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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 567 OF 2014**

Mr. Raju Joganpalli & Ors. ...Petitioners
Versus
1. The Municipal Commissioner & Ors. ...Respondents

Mr. Milind Jadhav, i/b M/s. Mint And Confreres for Petitioners.
Ms. Jyoti Chavan, AGP for Respondent No.4.
Ms. Vandana Mahadik, for Respondent Nos. 1 to 3 and 5.

**CORAM: A.S. OKA &
 RIYAZ I. CHAGLA, JJ.**

JUDGMENT RESERVED ON 2ND APRIL, 2018

JUDGMENT PRONOUNCED ON 3RD MAY, 2018

O R A L J U D G M E N T :- (Per Riyaz I. Chagla J.)

1. The Petitioners by this Writ Petition filed under Article 226 of the Constitution of India are challenging notice dated 4th December 2013 issued by Respondent No.4 which refers to order of this Court dated 14th October 2011, wherein the structure known as 'Vinayak Arcade' and 45 shops adjoining have been declared as unauthorised and illegal. The impugned notice calls upon the Petitioners to remove the unauthorised construction of Vinayak Arcade within stipulated period of 15 days failing which the unauthorised works will be demolished by Respondent – Corporation. The Petitioners have sought a declaration that they

are in legal and judicial possession of the balance subject property pursuant to handing over of an acquired area to the Central Railway on 5th June, 2017. The Petitioners have further sought directions against Respondent Nos. 1 to 3 and 5 to follow due process of law before taking action against the balance subject property and not to disturb possession of the Petitioners. Considering the challenge, this Petition is taken up for final hearing with the consent of the parties.

2. The Petitioners claim to be the legal owners of land bearing survey No. 27-A, Hissa No. 5/1(P) and now numbered as CTS No. 62/40 (P) of village Hariyali, Taluka Vikhroli, Mumbai suburban District admeasuring 935.3 sq. mtrs and structure standing thereon named as Vinayak Arcade having area admeasuring 594 sq. mtrs (for short the subject property). The subject property is situated immediately outside Vikhroli Railway Station of Central Railway on Western Side and is parallel to platform No.1 of Vikhroli Railway Station (W). It is the Petitioners' case that pursuant to land acquisition proceedings, an award came to be passed on 31st March 1967 under the provisions of Section 11 of the Land Acquisition Act,, 1894 in respect of two Survey Nos. Viz. the subject property and Survey No. 29 / 2 (P). The Petitioners have stated in the Petition that possession of the subject property

was not taken by Central Railway as per the possession receipt dated 19th April 1967 whereas the other property was taken over. It is the Petitioners' case that the subject property all along remained in the exclusive possession, use and occupation of the Petitioners and their family members and was never acquired or the possession thereof was taken by Special Land Acquisition Officer. The Petitioners have relied upon certain documents in the Petition which were executed after the said award and from which they claim that the Petitioners are still the owners of the subject property. The Petitioners have also relied upon certain proceedings between M/s. Godrej Boyce and Company and the Petitioners viz. Civil Suit bearing No.7668 of 1992 filed by the Petitioners against M/s. Godrej Boyce and Company restraining them from disturbing the possession of the Petitioners in the subject property. The Petitioners claim that said Suit was amicably settled and consent decree dated 5th January 1994 came to be passed. The Petitioners claim that from the consent terms it is clear that the Petitioners are considered to be the legal owners of the subject property. The Petitioners claim that the consent decree came to be amended on 5th January 1994 in terms of the actual area i.e. 935.3 sq. mtrs of the subject property instead of the area of 712 Sq. meters which was wrongly recorded, after carrying out

demarcation of the subject property on 19th January 1998. The Petitioners further claim to be paying taxes / charges in respect of the subject property to the Respondent – Corporation.

3. The Petitioners have further stated that as the subject property had become structurally weak and vulnerable on account of wear and tear due to the heavy vibration of the movement of local trains, the Petitioners had made two applications dated 25th August, 2007 and 31st October 2007 to Respondent No.1 – Corporation seeking permission to carry out repairs of the structure standing on the subject property known as Vinayak Arcade. The Petitioners state that the requisite permission for carrying out repairs was granted by two permission letters both dated 1st January 2008 issued by the Respondent - Corporation. It is stated that repair work was carried out and completion certificates both dated 16th December 2008 were issued by the Respondent – Corporation. The Petitioners have further stated that on 5th August 2008, the Urban Development Department of the State Government Respondent No.4 issued notification under sub section (1) A of Section 37 of the Maharashtra Regional and Town Planning Act, 1966 for proposed modification of development plan and to delete the reservation of 15.25 mtrs. wide Railway Reservation to the west of Central Railway line to

Ghatkopar Station to Mulund Railway Station and to reserve the said land for DP road having width of 15.25 mtrs. PIL No. 4 of 2011 came to be filed on 11th October 2010, by one Shri Joshi Shivshankar Jatashankar seeking removal of all encroachments on the western side of Vikhroli Railway Station, including the structure on the subject property. Another PIL bearing No. 19 of 2011 came to be filed in this Court by three members of the Bombay Catholic Sabha seeking putting up of an appropriate Foot Over Bridge for use by members of the public. Further directions were sought in the PIL i.e. putting up of parking lot and removal of encroachments as well as vacating the structure on the subject property of the Petitioners.

