



Judgment

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

SECOND APPEAL NO.568 OF 2017

1. Nagpur Improvement Trust,
through its Executive Officer,
Kings Way, Sadar, Nagpur.

2. The Divisional Officer (South)
Division, Hanuman Nagar,
Krida Chowk, Nagpur.

..... **Appellants.**

:: VERSUS ::

Jain Kalar Samaj, a public trust
registered under the Bombay Public
Trust Act, 1950, having registration
No.F-56(N), Reshimbagh, Umred
Road, Nagpur, through its Secretary.

..... **Respondent.**

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Shri A.C.Dharmadhikari, Counsel with Ms.Ritu Jog, Advocate for
Appellants.

Shri S.V.Manohar, Senior Counsel assisted by Shri Atharva Manohar
& Shri Tejas Patil, Advocates for Respondent No.1.

Shri PK.Mishra, Counsel for Intervenor.

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CORAM : URMILA JOSHI-PHALKE & M.W.CHANDWANI, JJ.

CLOSED ON : 02/09/2024

PRONOUNCED ON : 10/10/2024

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. A Division Bench has been constituted to answer
following questions:

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1. Whether suit shall lie against the Nagpur Improvement Trust without issuing a Notice under Section 115 of the Nagpur Improvement Trust Act, 1936 if the action of the Trust is outside the purview of expression “in respect of anything purporting to be done under this Act” used in the said provision?

2. Whether the action of the Nagpur Improvement Trust in issuing a Notice for taking action in lesser time than as provided in Section 115 of the Nagpur Improvement Trust Act, 1936 thereby resulting in depriving aggrieved party in approaching the Court for want of compliance with requirement of the said Section, would amount to a waiver of the requirement of Section 115 of the said Act?

2. Need for formulating above questions arose on account of inconsistent views taken by the Single Judge of this Court in **(Abdul Jabbar Haji Mohammed Ibrahim vs. The Chairman, Nagpur Improvement Trust, Nagpur and another¹)** decided on 2.4.1993 as also in the case of **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha vs.**

¹ Civil Revision Application No.345/1993 decided on 2.4.1993.

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Nagpur Improvement Trust and another² wherein it has been held that the Civil Court cannot proceed to adjudicate over the issue unless institution of civil proceeding is in compliance with Section 115 of the Nagpur Improvement Trust Act, 1936 (the NIT Act) and, therefore, the suit filed without complying with the mandatory provisions of Section 115 of the NIT Act is not maintainable. Whereas, the Hon'ble Apex Court in the case of **The Poona City Municipal Corporation vs. Dattatraya Nagesh Deodhar**³, while considering Section 487 of the Maharashtra Municipal Corporations Act, 1949 (the MMC Act), a *pari materia* provision has rendered a finding as under:

“(21) There remains for consideration the appellant's plea of limitation. For this plea, the appellant relies on Section 487 of Act 59 of 1949. The material part of the section runs thus :-

(1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer or servant in respect of any act done or purported to be done in pursuance

² 2013(1_) ALL MR 55

³ AIR 1965 SC 555

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or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act :-

(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office and, in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any, for the purpose of such suit, or

(b) unless it is commenced within six months next after the accrual of the cause of action.

The benefit of this section would be available to the Corporation only if it was held that this deduction of ten per cent was "an act done or purported to be done in pursuance or

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execution or intended execution of this Act". We have already held that this levy was not in pursuance or execution of the Act. It is equally clear that in view of the provisions of S. 127(4) (to which we have already referred) the levy could not be said to be "purported to be done in pursuance or execution or intended execution of the Act." For, what is plainly prohibited by the Act cannot be claimed to be purported to be done in pursuance or intended execution of the Act. Our conclusion is that the High Court has rightly held that the suit was not barred by limitation."

3. Thus, the Hon'ble Apex Court, while considering *pari materia* provision, held that Section would be available to the Corporation only in respect of an act done or purported to be done in pursuance or execution or intended execution of the Corporation Act. In other words, what follows is that this benefit will not be available if the act done or purported to be done is not in pursuance or execution of the said Act.

4. The above proposition laid down by the Hon'ble Apex Court is followed by the Single Bench of this Court in the case of

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Shri Gorakshan Sanstha, Akola vs. Akola Municipal Corporation⁴

wherein an identical issue was involved. The observation in paragraph No.7 of the said decision is reproduced as under:

“7. As per provisions of section 487 of the said Act a protection is granted with regard to any act done or purported to be done in pursuance or in execution or intended execution of the said Act. In that regard unless a notice is given by the plaintiff with duration of one month and a suit filed within six months of the accrual of the cause of action, such suit cannot be instituted. Having found that the plaintiff-Trust was entitled for exemption under section 132(1)(b) of the said Act it was clear that the Trust was not liable to be assessed for payment of tax. If that be the situation then issuance of the demand notice on 4-1-2011 cannot be said to be an act done in pursuance of or in execution of the provisions of the said Act. In other words there being an exemption from payment of taxes under section 132(1)(b) of the said Act, there would be no cause to demand such taxes by issuing any demand notice. Moreover, the said demand notice has been held to be illegal. It is thus clear that the demand notice was issued despite the fact that the plaintiff

4 2019(1) Mh.L.J. 776

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was exempted from payment of taxes. In such situation it will have to be held that the suit was not liable to be dismissed for failure to issue notice under section 487 of the said Act as present case such notice was not required to be issued. The decisions in Pune Municipal Corporation and anr., Namdev and Municipal Council, Washim (*supra*) apply to the facts of the present case and support the contentions of the appellant. The decision relied upon by the learned counsel for the respondent is clearly distinguishable.”

5. Thus, the view has been taken in the light of the Constitution Bench judgment in the case of **The Poona City Municipal Corporation** *supra*. On the basis of the decision of the Constitution Bench in the case of **The Poona City Municipal Corporation** *supra*, the Single Bench of this Court in the case of **Shri Gorakshan Sanstha, Akola** *supra* held in *pari materia* statute that the benefit of the provision will be available only if the act is purported to have been done under the NIT Act. Whereas, in cases of **Abdul Jabbar Haji Mohammed Ibrahim** *supra* and **Smt. Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra*, the Single Bench of this Court, while dealing with Section 115 of the NIT Act, has taken a

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different view that issuance of Notice under section 115 of the NIT Act is mandatory and the Civil Courts cannot proceed to adjudicate over the issue as to whether the act impugned is in conformity with the provisions of the Act unless Notice under Section 115 of the NIT Act is issued.

