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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1539 OF 1987

- 1(a) Mr. Maneesh Bawa son of
Late Shri Randhir S. Bhalla
- 1(b) Mr. Sumeet Bawa son of
Late Shri Randhir S. Bhalla
- 1(c) Smt. Archana Bhalla wife of
Late Shri Randhir S. Bhalla. .. Petitioners

Versus

1. The Special Land Acquisition Officer (7),
Bombay and Bombay Suburban District,
having his office at 2nd floor, Chhatrapati
Shivaji Market Building, Palton Road,
Bombay 400 001.
2. The Ward Officer 'T' Ward,
having his office at Lala Devi Dayal Road,
Mulund (West),
Bombay 400 080 ... Respondents

Mr. Janak Dwarkadas, Senior Counsel a/w Mr.D.Khambata, Senior Counsel a/w Mr. Kapil Moye, Mr. Paresh Shah, Ms. Leena Mirasee i/by M/s. Shah & Sanghvi for the Petitioners.

Ms. Geeta Shastri, Additional Government Pleader for the Respondent No.1 – State.

Mrs. Geeta Jogalekar for Respondent No.2- BMC.

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CORAM : A.S. OKA & V.L. ACHLIYA, JJ.

DATE ON WHICH SUBMISSIONS ARE HEARD : 22.09.2015

DATE ON WHICH JUDGMENT IS PRONOUNCED : 21.11.2015

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

. The lands which are the subject matter of this Petition under Article 226 of the Constitution of India have been described in Exhibit – A to the Petition are situated at Mulund (W), Taluka Kurla, Mumbai Suburban District. In the Development Plan under the Maharashtra Regional and Town Planning Act, 1966 (for short “the MRTP Act”) for the city of Mumbai which was sanctioned on 19th November, 1965 the land described in Exhibit – A to the Petition (for short “the said land”) was shown reserved for a playground. The original Writ Petitioner died on 29th May, 2014 and his legal representatives have been brought on record. It is pointed out in the Petition that a notice dated 30th September, 1986 was issued to the original Writ Petitioner by the second Respondent - Mumbai Municipal Corporation stating that pursuant to the provisions of Section 222 of the Mumbai Municipal Corporation Act, 1888 (for short “the MMC Act”) there was a proposal to construct 12 feet wide open Nalla through the said land. The original Petitioner filed Writ Petition No.2708 of 1986 in this Court in which interim order was passed preventing the second Respondent – Municipal Corporation from acting upon the said notice.

2. It is pointed out in the Petition that though the Development Plan came into force with effect from 20th December, 1965 no steps were taken to acquire the said land for the purpose of playground for a period of 20 years or more. It is pointed out in the Petition that notices purporting to be the notices under Sub-sections (3) and (4) of the Section 9 of the Land Acquisition Act, 1894 (for short “the said Act of 1894”) were issued on 1st April, 1987 in respect of the said land. By amending the Petition, a challenge was incorporated to the notification dated 4th March, 1987 (for short “the impugned notification”) issued in exercise of powers under Sub-sections (2) and (4) of Section 126 and Section 129 of the MRTP Act. The said notification recorded that the possession of the said land was required urgently and therefore, Section 129 of the MRTP Act has been applied. Under the said notification, the Special Land Acquisition Officer (7), Bombay was authorized to enter and take possession of the said land subject matter of the said notification in accordance with Sub-Section (1) of Section 129 of the MRTP Act after giving a notice of 15 days after the publication of the notification in the Maharashtra Government Gazette.

3. On 7th August, 1987, the learned Single Judge of this Court issued Rule in the Petition and granted ad-interim relief in terms of prayer

clause (c) thereby preventing further steps to be taken on the basis of the impugned notices dated 1st April, 1987 at Exhibits-E and E-1.

