THE HIGH COURT OF JUDICATURE AT BOMBAY : NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3746 OF 2005.

Mr. N.K. Harchandani,
aged about 50 years, Occu.: Business,
R/o. 7th Floor, Poonam Plaza,
Palm Road, Civil Lines, Nagpur,
Tahsil & District : Nagpur(Maharashtra)

.. **PETITIONER**.

// VERSUS //

(1) The State of Maharashtra,
through its Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai – 32.

(2) Nagpur Municipal Corporation,
Nagpur, through its Commissioner,
Civil Lines, Nagpur.

.... RESPONDENTS.

Shri M.G.Bhangde, Senior Counsel for Petitioner.
Shri A.G. Mujumdar, A.P.P. for Respondent/State.
Shri S.K. Mishra, Adv. for Respondent No.2.
Shri S.P.Dharmadhikari, Adv. for Intervenors.
Shri Sunil V. Manohar, Adv.for Intervenors.

CORAM : R.C. CHAVAN, J.
DATED : APRIL 13, 2006.

ORAL JUDGMENT :

This petition and the applications for intervention expose

how lack of precision in the legal regime governing developmental activities in Nagpur city have enabled people without scruples to take the system for a ride. The petition and the Civil Applications pose some very pertinent questions. The petition is therefore, **admitted** and taken up for hearing forthwith.

2. This judgment disposes of the writ petition, whereby the petitioner has taken exception to the orders passed by Nagpur Municipal Corporation and State of Maharashtra in respect of petitioner's building plans, as also three applications for intervention.

3. Apart from Nagpur Municipal Corporation, the local authority, Nagpur has an Improvement Trust as well, which regulates development of the city of Nagpur. A well intentioned measure to have an independent body, the Nagpur Improvement Trust, devoted to development of city, led to duality of authority, and eventually absence of any regulation, due to pretended confusion as to the authority which was supposed to control such activity. The facts to be unfolded would disclose as to how the petitioner took advantage of this divided control in order to avoid all regulation while constructing his building.

4. The petitioner became owner of parts of land bearing City Survey No.2217/1 by two transactions. By each of these transactions the petitioner acquired 5576.20 sq.mt. of land, as recorded by mutation entry Nos. 770 and 771, dated 10.08.1990 in the property card of the land (Annexure “Y” to the petition). On 26.07.1991 a plan for construction over the land was sanctioned but was abandoned by the petitioner. On 17.02.1992 the Nagpur Municipal Corporation sanctioned another plan of construction over the land. This plan included a basement, user whereof was not specified, ground floor, first floor, service floor and six more floors. A third plan was submitted by the petitioner to the Municipal Corporation on 21.09.1995 with some changes over the 1992 plan. On 04.04.1997 the Corporation approved this plan with modifications, rejecting the plan for entire seventh floor, reducing the building height, and specifying the user of basement for parking.

5. In 1997 and 1998 the petitioner executed sale deeds in favour of the applicants in Civil Application No.2236 of 2006 for office blocks in the basement and top floor i.e. seventh floor of the building. While registering these sale deeds the parties had produced before the Sub-Registrar a “No Objection Certificate” from the Nagpur Improvement

Trust and not from Nagpur Municipal Corporation. The petitioner also sold on 02.07.2001 to one Aspi Bapuna, applicant in Civil Application No.4798 of 2005, 63025.25 sq.ft. open land by two transactions for over Rs.3,93,00,000/-.

6. On 26.08.2004 respondent No.2, Nagpur Municipal Corporation, issued a notice to the petitioner under Section 53 of the MRTP Act (the Maharashtra Regional & Town Planning Act, 1966) specifying several irregularities in the construction and stating that the construction was not in accordance with the building permit. The notice called upon the petitioner to demolish the structure mentioned in the schedule and to stop unauthorised user. The seventh floor was found to be unauthorised and the building was three meters over the sanctioned height. Notice also specified that the shops were constructed in the basement area meant for parking. The petitioner submitted revised plans to the Nagpur Municipal Corporation on 28.10.2004 which were rejected by the Corporation on 22.11.2004.

7. The petitioner preferred an appeal under Section 47 of the MRTP Act before the “Minister/ Secretary of State of Maharashtra.”

After hearing the parties the appeal was dismissed on 25th February, 2005. Aggrieved thereby the petitioner has filed this petition seeking to have the notice dated 26.08.2004 and the order dated 22.11.2004 passed by the Nagpur Municipal Corporation, as also the appellate order passed by respondent No.1 State Government on 25.02.2005 quashed and set aside. The petitioner also sought interim relief of stay of the impugned orders pending decision of the petition.

8. At this stage, it may be useful to recount the contentions of the intervenors, whose applications for intervention are being disposed of by this very judgment. Civil Application No. 4799/05 has been filed by Shri Vijay Babhare, Municipal Corporator, and former Chairman of Standing Committee of the Nagpur Municipal Corporation. Civil Application Nos.2236/06 and 4798/05 are filed by purchasers of shops, office blocks and open site from the petitioner. Before hearing of the applications and the petition commenced, I had carefully gone through the three applications for intervention and found that they were meritless attempts to expand the scope of inquiry of the dispute in the present writ petition. An application for intervention can be permitted only if intervenor's participation is essential for deciding the *lis* before

the Court. As the discussion to follow would show the obfuscatory points sought to be raised by the intervenors would have obscured the issues involved, which deserved to be discouraged. Even so, the learned counsel for the intervenors were given opportunity to address to show if their prima-facie meritless applications merited any consideration.

9. Civil Application No.4799 of 2005 was filed by Shri Vijay Babhare, former Chairman of the Standing Committee of Nagpur Municipal Corporation. By this application he seeks to highlight his role in the attempt of the Corporation to strictly enforce the building Regulations in the instant case. He also contended that his participation was necessary because the petition and also petitioner's appeal under Section 47 MRTP Act contained allegations of malafides against him which he was entitled to answer. When the question of tenability of this application was considered, amusingly, the learned counsel for the petitioner first stated that he would withdraw allegations of malafides, but on second thought he withdrew the concession.