6. Though the facts which gives rise to these questions are not material to decide these questions which are referred, these facts are referred only for the purpose of reference. The NIT vide letter dated 22.11.1960 allotted a land admeasuring 43,687.5 square feet, situated at Reshimbagh, Umrer Road, Nagpur to "Jain Kalar Samaj", a public trust for construction of Hostel Building and purposes ancillary thereto and accordingly on 29.3.1966, the parties executed Lease Deed initially for a period upto 31.3.1991 and later renewed for a term of next 30 years. The NIT has come with a case that the respondent has breached the terms of the Lease Deed and therefore, by issuing notice dated 19.3.2005 cancelled the allotment letter/Lease Deed and called upon the respondent to remove its belongings and structure over the allotted land within a period of 30 days of receipt of Notice and to

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hand over the possession of the premises to the Divisional Officer, failing which the NIT informed the respondent that it shall take the possession of the land in question.

The principles enunciated by the Hon'ble Supreme Court in the case of **The Poona City Municipal Corporation** *supra* will be determinative to interpret the provision under Section 115 of the NIT Act, which is *pari materia* Section 487 of the MMC Act.

7. Learned Senior Counsel Shri S.V.Manohar for the respondent, submitted that before answering questions referred, it is necessary to see Section 9 of the Civil Procedure Code which states the Courts to try all civil suits unless barred. Thus, Section 9 deals with the question of Civil Court's jurisdiction to entertain a cause. Thus, the Civil Courts have jurisdiction to entertain suits of civil nature except when its cognizance is expressly or impliedly barred by necessary implication. Thus, for entertaining suits by Civil Courts, it must be of civil nature and not barred expressly or impliedly under any statute. To illustrate this, he cited an example of Section 321 of the Maharashtra Land Revenue Code, Section 80 of the Civil Procedure Code, and Section 197 of the Criminal

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Procedure Code, which gives protection to both the sides and contended on the above circumstances, it can be ascertained that there is no complete bar. The same principle according to him, is also applicable as far as Section 115 of the NIT Act is concerned. It is only a condition precedent to issue a Notice and not complete bar.

If a suit is filed against the NIT, what would be nature of enquiry?

The nature of enquiry would be, whether notice is given and whether act done is purporting to be done under the Act?

The purpose of notice is to avoid litigation. If the action is *mala fide*, no notice is required. While interpreting the provisions, word “done” assumes importance. If the act is not in pursuance of the provisions of the NIT Act, notice is not required. The basic right of the citizen is to invoke the law and the citizen cannot be deprived from invoking the said law. He further submitted that observations of the Single Bench of this Court in the case of **Abdul**

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Jabbar Haji Mohammed Ibrahim *supra* and Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha *supra* are erroneous.

8. Learned Senior Counsel Shri Manohar further adds that issuance of Notice by the NIT asking to remove structure by giving lesser period itself is a waiver by the NIT by conduct. Statutory Notice can be waived as it is only a procedural requirement. He submitted that the act of the NIT in issuing Notice granting less period than which is mentioned in Section 115 of the NIT Act itself is sufficient to infer that the NIT has waived the mandatory notice.

9. In support of his contentions, learned Senior Counsel Shri Manohar placed reliance on following decisions:

1. Union of India vs. Tarachand Gupta and Bros⁵;
(jurisdiction of Civil Courts)

2. Kishan Lal vs. State of J & K⁶;
(jurisdiction of Civil Courts)

3. The Poona City Municipal Corporation vs. Dattatraya *supra*;

4. Devi Singh vs. Municipal Corporation, Hyderabad⁷;

5 1971(1) SCC 486

6 (1994)4 SCC 422

7 (1973)4 SCC 66

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5. Bombay Housing Board (now the Maharani Housing Board) vs. M/s.Karbhase Naik and Co., Sholapur⁸;

6. Firm Surajmal Banshidhar and others vs. Municipal Board, Ganganagar⁹;

7. Municipal Corporation of Delhi vs. Sushila Devi (Smt) and others;¹⁰

8. Pune Municipal Corporation and another vs. Mohan Shrikrishna Asava¹¹;

9. Deoram Tulshiram Patil vs. Zilla Parishad, Nasik and others¹²;

10. Shri Gorakshan Sanstha, Akola vs. Akola Municipal Corporation *supra*;

11. State of U.P and others vs. Maharaja Dharmander Prasad Singh and others¹³;

12. Mahendra Builders vs. Brihan Mumbai Municipal Corporation of Greater Mumbai and ors¹⁴;

13. Sri Amar Chand Inani vs. The Union of India¹⁵;

14. General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Ikbal and others¹⁶;

15. Vasant Ambadas Pandit vs. Bombay Municipal Corporation and others¹⁷, and

8 (1975)1 SCC 828

9 (1979)1 SCC 303

10 (1999)4 SCC 317

11 1992 Mh.L.J. 1468

12 1993 Mh.L.J. 1392

13 (1989)2 SCC 505

14 2019(3) Bom.C.R.339

15 (1973)1 SCC 115

16 (2013)10 SCC 83

17 1981 SCC OnLine Bom 75

16. Chief Executive Officer, Zilla Parishad, Parbhani and another vs. Shrimantrao s/o Tukaram Yadav and others¹⁸.

10. *Per contra*, learned Counsel Shri A.C.Dharmadhikari for appellants submitted that statements and objects of the NIT have to be taken into consideration. The NIT is a public trust constituted for public benefits. By the provisions of the NIT Act, lands are to be allotted by the Authorities for the specific purposes. He invited our attention towards definition part and submitted that Section 2(i) of the NIT Act states “Rule” means a rule made under this Act. Section 2(m) states all references to anything done, required, authorized, permitted, forbidden or punishable, or to any power vested under this Act, shall include anything done, required, authorized, permitted, forbidden, or punishable or any power vested – (i) by provisions of this Act; or (ii) by any Rule, Regulation, or Scheme made under the provisions of this Act or (iii) under provisions of (City of Nagpur Corporation Act 1948) which the Trust has by virtue of this Act has power to enforce. Whereas, Section 76 of the NIT Act deals with powers to dispose of lands. He interpreted word “purport” and submitted that

¹⁸ 2024(1) Mh.L.J. 582

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purporting includes present or future acts. It is not merely a condition precedent, but it is a mandatory requirement. The object behind the provision of Section 115 to issue a pre-suit notice is to protect public interests. The consistent view is taken by this Court that notice is mandatory and, therefore, reference is not at all required to be answered.

11. He further submitted that so far as decision in the case of **The Poona City Municipal Corporation** *supra* is concerned, the same is not helpful as facts are not identical. He invited our attention to paragraph No.17 of the order under which reference is made and submitted that it is required to be taken into consideration why waiver is not included in the provisions. The Section is to be read as it is. Even, wrongful acts are covered under the said provisions. There is no waiver as far as public bodies are concerned. Lastly, he submitted that there was no occasion for the Court to make reference as there is a consistent view that the Notice is mandatory and it cannot be waived.

12. Thus, relevant question which arises for consideration is, whether the suit would lie against the NIT and Notice is

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mandatory under Section 115 of the NIT Act if the action of the Trust is outside the purview of “in respect of anything purporting to be done under this Act”.

