



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5122 OF 2022

1. M/s. Neelkamal Realtors  
Suburban Private Limited,  
a Company registered under the  
provisions of the Companies Act, 1956  
having their registered office at  
DB Central, Moulana Azad Road,  
Rangawala Compound, Jacob Circle,  
Mumbai – 400 011.
  
2. Mr. Ishaq Balwa,  
of Mumbai Indian Inhabitant and  
shareholder of the Petitioner No.1  
having my Office at DB Central,  
Moulana Azad Road,  
Rangawala Compound,  
Jacob Circle,  
Mumbai – 400 011. ....Petitioners

**VERSUS**

1. Office of the Custodian of  
Enemy Property of India,  
Kaiser-I-Hind Building,  
Currimbhoy Road, Ballard Estate,  
Mumbai – 400 001.
  
2. Assistant Custodian of Enemy Property,

office of the Custodian for  
Enemy Property of India,  
Kaiser-I-Hind Building,  
Currimbhoy Road, Ballard Estate,  
Mumbai – 400 001.

3. The District Collector/

Ex.Officio Dy. Custodian of  
Enemy Property, office of the  
District Collector, Court Naka,  
Ad Prabhakar Hegde Road,  
Kharkar Alley, Thane (West),  
Thane – 400 601.

4. The Tehsildar,

Padmavati Nagar,  
Thane (West),  
Thane – 400 601.

5. The Mira Bhayander Municipal

Corporation, having its office at  
Indira Gandhi Bhavan, Chatrapati  
Shivaji Maharaj Marg, Bhayander (West),  
Thane – 401 101.

6. The Additional Tahasildar, Mira Bhayandar

Having its office at Keshav Baliram Hegdewar  
Bhavan Building, 1<sup>st</sup> Floor, Behind Maxis Mall  
Amrutwani Road, Taluka and District : Thane. .... Respondents

- Mr. G.S. Godbole, Senior Advocate a/w. Mr. Aseem Naphade, Ms. Rutuja Patil, Mr. Yohaam Shah and Mr. Hasan Mushabber i/b. Negandhi Shah & Himayutullah, for the Petitioners in WP/5122/2022.
- Mr. Advait M. Sethna a/w. Mr. Sandeep Raman and Ms. Niyanta Trivedi i/b. Mr. Jasbir Saluja for Respondent Nos.1 & 2.
- Mr. A.A. Alaspurkar, AGP for Respondent Nos.3 and 3–State.
- Mr. N.R. Bubna, for Respondent No.5–Municipal Corporation.
- Ms. Patricia Fialho, Assistant Custodian of Enemy Property Mumbai Branch present in Court.

**CORAM : SUNIL B. SHUKRE &  
RAJESH S. PATIL, JJ.**

**RESERVED ON : 6<sup>th</sup> OCTOBER, 2023**

**PRONOUNCED ON : 23<sup>rd</sup> OCTOBER, 2023**

**JUDGMENT : { PER : – Sunil B. Shukre, J } :**

1. RULE. Rule made returnable forthwith. Heard finally by consent of learned counsel for the respective parties.

2. Petitioner No.1 is a Company registered under the Companies Act, 1956, of which Petitioner No.2 is a shareholder and authorized representative of Petitioner No.1. The petitioners claim that Petitioner No.1 has developed much of larger property and is in process of

developing the remaining larger property comprising various buildings constructed/to be constructed on the larger property as described in details in Paragraph 2 of the petition.

3. The Petitioners state that their effort to complete the development of remaining buildings on the larger property has come to a stand still on account of the impugned notice and impugned communications received by the petitioners.

4. The petitioners submit that they were issued a notice dated 17.12.2021 by the Assistant Custodian of Enemy Property stating that there was an enemy interest involved in the larger property developed/ being developed by the petitioners, and therefore, they were called upon to inform the Assistant Custodian if there were any objections to the proceedings initiated under Section 11 of the Enemy Property Act, 1968 (hereinafter referred to as "The EP Act, 1968") and if so, they were further called upon to produce before the Assistant Custodian all documents and other evidence in support of their objections. The show-cause notice was in effect called upon the petitioners as to why the said properties should not be taken over as Enemy Properties and dealt with under the provisions of The EP Act, 1968.

5. The petitioners submit that the Assistant Custodian of Enemy

Property also sent a letter to the District Collector, Thane and concerned Tahsildar dated 17.12.2021 (“the first impugned communication”), whereby he requested them to issue directions to all concerned officials for sending necessary information and also to ensure that no transfers, approvals and orders were issued in respect of the survey numbers mentioned in the notice. Further request was made to direct and ensure stopping of work in case any construction or redevelopment activity had commenced.

6. The petitioners further submit that following the request letter dated 17.12.2021 of Assistant Custodian, Additional Tahsildar, Mira Bhayander by his communication dated 07.01.2022 addressed to the Talathi Saja Mire and Talathi Saja Ghodbunder directed them to take an entry in the revenue records that the subject property be not transferred without prior permission of the Assistant Custodian of Enemy Property. The petitioners submit that by further communication dated 10.01.2022 addressed to the Town Planner of Mira Bhayander Municipal Corporation, the Assistant Tahasildar and the Corporation directed to issue stop work notice in respect of the ongoing construction in the larger property.

7. Being aggrieved by the action so taken, the petitioners have filed this petition challenging the aforesaid notice and the said

communications. The petitioners have also challenged the Mutation Entry No.518 in Form No.6 of Village Mahajanwadi, Taluka and District : Thane. and District: Thane and the consequent entry taken in 7/12 extract relating to the larger property.