10. Since as the Chairman of the Standing Committee, at the relevant time, or as city father, intervenor Shri Vijay Babhare did not have power or authority to regulate petitioner's construction, merely because some allegations of malafides are included in the petition, it would not be necessary to enlarge the scope of present inquiry. As already stated, such intervention would tend to obscure the principal issues involved in the lis. As an influential city father, rather than indulging in this forensic foray, the applicant could concentrate on setting right affairs of the Corporation, to avoid recurrence of similar defiance of building regulations. Had the Municipal Authorities taken timely steps when the construction was going on, or when parts of the structure were being sold or occupied, things would not have come to this pass.

11. Civil Application No.2236 of 2006 is filed by purchasers of, ironically, the very parts of the building which offend the plan approved in the year 1997, and which is the subject matter of the notice issued under Section 53. Applicants claim to have purchased the shops in the basement and on seventh floor by various sale deeds in the years 1997 and 1998 for over a crore of rupees. These sale deeds recite that even undivided share of land was sold to the applicants.

Therefore, they assailed the notice under Section 53 of the MRTP Act on the ground that they are entitled to the notice, since they are owners and occupiers of the structures, use whereof is sought to be discontinued by the Corporation. The applicants state that Nagpur Municipal Corporation Authorities have not only allowed mutations to be carried out in their names, but also have taxed their structures, and, in view of this, before their structures can be adversely affected they were entitled to notice under Section 53 of the MRTP Act.

12. Sale deeds in favour of applicants in C.A. No.2236/06 were executed in the years 1997 and 1998 after Nagpur Municipal Corporation granted approval to the plan submitted by the petitioner with modifications, which specifically ruled out construction of seventh floor and use of basement for any other purpose than parking. Thus, at the time of sale, the structures sold to intervenors were unauthorised. It can not be disputed that a builder would not be in a position to convey any structure without obtaining completion certificate from the Municipal Corporation, as also that no person can be permitted to occupy any structure without obtaining necessary certificate from the Corporation. Therefore, sale deeds executed in

defiance of these, requirements would not clothe the intervenors with any rights, which their vendor himself did not possess. It was necessary for the applicants to have checked up with the Municipal Authorities whether plans for construction of the structures which they were going to purchase were duly sanctioned or not.

13. In the discussion on the contention raised by the petitioner which follows it may be seen that according to the petitioner Nagpur Improvement Trust had nothing to do with the development of the site in question. The petitioner had submitted all his plans to Nagpur Municipal Corporation itself. Yet when the sale deeds were presented to the Sub-Registrar for registration, a No Objection Certificate obtained from Nagpur Improvement trust, which had nothing to do with the matter, was proceeded. It is possible that the Sub-Registrar would have had no occasion to know as to which of the areas are in control of Nagpur Municipal Corporation or Nagpur Improvement Trust. After the sale deeds the Municipal Authorities also blindly effected mutations and taxed the premises. However, since the transaction itself was inherently defective and fraudulent to the extent of pushing N.I.T.'s certificate for getting documents registered, further mutations

or taxation of the property does not clothe the intervenors with any right. Since their occupation itself is unauthorised they cannot claim that they too are entitled to protract the litigation by insisting upon receiving a notice under Section 53 of MRTP Act. In any case, lapses on the part of the employees of the Municipal Corporation cannot result in negating the duty of the Corporation to properly regulate the construction activities in the city. It would be useful for the city father, who had sought to intervene in the petition, to ask the Corporation to frame necessary Rules for effecting mutation and taxing the properties only after ensuring that the property had come into existence with necessary sanctions. The Municipal Authorities may have been taxing unauthorised structures too, because the Municipality has to raise resources to provide services. Therefore, such taxation may not operate as estoppel. The Municipal Authorities can not be exempted from taking action against such unauthorised structures merely because they are taxed. Even so,to avoid any misunderstanding in this behalf it would be useful for the Municipal Authorities to consider this aspect and deal with it appropriately.

14. Though these intervenors claim to have purchased the

properties in the years 1997 and 1998 and had got their properties promptly mutated in the municipal records, curiously copy of property register card filed by the petitioner at Annexure “Y” at pages 191 to 197 of the petition does not record any such sales in the years 1997 or 1998, through it mentions all mutations upto 2003. Deliberate production of no objection certificate of Nagpur Improvement Trust, which had nothing to do with the matter, concealing that the structures in question had not been sanctioned by the Nagpur Municipal Corporation and getting necessary mutations promptly effected in the Corporation records, while neglecting to have similar mutations in the City Survey record clearly shows the complicity of intervenors in the fraudulent designs of petitioner. In view of this, since the intervenors only seek to aid and abet the unauthorised activity of the petitioner, the application does not deserve to be considered.

15. Civil Application No.4798 of 2005 is filed by Bapunas, who purchased 63025.25 sq.ft. of open land by two transactions dated 26.09.2000 and 02.07.2001 for consideration of over Rs.3,93,00,000/-. Though initially the learned counsel for the petitioner attempted to

submit that there was enough F.S.I. left to enable Bapunas to construct on the site purchased by them, later he had no inhibition in categorically stating that what was sold to Bapunas was the leftovers in the land around 63000 sq.ft. and that no construction could be raised on that land. This implies that Bapuna had purchased the land for valuable consideration of Rs.3,93,00,000/- without any prospect of receiving any return since no development could take place on that land. The learned counsel for intervenor Bapunas submitted that precisely because of (mis)appropriation by the petitioner of rights of Bapunas to construct on their land, Bapunas want to intervene in the petition.

16. As already observed, the question in the petition relates to orders of the Municipal Authorities and the State in respect of structure in question. Bapuna as well as other purchasers/ intervenors who have filed Civil Application No.2236 of 2006 would have appropriate remedy in the competent Civil Court if they find that they have been duped, having received nothing in exchange of valuable consideration paid by them to the petitioner. They cannot be allowed to intervene in the petition to expand the scope of inquiry. Therefore, all the applications

for intervention bearing Civil Application Nos. 4798/2005, 4799/2005 and 2236 of 2006 are rejected.

17. With this lengthy prelude, I would proceed to consider the arguments advanced on merits of the petition by Shri M.G. Bhangde, learned Senior Counsel for the petitioner, Shri Mujumdar, learned Assistant Government Pleader for respondent No.1-State of Maharashtra and Shri Mishra, learned counsel for Respondent No.2 Nagpur Municipal Corporation.

