HIGH COURT OF JUDICATURE AT BOMBAY

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5282 OF 2016

Govind Abaji Kaspate & Others ..... Petitioners.
Vs.
Principal Secretary, Urban
Development Department & Another ..... Respondents

.....

Mr. R.V. Govilkar with Mr. M.R. Govilkar, Advocate for the petitioners.

Mr. B.V. Samant, AGP for respondent No.1.

Mr. D.R. More, Advocate for respondent No.2.

.....

CORAM : B. R. GAVAI AND M.S.KARNIK, JJ.

DATE : 22nd September, 2017.

ORDER (PER M.S. KARNIK, J.) :-

Rule. Rule made returnable forthwith by consent of parties.

2. The challenge in this petition is to the proposal for

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widening 24 meters road at Kaspate Vasti as mentioned in the notification dated 29/5/2010 issued by the respondent No.1. The petitioners seek an appropriate direction not to change the "existing road" by digging and resurfacing and /or by any other method till the representation of the petitioners is decided by the respondent No.1.

3. The brief facts in the nutshell are thus :-

The petitioners, four in numbers, have their respective houses in Survey Nos.253. The Survey No.253 is on the Western side of the "existing road" and Survey No.231, 232, 256, 255, 254, 253, 251, 252, etc. are also on the Western side of the road. On these survey numbers the villagers had constructed their houses and are occupying the same since last several years. On the Eastern side of these survey numbers, Survey No.257 is situated. The constructions existing on Survey No.257 are few in number and all are of recent origin. The area particularly called as Kaspate Vasti was typical undeveloped village initially on the outskirts of the respondent No.2 –

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Corporation. The said area was then not part of the respondent No.2 – Corporation. The said Kaspate Vasti came to be included within the limits of respondent No.2 – Corporation sometime in the year 1982. Some part of Kaspate Vasti was then under the control of Planning Department of respondent No.2 – Corporation whereas some portion of the village was included in the territory of 'Pimpari Chinchwad Navnagar Vikas Pradhikaran (i.e. Pimpari Chinchwad New Development Authority – hereinafter referred to as 'Pradhikaran'). The land which was included in the territory of the Pradhikaran was not acquired and it remained undeveloped.

4. The said village was a typical village without any development or modern or basic facilities and amenities like well planned and constructed roads, street lighting etc. In the absence of any proper road, the villagers had been using the open spaces in front of their respective houses as a kacha village road which was not shown on any of the plans. Placing reliance on the map prepared by the petitioners, the petitioners submit

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that their houses are mainly in Survey No. 253 and at C.S.Nos.1665, 1654, 1859 which were on the Western side. As per the amended Development Plan ('DP' for short) prepared under the provisions of the Maharashtra Regional and Town Planning Act ("the said Act" for short), the old 24 meter D.P. road shown in the erstwhile DP Plan of 1995 was shifted West towards Survey Nos.252, 253, 254, 255, 256, 232, 231 which cuts across the residential houses of the petitioners. The petitioners relied upon the C.T.S.No.1857, 1859, 1009, 1960, 1962, 1963, 1954, 1965, etc. to show the constructions existed at the time of actual measurement.

5. It is thus the petitioners' case that if old D.P. road which is to the East towards Survey No.257 is shifted or allowed to be shifted towards West towards Survey Nos.252 to 256, 231, 232, huge portions of the existing houses of the petitioners will have to be demolished. As a consequence, the structures which are unauthorized and which are about to come up on the Eastern side towards Survey No.257 will be saved to the

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detriment of the petitioners adversely affecting their respective houses.

6. The petitioners pointed out that the proposal was to widen the road by 12 meters on each side from the center of the existing road. It is the petitioners' case that the existing road is being shown incorrectly and improperly in as much as the road which is sought to be widened by 24 meters i.e. 12 meters from each side is not actual existing road but was mischievously shown as a road which in fact was and has been an open space in front of the houses of the petitioners.

7. It is, thus, pointed out by the petitioners that the existing road as indicated on the map ought to be beyond the city Survey boundary and therefore, on the East towards Survey No. 257.

