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| Mr.Satish Pradhan and Ors. | } | Petitioners |
| versus                     |   |             |
| Union of India and Ors.    | } | Respondents |

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|---------------------------|---|-------------|
| Mr.Deepak Nathani         | } | Petitioner  |
| versus                    |   |             |
| Maharashtra Metro Rail    | } |             |
| Corporation Ltd. and Ors. | } | Respondents |

|                             |   |             |
|-----------------------------|---|-------------|
| Mr.Raja Narasimhan and Anr. | } | Petitioners |
| versus                      |   |             |
| Maharashtra Metro Rail      | } |             |
| Corporation Ltd. and Ors.   | } | Respondents |

Mr.Rajiv Chavan with Mr.Parag A. Vyas for Union of India.

Mr.P.P.Kakade-Government Pleader with Mr.M.M. Pable-AGP for State.

Mr.Rohit Sakhadeo for respondent no. 3 in PIL/61/2019.

Mr.A.R.Singh and Ms.Aditi Gautam for respondent no.5 in PIL/61/2019.

Ms.Neeta Masurkar I/b. Mr.Pravartak Pathak for respondent no. 5 in PIL/79/2019.

Mr.Abhijit P. Kulkarni for respondent no. 3 in PILST/28370/2019 and for respondent no. 2 in PIL/79/2019.

Mr.R.M.Pethe for respondent no. 2 in PIL/61/2019.

Ms.Soma Singh for the proposed Intervener.

**CORAM :- S. C. DHARMADHIKARI &  
R. I. CHAGLA, JJ.**

**DATED :- NOVEMBER 20, 2019**

**P.C. :-**

1. This public interest litigation (PILST/28370/2019) seeks to challenge a Notification issued by respondent no. 1 (Union of India) dated 14<sup>th</sup> October, 2019. The other prayers and which are material for our purpose are prayers (B) to (F). They read as under:-

“(B) That this Honourable Court be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ direction or order under Article 226 of the Constitution of India, 1950, quashing and setting aside the decision taken by the Respondent No. 5, NMA in its 192<sup>nd</sup> Meeting dated 10<sup>th</sup> September 2018 as recorded in the Minutes of the 192<sup>nd</sup> Meeting of the NMA under Agenda no. 2: Discussion of Maharashtra

Metro Rail Corporation Limited (Pune Metro Rail Project);

(C) That this Hon'ble Court be pleased issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ direction or order under Article 226 of the Constitution of India, 1950, quashing and setting aside the letter dated 18<sup>th</sup> December 2018 bearing Outward No. MCO113545 written by the Respondent No.3 Municipal Commissioner of the PMC to the Respondent No.4 MAHA-METRO informing the said Respondent No.4 to take an "appropriate decision at their level" and declare that the said letter is, arbitrary, illegal and bad in law;

(D) That this Hon'ble Court be pleased to declare that the proposed alteration/ realignment of the metro line through Vitthalrao Vandekar Road (South Avenue) via East Avenue back onto the six lane Pune-Ahmednagar Highway is illegal and bad in law and further injunct the Respondent No.4 from carrying out any construction in the said proposed altered/ realigned portion mentioned above;

(E) That in the alternative, this Hon'ble Court be pleased to direct the Respondent No.5 NMA to reconsider the decision taken by it in the 192<sup>nd</sup> Meeting dated 10<sup>th</sup> September 2018 and permit the Respondent No.4 MAHA-METRO to construct the metro line on the median of the six lane Pune-Ahmednagar Highway within the prohibited area of the protected monument namely "Aga Khan Palace";

(F) That alternatively, this Hon'ble Court be pleased to direct the Respondent No. 4 MAHA-METRO to construct an underground metro line near the protected monument namely "Aga Khan Palace" instead of diverting the metro line through the Vitthalrao Vandekar Road (South Avenue) via East Avenue in Kalyani Nagar."

