errors as per sub-Rule (3) of Rule 32 of the Building Rules of 2014. The learned Single Judge has gainfully taken into consideration the provisions of Rule 32 of the Building Rules of 2014 while coming to the conclusion that the Municipal Board cannot compound the violations pertaining to the use of the building as well as the constructions of the additional floors beyond the permission granted and can only regularise those constructions which are in conformity with the Building Bye laws. Hence, we do not find any merit in the above contention of the learned counsel for the appellants/petitioners.

17. Learned counsel representing the appellants further argued that in the present case the appellants have only departed from the authorised plan and such departure cannot be termed as a construction without sanction. Learned counsel for the appellants has placed reliance on the decision of the Hon'ble Supreme Court, rendered in the case of ***Muni Suvrat-Swami Jain S.M.P. Sangh vs. Arun Nathuram Gaikwad and Others,*** reported in ***(2006) 8 SCC 590*** and has argued that the Hon'ble Supreme Court has held that mere departure from the authorised plan and putting up construction without sanction does not *ipso facto* justify demolition of the structure.

18. In the present case, it is an admitted position that permission was granted

to the appellant No. 1 for construction of a G+3 building for residential purpose. However, the appellant has constructed a G+6 building and has used the same for running a college, which is obviously other than residential purpose. In our view, it is not a simple case of raising construction by merely departing from the authorised plan, but is a case of clear violation of the permission granted by the Municipal Board. As noted above, the Municipal Board had granted permission to the appellant No. 1 for constructing a residential building, whereas the appellants have raised construction of a commercial building and have used the same for running a college and, therefore, the judgment rendered by the Hon'ble Supreme Court in ***Muni Suvrat-Swami Jain*** (supra), relied upon by the learned counsel for the appellants is of no help to the appellants.

19. Learned counsel for the appellants further argued that the learned Single Judge erred in concluding that the Deputy Commissioner, Nagaon could not have exercised the power under section 296 of the Act of 1956 as the Executive Officer of the Nagaon Municipal Board had issued the impugned orders/notices dated 03.09.2021 with the approval of the Deputy Commissioner. We may not be in agreement with the said view of the learned Single Judge, but we have to ascertain whether any such appeal/revision was actually filed by the appellants/petitioners and the same was pending. It is the case of the appellants is that vide Annexure-14 they had preferred an appeal/revision challenging the impugned orders/notices dated 03.09.2021.

20. From a perusal of Annexure-14 it cannot be said that the appellants challenged the validity of the orders/notices dated 03.09.2021, or made any prayer to suspend or quash the execution of the said orders/notices, or any resolution passed by the Nagaon Municipal Board. The only request made by the appellants to the Deputy Commissioner vide Annexure-14 was that some

time may be granted to them so that they could shift the college from the building in question to a new campus. At this stage, it would be useful to quote the relevant portion of Anneuxre-14, which is as under:

"*Dear Madam*

I would like to place before you the following few lines for your kind perusal. That I am heading a society noted above for the development of Science and Arts education in greater Nagaon area having 1500 students. My result of the college since establishment of the college in the year 2005 is very satisfactory and 62 students passed out with standing positions.

My college buildings are situated in the heart of Nagaon town and during construction period there were some compundable violation on our part.

The college building are constructed and these are being very temporary and we are shifting to our new campus in Uppathori and arrangements are made.

As the college being started from 6th September we don't have any option but to continue in this buildings till such time the new building is ready for accommodation. We are ready to pay the penalty as per rule and "AS BUILT DRAWING" we may be given sizable time for submission of drawing, floor area ration (FAR) and area statement. We request you to allow us for submission of the same and to accept the penalty.

We are law abiding citizens and running educational institutions to cater the needs of quality education."

21. The said document at Annexure-14 cannot be termed as a revision or appeal preferred by the appellants with a prayer for suspending or quashing the execution of any resolution or order passed by the Nagaon Municipal Board. In such circumstances, we are of the view that when no such appeal/revision was filed by the appellants before the Deputy Commissioner challenging the orders/notices dated 03.09.2021, no question arose to decide the same by the Deputy Commissioner.

22. Learned counsel for the appellants also argued that as mandated by the Hon'ble Supreme Court in ***Kishansing Tomar vs. Municipal Corporation of the city of Amedabad and Others,*** reported in ***(2006) 8 SCC 352,*** the elections of every

municipality are required to be completed in a time-bound manner and if no such elections are held, any decisions taken by the executives of such municipality are liable to be interfered with. So far as this argument of the learned counsel for the appellants is concerned, we are of the view that certainly the elections of municipalities are required to be conducted within time on expiry of its duration, but that itself cannot provide a ground to any person to violate the law and to claim that since elections are not held in time, no action can be taken by the authorities concerned to correct the said violations.

23. In view of the above discussions, we do not find any case for interference. Hence, this intra-court appeal is dismissed.

No order as to costs.

JUDGE **CHIEF JUSTICE**

Comparing Assistant