Question No.1 :

13. Before answering question, whether the act done is in purport of the Act, it is required to see the relevant provisions of the Code of Civil Procedure which deal with when civil suits are barred in Civil Courts. Section 9 of the Code of Civil Procedure reads as under:

Section 9 : Courts to try all civil suits unless barred – the Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation (I) : A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

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Explanation (II) : For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation (I) or whether or not such office is attached to a particular place.

14. The scope of Section 9 of the Code of Civil Procedure primarily deals with the questions of Civil Court's jurisdiction to entertain a cause. There is a strong presumption that Civil Courts have jurisdiction to decide all questions of civil nature. The exclusion of jurisdiction of Civil Courts is, therefore, not to be readily inferred and such exclusion must either be "explicitly expressed or clearly implied." The "Rule" that exclusion of jurisdiction of Civil Courts is not to be readily inferred is based on the theory that Civil Courts are Court of general jurisdiction and the people have right, unless expressly or impliedly barred. The object behind is that the citizens have right to access to the Court of law for redressal of their just grievances.

15. The test adopted in examining such questions is, (i) whether legislative intent to exclude arises explicitly or by necessary implications and (ii) whether statute in question

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provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.

16. In the case of **Swamy Atmananda and ors vs. Sri Ramakrishna Tapovanam and ors**¹⁹, the Hon'ble Apex Court held that a person having a grievance as against other must have a remedy. The maxim '*ubi jus ibi remedium*' is not an empty formality. The jurisdiction of the Civil Court exemplifies the said doctrine. The jurisdiction of the Civil Court cannot be held to have been ousted unless it is so, expressly or by necessary implication, stated in the statute. It is further held that a statute, as is well-known, must be read in such a manner so as to give effect to the provisions thereof. It must be read reasonably. A statute must be construed in such a manner so as to make it workable.

17. The principles, regarding "exclusion of jurisdiction of Civil Courts", have been laid down by the Constitution Bench of the Hon'ble Apex Court in the case of **Dhulabhai and others vs. The State of Madhya Pradesh and another**²⁰, as under:

19 (2005)10 SCC 51

20 (1966)3 SCR 362

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(1) where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure;

(2) where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and

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whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not;

(3) challenge to the provisions of the particular Act as *ultra vires* cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals;

(4) when a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit;

(5) where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies;

(6) questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or

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there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry, and

(7) an exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

18. The Hon'ble Apex Court, in the case of **Union of India vs. Tarachand Gupta and Bros** *supra*, relied by learned Senior Counsel Shri Manohar, in paragraph No.22, observed that the principle is that exclusion of the jurisdiction of the Civil Courts is not to be readily inferred. Such exclusion, however, is inferred where the statute gives finality to the order of the tribunal on which it confers jurisdiction and provides for adequate remedy to do what the Courts would normally do in such a proceeding before it. Even where a statute gives finality, such a provision does not exclude cases where the provisions of the particular statute have not been complied with or the tribunal has not acted in conformity with the fundamental principles of judicial procedure. The word "jurisdiction" has both a narrow and a wider meaning. In the sense

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of the former, it means the authority to embark upon an enquiry; in the sense of the latter it is used in several aspects, one of such aspects being that the decision of the tribunal is in non-compliance with the provisions of the Act. Accordingly, a determination by a tribunal of a question other than the one which the statute directs it to decide would be a decision not under the provisions of the Act, and therefore, in excess of its jurisdiction.

19. The Hon'ble Apex Court, in the case of **Kishan Lal vs. State of J & K** *supra*, relied upon by learned Senior Counsel Shri Manohar, **Firm Seth Radha Kishan vs. The Administrator, Municipal Committee, Ludhiana**²¹ and **Provincial Government of Madras vs. J.S.Basappa**²², held that Section 9 of the Code of Civil Procedure lays down *inter alia* that the Courts shall have jurisdiction to try all suits of civil nature, excepting suits of which cognizance is either expressly or impliedly barred. It is now firmly settled that in construing these provisions, the fundamental principle of law that a person having grievance of a civil nature has independently of any statute, a right to institute a suit in some Court must be

21 ILR 1947 Nagpur 719

22 AIR 1947 Privy Council 1978

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remembered, and every presumption must be made in favour of the jurisdiction of Civil Courts and exclusion of the jurisdiction of a Civil Court is not to be readily inferred. The cognizance of a suit of a civil nature must be expressly and impliedly barred and the provisions of law ousting the jurisdiction of the Civil Courts must be strictly construed. In **Provincial Government of Madras** *supra*, while construing effect of Section 18A of the Madras General Sales Tax Act, the Hon'ble Apex Court observed that "under that provision, the jurisdiction of the Civil Courts would not be taken away where action of the authorities is wholly outside the law and is not a mere error in exercise of jurisdiction."

20. The question referred for determination is, whether the suit shall lie against the NIT without issuing Notice as contemplated under Section 115 of the NIT Act, if the action of the Trust is outside the purview of expression "in respect of anything purporting to be done under this Act".

21. Section 115 of the NIT Act is reproduced, as under, for reference:

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115. (1) No suit shall be instituted against the Trust or any Trustee or any person associated with the Trust under section 17 or any member of a committee appointed under section 18 or any officer or servant of the Trust, or any person acting under the direction of the Trust or of the Chairman or of any officer or servant of the Trust, in respect of anything purporting to be done under this Act, until the expiration of two months next after notice in writing has been, in the case of the Trust, left at its office, and in any other case delivered to or left at the office or place of abode of the person to be sued, stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intending plaintiff ; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Every such suit shall be dismissed unless it is instituted within six months from the date of the accrual of the alleged cause of action.

(3) If the Trust or other person referred to in sub-section (1) shall have tendered sufficient amends to the plaintiff before the institution of such suit, the plaintiff shall not recover any sum in excess of the amount so tendered and shall also pay all costs incurred by the defendant after such tender.

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22. Before adverting to the issue, it is necessary to understand meaning of word “purport”.

23. “The Law Lexicon” defines word “purport”, as used in speaking of the purport of an instrument, means the substance thereof as it appears on the face thereof to every eye that reads it, which means to have as it purports, to profess or claim by its tenor, substance. “Purport” imports what appears on the face of the instrument. It is usually intended to express the substance and effect as appears from the face of the instrument.”

“Black’s Law dictionary” defines word “purport”, as “the idea or meaning that is conveyed or expressed, especially by a formal document.”

“Concise Oxford Dictionary” defines word “purport” as the meaning or substance of a document or a speech, the purpose of a person or a thing: as substance, tenor, to mean, to have as its purport, to profess or claim by its tenor.

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In Marathi, word “purport” can be expressed as “अभिप्रेत असलेले किंवा हेतू असलेले”.

24. A bare perusal of Section 115 of the NIT Act indicates that no suit shall lie against the Trust or the persons described under the provisions “in respect of anything purporting to be done under this Act”, until the expiration of two months next after notice in writing has been left at the office of the Trust or delivered to or left at the office or place of abode of the person to be sued.