8. The petitioners had filed Writ Petition No.431/2011

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in this Court. By an order dated 9/2/2015 the petition came to be disposed of by passing the following order :-

ORDER

"(i) The Petitions are disposed of as withdrawn with liberty as prayed. If representations are made by the Petitioners, the same shall be expeditiously decided by the State Government in accordance with law ;

(ii) We accept the statement made by the learned counsel appearing for the Pimpri Chinchwad Municipal Corporation that the Petitioners shall not be dispossessed without following due process of law. We make it clear that unless the properties of the Petitioners are acquired by taking recourse to Section 126 of the MRTP Act of 1966 or any other law relating to acquisition of properties for public purpose, the Petitioners cannot be dispossessed ;

(iii) In view of the above order, the Civil Applications do not survive ;

(iv) All contentions of the parties on the representations to be made by the petitioners are kept open."

9. The petitioners thereupon made a detailed representation pointing out the basic and fundamental defects, flaws and the shortcomings in preparing the maps while showing the road in the proposed widening. According to him, there was grave error in marking the center of the road which

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has resulted in shifting the road towards the petitioners' properties. This affected the residential houses of the petitioners to the extent of 60 ft. In the submission of the learned Counsel for the petitioners, one Mr. Vilas Nangude, who was the corporator of that area at the relevant time moved a resolution for changing/amending the position of the D.P. Road under Section 37 of the MRTP Act and accordingly by a resolution No.5077 passed on 4/12/2003, a proposal was sent to the Government for approval on 24/1/2006. By a letter dated 30/11/2006 the Government was informed/requested to cancel or set aside the action initiated under Section 37. By an office note dated 2/4/2009 the then Municipal Commissioner again requested the Government to rethink / review the proposal sent to the Government under Section 37. According to the petitioners, it was a result of the pressure of the local corporator that the proposal under Section 37 was sent to the Government. In the meeting dated 19/11/2011, it was noted that the Government had accepted the proposal for widening the road by 24 meters from Kalewadi Phata to Kaspate Vasti. Learned

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Counsel contends that as the said road passes mainly through Survey No.257 it was not possible to widen the road from both the sides and therefore it was necessary to show the widening of the road on the East side of the road. In the meeting dated 14/12/2011, Mrs.Sujata Nangude, Corporator suggested deleting certain portion of the Resolution No.1232 for changing the proposal under Section 37 which was already sent to the Government. The said suggestion of Mrs. Sujata Nangude was accepted and the part of the proposal earlier sent under Section 37 for widening the road on the Eastern side of the road by 24 meters was deleted. It is the petitioners case that the said Sujata Nangude is the wife of Mr. Vilas Nangude and therefore the said amendment was made only with a view to favour Mr. Vilas Nangude.

10. According to the petitioners contrary to the orders passed by this Court the construction activities were going on the disputed portion and therefore, they filed another Writ Petition No.5333/2015 in which by an order dated 16/6/2015

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this Court directed the 2nd respondent to take immediate action. The petitioners also filed Contempt Petition No.325/2015 to point out the deliberate and intentional breach of the order dated 16/6/2015. According to the petitioners, they came across a letter dated 28/1/2016 issued by the Assistant Director, Town Planning, Pune, which took note of the order dated 9/2/2015 passed by this Court in Writ Petition No.431/2011. It also records about the representation made by the petitioners as regards the widening of the road and the realignment thereof. According to the learned Counsel for the petitioners the letter would reveal that there is no widening equi distance as per the notification dated 29/5/2010. Therefore, Corporation was called upon to widen the road equi distance for acquisition.

11. The petitioners, therefore, approached the respondent No.1 on 21/4/2016 and pointed out that the respondent No.2 – Corporation is bent on acting illegally and is going ahead with the plan of widening the road only towards the West side of the existing road which would affect the

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residential houses of the petitioners. It is further pointed out that damage to the houses would be to the extent of 80% to 100%. The petitioners, therefore, called upon the respondent No.1 to hear and decide the representation made by them immediately. It was also pointed out that the entire action was at the instance of the local corporator and under the pressure of the builders/developers who have interest in the development of properties on the Eastern side of the existing road.