4. There is a reply filed by Shri Sakharam Pandurang Jadhav, the Special Land Acquisition Officer (7), Mumbai. It is stated that the said officer called upon the Second Respondent – Municipal Corporation to deposit a sum of Rs.55,47,542/- being an estimated amount of compensation and accordingly, the said amount has been deposited by the Municipal Corporation. It was contended that there was no delay in invoking the urgency clause under Sub-section (1) of Section 129 of the MRTP Act. There is also an affidavit in reply filed by Shri P.K. Natarajan, Assistant Engineer, working in the office of the Chief Engineer (Development Plan) of the Second Respondent – Municipal Corporation. There is a rejoinder filed by Shri Randhir Singh Bhalla, the original Writ Petitioner. There are further affidavits filed by Shri Sakharam Pandurang Jadhav, Special Land Acquisition Officer (7) as well as Shri P.K. Natarajan, Assistant Engineer (D.P.) of the Mumbai Municipal Corporation. There is another rejoinder filed by Shri Randhir Singh Bhalla, the original Writ Petitioner.

5. The learned Senior Counsel appearing for the Petitioners invited our attention to the impugned notification. He urged that Sub-Section (2) and Sub-Section (4) of Section 126 of the MRTP Act operate

in different fields and therefore, both the Sub-Sections could not have been invoked at the same time. He urged that a declaration under Sub-Section (2) of Section 126 can be made within a period of one year from the date of publication of the Development Plan. He urged that in the present case, the Development Plan was published in 1965 and therefore, Sub-Section (2) could not have been invoked. He pointed out that Sub-Section (4) of Section 126 can be invoked provided that the market value at the date of declaration in the Official Gazette under Sub-Section (4) of Section 126 is paid. He pointed out that a declaration under Sub-Section (4) of Section 126 can be made even after expiry of a period of one year from the date of publication of Development Plan. He submitted that the impugned notification which invokes both Sub-Section (2) and Sub-Section (4) of Section 126 becomes *per se* illegal. He invited our attention to the provisions of Section 129 of the MRTP Act and in particular Sub-Section (1) thereof. He urged that Sub-Section (1) of Section 129 of taking over possession of the acquired land in case of urgency can be invoked only in a case where a notification under Sub-Section (2) of Section 126 has been published. He urged that in the present case, such a notification under Sub-Section (2) of Section 126 could not have been lawfully published. He submitted that in any event, as a notification as contemplated by Sub-Section (2) of Section 126 of the MRTP Act is not published within

one year from the date of publication of the Development Plan, Sub-Section (1) of Section 129 could not have been invoked. He pointed out that the impugned notification was issued 20 years after the Development Plan came into force. He pointed out that in fact it was published after the Draft Revised Development Plan was notified in the year 1984. He pointed out that in any event, a combined notification invoking Sub-Sections (2) and (4) of Section 126 as well as Sub-Section (1) of Section 129 of the MRTP Act is completely illegal and the same deserves to be set aside.

6. The learned counsel appearing for the Mumbai Municipal Corporation submitted that both Sub-Sections (2) and (4) of Section 126 of the MRTP Act have been rightly invoked by the impugned notification. She urged that even assuming that Sub-Section (2) of Section 126 could not have been invoked on the date of the impugned notification, Sub-Section (4) of Section 126 could have been certainly invoked. She urged that the fact that the acquired land is immediately required for the public purpose cannot be disputed and therefore, Sub-Section (1) of Section 129 of the MRTP Act has been rightly invoked. She pointed out the provisions of Section 126 as on the date of the impugned notification and submitted that a declaration under Sub-Section (2) of Section 126 could have been made within a period of

three years from the date of publication of the Development Plan. She would, therefore, urge that no interference is called for.

7. After the Petition was closed for Judgment, the learned Additional Government Pleader, after notice to all the parties placed on record a decision of the Full Bench of this Court in the case of *Shiorani w/o Shriram Jaiswal by Legal Representatives and others Vs. State of Maharashtra and others*¹ as well as the decision of the Apex Court in the case of *State of Maharashtra and another Vs. Sant Joginder Singh Kishan Singh and others*². She urged that Sub-Section (4) of Section 126 has been considered in both decisions. The learned Senior Counsel appearing for the Petitioners submitted that he does not wish to make any further submissions on the decisions relied upon by the learned Additional Government Pleader.