18. The learned counsel for the petitioner assailed the order passed by the Principal Secretary to the Government of Maharashtra on 25.02.2005 on the ground that he had no jurisdiction to hear the appeal. For this purpose he relied on notification bearing No.TPS/295/505/CR-95/UD/12 dated 6th August, 2001 a copy whereof has been appended by the petitioner to Civil Application No.2231 of 2006 for amendment of the petition. By this notification issued in exercise of powers conferred upon the Government under Sub-Section (1) of Section 151 of the MRTP Act, and in supersession of earlier orders, the Government of Maharashtra directed that the Chief

Minister or Minister for Urban Development shall hear and decide all appeals filed under Section 47 of the MRTP Act arising from jurisdictions of the Municipal Corporations of the State and Special Town Planning Authorities appointed under Section 40 of the Act, excluding Vasai and Virar. The Minister of State for Urban Development was empowered to decide all the appeals under Section 47 arising from the jurisdiction of A-Class Municipal Councils and also appeals under Section 93 and 124(C) of the MRTP Act. The Principal Secretary was empowered to decide all the appeals pertaining to Vasai and Virar Sub-Division of Thane District under Section 47 of the Act. The Director of Town Planning was empowered to continue to hear and decide appeals under Section 47 of the Act pertaining to B and C Class Municipal Councils, and all non-municipal Towns and Nagar Panchayats. Clause (2) of the notification which is assailed by the learned counsel for the petitioner reads as under :

> *“(02) The aforementioned distribution of powers may be varied in particular cases depending upon their complexity and other relevant factors. Similarly, the Hon'ble Chief Minister/ Minister for Urban Development may further re-delegate the powers for hearing and taking decision to the Minister of State for Urban Development or the Principal Secretary-I to Government of Maharashtra, Urban Development Department.”*

19. The learned counsel for the petitioner submitted that Section 151 of the MRTP Act, under which this notification is issued, would enable the Government to delegate its powers to any authority. The notification delegates powers to the Chief Minister or the Minister for Urban Development in respect of areas within Nagpur city, and then goes on to permit the Chief Minister or the Minister concerned to re-delegate powers to Minister of State or the Principal Secretary. The learned counsel submitted that such re-delegation is impermissible because the section does not provide for such re-delegation.

20. The learned Assistant Government Pleader first submitted that this argument is not open to the petitioner who filed an appeal before the Principal Secretary. Copy of Memo of Appeal preferred by the petitioner (Annexure P to the petition) would show that it was addressed to the Principal Secretary as well. As rightly pointed out by the learned A.G.P. it is not that the petitioner had submitted to the jurisdiction of the Principal Secretary on being dragged before the Principal Secretary by adversaries. The petitioner had himself invoked that jurisdiction. Therefore, if the petitioner went to a wrong forum,

which had no jurisdiction, knowingly with a hope of getting relief in his favour, he cannot assail the order as nullity because the forum has decided against him. Further, if the petitioner did feel that the Principal Secretary lacked jurisdiction and therefore, order of the Principal Secretary would be nullity, the petitioner could have raised such contention before the Principal Secretary himself and could have sought to have the matter placed before the competent authority. Not having done so and having deliberately spent time before what, according to the petitioner, was a forum without jurisdiction, the petitioner cannot now take advantage of his own so called lapse to further postpone the consequences of notice under Section 53 of the MRTP Act. The learned A.G.P. stated that the Principal Secretary did have jurisdiction and had rightly decided the petitioner's appeal.

21. The contentions of the learned counsel for the petitioner that parties cannot clothe jurisdiction on an authority lacking jurisdiction by consent is unexceptionable. However, if that was so, just as the petitioner claimed to have ignored the directions given by the Municipal Corporation on 04.04.1997 on the plans submitted by him on 21.09.1995, because he believed that corporation lacked jurisdiction to

do so, he could have as well ignored the appellate order and avoided rushing to this Court. The whole conduct of the petitioner smacks of attempting to perpetrate the illegalities committed by him. Even so, since the point has been raised, I would consider the question as to whether the Principal Secretary indeed lacked the jurisdiction or not.

22. The learned counsel for the petitioner relied on judgment of the Supreme Court in *Sahni Silk Mills (P) Ltd., Vs. E.S.I. Corpn.*, reported at **(1994) 5 SCC 346** relating to the provisions of Section 94-A of the Employees State Insurance Act. A Regional Director issued notice under Section 85-B of the Act and imposed damages on the defaulting parties. The order was challenged before the E.S.I. Court and the High Court, which repelled the challenge. It was urged before the Supreme Court that powers under Section 85-B can be exercised only by the Corporation. Section 94-A permitted the delegation of powers of the Corporation. By notification dated 28.02.1976. The powers of the Corporation were made exercisable by the Director General or any other officer authorised by him. This part of the notification, which enabled the Director General to authorise any other officer to exercise powers, was under challenge. In this context,

following observations of the Supreme Court may be usefully reproduced :

> *"5. The courts are normally rigorous in requiring the power to be exercised by the persons or the bodies authorised by the statutes. It is essential that the delegated power should be exercised by the authority upon whom it is conferred and by no one else. At the same time, in the present administrative set-up extreme judicial aversion to delegation cannot be carried to an extreme. A public authority is at liberty to employ agents to exercise its powers. That is why in many statutes, delegation is authorised either expressly or impliedly. Due to the enormous rise in the nature of the activities to be handled by statutory authorities, the maxim delegatus non potest delegare is not being applied specially when there is question of exercise of administrative discretionary power.*
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> *12. It has to be borne in mind that the exercise of the power under Section 85-B (1) is quasi-judicial in nature, because there is always a scope for controversy and dispute and that is why the section itself requires that before recovering any such damages, a reasonable opportunity of being heard shall be given to the employer. The employer is entitled to raise any objection consistent with the provisions of the Act. Those objections have to be considered. After consideration of objections, if any, an order for recovery of damages has to be passed. The maxim delegatus non potest delegare was originally invoked in the context of delegation of judicial powers saying that in the entire process of adjudication a judge must act personally except insofar as he is expressly absolved from his duty by a statute. The basic principle behind the aforesaid maxim is that "a discretion conferred by statute is prima facie intended to be exercised by the*

authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute".