12. An affidavit has been filed on behalf of the respondent No.2 – Corporation duly affirmed by Shri Prakash Thakur working as Deputy Director of Town Planning Department with respondent No.2 – Corporation. It is stated in the affidavit that for the purpose of seeking reliefs the petitioners have mainly relied upon the communication dated 18/11/2015 made by the Assistant Director of Town Planning, Pune Division, Pune to the State Government in connection with the alignment of road in question. The affidavit records that after receipt of the representation dated 14/10/2015 filed by the

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petitioners, State Government called upon ADTP, Pune to submit his report in respect of road in question. It is mentioned that the report dated 28/1/2016 is submitted by the ADTP without considering the factual position and factual aspects. It is further stated that the Joint Director, Town Planning Department, Pune, submitted its report dated 9/2/2016 to the State Government which is completely contradictory to the report submitted by ADTP who is sub-ordinate to the Joint Director, Town Planning Department. On perusal of both these reports, the Director of Town Planning has submitted his independent report after going through the entire files. This report of the Director of Town Planning is in conformity with the report dated 9/2/2016 of the Joint Director, Town Planning Department, Pune Division, Pune. The report of the Director of Town Planning and Joint Director of Town Planning are in conformity with each other. It is, therefore, averred that the report dated 28/1/2016 prepared and signed by the ADTP, Pune has no significance in law and cannot be acted upon. The State Government after perusal of the reports submitted by the Joint Director, Town Planning and

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Director, Town Planning dated 9/2/2016 and 29/4/2016 respectively, communicated to the Corporation by its letter dated 21/7/206 that the alignment of the road cannot be changed as modification so suggested by the Corporation has already been sanctioned by the State Government, therefore, the request of the petitioners cannot be entertained. The letter dated 21/7/2016 also makes a reference to the letter dated 1/4/2016 filed by the petitioners to the State Government. By this letter petitioners had requested the State Government to act in accordance with the report dated 28/1/2016 submitted by the ADTP, Pune.

13. Thus, according to the respondents the representation dated 14/10/2015 made by the petitioners impliedly stands decided in light of their communication dated 26/7/2016. A detailed affidavit dated 31st June, 2016 has also been filed on behalf of the respondent No.2 setting out the various steps taken for modification of the plan which has been sanctioned by the State Government for widening of the 24

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meters wide road.

14. At this stage, it would be pertinent to make reference to the report dated 8th February, 2016 of the Joint Director, Town Planning, Pune, wherein it has been clearly mentioned that 24 meters DP road has been widened equi distance from the center of the existing road.

15. We have heard learned Counsel. The principal contention of the learned Counsel for the petitioners is that the representation made by the petitioners is not decided nor they have not been heard by the State Government. It is also the contention of the petitioners that at the instance of a local corporator, alignment of the road is shifted towards the petitioners' property on the Western side. According to the learned Counsel, the 'existing road' is shown incorrectly and improperly in as much as the road which is sought to be widened by 24 meters i.e. 12 meters from each side is not actual

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existing road but it is the open space in front of the houses of the petitioners. In our opinion, the reliance placed by the petitioners on the report dated 28/1/2016 of the ADTP, Pune, is completely misplaced. There is no dispute that the ADTP is sub-ordinate to the Director and the Joint Director of Town Planning. The Director of Town Planning, after going through the records and upon considering all the factual aspects in relation to the road in question has submitted his report dated 29/4/2016 which is in conformity with the report dated 9/2/2016 of the Joint Director of Town Planning. It is upon perusal of the said reports of the Joint Director of Town Planning, Pune Division, Pune and Director of Town Planning that the State Government Communicated the Corporation by its letter dated 21/10/2016 that the alignment of the road cannot be changed as modification of the DP suggested by the corporation has already been sanctioned by the State Government and therefore, the request of the petitioners cannot be entertained.