8. We have given careful consideration to the submissions. The relevant part of the impugned notification reads thus :

“Now, therefore, in exercise of the powers conferred by sub-sections (2) and (4) of section 126 and section 129 of the said Act, read with section 6 of the Land Acquisition Act, 1894 (I of 1894) in its application to the State of Maharashtra and with Government Notification, Urban Development,

1 1994 Mh.L.J. 1821

2 1995 (1) Mh.L.J. 793

Public Health and Housing Department, No.TPS 2175/5106-UD-VII, dated 3rd March, 1979 the Commissioner, Konkan Division hereby declares that the said lands are urgently needed for the said public purpose.

The Special Land Acquisition Officer (7), Bombay and Bombay Suburban District, is hereby appointed under clause (c) of section 3 of the Land Acquisition Act, 1894 to perform the functions of the Collector for all proceedings hereafter to be taken in respect of the said lands. **He is also authorized to enter and take possession of the land under section 129, sub-section (1) of the said Act, after giving a notice of fifteen days after publication of the notification in the Maharashtra Government Gazette.”**

(emphasis added)

9. With a view to appreciate the submissions made by the learned counsel representing the parties, Section 126 as it existed on the statute book on the date of the impugned notification will have to be considered. Section 126 as it stood in the statute book on the date of the impugned notification as well as on the date of its publication reads thus :-

“126. Acquisition of land required for public purposes specified in plans.

- (1) When after the publication of a draft Regional plan, a Development or any other plan or town planning scheme, any land is required or reserved for any of the

public purposes specified in any plan or scheme under this Act at any time the Planning Authority, Development Authority, or as the case may be, [any Appropriate Authority may, except as otherwise provided in Section 113-A, acquire the land] either by agreement or make an application to the State Government for acquiring such land under the Land Acquisition Act, 1894.

- (2) On receipt of such application, if the State Government is satisfied that the land specified in the application is needed for the public purpose therein specified, or [if the State Government (except in cases falling under Section 49 [and except as provided in Section 113-A] itself is of opinion] that any land in any such plan is needed for any public purpose, it may make a declaration to that effect in the Official Gazette, in the manner provided in Section 6 of the Land Acquisition Act, 1894, in respect of the said land. The declaration so published shall, notwithstanding anything contained in the said Act, be deemed to be a declaration duly made under the said section :

[Provided that, no such declaration shall be made after the expiry of three years from the date of publication of the draft Regional plan, Development plan or any other plan.]

- (3) On publication of a declaration under the said Section 6, the Collector shall proceed to take order for the acquisition of the land under the said Act and the provisions of that Act shall apply to the acquisition of the said land, with the modification that the market value of the land shall be -

- (i) Where the land is acquired for the purposes of a new town, the market value prevailing on the date of publication of the notification constituting or declaring the Development Authority for such town;

- (ii) where the land is acquired for the purposes of a Special Planning Authority, the market value prevailing on the date of publication of the notification of the area as an undeveloped area; and

(iii) in any other case the market value on the date of publication of the interim development plan, the draft development plan, or the plan for the area or areas for comprehensive development, whichever is earlier, or as the case may be, the date of publication of the draft town planning scheme:

Provided that, nothing in this sub-section shall affect the date for the purpose of determining the market value of land in respect of which proceedings for acquisition commenced before the commencement of the Maharashtra Regional and Town Planning (Second Amendment) Act, 1972 (Mah. XI of 1973) :

Provided further that for the purpose clause (ii) of this sub-section, the market value in respect of land included in any undeveloped area notified under sub-section (1) of Section 40 prior to the commencement of the Maharashtra Regional and Town Planning (Section Amendment) Act, 1972 (Mah. XI of 1973) shall be the market value prevailing on the date of such commencement.

- (4) If a declaration is not made within the period referred to in sub-section (2) or having been made, the aforesaid period expired at the commencement of the Maharashtra Regional and Town Planning (Amendment) Act, 1970, the State Government may make a fresh declaration for acquiring the land under the Land Acquisition Act, 1894, in the manner provided by sub-sections (2) and (3) of this section, subject to the modification that the market value of the land shall be the market value at the date of declaration in the Official Gazette made for acquiring the land afresh.”