**2.** The petitioners before this court are citizens of India and residents of Kalyani Nagar. This nagar is located in the eastern portion of Pune city. Respondent no. 1 is the Union of India and through its Ministry of Housing and Urban Affairs, who has issued

the notification of 14<sup>th</sup> October, 2019, whereas, respondent no. 2 is the State of Maharashtra, through its Urban Development Department, who has approved the Pune Metro Rail Project vide notification dated 23<sup>rd</sup> December, 2016. The third respondent is the Pune Municipal Corporation, who has granted approval for realignment of the Metro viaduct through the residential area of Kalyani Nagar in Pune on 18<sup>th</sup> December, 2018. Respondent No. 4 is a company incorporated under the Companies Act, 2013. It has been established as a Special Purpose Vehicle for the implementation of the Pune Metro Rail Project. It is jointly owned by the Government of India and the Government of Maharashtra on 50:50 equity basis. The fifth respondent is an authority set up under the provisions of the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010. That was enacted in March, 2010. This National Monuments Authority (NMA) set up under the same is entrusted with several functions, particularly to protect and preserve monuments and sites through management of the prohibited and regulated area around the centrally protected monuments. A report was submitted by the Archaeological Survey of India (ASI) (6<sup>th</sup> respondent) dated 31<sup>st</sup> August, 2018 refusing to grant approval for the metro line to run on the median of a portion of the Pune-Ahmednagar Highway abutting the boundary wall of the Aga

Khan Palace, which is a protected monument under the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010.

**3.** The petitioners are contending that they are not opposed to the construction of Metro Railway in the city of Pune, but are only aggrieved by the realignment of the Metro Railway line through the area of Kalyani Nagar. It is stated that this project, styled as Pune Metro Rail Project is a public transport project. Thus, it is styled as a Vital Infrastructure Project by respondent no. 2 vide two Government Resolutions dated 29<sup>th</sup> October, 2013 and 23<sup>rd</sup> December, 2016. The other notification issued by the Union of India dated 21<sup>st</sup> October, 2014 extends the application of the provisions of the Metro Act to the Pune Metropolitan Area. There are two corridors and the description of the same is set out in para 12 of the petition.

**4.** The present Public Interest Litigations (PILs) concern the alteration of the Metro Rail alignment of Phase-1, Corridor-2 (Vanaz to Ramwadi), by which, the path of the Metro Railway, which was originally supposed to run along the Pune-Ahmednagar Highway, has been proposed to be partially diverted/ altered/ realigned through the area of Kalyani Nagar located on the east side of the City of Pune. It is a predominantly residential area.

Now, the proposed realignment would run through Vitthalrao Vandekar Road (South Avenue), turn sharply at the North end of Aga Khan river bridge onto east Avenue, go over the busy Mariplex Junction and then climb and turn over the VIP Airport Road underpass back onto the six lane Pune-Ahmednagar Highway. It is only for the alleged protection to this monument known as Aga Khan Palace that this realignment is proposed. It is stated in paras 14 and 15 as under:-

“14. As mentioned above, since a portion of Corridor 2 was to be constructed near the “Aga Khan Palace”, on 13<sup>th</sup> April 2018, the Respondent No. 4-MAHA-METRO addressed a letter/ proposal bearing Ref. No. Maha-Metro/ Pune/ KP/ Plng/ to the Respondent No. 6, ASI thereby requesting for permission to construct the Metro viaduct within the Regulated Zone of the Aga Khan Palace. The Respondent No. 4 MAHA-METRO while relying on Google Maps/ Images specifically stated in paragraph 3, “The distance between the Metro Alignment and the Nationally Protected Monument is beyond 100 meters”. In the Form (FORM 1) annexed to the said letter, at Point No. 9, the Respondent No. 4 has, while placing reliance on Google Images specifically stated that the distance from the construction site to the main monument is 118.50 meters and the distance from construction site to the protected boundary wall of the monument is 19.80 meters. The Petitioners are also producing a coloured photograph/ image of the said area. A True copy of the said Letter bearing Ref. No. Maha-Metro/ Pune/ KP/ Plng/ dated 13<sup>th</sup> April 2018, along with the Form I and the Google Map and the coloured photograph (produced by the Petitioners) is annexed hereto and marked as **Exhibit-C**.