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16. It has been pointed out that the public notice was issued for inviting suggestion/objection from general public for seeking their suggestion and objections in respect of the modification proposed by the Corporation to the development plan and more particularly the said road. Even the objections of the petitioners were considered. However, taking into consideration larger interest of general public and also the pressing need to widen the road to have smooth movement of traffic and to avoid congestion the proposed modification to development plan was warranted. The General Body of the Corporation accorded the sanction on 24/10/2005 vide its Resolution No.5618. The proposal was thereafter forwarded to the State Government for seeking its sanction under the said Act. The State Government accorded its sanction on 29/5/2010. This Court in Writ Petition No.431 of 2011 was pleased to grant liberty to the petitioners to file a representation to the State Government while disposing of the Writ Petition on 9/2/2015. The petitioners relied upon the observations made by the Assistant Director of Town Planning in his report dated

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28/1/2016 to the effect that there appears to be variance in respect of location of road at the site from the plan in which the road is shown. The Corporation has taken a stand that the ADTP has merely considered the plans without verifying the records and/or plans maintained in the office of respondent No.2 and also the factual position at the site which was very much necessary and imperative before making any communication in this regard to the State Government. The Corporation has taken a stand that the office of ADTP failed to peruse the actual road lines indicated in the sanction development plan (modified plan) and whether it matches with the road line at the ground level before expressing its opinion contrary to the factual position. The respondents have taken a stand that the ADTP failed to ascertain the factual position at the site and also failed to peruse the records maintained in the office of the Corporation before communicating his opinion to the State Government. Perusal of the modified sanctioned plan shows the existing road and also road lines for widening the road to the extent of 24 meters. It is in this light of the matter that the Corporation wrote a letter to

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the Chief Secretary, Urban Department. It is further pointed out that the Corporation does not intend to encroach on the land of the petitioners and the total stretch of the road which has been widened from Kaspate Vadi to Kalewadi Road to the extent of 1.3 kms. 2/3rd area has been surrendered to the respective land owners to the Corporation for the development of the said road in lieu of Transferable Development Rights (TDR) or acceptance of monetary compensation. The Corporation has further brought on record that taking into consideration the vehicular traffic of the residents of the area and the movement of the traffic to and fro from the factories that are situated around the area a lot of obstruction is created to the smooth movement of the Traffic. The small stretch of the road results in traffic congestion which adds to the pollution of the city. In respect of the portion of land owned by the petitioners, the Corporation has already forwarded a proposal to the Land Acquisition Officer, Pune for acquiring the land and the same is pending with the said authority.

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17. Though the petitioners have alleged that the change in alignment of the road is done at the instance of the local Corporator, the petitioners have failed to make him a party.

18. Learned Counsel for the petitioners has relied upon the decisions of the Apex Court in the case of **(a) Jawaharlal Nehru University Vs. B.S. Narwal (1980) 4 SCC 480 ; (b)Sundarjas Kanyalal Bhatija & ors Vs. Collector, Thane, Maharashtra & ors. (1989) 3 SCC 396 ; (c) Sultan Singh Vs. State of Haryana & anr. (1996) 2 SCC 66** and **(d) Nisha Devi Vs. State of Himachal Pradesh & ors. (2014) 6 SCC 392,** to contend that the order passed by the State Government modifying the sanctioned plan stands vitiated on account of breach of principles of natural justice.

19. The contention of the petitioners that the action on the part of the State Government modifying the sanctioned DP

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stands vitiated for non compliance with the principles of natural justice is untenable. This Court in the case of **Ramdas s/o. Marotrao Kathle and Ors. Vs. The State of Maharashtra and Ors. 2016 SCC OnLine Bom 8989**, (to which one of us i.e. Gavai J. was party) has considered the parameters on which the action of the State Government under Section 37 (2) of the said Act can be challenged. In **Ramdas Kathle** (supra) this Court after referring to the various authoritative pronouncements of the Apex Court in para 29 observed thus :-

> **29.** The Division Bench of this Court in the case of Mihir Yadunath Tatthe (cited supra) has considered the very issue which falls for consideration before us, wherein a challenge was raised that hearing was not given by the Municipal Commissioner but by the City Engineer and as such, the report submitted by the Corporation was not in accordance with law. It will be relevant to refer to paragraph nos. 65 and 68 of the said Judgment. They are as under :
>
> > "65. Applying the tests laid down by the Supreme Court in the case of Jaswant Sugar Mill, the fact that the Planning Authority, pursuant to the direction given by the State Government under Section 37(1), is required to publish a notice inviting objections/suggestions within 60 days from the said direction and to prepare a report after hearing the objections of the person affected by the proposed modification and forward the same to the State Government for action under Section 37(2), it cannot be said that the acts done by the Planning Authority are judicial/quasi judicial act. Rather, such acts of the Planning Authority are administrative. Once the sanction has been accorded by the General Body of