Since in that case, subsequently, by notification dated 19.02.1983, the Corporation resolved that the powers under Section 85-B of the E.S.I. Act could be exercised even by the Regional Director and other officers, the dispute did not survive. The Court, however, held that the Director General could not have delegated his powers to the other officers.

23. There can be no doubt that if the statute does not permit re-delegation, the authority to which the power is delegated in the first place would not be permitted to re-delegate the same to a subordinate authority. Therefore, in this case, it would have to be found out whether there is infact a re-delegation by the Chief Minister or Minister. The learned Assistant Government Pleader contended that Section 47 of the MRTP Act itself provides that appeal may be made to the State Government or an officer appointed by the State Government in this behalf, not below the rank of Deputy Secretary. Thus, the section itself provides that an appeal is competent to the

State Government, or to an officer appointed by the State Government. Clause (i) of Section 151 of the MRTP Act enables the State Government by notification in the official gazette to delegate any powers exercisable by it i.e. the State Government, under the Act or Rules to any officer appointed by the State Government. Thus, the notification dated 06.08.2001 issued under Section 151 of the Act would refer to the delegation of powers exercisable by the Government under Section 47, since the section itself provides for appeals being entertained without any delegation of powers not only by the State Government, but also by officers above the rank of Deputy Secretary. The learned A.G.P. submitted that paragraph (2) of the notification may be read as assignment of business of hearing appeals by the Chief Minister or Minister to an officer who already had such power in terms of Section 47. Therefore, according to him mere use of word “re-delegation” in said paragraph 2 of the notification dated 06.08.2001 in itself need not turn such allocation into actual re-delegation.

24. The learned A.G.P. further submitted that rules of business framed under Article 166(3) of the Constitution of India do not relate to delegation of powers but only define, under the rules of business, as to

who is to be the “State Government” for a particular purpose. The rules provide for powers to be exercised by the minister. No delegation of powers is involved in this since the rules of business only define as to what is Government in relation to the particular business of the Government. In any case delegation, if any, in respect of powers of the Government, would not affect the power of an officer not below the rank of Deputy Secretary, who too, under Section 47, may be competent to hear an appeal. Though phraseology of notification dated 6th August, 2001 is not exactly ideal and it does use the word re-delegation by the Chief Minister or Minister for Urban Development, the learned A.G.P. submitted that since Section 47 itself provides for hearing of appeals by the State Government as well as officers above the rank of Deputy Secretary, there is no question of delegation of powers and only the question of allocation of business of hearing appeals arising from various categories of local bodies has been covered by the notification under Section 151 of the MRTP Act issued on 6th August, 2001. According to the learned A.G.P. it would be appropriate to make the notification workable rather than strike it down as violative of maxim *delegatus non potest delegare*. He submitted that in *Sahni Silk Mills's* case, on which the learned counsel

for the petitioner placed reliance, the Supreme Court had observed in paragraph 5 that in the present administrative setup extreme judicial aversion to the delegation cannot be carried to an extreme. The learned A.G.P. submitted that this is not a case of inherent lack of jurisdiction and since the petitioner himself had taken appeal to the Principal Secretary the decision in appeal may not be ignored as nullity on this count.

25. Ordinarily when a new enactment comes into force, all the notifications required to be issued are not simultaneously notified. Subordinate legislation takes its own time. In several enactments, several questions would be required to be decided by the Government. The learned A.G.P. therefore, submitted that in absence of any notification the question as to what is State Government in the particular context would always have to be decided with reference to the rules of business framed under Clause (3) of Article 166 of the Constitution. He submitted that whenever appeals are statutorily required to be decided by Government, it would be the business of the Government to hear appeals and therefore, such hearing of appeals will be covered by Rules of Business till any other provision is made.

26. The learned counsel for petitioner countered by placing reliance on the decision in *Sheikh mohamed Fatemohamed Vs. Raisuddin Azimuddin Katil*, reported at **2000(3) ALL MR 546**, pointing out that the Full Bench of this Court was considering the question of delegation of powers of the Government under Hyderabad Abolition of Inams and Cash Grants Act (1954). Section 2 A(2) of the said Act provides for appeal to the State Government against the orders of authorised officer. There is no reference to the power of the State Government to delegate its authority to any other officer of the State Government. However, the Government routinely delegated the powers to hear the appeal under Section 2-A(2) of the said Hyderabad Act to an Officer on Special Duty. The Full Bench considered the question of rules for conduct of business of the Government framed under Clause (3) of Article 166 of the Constitution of India and held that resort could not be had to the rules of business framed under Article 166(3). In view of this the learned counsel for the petitioner submitted that the delegation to the Principal Secretary of powers to hear the appeal was totally impermissible and hence, the decision rendered by the Principal Secretary being without jurisdiction, was a

nullity.

27. The contention of the learned counsel for the petitioner that the Full Bench of this Court in *Sheikh Mohammed Vs. Raisuddin* ruled that whenever power to hear appeal against statutory order is not delegated by the statute itself, the Government cannot regulate powers through rules of business under Article 166 of the Constitution, needs to be examined. It may be seen that reference to Full Bench was occasioned because in *G.K.Deshmukh Vs. Devisingh*, reported at **AIR 1972 Bombay 369**, a Division Bench of this Court took the view that when a function of making a quasi-judicial decision like the one under Section 2-A of Hyderabad Abolition of Inams and Cash Grants Act is before the Court, looking to the scheme of the statute it cannot be delegated to another person or authority in the absence of statutory provision authorising such delegation. Another Division Bench deciding *Maruti Pandu Vs. Babu Narayan*, reported at **1983 MH LR Bom 148** while considering the provisions of Section 2-A of the same Act, held that Officer on Special Duty could be conferred with authority to hear an appeal required to be decided by the State Government under

notification which springs from Article 166 of the Constitution read with Rules of business of the Government.