15. The Petitioners submit that on 31<sup>st</sup> August 2018, the Respondent No. 6 ASI through the RD and Competent Authority forwarded the proposal of the Respondent No.4 MAHA-METRO to the Respondent No. 5 NMA. According to the Respondent No. 6, the proposed construction of the Metro viaduct fell within a distance of 11.00 mts from the protected area of Aga Khan Palace and also falls within

the Prohibited area of the said monument. The True copy of the said letter dated 31<sup>st</sup> August 2018 written by the Respondent No. 6 ASI to the Respondent No. 5 NMA is annexed hereto and marked as **Exhibit-D.**”

5. Then, it is stated that the application dated 10<sup>th</sup> September, 2018 was considered by the fifth respondent during its 192<sup>nd</sup> Meeting held on that date and it came to be rejected. The rejection has been accepted and thereafter, what has transpired is that another application was made and which application deviates the Metro line. It brings it within the residential area aforementioned. Now, the proposed realignment increases the length of the Metro viaduct by 0.92 kilometers. This alternate alignment entails a huge cost of Rs.185 crores. There are other issues like land acquisition, lower network efficiency, increased commute time, lower ridership etc. Considering these aspects, it is stated that the Pune Municipal Commissioner has not granted specific approval to proceed with the construction of realigned portion of the Metro line. There is no resolution passed by the Standing Committee or the General Body of the Pune Municipal Corporation approving this realignment. It is in these circumstances that relying upon the two other PILs, namely, PIL No. 61 of 2019 and PIL No. 79 of 2019 so also the orders made thereon, it is urged that there was a stay of the project, particularly in relation to this realignment. Notification under section 32 of the Metro Railways (Construction

of Works) Act, 1978 (hereinafter referred to as “the Act of 1978”) was not issued. That was the principal reason for the stay. Now, that notification has also been issued on 14<sup>th</sup> October, 2019. It is in these circumstances that after making a representation, but finding no response to it that this PIL (PILST/28370/2019) has been filed.

6. Mr.Dalal appearing for the petitioners would submit that the affidavit in support of the PIL would indicate that the concerns of the petitioners are genuine and *bona fide*. They are espousing the cause of the public and particularly the residents of the locality. The predominant residential locality will suffer inconvenience apart from other hazards. The PIL petitioners have no personal gain, private motive or oblique reason. They are, therefore, concerned about the compliance with the law and we must take a serious note of their objections and the contentions.

7. A common list of dates and events was handed over by Mr.Dalal. After referring to the list of dates and events, Mr.Dalal would urge that the realigned portion of the Metro line is to pass through median of the municipal road owned by the Pune Municipal Corporation in Kalyani Nagar, which, according to the new Development Plan for the City of Pune, is the Shiva-Kharadi DP Road. It is the admitted position that Pune Municipal

Corporation has given the said land (realigned portion) to the MAHA-METRO. The Maharashtra Municipal Corporations Act, 1949 and particularly the provisions of section 79(c) and (d), according to Mr.Dalal, are attracted, as there is, in this case, an act attributable to the Commissioner of handing over of the land belonging to the Municipal Corporation to any Department or undertaking of the Government of India or Government of Maharashtra for public purpose, but the non-obstante clause clearly says that the Commissioner has a discretion to allot such land with the approval of the Government. Therefore, the Municipal Commissioner cannot merely give away or handover the land without a formal conveyance and if he is relying upon clause (g) of section 79, then, that postulates taking sanction of the Municipal Corporation and the approval of the State Government. In this case, both are absent. Therefore, the Maharashtra Metro Railway Corporation Limited could not have carried out any work, much less erected a pillar right in the middle of the road.

**8.** The second contention of Mr.Dalal is that the notification published under section 32 of the Act of 1978 is dated 14<sup>th</sup> October, 2019. However, the construction of the realigned portion was commenced by the fourth respondent in the month of March, 2019. It is approximately seven months prior to the issuance of

the notification. The notification has not only to be issued, but published as well. That is a mandatory requirement. It is in these circumstances that the notification cannot be given a retrospective effect. It cannot be applied to rectify the non-compliance of a mandatory provision of the law.

9. Our attention has then been invited by Mr.Dalal to several provisions of the Act and particularly the two enactments in question. He firstly relies upon the Act of 1978. He invites our attention to the Statement of Objects and Reasons thereto. He would submit that this envisages acquisition of land. Secondly, he invites our attention to the definition of the term “metro railway” and “metro railway administration” therein to contend that it is the administration and comprising of the whole Board, which has to thereafter take the requisite steps. There is a power of acquisition conferred by section 6 falling in Chapter III of this Act titled as “Acquisition”. After that, a full procedure has to be followed and then comes section 10, which, by sub-section (2) vests absolutely in the Central Government, free from all encumbrances, either the land, building, street, road or passage, or the right of user, or the right in the nature of easement. Mr.Dalal would submit that section 11 gives power to take possession of the acquired land. He invites our attention to section 32 of this Act to

submit that the Central Government has a discretion to notify in the *Official Gazette* an addition to the Schedule. Thus, the Central Government may, by a notification in the *Official Gazette*, add to the Schedule the Metro alignment in respect of a Metropolitan city, Metropolitan area and the National Capital Region, to which, the Act of 1978 is made applicable under sub-section (3) of section 1. Likewise, there can be an alteration made of a metro alignment specified in the Schedule. However, a notification has to be laid before each house of the Parliament is the requirement of sub-section (2) of section 32.