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the PMC, after the receipt of the direction from the State Government for including the said land in residential zone deleting it from HTHS Zone and make changes as per Section 37 (1), to issue public notice calling objections/suggestions from the public and to prepare a report under Section 37(1) of the Town Planning Act and send the proposal to the State Government for final approval, such decision has to be carried out by the executive functionary i.e., the Municipal Commissioner either by himself or through his subordinate officials. In the matter such as this with which we are concerned, the act of the Municipal Commissioner in issuing public notice calling objections/suggestions from the public, the authorisation to the City Engineer to collect objections and hear objectors and prepare the report and the act of forwarding the report to the State Government alongwith complete record are not the act of agency or delegation but implicit in the discharge of executive functions and all these acts shall be deemed to have been done by the Planning Authority."

"68.We are afraid, the judgment in the case of C.V. Shah has no application in the facts of the present case. As already noticed, in the present case, the Pune Municipal Corporation in its meeting held on 26th December, 2000 accorded sanction for including the subject land in the residential zone deleting it from HTHS Zone and make changes as per Section 37(1), to issue public notice calling for objections/suggestions from the public and to prepare a report and send the proposal to the State Government for final approval. **The resolution having been passed by the General Body, obviously, its implementation has to be done by the Municipal Commissioner and his subordinate officials and that is what has been done in the present case. It is not necessary that the resolution passed by the general body has to be implemented by the Municipal Commissioner himself who is the Chief Executive Officer. In the very functioning of the Corporation in executive matters, the Municipal Commissioner can always take assistance of his subordinates and, accordingly, he**

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> **cannot be said to have committed any illegality in directing that persons affected due to the modification shall be heard by the City Engineer and consequently, the City Engineer heard the**
>
> **objectors who were present for the hearing**."
>
> (emphasis supplied).

Further in para 40 it has been observed thus :-

> **40.** To appreciate the submissions made by the petitioners in this behalf, it will be necessary to refer to the Judgment of Their Lordships of Apex Court in the case of Pune Municipal Corporation and another vs. Promoters and Builders Association and another reported in (2004) 10 SCC 796, wherein the very same provision, which falls for consideration before us, has been considered by Their Lordships. In the said case, it was contended that the sanction granted by the State Government under sub-section 2 of Section 37 of the said Act was beyond the powers of the State Government u/s. 37(2). This Court had held that the language of Section 37(2) did not allow the State Government to add conditions on its own or to amend on its own in the modifications submitted by the Planning Authority. Reversing the Judgment of this Court, Their Lordships of the Apex Court observed thus :
>
> > "4.....Deliberation with the public before making the amendment is over at this stage. The Government, thereafter, under clause (2) is given absolute liberty to make or not to make necessary inquiry before granting sanction. Again, while according sanction, the Government may do so with or without modifications. The Government could impose such conditions as it deems fit. It is also permissible for the Government to refuse the sanction. This is the true meaning of the clause (2). It is difficult to uphold the contrary interpretation given by the High Court. The main limitation for the Government is made under clause (1) that no authority can propose an amendment so as to change the basic character of the development plan. The proposed amendment could only be minor within the

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> limits of the development plan. And for such minor changes it is only normal for the Government to exercise a wide discretion, by keeping various relevant factors in mind. Again, if it is arbitrary or unreasonable the same could be challenged. It is not the case of the respondents herein that the proposed change is arbitrary or unreasonable. They challenged the same citing the reason that the Government is not empowered under the Act to make such changes to the modification."
>
> "5.....As we have already pointed out, the true interpretation of section 37(2) permits the State government to make necessary modifications or put conditions while granting sanction. In section 37(2), the legislature has not intended to provide for a public hearing before according sanction. The procedure for 64 wp1501.16.odt making such amendment is provided in section 37. Delegated legislation cannot be questioned for violating the principles of natural justice in its making except when the statute itself provides for that requirement. Where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it is not permissible to read natural justice into such legislative activity. Moreover, a provision for 'such inquiry as it may consider necessary' by a subordinate legislating body is generally an enabling provision to facilitate the subordinate legislating body to obtain relevant information from any source and it is not intended to vest any right in anybody. (Union of India and Anr. v. Cynamide India Ltd and Anr. (1987) 2 SCC 720 paragraphs 5 and 27. See generally H.S.S.K. Niyami and Anr. v. Union of India and Anr. (1990) 4 SCC 516 and Canara Bank v. Debasis Das (2003) 4 SCC 557). While exercising legislative functions, unless unreasonableness or arbitrariness is pointed out, it is not open for the Court to interfere. (See generally ONGC v. Assn. of Natural Gas Consuming Industries of Gujarat 1990 (Supp) SCC 397) Therefore, the view adopted by the High Court does not appear to be correct."