28. Confronted with these conflicting judgments a 3rd Division Bench hearing *Sheikh Mohammed Vs. Raisuddin* referred the matter for consideration by the Full Bench. This is how the Full Bench came to consider the question as to which of the two earlier decisions laid down the correct law. The Full Bench upheld the decision in *Ganeshrao's* case reported at *AIR 1972 Bom.369,* overruling the decision reported at *1983 MH LR Bom.148*. While so doing the Full Bench observed in paragraphs 12 to 14 of its judgment as under :

> *"12. It is quite clear that what is meant by sub-article (3) is the convenient transaction of business of the Government and allocation amongst different Ministers of this business, so as to make the running of the Government smooth. It is difficult to visualize the situation under this sub-article. Whether the concept of an appeal, arising out of a quasi judicial power can be termed as a business of the Government.*
>
> *13. So far as the said Act is concerned, there would not have been any question of there being any appeal in respect of inams tenure determining respective rights of the landlord and / or tenant of the occupant. This being entirely the field of the Statute, specially enacted for the purpose and right of appeal also having been given by it, in our opinion, it cannot*

be regulated by general power of rule making as provided under Article 166 of the Constitution of India, more so, when the Article 166, in our opinion, does not deal with the business of the nature of deciding quasi judicial dispute and appeals arising thereunder.

14. The quasi judicial functions, thus, in our opinion would be out of the purview of this Article, much less than would not be covered by the Rules of business under Rule 15, as sought to be done, as noted in the decision of Maruti Pandu's case(cited supra).”

29. The question before the Full Bench was one of the power of the State Government to routinely delegate, to an officer on special duty, its power under Clause (2) of Section 2-A of the Hyderabad Act. The causation by which the Full Bench reached the conclusion may not be exactly helpful in the present case, because in the instant case Section 47 of the MRTP Act expressly provides for appeals being not only heard by the State Government, but also by an officer above the rank of Deputy Secretary, as contrasted with Clause 2 of Section 2-A of the Hyderabad Act where there was no express provision for decision by any other authority. The Full Bench had not held that an appeal arising out of quasi judicial power could not be termed as business of the Government, though the Bench found it difficult to so visualise. Sometimes, even if one finds some things difficult, they have

to be done.

30. The question of amenability of exercise of quasi-judicial functions to the rule making power under Article 166(3) of the Constitution was considered by the Supreme Court in *G. Nageswara Rao Vs. A.P.S.R.T.Corpn.*, reported at **AIR 1959 SC 308** while considering the provisions of Motor Vehicle's Act, 1939. Majority of the Supreme Court headed by the Chief Justice held that Section 68-D of Motor Vehicles Act imposes duty on the State Government to decide judicially in approving or modifying the scheme proposed by the transport undertaking. (Minority comprising of Wanchoo and Sinha JJ held that while doing so the State Government was not discharging any judicial or quasi-judicial function and that it was discharging only nominal administrative function). In that context hearing given by the Secretary incharge of the Transport Department was being questioned. The majority of the Supreme Court had therefore, to consider whether the powers to perform this quasi judicial function could be dealt with by Rules made by the Governor for transaction of business. In this context it was argued that the Rules which the Governor is authorised to make are only to regulate the acts of the Governor or his

subordinates in discharge of the executive power of the State Government and therefore, will not govern the quasi-judicial functions entrusted to it. In paragraph 28 of the judgment the majority of the Court clearly repelled this argument by observing as under :

> *"There is a fallacy in this argument. The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power. The procedural rules made by the Governor for the convenient transaction of business of the State Government apply also to quasi-judicial acts, provided those Rules conform to the principles of judicial procedure."*

31. In view of this categorical finding of the Supreme Court way back in the year 1959, it may not be permissible to follow the difficulties expressed by the Full Bench of this Court in visualising whether an appeal to be decided in exercise of quasi judicial powers was amenable to the rule making power of the Governor under Article 166 of the Constitution. Had this judgment of the Supreme Court been noticed by the Full Bench, it would have surely conformed to the view of the Supreme Court and would not have expressed any difficulty. Any different view is not shown to have been taken by the Apex Court so far.

32. Apart from this in *A. Sanjeevi Vs. State of Madras*, reported at **AIR 1970 SC 1102** the question of allocation of business of Government had come up before a six Judge bench of the Supreme Court. Paragraph 4 of the judgment shows that in that case the question was as to who is to form the opinion requisite under Section 68-C of the Motor Vehicles Act. It was urged that the requisite opinion could have been formed either by the council of ministers or the minister to whom the business had been allocated, but not by the Secretary. After considering the submissions advanced, in paragraph 11 of the judgment the Court observed as under :

> *"11. We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. but in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Minister, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the*

> *advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers."*

This judgment should set of rest any doubts as to what is "Government" in the context of exercise of statutory powers, including quasi judicial powers.

33. In the light of foregoing discussion the position that would emerge is as under :

(a) Rules of business framed under Clause (3) of Article 166 of the Constitution could also cover business of hearing statutory appeals.

(b) "Government" for this purpose is not just Council of Ministers but even officers of the Government, as may be authorised under such rules.

(c) Under the Rules of business of Maharashtra Government, Minister in charge of the Urban Development Department is "the Government" for the purpose of exercising powers under Section 47 of

the MRTP Act.

(d) Notification dated 06.08.2001 under Section 151 of the MRTP Act must be taken to merely reiterate this position and cannot be held to delegate to the Minister, the powers which he already possesses.

(e) Since power to hear appeal already vested in the Minister by virtue of Rules of business, his delegating the same to the Principal Secretary would not amount to re-delegation, not withstanding the use of word re-delegation in para 2 in the notification dated 06.08.2001.

(f) In any case since Section 47 itself independently conferred power to hear appeals on officers 'appointed' by the State Government to hear such appeals, “delegation” of powers to such officers was not at all contemplated. The State Government was to merely “appoint” officers to hear appeals.

(g) Consequently there was no warrant to invoke the power to delegate under Section 151 of the MRTP Act and such delegatory exercise is redundant. The notification has to be read as one merely allocating appeals arising from various local bodies to various authorities.

(h) In view of this, it cannot be said that Principal Secretary lacked the authority to decide appeal.

(i) In any case, the petitioner having himself approached the Principal Secretary and not having ever demurred about lack of jurisdiction, it is not open to the petitioner to indulge in this dilatory trick of pointing out that he was before the wrong forum to suggest that he may now be allowed to spend more time with the right forum.