4. An order came to be passed by this Court in PIL No. 19 of 2011 on 14th October 2011. This Court by the said order held that the Petitioners cannot contend that any structure existed on the subject property prior to 1967 as it is clear that the subject property was reserved for railways in 1967. It is held that the Petitioners were only allowed to carry out repairs in 2008 and despite which they had put up construction of a mall known as Vinayak Arcade and shops adjoining the mall. The Petitioners had preferred review of the order dated 14th October 2011 and this Court dismissed the Review Petition on the ground that the

subject property belongs to the Central Railway. This Court held that the Petitioners were not shown in the award as occupiers of the subject property and hence were not compensated and their contention that their structures are in existence prior 1962 was not accepted. This order along with order dated 14th October 2011 was challenged by the Petitioners in the Supreme Court by filing Special Leave to Appeal No. 34983 / 34984 of 2011. By an order dated 16th December 2011, the Supreme Court dismissed Special Leave to Appeal. Meanwhile, on 7th December 2011, this Court disposed of PIL No. 4 of 2011. The Petitioners thereafter challenged the said order in the Supreme Court by Special Leave Petition No. 9396 / 9397 of 2012.

5. A Notice of Motion had been taken out by the Central Railways in PIL No. 19 of 2011 being Notice of Motion No. 82 of 2012 seeking certain directions pursuant to the order dated 14th October 2011. This Court had passed order dated 12th April 2012 disposing of the said Notice of Motion. The Petitioners challenged the said order in SLP No.7371 of 2012. The Supreme Court passed order dated 20th April 2012 by which the Petitioners were directed to file an undertaking to remove the structure on the subject property within six weeks and subject to filing of the undertaking within a week from the date of the order, the operation

of the impugned order was stayed. The Petitioners claim to have removed part of the structure on the subject property as undertaken to do so and the Municipal Corporation had agreed to stay its hands pursuant to the orders of the Supreme Court and this Court. An order came to be passed by the Supreme Court dated 23rd July 2012 by which the statement of the learned counsel appearing for the Petitioners that they had delivered to the railways the possession of the subject land was recorded and hence the SLP was held to have become infructuous. Accordingly, the SLP was dismissed by the Supreme Court by holding that the observations in order dated 14th October 2011 had attained finality and thus refrained from commenting on the merits of the said order. The Petitioners were issued the impugned notice and being aggrieved they have filed this Petition. An Affidavit of Shri Sachin B. Jadhavar, the then Assistant Engineer of the Respondent Corporation is filed on behalf of Respondent Nos. 1 to 3 and 5 opposing admission of the Petition. It states that the impugned notice is legal and valid and issued pursuant to the order in PIL No. 19 of 2011.

6. The learned counsel for the Petitioners submits that the subject property has remained in the possession of the Petitioners and was not acquired by the Central Railways in 1967. He has

submitted that balance subject property other than the part of which handed over to the Central Railways pursuant to the orders of the Supreme Court, remains in the possession of the Petitioners. He has submitted that the Petitioners are the legal and juridical owners of the balance subject property admeasuring 646.06 Sq. meters. He has submitted that the impugned notice is required to be quashed and set aside as it seeks removal of the balance structure on the subject property which is in the legal and judicial possession of the Petitioners. He has relied upon an Affidavit of one Shri Vijay Shankar Joganpali on behalf of the Petitioners which claims that the Petitioners have fully complied with the directions of the Supreme Court by removing part of the structure on the subject property and handing over the land to the Central Railway. He has further submitted that the impugned notice is in violation of the principles of natural justice by ordering demolition of the balance subject property without according opportunity of hearing to the Petitioners. He has submitted that the impugned notice requires to be quashed and set aside in line with the law laid down by this Court in ***Sopan Maruti Thopte Vs. Pune Municipal Corporation***¹.

¹ AIR 1986 Bombay 304.

7. The learned counsel appearing for the Respondent Nos. 1 to 3 and 5 and the learned AGP for Respondent No.4 has supported the impugned action of the Respondents as well as the impugned notice issued by the Respondent Corporation. They have submitted that the order dated 14th October 2011 has attained finality as the challenge to the said order has been rejected by the Supreme Court. They have accordingly submitted that the Petitioners cannot contend that the structure on the subject property existed prior to 1967 and / or that they have carried out repairs to the structure only in 2008, when this Court had by order dated 14th October 2011 clearly held that the subject property had been acquired by the Central Railways and that the construction of the mall known as Vinayak Arcade and shop adjoining mall had come up only in 2008. They have thus submitted that the impugned notice of demolition is issued pursuant to and in compliance of the said order of this Court which held that the structure to be unauthorised and illegal.