It would also be material to quote para 48 which reads thus :-

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> **48.** In our considered view it will, therefore, not be possible to accept the contention of the petitioners, that the State Government ought to have taken into consideration, the detailed objections as raised by the petitioners and recorded reasons for not accepting the said objections prior to issuing the impugned notification. As already discussed by us hereinabove, perusal of the file would reveal that the State Government has taken into consideration, all the relevant factors. Perusal of the file would reveal that the objection raised by the parties and comments thereto by the Planning Authority were very much available, in the nature of report submitted by the Commissioner. The views of various Authorities including the Director of Town Planning were also very much available before the State Government. The minutes of meeting of Heritage Committee were taken into consideration by the State Government. Not only that, but specific query was made to the Commissioner of Nagpur Municipal Corporation, as to whether it was feasible to maintain width of road to 24 meters, without affecting the Heritage structure of Murlidhar temple, Kelibag temple and Gujar gateway. The Commissioner of Nagpur Municipal Corporation has accordingly replied vide his communication dt.3.10.2013 stating therein that it was possible to maintain width of said road to 24 meters after making certain changes. The said have also been considered by the State Government while taking final decision. Not only that, but the impugned notification itself imposes a condition that the heritage structure of Murlidhar temple, Kelibag temple and Gujar gateway shall be kept intact, while widening the said road as per the plan width.

20. It is by now well settled that there is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. Applying parameters laid down by the Apex Court, in the present case it cannot be held and it is not even the case of the petitioners that the State Government is lacking

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legislative competence to issue the impugned notification. It is also not the case of violation of any of the fundamental rights guaranteed under the Constitution of India. No case is made out of violation of any provisions of the Constitution of India. As discussed by us hereinabove, perusal of the material would reveal that the power is exercised in conformity of the provisions u/s.37 (1) and (2) of the said Act and within limits as provided under the said provision. It is also not the case of the petitioners that the impugned notification is repugnant to any of the laws.

21. The case of the petitioners is that the action on the part of the respondents in changing the alignment is arbitrary and unreasonable and with a view to favour a local Corporator. The record, however, indicates that the road has been widened 12 meters on each side from the center of the existing road. The Joint Director and the Director who are the authorities competent under the said Act have submitted the reports which are in conformity to one another. It is a matter of record that the ADTP, who is subordinate to the Joint Director and Director of

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Town Planning had submitted a report without taking into consideration the sanctioned plans and the exact situation of the road as it existed at the site. In the light of the law laid down by this Court in the case of **Ramdas** (supra), we do not find any substance in the submission of the learned Counsel for the petitioners that the action on the part of the State Government in modifying the sanctioned plan is vitiated on account of non observance of the principles of natural justice. We find that letter of State Government dated 21/7/2016 deals with the representation dated 1/4/2016 filed by the petitioners which is in continuance of the petitioners' representation dated 14/10/2015 made to the State Government and the State Government has rejected the request so made by the petitioners in the light of the two reports dated 9/2/2016 of the Joint Director, Town Planning and dated 29/4/2016 of Director of Town Planning.

22. We find that the action on the part of the State Government in modifying the sanctioned plan is in conformity

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with the provisions of Section 37 (1) and (2) of the said Act and no interference thereon is warranted in the exercise of our writ jurisdiction under Article 226 of the Constitution of India.

23. The petition is therefore devoid of merits and the same is dismissed with no order as to costs.

24. The stay earlier granted to continue till 24/2/2018.

(M.S. KARNIK, J.) **(B.R.GAVAI, J.)**

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