34. Apart from this, it may be seen that the petitioner has also challenged the notice issued on 26.08.2004 and the order passed by respondent No.2 Nagpur Municipal Corporation on 22.11.2004 (which he had challenged before respondent No.1). Therefore, it would be necessary to examine correctness of these actions of respondent No.2, which would cover the question whether the Principal Secretary had erred while deciding the appeal.

35. The learned counsel for the petitioner submitted that when the plan was sanctioned on 17.02.1992 bye laws dated 24.06.1965 were in force and these bye laws did not refer the concept of Floor

Space Index (F.S.I.) and therefore, consideration of petitioner's plans with reference to F.S.I. was improper. He further submitted that after having sanctioned the plan on 17.02.1992 which included a basement without any user being specified, as also plan for seventh floor, it was impermissible for the Municipal Corporation to specify the purpose for use of basement or to reduce the height and disallow 7th floor, while considering the plan submitted on 21.09.1995.

36. Both these contentions were stoutly opposed by the learned counsel for respondent No.2 Municipal Corporation. He submitted that the provisions of MRTP Act apply to all developmental activities in city of Nagpur in respect of which a Development Plan has been sanctioned in the year 1976 itself. Referring to the provisions of Section 46 of the MRTP Act, the learned counsel submitted that in considering the applications for permission, the Planning Authority must have due regard to the provisions of draft or final plans or proposals published under the Act. He submitted that the concept of F.S.I. was already existed in the Development Control Rules under the MRTP Act, though it may not have been there in very specific terms in 1965 bye laws. These, Development Control Rules have been eventually notified on

09.04.2001.

37. The learned counsel for respondent No.2 Municipal Corporation further submitted that any building permit is valid only for a period of two years from the date of its sanction under the bye laws. Therefore, permit dated 17.02.1992 on which the petitioner relies expired on 17.02.1994. The petitioner does not state that any extension was ever sought. Therefore, according to the learned counsel for Respondent No.2, the plan sanctioned on 17.02.1992 had also lapsed just as earlier plan dated 26.07.1991 had lapsed and was consequently of no use. He submitted that the plan dated 21.09.1995 submitted by the petitioner was sanctioned by the Municipal Corporation on 04.04.1997 with some modifications. Therefore, construction ought to conform to this sanction with modifications. The learned counsel for the petitioner has not been able to explain as to how he could claim to have proceeded with construction of seventh floor which was disallowed, or change the user of basement when, by sanction dated 04.04.1997, the Municipal Corporation has specifically earmarked the basement for parking. The contention of the learned counsel for petitioner contented that the petitioner was entitled to

ignore sanction dated 04.04.1997 because it was without any authority of law, is atrocious. The learned counsel for petitioner has not been able to explain as to how sanction dated 04.04.1997 lacked the authority of law. Therefore, as rightly submitted that the construction in question being in violation of the sanctioned plan was liable to be removed as conveyed to the petitioner by notice under Section 53 of the MRTP Act.

38. The learned counsel for the petitioner next submitted that actual area of construction was not calculated properly by the Municipal Authorities as also by the appellate Authority. He pointed out the discrepancies in this behalf, particularly in respect of the area calculation of third floor. He submitted that passages and balconies were required to be excluded under sub-clause (42) of Clause 1 of Building Bye laws of 1965. He pointed out that even Clause 15.4.2 of the bye laws which became applicable from 01.01.1993 excluded the balconies. The learned counsel for respondent No.2 submitted that the area of third floor was rightly calculated by the Corporation and that an area could not be excluded only because walls had not yet been constructed to enclose that disputed area. The learned counsel for

respondent No.2 further submitted that the bye laws may exclude balconies, but not passages, and it is not shown as to what is the exact area of passages or balconies which is sought to be deducted by the petitioner. He submitted that the competent authorities in the Municipal Corporation have correctly calculated the floor area with reference to the land purchased by the petitioner and have found that the construction exceeds permissible limits. It would not be possible for this Court to go into this disputed questions of fact relating to computation of actual floor area.

39. The learned counsel for the petitioner had stated that the F.S.I. available is infact more than that what is consumed, and, for a moment, sought to suggest that the F.S.I. available would make it possible even for intervenor Bapuna to construct on 63000 sq.ft. land purchased by Bapuna, though he soon withdrew this contention, and declared that Bapuna had purchased open land with open eyes knowing that there was no prospect of developing the land purchased. It is ridiculous to suggest that a person would purchase property worth over Rs.3,93,00,000/- without any prospect of laying even a stone thereon. Thus admittedly the petitioner's structure is not within the

limits of F.S.I. available to the area of plot which remained with him after sale of 63000 sq.ft. of site to Bapuna.

40. The learned counsel for the petitioner assailed notice issued by Nagpur Municipal Corporation under Section 53 of the MRTP Act on the ground that Section 53 of the Act has no application at all. He submitted that for initiating action under Section 53 it is necessary that the development of the land should have been carried out as indicated in Section 52 of the MRTP Act. For attracting provisions of Section 52, according to the learned counsel, it is necessary to show that the development has been carried out without permission required under the Act. According to the learned counsel since Nagpur Municipal Corporation was not at all the "Planning Authority" at the relevant time in respect of the area in question, there was no question of obtaining permission of Nagpur Municipal Corporation under MRTP Act. Consequently there is no violation of Section 52, and no occasion for the corporation to act under Section 53 of the MRTP Act.

41. For this purpose the learned counsel for the petitioner took me to the definitions of the Planning Authority and Local Authority in Clauses 19 and 15 of Section 2 of the MRTP Act, which read as under :

"[(19) "Planning Authority" means a local authority; and includes, -

(a) a Special Planning Authority constituted or appointed or deemed to have been appointed under section 40;

(b) in respect of the slum rehabilitation area declared under section 3C of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971, the Slum Rehabilitation Authority appointed under Section 3A of the said Act;]

Clause 15 of the same Section defines 'Local Authority'

as under :

"(15) "local authority" means -

(a) the Bombay Municipal Corporation constituted under the Bombay Municipal Corporation Act or the Nagpur Municipal Corporation constituted under the City of Nagpur Municipal Corporation Act, 1948, or any Municipal Corporation constituted under the Bombay Provincial Municipal Corporation Act, 1949.