8. We have considered the submissions. We find that the order dated 14th October 2011 passed by this Court in PIL No. 19 of 2011 has attained finality. The Special Leave Petition filed by the Petitioners challenging the order dated 14th October 2011 has

been dismissed. In the said order dated 14th October 2011, this Court in paragraph 10 held thus:-

10. "It is necessary to note that in the order of the Competent Authority dated 31 October 2005 under Urban Land Ceiling Act it is specifically mentioned that the area declared by the Authority being CTS No. 62/40/Part Survey No. 27-A/5/1/Part admeasuring 935.3 Sq. mtrs was reserved for public purpose of railways and it was situated in local commercial zone. Thus, it is clear that the land in question claimed by respondents 8 and 9 was reserved for railways in 1967. Respondent No.8 obtained the declaration of land as vacant land from the U.L.C. Authorities in the year in 2005. Having obtained the said order on the basis that the land in question was reserved for railways, respondents no.8 and 9 cannot be now permitted to contend that any structure existed on the land in question since prior 1967. Respondents 8 and 9 obtained permission to carry out the repairs only in 2008 and have put up the construction of the mall by name Vinayak Arcade and shops adjoining the mall thereafter."

9. We find that the subject property which has been mentioned by this Court in paragraph 10 is the same property which is described by the Petitioners in paragraph 1 of the Petition. This Court has held that the subject property had been acquired and reserved for Central Railways in 1967. This Court has held that only permission to carry out repairs had been granted by the Respondent Corporation in 2008 but despite which the Petitioners had put up a structure / mall known as Vinayak Arcade. In the light of the said order, it is not open for the Petitioners to contend

that they are in legal and judicial possession of the balance subject property i.e. 646.09 sq. mtrs. retained by them pursuant to their handing over of the acquired area to the Central Railway on 5th June 2012. The Petitioners are bound by the order dated 14th October 2011, which has attained finality. Even the Apex Court has held that the said order has become final. We find no infirmity in the impugned notice issued by the Respondent Corporation which on the basis of the said order and in compliance thereof directs the removal of the unauthorised construction of Vinayak Arcade. There is no prejudice caused to the Petitioners since this Court has held the structure to be unauthorised. It is not open for the them to contend that the impugned notice is in violation of the principles of natural justice.

10. This Court whilst exercising writ jurisdiction under Article 226 of the Constitution of India exercises powers which are purely discretionary. The Supreme Court in **Sangram Singh Vs. Election Tribunal Kotah & Anr.**² in paragraph 14 has held thus:

14. That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Art.226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognised lines and not arbitrarily, and one of the limitations

² AIR 1995 S.C. 425.

imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case.

11. It is thus clear that this Court in exercising discretionary power cannot be turned into a Court of Appeal or Revision to set aside errors which do not occasion injustice. Unless a clear case of prejudice is made out to the Petitioners by issuance of the impugned notice, this Court will not exercise its discretionary power under Article 226 of the Constitution of India and interfere with the impugned notice. It has been held by the Supreme Court in ***Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan***³ that where no prejudice is caused to the person concerned by the order which is alleged to have been passed in violation of natural justice, the order is not liable to be set aside under Article 226 of the Constitution of India.

12. We find that in the present case the impugned notice has been issued only in pursuance and compliance of the order of this

3 (2000) 7 Supreme Court Cases 529.

Court dated 14th November 2012, which held the structure on the subject property to be unauthorised. The said order of this Court having attained finality, the impugned notice cannot be said to cause any prejudice to the Petitioners. The impugned notice is thus legally and validly issued. We, therefore, reject the contention of the Petitioners that the impugned notice requires to be set aside as no hearing was granted to the Petitioners prior to issuance of impugned notice of demolition. The directions issued by this Court in ***Sopan Maruti Thopte (Supra)*** will not apply in the facts and circumstances of the present case. We find no merit in the challenge to the impugned notice or case of the Petitioners having legal and judicial possession of the subject property in their possession.

13. In the circumstances, this Petition fails and is dismissed with no order as to costs.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)

14. The learned counsel for the Petitioners applies for continuation of ad-interim relief granted by this Court. The said prayer is opposed by the learned counsel appearing for the

contesting Respondents. Considering the ad-interim relief was in operation till this judgment, we are inclined to continue the same for a period of eight weeks. Accordingly, ad-interim relief will continue to operate for a period of eight weeks from the date of uploading of this judgment.

(RIYAZ I. CHAGLA J.)

(A.S. OKA, J.)