10. The argument, therefore, is that absent compliance with all this, the alignment could not have been presumed by the fourth respondent in the month of March, 2019. That erroneous understanding of the fourth respondent, particularly of the provisions of the law is incapable of correction is the submission of Mr.Dalal.

11. Finally, the attempt is to show that although there is a monument, namely, Aga Khan Palace on the State Highway, still, the distance between the same is beyond 100 meters. Ultimately, it is a State Highway. There could have been an alignment of the Metro Rail on this road. There was no question of the alignment being shifted. The Metro Railway as also the National Monument

Authority ought have considered the judgment of this court in the case of *Parisar Sanrakshan Sanwardhan Sanstha vs. Pune Municipal Corporation*<sup>1</sup>. For all these reasons, it is submitted that the PILs be allowed.

**12.** There are submissions canvassed in PIL No. 79 of 2019 and to the effect that there is no notification under section 37(1-AA) of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act). That notification had to follow the entire procedure and that is admittedly not complied with. In these circumstances, the works at site cannot be said to have any legal support.

**13.** In this case, wherein the facts are taken essentially from Public Interest Litigation (ST) No. 28370 of 2019, it is evident that the petitioners are aware of the works and which are commenced by the fourth respondent. In the instant case, the petitioners have annexed a copy of the notification dated 14<sup>th</sup> October, 2019. That notification in terms says that in exercise of the powers conferred by sub-section (3) of section 1 of the Metro Railways (Construction of Works) Act, 1978, the Central Government had extended the application of the provisions of the said Act to the Pune Metropolitan Area in the State of Maharashtra vide notification of the Government of India in the erstwhile Ministry of Urban

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<sup>1</sup> 2013 SCC OnLine Bom. 1176

Development number S.O.2732(E), dated 21<sup>st</sup> October, 2014. The powers under clause (a) of sub-section (1) of section 32 of the said Act were already exercised and the Central Government added metro alignment of Pune Metro Railway Project, Phase-1, Corridor 1 (Pimpri-Chinchwad to Swargate) and Corridor-2 (Vanaz to Ramwadi) to the Schedule of this Act vide notification of the Government of India dated 5<sup>th</sup> January, 2018. The 14<sup>th</sup> October, 2019 notification did an alteration of the alignment in respect of Corridor-2 of Pune Metro Rail Corridors, Phase-1 and this alteration is published in the *Official Gazette*.

14. To our mind, therefore, there is no question of any retrospective effect being given to this notification. The works were already notified, in the sense that the act itself became applicable to Pune Metropolitan area with effect from 21<sup>st</sup> October, 2014. There was already an alignment notified in the Schedule by making a provision in the Schedule. That was done on 5<sup>th</sup> January, 2018. Now, an alteration has been done. That alteration conforms with the power conferred by clause (b) of sub-section (1) of section 32. Admittedly, there is a notification in the *Official Gazette* altering the metro alignment already specified in the Schedule. That was done because the Central Government was of the opinion that such an alteration is necessary for the construction,

maintenance of the Metro Railway to which such alignment relates. The contention of retrospectivity of the notification must, therefore, fail.

**15.** We also find that the petitioners have annexed to the petition itself a communication addressed on 13<sup>th</sup> April, 2018 to the competent authority, namely, Archaeological Survey of India. That is on the subject “alignment of the Metro Rail in the vicinity of the nationally protected monuments in Pune”. This letter, copy of which is at page 33 of the paper book, also sets out that this is a vital infrastructure project termed as such by the Government of Maharashtra vide Government Resolutions dated 29<sup>th</sup> October, 2013 and 23<sup>rd</sup> December, 2016. This letter also presupposes the existence of that nationally protected monument, namely, Aga Khan Palace. The zone is regulated and therefore, permission from the competent authority on the recommendations of the National Monument Authority was required so as to construct metro viaduct. On this application, which was made in the prescribed format annexed therewith the required documents, it appears that the Government of India, Office of the Regional Director and Competent Authority for Maharashtra Archaeological Survey of India addressed a communication dated 31<sup>st</sup> August, 2018 to the Member Secretary, National Monuments Authority. It

also pointed out that the proposed construction site falls in the prohibited area of centrally protected monument. He invited the attention of the authority to the decision of this court in Public Interest Litigation No. 59 of 2016.