[(b) a Council and a Nagar Panchayat constituted under the Maharashtra Municipal Councils, ***Nagar Panchayats*** *and Industrial Townships Act, 1965,]*

(c) (i) a ***Zilla Parishad*** *constituted under the Maharashtra Zilla Parishad and Panchayat Samitis Act, 1961,*

(ii) the Authority constituted under the Maharashtra Housing and Area Development Act, 1976],

(iii) the Nagpur Improvement Trust constituted under the Nagpur Improvement Trust Act, 1936,];

which is permitted by the State Government for any area under its jurisdiction to exercise the powers of a Planning Authority under this Act ;"

42. There is no doubt that the Planning Authority means a Local Authority, and Local Authority means Nagpur Municipal Corporation as well. The learned counsel however, submitted that Nagpur Municipal Corporation would not be a Local Authority for the entire area within the jurisdiction of the Corporation, and in view of the last part of Clause (15) of Section 2 it would be a Local Authority only for the area which is permitted by the State Government for any area in its jurisdiction to exercise powers of the Planning Authority under this Act. The learned counsel would like me to read clause 15 of Section 2 of MRTP Act, as under :

"Local Authority" means :

(a).....Nagpur Municipal Corporation...., (Comma)

(b)....., (Comma)

(c) (i) ....., (Comma)

(ii) ....., (Comma)

(iii) ....., (Comma)

which is permitted by the State Government for any area under its

jurisdiction to exercise powers of the Planning Authority under this Act ; (semi colon).

43. According to him the expression "which is permitted by the State Government for any area under its jurisdiction to exercise powers of the planning authority under this Act" is applicable to all the three sub-clauses (a), (b) and (c) of Clause 15. Fortunately Clause 15 as it originally appeared in the text of the act published at Page 142 in Part-IV of Maharashtra Government Gazette, dated 29th December, 1966 is available. This clause in the gazette notification reads as under :

"(15) "local authority" means -

(a) the Bombay municipal Corporation constituted under the Bombay Municipal Corporation Act, or the Nagpur Municipal Corporation constituted under the City of Nagpur Municipal Corporation Act, 1948, or any municipal corporation constituted under the Bombay Provincial Municipal Corporations Act, 1949, (Comma)

(b) A Municipal Council constituted under the Maharashtra Municialities and Panchayat Samitis Act, 1965 ; (Semi colon)

(c)(i) a Zilla Parishad constituted under the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, (Comma)

(ii) the Nagpur Improvement Trust constituted under the Nagpur Improvement Trust Act, 1936,

(Comma)

which is permitted by the State Government for any area under its jurisdiction to exercise the powers of a Planning Authority under this Act ;" (Semi Colon)

44. It may be seen that after Clause (a) there is comma whereas after clause (b) there is semi colon indicating that clauses (a) and (b) are in one group. Then thereafter follows clause (c) which initially had two sub-clauses (i) and (ii) which culminate in commas, and which is followed by expression, 'which is permitted by the State Government' etc., ending with a semi colon. The semi colon after clause (b) is not shown to have been replaced by a comma by any amending Act.

45. It may also seen that appendage "which is permitted by the State Government..... etc." obviously applies only to Clause (c) and not to clauses (a) and (b), because it would be ridiculous to say that a Municipal Corporation or a Council is not a local authority for areas within its jurisdiction. It is also equally clear that Zilla Parishad or Nagpur Improvement Trust, not being local authorities, would have to be deemed to be the local authorities only for areas over which the State Government permitted such bodies to exercise powers of the

Planning Authority. In respect of Zilla Parishads, who have jurisdiction over the entire district area would have to be specified since it is not intended to cover development of entire rural area by the "Town" Planning Act. Unlike other local authorities the Nagpur Improvement Trust was specifically created to look after improvement of the City of Nagpur. Therefore, its jurisdiction coincided, or in a large measure overlapped with that of Nagpur Municipal Corporation. Therefore, while permitting Nagpur Improvement Trust to exercise powers of the Planning Authority and therefore making the Trust local authority under Clause 15 of Section 2 of the MRTP Act, its jurisdiction had to be defined. This is the genesis of the last lines of sub clause (c) of Clause 15 of Section 2. Jurisdiction of Nagpur Municipal Corporation may have been pro-tanto excluded to avoid duality of control or conflict of authority. It does not follow that the Nagpur Municipal Corporation as local authority was not Planning Authority under Clause 19 of Section 2 of MRTP Act.

46. The learned counsel for the petitioner had relied on the notification published in Part-I-A of Maharashtra Government Gazette dated 11th March, 2002 to contend that the Nagpur Municipal

Corporation got jurisdiction only from 27.02.2002. This contention is fallacious and has to be rejected because notification dated 27.02.2002 itself makes it abundantly clear that the earlier notification dated 6th October, 1967 had conferred powers of Planning Authority on the Nagpur Improvement Trust for the area specified. Notification dated 27th February, 2002 withdrew the earlier notification and restricted the role of Nagpur Improvement Trust as the Planning Authority only over about 7208.75 hectares of the area specified in the said notification.

47. If according to the petitioner Nagpur Municipal Corporation was not the Planning Authority under MRTP Act and that the Nagpur Improvement Trust was Planning Authority for the entire city, he should have shown that he had approached the Nagpur Improvement Trust and had obtained requisite sanction from the Trust. It is distressing to note that the petitioner has been extremely unscrupulous in his approach and wants to totally evade all control by any authority for the construction activities undertaken by him. For assailing action of the Municipal Corporation under Section 53 of the Act he states that the Trust and not Corporation was the Planning

authority, but does not approach the trust for obtaining permission for construction. He approaches the Corporation for permission to construct, but deviates from the modifications made by the Corporation in his proposed plan. While executing sale deeds in favour of the intervenors in Civil Application No.2236/2006 he produces No Objection Certificate from the Nagpur Improvement Trust, concealing from the Sub-Registrar the fact that Trust was not the competent authority and that his construction had not been approved by Nagpur Municipal Corporation, which was competent authority to whom he had applied.