25. Thus, if the action of the Trust falls within the purview of expression “in respect of anything purporting to be done under this Act”, notice would be essential.

26. The *pari materia* provision as laid down in other statutes also, need to be considered.

27. Section 487 of the Bombay Municipal Corporation Act, reads thus:

(1) No suit shall be instituted against the Corporation or against the Commissioner, or the Transport Manager, or against any municipal officer

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or servant, in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:-

(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office and, in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any for the purpose of such suit, for

(b) unless it is commenced within six months next after the accrual of the cause of action.

28. Section 64 of the Bombay Housing Board provides “No person shall commence any suit against the Board or against any officer or servant of the Board or any person acting under the orders of the Board for anything done or purporting to have been done in pursuance of this Act, without giving to the Board, officer

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or servant or person two months previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of and, in case of any such suits for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than amounts so tender and shall pay all costs incurred by the defendant after such tender.

29. Section 179 of the Rajasthan Town Municipalities Act, reads as follows:

"179. Limitation of suits, etc. -(1) No suit shall be instituted against any municipal board, president, member, officer, servant or any person acting under the direction of such municipal board, chairman, member, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after notice in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a municipal board, delivered or left at its office, and, in case of a chairman, member, officer, or servant, or person as aforesaid, delivered to him or left at his

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office or usual place of abode; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Every such suit shall, unless it is a suit for the recovery of immovable property or for a declaration of title thereto, be dismissed if it is not instituted within six months after the accrual of the alleged cause of action.”

30. Section 478 of the Delhi Municipal Corporation Act has a similar provision.

31. Section 280 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, reads as under:

280. Limitation of suits, etc.. (1) No suit shall be commenced against any Zilla Parishad or against any officer or servant of, or working under, a Zilla Parishad or any person acting under the orders of a Zilla Parishad or Panchayat Samiti for anything done, or purporting to have been done, in pursuance of this Act, without giving to such Zilla Parishad officer, servant, or person one month's previous notice in writing of the intended suit nor

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after three months from the date of the act complained of. The notice shall state the cause of action, the nature of the relief sought, the amount of compensation claimed and the name of place of abode of the person who intends to bring the action.

(2) In the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

32. There are two sets of judgments, which interpret expression “any act done or purported to be done”.

33. In **The Poona City Municipal Corporation** *supra* wherein the Hon’ble Apex Court, in the light of Section 487 of the Bombay Provincial Municipal Corporation Act which is *pari materia* to provision as Section 115 of the NIT Act, while interpreting phrase “purported to be done in pursuance or execution or intended execution of the Act”, interpreted that what is plainly prohibited by

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the Act cannot be claimed “to be purported to be done in pursuance or intended execution of the Act”.

34. In the case of **Devi Singh** *supra*, the Hon’ble Apex Court, while interpreting expression of “any act done or purporting to be done in pursuance of execution or intended execution of the Act”, held that the question whether a notice under the aforesaid section was necessary has to be decided on the averments made. It was never the case of the plaintiff that the defendant Corporation was acting or purported to act under the provisions of the Act. The dispute raised related to the ownership of the property as also its possession, the Court noted that it had not been shown any provision in the Corporation Act by which the Corporation or its officers were entitled to either take possession of another person's property or retain its possession or dispossess a person who was already in possession without having recourse to the ordinary remedies under the law, and expressed that it was wholly unable to understand how Section 56 of the Corporation Act could be of any avail to the Corporation in the matter of notice under Section 447 of the Act. It also noted that the whole controversy between

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the parties centered on the question whether the Bazaar was the property of the plaintiff and was in his possession at the time of the institution of the suit, which had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. It was also held that learned Counsel for the Corporation had not been able to show how the suit as laid and framed attracted the applicability of Section 447 of the Corporation Act and thus held that under the aforesaid section no notice was necessary before the institution of the suit.

35. In the case of **Bombay Housing Board (now the Maharani Housing Board)** *supra*, in paragraph No.31, the Hon'ble Apex Court held that an act which is *prima facie* illegal is not within the category of acts done or purported to have been done in pursuance of that Act, and that it is only an act done under a vestige or semblance of authority or with some show of a right that would fall within the category. Bhagwati, J. in the course of his judgment said that the acts which would fall within the category of those done or purported to have been done in pursuance of the Act could only be

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those which were done under a vestige or semblance of authority, or with some show of a right and that the distinction between ultra vires and illegal acts on the one hand and wrongful acts on the other hand in the sense that they purport to have been done in pursuance of the Act is that they are intended to have been done in pursuance of the Act and are done with a vestige or, semblance of authority or sort of a right invested in the party doing those acts.

36. In the case of **Firm Surajmal Banshidhar and others** *supra*, considering the provisions under the Rajasthan Town Municipalities Act, 1951, while interpreting legal terminology “done or purported to be done under the Act”, the Hon’ble Apex Court held that the question, was whether illegal levy of terminal tax (assuming that it was illegal as held by the High Court) could be said to be a thing “done or purported to be done” under Act and held that a similar question arose for consideration of this Court in the case of **The Poona City Municipal Corporation** with reference to the provisions of Section 127(4) of the Bombay Provincial Municipal Corporation Act, 1949 and it was held that if levy of the tax was prohibited by the Act concerned and was not in pursuance

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of it, it could not be said to be “purported to be done in pursuance or execution or intended execution of the Act.” It was observed that what is plainly prohibited by the Act cannot be claimed to be “purported to be done in pursuance or intended execution of the Act”. It was observed that what was plainly prohibited by the Act could not be “claimed to be purported to be done in pursuance or intended execution of the Act.” It was therefore held that the suit was outside the purview of the section 127(4) and was not barred by limitation.

37. In the case of **J.N.Ganatra vs. Morvi Municipality, Morvi**²³, while considering the terminology "an act done or purported to be done in pursuance or execution or intended execution of this Act" it was held that a power under a statute has to be exercised in accordance with the provisions of the statute and in no other manner.

38. In the case of **Municipal Corporation of Delhi** *supra*, the Hon'ble Apex Court, in paragraph No.7, while considering Section 478 of the Delhi Municipal Corporation Act, 1957, held that the

23 AIR 1965 SC 555

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bundle of facts constituting the cause of action which has accrued to the claimants were the ownership and possession of the tree vesting in the Corporation, its maintenance by the Corporation, fall of the branch of the tree over the deceased and the death consequent to the injury sustained. The *causa proxima*, i.e., the immediate cause of action was the fall of the branch of the tree over the head of the deceased. The fall of the branch of the tree cannot be attributed to any act done or purporting to have been done in pursuance of the Act etc. by the Municipal Corporation or any officer or employee thereof.