10. Thus, on the date of the impugned notification, in view of the proviso to Sub-Section (2) of Section 126 , a declaration under Sub-Section (2) of Section 126 could be made only within a period of three

years from the date of publication of the Development Plan. In the year 1994, the said proviso was amended for providing for a period of one year instead of three years. Sub-Section (4) of Section 126 is applicable only when a declaration is not made within the period specified in the proviso to Sub-Section (2). The difference between a declaration under Sub-Section (2) and Sub-Section (4) is that if a declaration under Sub-Section (2) is made in a manner provided under Section 6 of the said Act of 1894, market value is payable as on the date on which the Development Plan is published. If a declaration under Sub-Section (4) of Section 126 is made, the market value is payable as on the date of the publication of such a declaration in the Official Gazette.

11. Section 125 of the MRTP Act provides that any land required, reserved or designated in a Development Plan for a public purpose shall be deemed to be land needed for a public purpose within the meaning of the said Act of 1894. The question is on the failure to make a declaration under Sub-Section (2) of Section 126 within the time specified in the proviso to Sub-Section (2) what is the effect on the deeming fiction provided under Section 125. On plain reading of Section 125 of the MRTP Act, the deeming fiction will continue to apply so long as the particular land is shown as reserved in the sanctioned Development Plan. Therefore, even if a declaration under Sub-Section

(2) of Section 126 is not made within the specified time, the recourse can be always taken to Sub-Section (4) of Section 126. Even if recourse is taken to Sub-Section (4) of Section 126, the deeming fiction under Section 126 continues to apply provided on the date of declaration under Sub-Section (4), the land continues to remain under reservation in the sanctioned Development Plan. As stated earlier, when a declaration under Sub-Section (4) of Section 126 is made, the market value payable will be of the date of publication of such a declaration in Official Gazette.

12. Effect of Section 125 of the MRTP Act is that the acquisition commences either by a declaration under Sub-Section (2) of Section 126 or by a declaration under Sub-Section (4) of Section 126 which is required to be made in accordance with Section 6 of the said Act of 1894. Thus, when acquisition is made of the land reserved in a sanctioned Development Plan, in view of the deeming fiction under Section 125, no enquiry is contemplated about the existence of public purpose as provided in Section 5-A of the said Act of 1894.

13. The grievance of the Petitioners is that the impugned notification refers to both Sub-Section (2) and Sub-Section (4) of Section 126 and the power is purportedly exercised under both the Sub-

Sections. Obviously, on 4th March, 1987 the power under Sub-Section (2) of Section 126 could not have been invoked as the period of three years had expired from the date of the publication of the Development Plan. But Sub-Section (4) of Section 126 could have been always invoked on that day. Therefore, the impugned notification does not become bad in law merely because it refers to Sub-Section (2) of Section 126 as well especially when there is a specific reference therein to the exercise of powers under Sub-Section (4) of Section 126. On the date of the impugned notification and on the date of the publication thereof in official Gazette, the power under Sub-section(4) of Section 6 could have been lawfully invoked as the said land continued to be under the reservation for a playground. Therefore, in our view, the impugned notification will have to be treated as the one issued in accordance with Sub-Section (4) of Section 126 of the MRTP Act and the same cannot be quashed only on the ground that both the Sub-Section (2) and Sub-Section (4) of Section 126 have been referred therein.