48. The learned counsel for the petitioner next submitted that the petitioner had submitted revised plans after the notice dated 26.08.2004 was received by him. These plans submitted on 28.10.2004 was rejected outright by the Corporation on 22.11.2004. According to the learned counsel the plans were required to be considered afresh if the Corporation is to contend that the provisions of Clause (3) of Section 53 applied. Under Clause (3) of Section 53 of the MRTP Act person aggrieved by the notice is entitled within the period specified in the notice, to apply for permission under Section 44 for retention of the land or any building or work, to which the notice

relates, and pending final determination or withdrawal of the application, the mere notice in itself, does not affect retention of the building of works or the continuance of such use. The learned counsel for respondent No.2 Municipal Corporation submitted that the revised plans were duly considered in light of rules applicable and were rejected as they violated the rules, and that there is no force in the contention that the revised plans were not considered by the Corporation. The letter dated 22.11.04 whereby Corporation rejected the petitioner's revised plan which is at Annexure “O” to the petition, spells out six objections to the plan while rejecting the plans. The learned counsel for the petitioner was unable to show as to how these plans were wrongly rejected or how they conformed to rules.

49. The learned counsel for one of the intervenors had drawn my attention to two decisions of the Supreme Court which strongly deprecated the practice of condonation of unauthorised construction. In *M.I. Builders Pvt. Ltd Vs. Radhey Shyam Sahu*, reported in **(1999) 6 SCC 464,** the Court was considering amongst other things unauthorised construction by a builder who was permitted to construct underground Shopping Complex in a park. In paragraph 73 of the

judgment the Court observed that no consideration should be shown to a builder or any other person where construction is unauthorised and that this dictum is now almost bordering the rule of law. The Court held that though allottees to the shop wanted use of judicial discretion in moulding the relief, the discretion should not be exercised for perpetuating illegality. The Court observed that unauthorised construction which cannot be compounded has to be demolished and that judicial discretion cannot be guided by expediency. The Court added that while directing demolition of unauthorised construction, an inquiry as to how construction came about should be ordered and offenders should also be booked.

50. In *Friends Colony Development Committee Vs. State of Orissa*, reported at **2004 (8) SCC 733** the Supreme Court has held that deliberate deviations should not be condoned or compounded. In that case too the builder had added additional fifth floor which was totally unauthorised. In spite of the disputes and litigations, the builder had parted with his interest and inducted occupants on all the floors including the additional floor. The Court further held that the deviations which deserve to be condoned must be bona fide or

attributable to some misunderstanding or are such deviations where the benefit gained by demolition would be far less than the disadvantage suffered. The Court had observed that deliberate deviations with the intention of gaining profit deserve to be dealt with sternly so as to act as a deterrent in future.

51. In *Mahendra Baburao Mahadik Vs. Subhash Krishna Kanitkar*, reported at **(2005) 4 SCC 99**, the Supreme Court had considered the decisions in *Friends Colony Development Committee Vs. State of Orissa* as also *M.I. Builders (P) Ltd. Vs. Radhey Shyam Sahu* and had quoted, by way of reiteration, the principles enunciated in paragraph 25 of the judgment in *Friends Colony's* case and paragraph 73 of the *M.I. Builder's* case.

52. As the foregoing discussion would show the petitioner builder had indulged in deliberate deviations bordering on fraud, which do not deserve to be compounded or condoned, as observed by the Supreme Court in the *Friends Colony's* case. In that case too the Court has also observed that officers conniving at such deviations should not be spared.

53. To sum up :

(a) The petitioner is not entitled to rely on the plan sanctioned on 17.02.1992 since he had not completed construction within the stipulated period and had not sought any extension of time for completing construction as per this plan.

(b) The petitioner submitted a revised plan on 21.09.1995 i.e. about 3-1/2 years after the second plan was sanctioned on 17.02.1992, but did not adhere to the condition on which the approval was granted on 04.04.1997 and raised unauthorised seventh floor and also changed the user of basement.

(c) After having exhausted entire Floor Space Index (FSI) available for the entire plot he had no compunction is selling chunk of remaining open land for a valuable consideration of over Rs. 3,93,00,000/- and had the cheek to tell the Court that the purchaser would not be able to construct on the land since the purchaser had purchased the land with open eyes.

(d) Inspite of the stipulation on 04.04.1997 of the Municipal Corporation that the basement be used for parking only and that

seventh floor was not sanctioned, after 04.04.1997 the petitioner sold to the intervenors who have filed C.A. No.2236/2006, some portion in basement and top floor for commercial use for a valuable consideration of about a crore of rupees.

(f) Though the petitioner had not obtained sanction for any of his plans from Nagpur Improvement Trust, he obtained no objection certificate from Nagpur Improvement Trust for getting sale deeds in favour of the intervenors in Civil Application No.2236 of 2006 registered.

54. It is therefore, clear that the entire conduct of the petitioner not only lacks bona fides, but borders on playing fraud. It is equally unfortunate that the Municipal Authorities who were charged with duty of regulating the construction activity, failed to diligently discharge their duties. In view of the law laid down by the Apex Court in three judgments, quoted above, there is no question of showing any indulgence for such activities. There is no question of assisting the petitioner who not just failed to come to the Court with clean hands but rather dared to enter the Court red handed.

55. Rights of intervenors are not required to be considered in this petition since it would unnecessarily protract the litigation, obscure the issue and enable the petitioner to perpetrate his illegalities and to go ahead with disposal of his unauthorised construction to unsuspecting buyers.

56. As I dismiss the petition as also the applications for intervention by this order, it would be appropriate to also direct the Municipal Commissioner to initiate an inquiry into the conduct of the officers who were responsible for allowing the construction to be raised to such level and had failed to examine whether the construction was proceeding according to sanctioned plans.

57. The Municipal Commissioner, Nagpur Municipal Corporation, Chairman of Nagpur Improvement Trust, and the State Government may examine this one instance of flagrant violation of rules to devise remedial measures in order to ensure that such instances do not recur and unsuspecting buyers do not become victims of the activities of

unscrupulous builders.

In the result, the petition as well as applications for intervention are rejected.

Interim stay be continued for fifteen days after the copy of the judgment becoming available.

JUDGE

RR.