39. In the case of **Pune Municipal Corporation and another** *supra*, the Division Bench of this Court, while referring terminology “any act done or purported to be done in pursuance of or execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act”, observed that Section 487 of the Bombay Provincial Municipal Corporation Act requires a Notice as a condition precedent to the institution of the suit; but only in respect of “any act done or purported to be done in pursuance of or execution or intended execution of the Act

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or in respect of any alleged neglect or default in the execution of this Act.” As said earlier, neither the Act nor the rules or the Standing Order enable the detention of a truck beyond the period required for making of an assessment. Dogged resistance to the plaintiff’s attempt to secure the release of the truck, was, therefore, held not to be an act in pursuance or execution or intended execution of the Act or any neglect or default in the execution of the Act.

40. A Single Bench of this Court in the case of **Nagpur Municipal Corporation vs. Bhaurao s/o Marotrao Mohod (D) thr. Legal Heirs**²⁴ while considering the phrase has held that the reason stated by the Courts below for rejecting the objection was that notice under Section 384 was required to be issued only when the suit that was filed was in respect of any act done in pursuance or execution of the provisions of the Act or in respect of any alleged neglect or default in the execution of the Act or any rule or any bye-law made under the Act and since the notice dated 18/08/1984 was not issued in pursuance or execution of the Act or any alleged neglect or default in the execution of the Act, the suit

²⁴ 2015(1)Mh.L.J. 596

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as filed by the respondent was not hit by Section 384 of the said Act. It must be noted here that the notice threatened forcible eviction of respondent by granting him just 3 days time to vacate the suit shop, and, therefore, the notice was in clear violation of Section 106 of the Transfer of Property Act, with the agreement between the appellant and the respondent being one of lease and not a licence. It noted that the Act did not confer any special power on the Corporation to forcibly evict the tenants or lessees facing a situation as in the present case, bypassing the provisions of the Transfer of Property Act and powers of Civil Court, and, therefore, the rejection of its objection by both the Courts below was held to be legal and proper and was not interfered with.

41. In the case of **Shri Gorakshan Sanstha, Akola** *supra* also, Section 487 of the Municipal Corporation Act was considered and it has been held that as per provisions of Section 487 of the said Act protection is granted with regard to any act done or purported to be done in pursuance or in execution or intended execution of the said Act. In that regard it was held that unless a notice is given by the plaintiff with duration of one month and a suit filed within

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six months of the accrual of the cause of action, such suit cannot be instituted. Having found that the plaintiff-Trust was entitled for exemption under Section 132(1)(b) of the said Act, it was held that it was clear that the Trust was not liable to be assessed for payment of tax, and if that be the situation then issuance of the demand notice on 04/01/2011 cannot be said to be an act done in pursuance of or in execution of the provisions of the said Act.

42. In the case of **Chief Executive Officer, Zilla Parishad, Parbhani and another** *supra* also, the Single Bench of this Court, while considering *pari materia* provision under Section 280 of the Zilla Parishads and Panchayat Samitis Act and under Section 180 of the Bombay Village Panchayats Act, held that from the wording of Section 180(2) it is clear that Notice is required before institution of the suit only in cases where action is brought for the act while acting under anything done or purporting to have done by or under the said Act.

43. In the light of the above decisions, one more decision is required to be referred dealing with the meaning of the word “purport”.

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44. In the case of **Azimunissa and others vs. The Deputy Custodian, Evacuee Properties, District Deoria**²⁵, it is observed that “the word “purport” has many shades of meaning. It means fictitious, what appears on the face of the instrument, the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable; **Dicker v. Angerstein**⁽²⁾. Purporting is therefore indicative of what appears on the face of it or, is apparent even though in law it may not be so”.

45. Thus, the Hon’ble Apex Court held that in regards to the provision that was before them for consideration, the word “purport” meant the meaning given to it by them. The very first sentence shows that the word “purport” has many shades of meaning which itself sufficiently shows that for purposes of some statutes, the word “purport” can have a different shade of meaning than that given to it by the Hon’ble Apex Court in **Azimunissa’s** case and that the expression “purported to be done under the Act”

25 AIR 1961 SC 365 (V 48 C 59)

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will not include an Act which is wholly outside the provisions of the Act.

46. Thus, in the catena of decisions, the Hon'ble Apex Court held that "an act purported to be done under the provisions of the Act should be in pursuance of execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act".

47. Though learned counsel Shri A.C.Dharmadhikari relied upon the decision in **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra* to contend that the expression "in respect of anything purporting to be done under this Act" employed under sub-section (1) of section 115 of the NIT Act is comprehensive enough to include all such acts which are already done and the acts which are to be done, however, what is conveyed by this expression is that the act whether done or to be done, has to be purporting to be done under the Act/Statute.

48. In the case of **State of Maharashtra and another vs. Shri Chander Kant**²⁶, relied upon by learned counsel Shri

26 1977(1) SCC 257

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A.C.Dharmadhikari though it has been held that the words "Act purporting to be done in official capacity" apply to non-feasance as well as to misfeasance and the word "act" extends to illegal omissions and no distinction can be made between acts done illegally and in bad faith and acts done bona fide in official capacity on account of which it has been held that Section 80 of the Code of Civil Procedure therefore is attracted when any suit is filed against a Public Officer in respect of any act purporting to be done by such Public Officer in his official capacity.

In our considered opinion, the impression in respect of anything purporting to be done under this Act, has to relate to an action, which is not only legal, but is also corroborated under the power conferred by any provision therein on any authority and cannot be stretched to elude on illegal action or something not contemplated by the Act/Statute. Such an opinion would make act illegally done by misuse of the provision of an Act/Statute which is not warranted in law. Apart from which it would be contrary to what has been expressed by the Hon'ble Apex Court in the cases of **Devi Singh *supra* and Bombay Housing Board *supra*.**

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49. In the case of **Ram Kumar and ors vs. State of Rajasthan and ors**²⁷, as relied upon by learned counsel Shri A.C.Dharmadhikari, it has been held that no notice under Section 80 of the Code of Civil Procedure is required before filing suit if the act done by the public officer is not in discharge of his official duties, which in fact supports the proposition canvassed by learned Senior Counsel Shri Manohar.

50. In the case of **Nagpur Improvement Trust, through Chairman vs. Anil Narayanrao Shastri**²⁸, law laid down in the case of **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra*, is only reiterated and thus what has been said for **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra* would be equally applicable.

51. In the case of **The Nagpur Improvement Trust vs. Bhagwandas**²⁹ it is held that the word "act" extends to illegal omissions also and no distinction can be made between acts done illegally and in bad faith and the acts done *bona fide* in official capacity and therefore, all sorts of acts are covered by the expression "in respect of anything purporting to be done under this

27 MANU/SC/4259/2008

28 (Second Appeal No.419/2005 decided by this court on 22.11.2018)

29 MANU/MH/2245/2020

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Act" employed under sub-section (1) of the NIT Act. This however militates against what has been held in Bombay Housing Board *supra* and **Devi Singh** *supra* by the Hon'ble Apex Court.