14. Another issue is of the applicability of Sub-Section (1) of Section 129 of the MRTP Act which reads thus :-

“129. Possession of land in case of urgency-

- (1) At any time after the publication of a notification under sub-section (2) of section 126, where the State Government, on an application of the Planning Authority, Development Authority or Appropriate Authority, is satisfied that the possession of any land which is reserved or designated for a public purpose either under a Regional plan or Development plan urgently required in the public interest by that Authority, the State Government may, by an order in writing authorise the, Collector to enter on and take possession of the land under acquisition after giving a notice of fifteen days; and thereupon, the right or interest in that land shall be extinguished from the date specified in the order; and on the date on which possession is taken, the land shall vest without any further assurance and free from encumbrances in the State Government:

Provided that, before or at the time of taking possession of any land under this sub-section, the Collector shall offer to the person interested compensation for the standing crops and trees, if any, on such land; and for any damage sustained by him which is caused by such sudden dispossession and not excepted in section 24 of the Land Acquisition Act, 1894, and if such offer is not accepted, the value of such crops and trees and the amount of such other damage shall be allowed in awarding compensation for the land under the provisions of the said Act.

- (2) Where possession of land is taken under sub-section (1), the planning Authority, the Development Authority or as the case may be, Appropriate Authority, shall subject to the provisions of sub-section (1), pay to the owner concerned interest at 4 per cent per annum on the amount of compensation from the date of taking possession of the land under acquisition to the date of payment.
- (3) Where possession of land is taken under sub-section (1), the Planning Authority, or Development Authority, or as the case may be, the Appropriate Authority may, at the request of the person interested, pay an advance not exceeding two-thirds of the amount estimated to be

payable to such person on account of the land after executing an agreement in that behalf under section 157.”

15. On plain reading of Sub-Section (1) of Section 129, the same is applicable only when a publication of a notification under Sub-Section (2) of Section 126 is made. In other words, for the exercise of the power under Sub-Section (1) of Section 129, a publication of notification under Sub-Section (2) of Section 126 is *sine qua non*. There may be a good reason why the power under Sub-Section (1) of Section 129 can be exercised only in a case where a notification under Sub-Section (2) of Section 126 is issued. Notification under Sub-Section (2) of Section 126 is required to be issued within a specified time limit from the date of publication of the Development Plan which provides for the reservation. However, a notification under Sub-Section (4) of Section 126 can be issued anytime thereafter so long as the reservation in the sanctioned Development Plan continues. When action is not taken by issuing a notification under Sub-Section (2) of Section 126 within the stipulated time, it is obvious that there may not be any urgent need to acquire and possess the land under the reservation. Thus, on plain reading of Sub-Section (1) of Section 129, the same could have been invoked only if there was a valid declaration/notification issued under Sub-Section (2) of Section 126. In the present case, the impugned notification has been issued long after the period provided in the

proviso to Sub-Section (2) of Section 126 had expired. Therefore, action of invoking Sub-Section (1) of Section 129 cannot be justified in this case. We have already held that the impugned notification to the extent of the exercise of powers under Sub-Section (4) of Section 126 will have to be held as legal and valid. Therefore, that part of the impugned notification by which Sub-Section (1) of Section 129 is invoked will have to be quashed and set aside.

16. Hence, the Petition must succeed in part and we pass the following order :-

ORDER

- (i) The impugned notification dated 4th March, 1987 is declared as legal and valid to the extent to which Sub-section (4) of Section 126 of the MRTP Act has been invoked. The said notification shall be treated as a notification issued under Sub-Section (4) of Section 126 of the MRTP Act read with Section 6 of the said Act of 1894 and therefore, the market value payable on account of acquisition shall be the market value at the date of publication of the impugned notification in the Official Gazette;

- (ii) The impugned notification stands quashed and set aside only to the extent to which it purports to invoke Sub-Section (1) of Section 129 of the MRTP Act;
- (iii) We make it clear that subject to the above order, all further steps shall be taken for acquiring the said land on the basis of the impugned notification in accordance with law;
- (iv) Rule is partly made absolute on above terms with no orders as to cost.

(V.L. ACHLIYA, J)

(A.S. OKA, J)

Mr. Kapil Moya with Ms. Leena Mirasee i/by M/s. Shah & Sanghvi for the Petitioners.

After the pronouncement of the judgment, the learned counsel for the Petitioners seeks continuation of the interim relief operative in the Petition. On his prayer, we direct that the interim relief will continue to operate for a period of six weeks from today.

(V.L. ACHLIYA, J)

(A.S. OKA, J)