**16.** Thereafter, on 10<sup>th</sup> September, 2018, the 192<sup>nd</sup> meeting of this National Monument Authority was held at New Delhi, in which, Agenda Item No. 2 pertains to the Maharashtra Metro Rail Corporation Limited (Pune Metro Rail Project). In these circumstances, the case of the Metro Rail Corporation Limited was rejected. Once it was so rejected, the fourth respondent had to make an alteration and that alteration has been made in terms of the statutory powers and in the manner laid down by the statute.

**17.** To our mind, therefore, there is no question of going behind such alteration and probing the wisdom thereof. Now, the Metro Railway will pass through a residential area or predominantly residential zone by itself and without anything more is no ground to interfere with the decision of the competent authority. The competent authorities have, after considering all the pros and cons, particularly the rejection of their case, taken a conscious decision to alter the alignment. That decision cannot be faulted with. That is a decision taken by a body of experts. They have applied their mind and it is not the argument of Mr. Dalal that

they have acted beyond the powers conferred in them or that their decision is vitiated by *mala fides*. The chosen alignment is not selected deliberately to cause inconvenience to the residents. The whole alignment in the Corridor is to connect the places so as to make an effective transportation. It is well thought of and that is clear from the communication at page 61 of the paper book dated 1<sup>st</sup> October, 2018 of the Maharashtra Metro Rail Corporation Limited to the Municipal Commissioner of the Pune Municipal Corporation. A careful perusal of this communication would enable us to reject the other argument of Mr.Dalal. That other argument is that this is a taking over of the land or handing over of the land. That has to be acquired, according to Mr.Dalal and there is nothing like a mere handing over.

**18.** We are unable to accept this contention for more than one reasons. Firstly, he relies upon the Maharashtra Municipal Corporations Act, 1949. In that, we have clear definitions. Unless the context otherwise requires, the terms and words are distinctly defined. In the instant case, the words as defined in sections 2(47) (“private street”) and 2(52) (“public street”) are crucial. They read as under:-

“2(47) “private street” means a street which is not a public street.

2(52) “public street” means any street,-

(a) heretofore levelled, paved, metalled, channelled, sewered or repaired out of municipal or other public fund, or

(b) which under the provisions of section 224 is declared to be, or under any other provision of this Act becomes, a public street.”

19. These definitions are to be read along with the definition of the term “street” appearing in section 2(63). That includes any highway, and any causeway, bridge, viaduct, arch, road, lane, footway, sub-way, court, alley or riding path or passage whether a thoroughfare or not, over which the public have a right of passage or access or have passed and had access uninterruptedly for a period of twenty years. Now, what the argument of Mr.Dalal overlooks is that there is no question of handing over or acquiring of any land. All that the Maharashtra Metro Rail Corporation Limited is permitted to do is to erect a pillar. That is on the median of the road. That is a pre-existing road. It is a street and to be precise, a public street. Public have a right of passage. It is dedicated to the public. In a decision in the case of *State of U. P. vs. Ata Mohd.*<sup>2</sup>, the Hon’ble Supreme Court has pointed out the status of a road or a street dedicated to the public succinctly. It is merely the surface or the soil at best that can be claimed to be of oneself. However, the land beneath vests in the superior title holder. This is not a question of taking over or acquisition of the land. It is the

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2 AIR 1980 SC 1785

State Government and the Central Government controlled or participating company or legal entity which is building, constructing or erecting a viaduct. It is in these circumstances, there is no question of applicability of section 79 of the Act. Here, the property of the Municipal Corporation is not being disposed of as erroneously understood. There is, therefore, no question of section 79 governing this act.

**20.** To our mind, therefore, all the three submissions of Mr.Dalal have no merit. The public interest litigations deserve to be dismissed and are accordingly dismissed, but without any order as to costs.

**(R.I.CHAGLA, J.)**

**(S.C.DHARMADHIKARI, J.)**