52. Though further reliance is placed on the decision in the case of **Nagpur Improvement Trust vs. Ashabai**³⁰ wherein it is held that Civil Courts cannot adjudicate the issue about legality and illegality of the suit without compliance of Notice under Section 115 of the NIT Act, it is equally trite that a person cannot be rendered remediless, and if the Civil Court cannot adjudicate upon the issue about legality and illegality for a suit without compliance with the requirement of a notice under Section 115 of the NIT Act that would be the situation, as the NIT Act does not then provide for any other remedy to a person aggrieved by such illegal notice.

53. Thus, learned counsel Shri A.C.Dharmadhikari submitted that the above decisions clearly indicate that any action taken by the NIT including cancellation of the allotment falls within the purview and definition of the Act "purported to be done under the Act," and, therefore, issuance of Notice and the waiting period

30 MANU/MH/3787/2023

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prescribed that is two months is mandatory. He further submitted that in view of the settled legal position, the reference to the Division Bench was not at all necessary and in support of his contentions, he placed reliance on the decision in the case of **Dr. Parthsarathi S/o Mukund Shukla vs. The Maharashtra Medical Council, Mumbai**³¹ wherein it is held that Reference is to be made to the Larger Bench after framing a question germane to the controversy and when the cause is live and in existence. For academic purpose, a reference can be made to the Larger Bench, only if the issue, though not live, is of national importance and in order to avoid prospective litigation.

54. The question, whether notice was necessary, has to be decided on the facts and circumstances of each case, wherein the question regarding taking of possession or retaining of the possession or dispossessing person, who is already in possession in question, any authority cannot take the possession without having recourse to the ordinary remedies under the law. The notice under Section 115 of the NIT Act is required to be issued only when the suit filed is in respect of any act done in pursuance or execution of

³¹ 2002(1)Mh.L.J. 737

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the provisions of the Act or in respect of any alleged neglect or default in the execution of the Act or any Rule or any bylaws made under the Act. It must be noted that the very act of issuing, even for eviction, Notice indicating granting of a lesser period than mentioned in Section 115 of the NIT Act itself is a clear violation of Section 106 of the Transfer of Property Act and the said act does not cover under the act purporting to be done under the said Act.

55. In the decisions, on which learned counsel Shri A.C.Dharmadhikari placed reliance, especially the decision in the case of **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra* and **Abdul Jabbar Haji Mohammed Ibrahim** *supra*, the law settled by the Hon'ble Apex Court was not considered in view of which it was held that notice under Section 115 of the NIT Act is mandatory, which in fact will have to be held to be *per incuriam*.

56. Section 115 of the NIT Act, mandates that no such suit shall be instituted against the trust or any trustees associated with the trust or any officer or servant of the trust in respect of anything purporting to be done under the NIT Act unless Notice in writing has been given and two months have expired from the date of

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receipt of such notice. There is no other provision in the NIT Act barring the jurisdiction of the Civil Courts. What is required under Section 115 of the NIT Act is that before filing of the suit by any aggrieved person against the trust or its trustees or any person associated with the trust or any officer or servant of the trust, two months notice should be given.

57. Thus, so far as the NIT Act is concerned, the jurisdiction of the Civil Courts is not expressly or impliedly excluded. On the contrary, the very fact that a provision has been made for giving two months notice before filing of the suit would show that the Civil Courts have jurisdiction and its jurisdiction is not excluded or ousted.

58. A look at the Corporation Act and the NIT Act would clearly reveal that the provisions of the said Act even if assumed to have created right or liabilities do not provide any remedy for its enforcement, entirely. The averments made by the plaintiff in the plaint clearly make out a case for infringement of civil right then jurisdiction of the Civil Courts is clearly attracted more so when the notice issued is without following due process of law, which is

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not an act purported to be an act/action done under the Act, on account of which, no such notice is required. Thus, in view of catena of decisions, levying of tax which is prohibited, levying excess tax than permitted and dispossessing a person without following a due process of law, denying compensation on negligence, forcible possession, are held to be the acts outside the purview of expression in respect of “anything purporting to be done under this Act”.

59. The Single Bench of this Court, in the cases of **Smt.Jankibai Jaiswal Bahu Uddesiya Sanstha** *supra* and **Abdul Jabbar Haji Mohammed Ibrahim** *supra* , has not considered these aspects and concluded that notice is mandatory which is not good law and contrary to the law laid down by the Hon'ble Apex Court.

60. It is well settled that a statute creating a special jurisdiction must be strictly construed, especially when it has the effect of depriving the subject of a common law right. As soon as the powers which are given under the provisions of the Act are exceeded or transgressed by the authority, the Civil Courts acquire jurisdiction and such acts would not be covered under the

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expression of “purporting to be done under the Act”, so as to afford a plea of lack of jurisdiction for want of notice.

61. In view of the Hon’ble Apex Court decision, in the case of **Azimunissa and others** *supra*, the expression “purporting to be done under the Act” will not include an act which is wholly outside the provisions of Act. The acts like levying of the tax, which are prohibited or levying excess tax or dispossessing a person without following a due process of law, are held to be acts outside the purview of the Act “purporting to be done or to be done under the Act”.

Question No.1 is, therefore, being answered accordingly.

Question No.2

62. The second question which comes for our consideration is, whether the action of the NIT in issuing the Notice for taking action in lesser time than as provided in Section 115 of the NIT Act thereby resulting in depriving the aggrieved party in approaching the Court for want of compliance with requirement of Section 115

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of the NIT Act would amount to a waiver of the requirement of the said Section.

63. A bare perusal of Section 115 of the NIT Act, indicates that no suit shall lie against the Trust or the persons described under the provisions in respect of anything purporting to be done under this Act, until the expiration of two months next after notice in writing has been, in the case of the Trust, left at its office, and in any other case delivered to or left at the office or place of abode of the person to be sued. Thus, if the action of the Trust falls within purview of expression “in respect of anything purporting to be done under this Act” Notice under Section 115 of the said Act would be mandatory and the person who is aggrieved by the action of the Trust or the persons described under Section 115 of the said Act will have to wait for filing of suit after issuing Notice in terms of the aforesaid provisions.

64. Now, question remains, if the NIT proposes to take action like removing of structure, Notice to evict lease premises on the ground of breach of conditions within a period of less than 60 days would that amount to denial of right of other side to file suit or

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deprivation of right to file suit against the NIT. By such act, whether the NIT is waiving requirement of Section 115 of the NIT Act.

65. Before answering the above said questions, let us understand the expression “waiver”.

66. The word “waiver” has been described in Halsbury’s Laws of England, 4th Edition, paragraph No.1471, which is reproduced for reference as under:

“1471. Waiver – Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision does not exist. Waiver of this kind depends upon concern, and the fact that the other party has acted upon it is sufficient consideration..... It seems that, in general, where one party has by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on

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accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the question which he has himself so introduced, even though it is not supported in point of law by any consideration.”

In Halsbury’s Laws of England, Vol.16(2), 4th Edition, paragraph No.901, which is reproduced for reference as under:

901. "The expression 'waiver' may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right... Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only.. Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the

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right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it.”

67. In general, “waiver” is, when one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him.

68. The Hon’ble Apex Court in the case of **Kalpraj Dharamshi vs. Kotak Investment Advisors Limited and another**³², observed in paragraph No.104 that for considering, as to whether a party has waived its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established, that a party expressly or by its conduct acted in a manner, which is

inconsistent with the continuance of its rights. However, the mere acts of indulgence will not amount to waiver. A party claiming waiver would also not be entitled to claim the benefit of waiver, unless it has altered its position in reliance on the same.

69. The Hon'ble Apex Court, in the case of **Manaklal vs. Dr.Prem Chand**³³, observed that, "it is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objections. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. As **Sir John Romilly M. R.** has observed in **Vyvyan v. Vyvyan**³⁴, 'waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim'".

70. Thus, it is well settled that a waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred, only if and after it is shown

33 1957 SCR 575

34 (1861)30 Beavv. 54

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that the party knew about his right and he neglects to enforce them or chooses one benefit instead of another. Thus, for applying principle of “waiver”, it will have to be established, that though a party was aware about the relevant facts, it has neglected to take such an objection or chose not to take an objection.

71. The Hon’ble Apex Court, in the case of **Krishna Bahadur vs. M/s.Purna Theater and ors**³⁵, observed that a right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute, subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct.

72. In the cases of **Dawsons Bank Limited vs. Nippon Menkwa Kabushiki Kaisha**³⁶, **Bashesar Nath vs. The Commissioner of Income Tax, Delhi and Rajasthan and anr**³⁷, **Associated Hotels of India Limited, Delhi vs. S.B.Sardar Ranjit Singh**³⁸, **Jaswant Singh**

35 (2004)8 SCC 229

36 AIR 1935 PC 79

37 AIR 1959 SC 149

38 AIR 1968 SC 933

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**Mathura Singh and anr vs. Ahmedabad Municipal Corporation and
ors**³⁹, the Hon'ble Apex Court summarizes term "waiver", as under:

"Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them."

73. Thus, the Hon'ble Apex Court by various pronouncements settles the principles of "waiver" as for constituting "waiver", it must be established that though a party knows the material facts and is conscious of his legal rights, in a given matter, but fails to assert its right at the earliest possible opportunity, it creates an effective bar of waiver against him. Waiver is an intentional relinquishment of rights. It involves conscious abandonment of an existing legal right, advantage, benefit, claim, or privilege. It is an agreement, not to assert a right. There can be no waiver unless

39 (1992) Suppl. (1) SCC 5

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the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them.

74. In the background of this legal position, we will have to examine as to whether the Notice of lesser period by the NIT depriving the other party from approaching the Court amounts to a waiver of right stipulated in favour of the NIT in view of Section 115 of the NIT Act.

75. In the case of **General Manager, Sri Siddeshwara Cooperative Bank Ltd. & anr. vs. Sri Iqbal & ors.**⁴⁰, while considering the plea of waiver vis-a-vis a statutory provision, it is held that no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and

40 (2013)10 SCC 83

the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not, depends on facts of each case and no hard and fast rule can be laid down in this regard.

76. The Full Bench Judgment of this Court in the case of **Vasant Ambadas Pandit** *supra* has held that the true legal position in this behalf is that no suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the Civil Court. In fact, it is not suggested who else can try. The question, whether, in fact, there was waiver or not, would

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necessarily depend on facts of each case and would be liable to be tried by the same Court if raised. The order of rejection of plaint, therefore, by the Principal Judge of the City Civil Court was incorrect and liable to be set aside.

The reference was made before the Full Bench as the suit was instituted by the plaintiff on 1.7.1970 in City Civil Court, Mumbai against the Bombay Municipal Corporation seeking declaration that the Notice of the Corporation, Section 351 of the Act, dated 29.3.1969 was illegal, void, bad in law and unenforceable. By the said suit, the plaintiff also claimed the injunction restraining the defendant from enforcing the said Notice. The defendant No.1 raised a plea that the suit is bad for want of statutory Notice under Section 527 of the Bombay Municipal Corporation Act. While answering this reference, the Full Bench held what has been stated above.

77. Though learned counsel Shri A.C.Dharmadhikari strongly opposes the above contention by submitting that Section is to be read as it is, there cannot be waiver when public body is involved, and the expression, “anything to be done or purporting to be done

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under the Act” even covers wrongful act and, therefore, the Notice of lesser period cannot be treated as “waiver”, for which he places reliance on the decision of the Hon’ble Apex Court in the case of **Commissioner of Customs, Mumbai vs. Virgo Steels, Bombay and anr**⁴¹, what is necessary to note that by referring the earlier decision in the case of **S.Raghubir Singh Gill vs. Gurcharan Singh Tohra and ors**⁴², Court negated an argument that the requirement of Section 94 of the Representation of the People Act, 1951 cannot be waived. This argument was based on the principle that public policy cannot be waived. Rejecting the said argument, the Court held that the privilege conferred or a right created by a Statute, if it is solely for the benefit of an individual, he can waive it. It also held that where a prohibition enacted is founded on public policy, Courts should be slow to apply the doctrine of waiver but if such privilege granted under the Act is for the sole benefit of an individual as is the case under Section 94 of the Representation of the People Act, the person in whose benefit the privilege was enacted has a right to waive it because the very concept of privilege inheres a right to waiver. The Hon’ble Apex Court further

41 (2004)4 SCC 316

42 1980 Supp SCC 53

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observed, in paragraph No.14 that from the ratio laid down by the Privy Council and followed by this Court in the above-cited judgments, it is clear that even though a provision of law is mandatory in its operation, if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right. In paragraph No.15, the Hon'ble Apex Court considered the mandatory requirement of issuance of Notice and held that bearing in mind the above decided principle in law, if the mandatory requirement of issuance of notice under Section 28 of the Act is considered, it will be seen that requirement as provided by the Statute is solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, though the section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken, this was not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice, thus, this right of notice being personal to the person concerned, the same can be waived by that person.

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78. Thus, the expression “waiver” is extensively dealt with by various pronouncements of the Hon’ble Apex Court and this Court also, which clearly show that “waiver” is an intentional relinquishment of a right. It is an agreement between the parties under which the party fully knowing of its right has agreed not to assert a right and that party expressly or by its conduct has acted in such a manner which is inconsistent with the continuance of its right and thus has chosen not to exercise such right.

79. As observed earlier, Section 115 of the NIT Act mandates that no suit shall be instituted against the Trust or its trustee or any person associated with the Trust or against any office bearer servant of the Trust in respect of anything purported to be done under the NIT Act, unless a Notice in writing has been given and two months have been expired. It is well settled that right of a aggrieved person to file a suit affecting his civil right or rights under common law could always be agitated by filing a civil suit in the Civil Court, unless the jurisdiction of the Civil Court is expressly or impliedly barred. The presumption is always in

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favour of the jurisdiction of the Civil Courts and exclusion of the jurisdiction of the Civil Courts is not to be readily inferred.

80. The Hon'ble Apex Court, in the case of **Ramprasad Narayan Sahi and anr vs. The State of Bihar and ors**⁴³, held that the meanest of citizens has a right of access to a Court of law for the redress of his just grievances.

81. **Romer, L.J. in Lee vs. Showmen's Guild of Great Britain** [(1952)2 QB 239 (CA)] holds "the Courts jealously uphold and safeguard the prima facie privilege of every man who take resort to them for determination and enforcement of his legal rights".

82. In the light of the above well settled legal principles, while considering rights of the parties by taking into consideration the provisions under Section 115 of the NIT Act, what is required is that before filing a suit by an aggrieved person against the Trust or its trustees or its office bearers or servants, two months Notice should be given.

43 AIR 1953 SC 215

83. Thus, so far as the NIT Act is concerned, the jurisdiction of the Civil Courts is not expressly or impliedly excluded. On the contrary, it is only interdicted for giving two months notice before filing of the suit, whereupon the Civil Courts acquire jurisdiction. The object behind the said notice is to curtail the litigation. The intention behind the Notice is to make aware the officers that the act committed by them is illegal act and to give an opportunity to rectify the same or correct the same, otherwise the action would be taken against them. But, if the action itself is *mala fide* or illegal, then in view of the catena of decisions, the said Notice is not required. The Full Bench of this Court, while interpreting the *pari materia* provision by referring the Apex Court's judgment in the case of **Dhirendra Nath Gorai and Subal Chandrashaw and ors vs. Sudhir Chandra Ghosh and ors**⁴⁴, observed that in our opinion, the true legal position in this behalf is that no suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of the Notice is a condition precedent to the exercise of the jurisdiction, but this being the mere procedural requirement, the same does not

44 (1964)6 SCR 1001

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go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the Civil Courts. In fact, it is not suggested who else can try. The question whether in fact there is a waiver or not would necessarily depend on the facts of each case and is liable to be tried by the same Court, if raised.

84. Thus, from the interpretation laid down in catena of decisions, while considering the *pari materia* provisions under the different Acts, it is apparent that Notice under Section 115 of the NIT Act would be required to be issued only when the action is in respect of any act done in pursuance or execution of the provisions of the Act in respect of any alleged neglect or default in the execution of the Act or any Rule or any bye-law made under the Act. The preamble of the Act or purport of the Act is to properly plan all types of construction, regular housing scheme, maintaining city streets, drainage, sanction, and other city improvement scheme. If the Notice is issued for demolition of structure for eviction mentioning lesser time than what is given under Section

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115 of the NIT Act as a result of which the other party is deprived from approaching the Civil Courts in violation of Section 106 of the Transport of Property Act, when the act does not confer any special power on the NIT to either forcible demolition of the structure or evict tenants or lessees which is not the act in pursuance or execution or within purport of the Act, no notice would be required. There is no provision in the NIT Act by which the NIT or its officers are either entitled to take possession of the property of other person or retain its possession or dispossess a person who is already in possession without having recourse to the ordinary remedies under the law. This would not be an act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. Therefore, issuing a Notice mentioning a lesser period than mentioned in Section 115 of the NIT Act and depriving the other party to approach the Civil Courts and depriving him from asserting his right under the common law by ignoring the provisions which is for the benefit of the Trust and the Trust has chosen not to act as per the provisions amounts to “waiver”. Such “waiver” can be ascertained from the conduct of the parties. In every case when the

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NIT, initiates an action or intends to do so, it is aware of what its rights are and of the party too, to whom notice has been given. In such circumstances, if the action is intended to be taken within a time frame, which would make the person against whom such action is to be or intended to be taken, unable to comply with the requirement of giving the statutory notice under Section 115 of the NIT Act, then such action on part of the NIT would amount to a waiver of the requirement of such notice, thereby, permitting the Civil Court to entertain and decide the suit. Thus, in a given case, if the Trust knows the material facts and is also conscious about its legal rights, but fails to observe or assert the said legal right and issues a Notice of intending action of a lesser period affecting the right of the other side is an intentional relinquishment of right, it is conscious abandonment of an existing legal right amounts to “waiver”.

85. Recently, the Hon’ble Apex Court, in the case of **Kalpraj Dharamshi** *supra*, by referring the catena of decisions, observed that for constituting acquiescence or waiver, it must be established that though a party knows a material facts and is conscious of legal

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rights in a given matter, but fails to assert its right at the earliest possible opportunity, it creates an effective bar of waiver against him. Whereas, acquiescence would be a conduct where a party is sitting by, when another is invading his rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim, or privilege and it is an agreement not to assert a right. There can be no waiver, unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them.

86. In view of that, the act of issuing the Notice of a lesser period than mentioned in the provision is abandonment of a right or it is a choice of the NIT not to exercise the right and, thus, amounts to “waiver” by conduct.

87. In the light of the above discussion, the questions, therefore, are answered as under:

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1. Whether suit shall lie against the Nagpur Improvement Trust without issuing a Notice under Section 115 of the Nagpur Improvement Trust Act, 1936 if the action of the Trust is outside the purview of expression “in respect of anything purporting to be done under this Act” used in the said provision?

Answer: The word “purport” has many shades of meaning. The expression “purporting to be done under the Act” will not include an act which is wholly outside the provisions of the Act. It cannot be gainsaid that the actions, like demolition of structure, eviction of tenants, retaining the possession or forcible eviction by granting him lesser period and depriving the other party from challenging the action, are not in pursuance or execution of the Act.

In the light of the observations of the Hon’ble Apex Court in **Azimunissa’s** case *supra*, the expression

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“purporting to be done under the Act” will not include an act which is wholly outside the provisions of the Act, therefore, the Notice of two months is not mandatory in such a situation.

2. Whether the action of the Nagpur Improvement Trust in issuing a Notice for taking action in lesser time than as provided in Section 115 of the Nagpur Improvement Trust Act, 1936 thereby resulting in depriving aggrieved party in approaching the Court for want of compliance with requirement of the said Section, would amount to a waiver of the requirement of Section 115 of the said Act?

Answer: The Trust is fully aware about its rights enshrined under Section 115 of the NIT Act. The requirement or condition is included for the benefit of the Trust. The Trust is fully cognizant of its rights, but neglecting so, chooses one benefit instead of another. The action of the NIT in issuing Notice of a lesser period deprives the right of other

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party by its own conduct acted in a manner which is inconsistent with the continuance of its right and amounts to waiver of the right.

(M.W.CHANDWANI, J.)

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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