8. Mr. Godbole, learned Senior Advocate for the petitioners submits that there is no power conferred upon the Assistant Custodian (Respondent No.2) or office of Custodian of Enemy Property (Respondent No.1) to issue the first impugned communication requesting the Collector and concerned Tahasildar to issue directions as referred to earlier in respect of the parties of the larger property (“subject property”). In support of his contentions, he has taken us to various provisions of The EP Act, 1968 and Rules made therein and also the notifications issued by the Central Government.

9. He further submits that there is nothing brought on record by Respondent Nos.1 and 2 showing that the subject property is already vested in Respondent No.1 under the provisions of Defence of India Act, 1962 and rules framed thereunder and Defence of India Act and rules framed thereunder and it continued to vest, by virtue of Section 5 of The EP Act, 1968, in the Respondent No.1 or the Custodian of Enemy Property, requiring him to take such measures as he considers necessary for protecting and preserving such property till its disposal in

accordance with The EP Act, 1968 and as per the powers conferred upon him under Section 8 of The EP Act, 1968. He also submits that the object of The EP Act, 1968 is to provide for the continued vesting of Enemy Property already vested in the Custodian of Enemy Property of India and that there is no provision in the EP Act conferring Power on the Custodian to issue the directions as contained in the first impugned communication.

10. Disagreeing with the submissions of learned Senior Counsel for the Petitioners, Mr. Sethna, learned counsel for Respondent Nos.1 and 2 submits that the impugned notice and the first impugned communication have been issued by Respondent No.2 as a part of his duty to protect Enemy Property in terms of Section 8 of The EP Act, 1968, and they are in consonance with the scheme of The EP Act, 1968, which provides for protection and preservation of the Enemy Property.

11. He further submits that no person who claims to be the purchaser of Enemy Property, as in the present case, has any right to claim title to such property and the burden to prove the title to the property is on the person in occupation of such property. He further submits that this is the reason why the EP Act, 1968 provides for continued vesting of Enemy Properties which have stood automatically vested in custodian of Enemy Property by virtue of Government of India

Notifications dated 10.09.1965, 11.09.1965 and 18.12.1971. He also submits that in the present case, there is reliable evidence *prima facie* showing automatic vesting of the subject property.

12. Mr. Sethna further submits that the impugned communication sent by Respondent No.2 is a part of the duty of Respondent No.2 to protect and preserve the Enemy Property, and therefore, even though there is no express power conferred upon him under The EP Act, 1968, to issue a communication regarding stopping of work or prohibiting transfers without prior approval, such power can be impliedly read into the provisions of The EP Act, 1968, and therefore, it cannot be said that the other impugned communications sent by concerned Tahasildar to Mira Bhayander Corporation, on the basis of which stop work notice has been issued to the petitioners, are without jurisdiction. He further submits that such power can also be said to have been derived from Rule 5 of 2015 Rules made under The EP Act, 1968. He also submits that this petition involves disputed questions of facts, and therefore, the petitioners be relegated to alternate remedy.

13. Mr. Bubna, learned counsel for the Corporation submits that whatever has been done by the Corporation in the present case is only as per the impugned communication received by the Town Planner. Similar is the submission of learned AGP for the State.



14. The petitioners have, apart from the impugned communications, also questioned the legality and correctness or otherwise of the notice issued to them by Respondent No.2 under Section 11 of The EP Act, 1968. We may state here that it is only a notice received by the petitioners inviting their objections to the proceedings under Section 11 of The EP Act, 1968, and so, the petitioners can always file their objections in respect to the notice and can also appear before Respondent No.2 to explain their stand in the matter and as that has not happened so far, this Court would not interfere with the proceedings initiated by Respondent No.2 under Section 11 of The EP Act, 1968.

15. This Court would, however, consider the challenge raised in this petition to the power of Respondent No.2 to issue the first impugned communication sent to the District Collector, Thane and concerned Tahsildar, calling upon them to issue necessary directions for prohibiting transfers and stopping work of construction as it is the contention of the petitioners that this communication has been issued by Respondent No.2 without there being any power conferred in that regard on him under The EP Act, 1968 and thus this communication is without jurisdiction. With this the controversy involved in this petition would narrow down to the power and authority of Respondent No.2 to issue the first impugned communication to the District Collector and

concerned Tahasildar, which is regards a question of law. That being so, we would confine our consideration to the said challenge only. Thus, there would be no need to also consider the objection raised by the learned counsel for Respondent Nos.1 and 2 that this petition involves disputed questions of facts, and therefore, the petitioners be relegated to such alternate remedy as may be available to them in civil law.

16. The issue that we are called upon to consider and decide in this petition is about the power of Respondent No.2 to send communication dated 17.12.2021 addressed to the District Collector and Tahsildar (the first impugned communication) thereby requesting to issue directions to concerned officials regarding sending of report on the survey numbers given in the notice issued under Section 11 of the EP Act, 1968, in which involvement of enemy interest has been alleged and ensuring that no transfer, approvals, orders etc. are made or issued in respect of survey numbers under reference without approval of office of Respondent No.2 and to issue an order regarding stopping of work of the ongoing construction, if any, because of which a series of orders have been passed by Additional Tahsildar, Mira Bhayander to respective authorities like Talathi Saja Mire, Talathi Saja Ghodbunder and Town Planner of Mira Bhayander Corporation for taking relevant entries in

the revenue records regarding prohibition on transfer of these survey numbers without approval of Respondent Nos.1 and 2 and stopping of work of the ongoing constructions. So, the first communication that we must examine for its legality or otherwise would be the communication dated 17.12.2021 issued by Respondent No.2 to the District Collector, Thane and Talsildar, Padmavati Nagar, Thane (West), Thane in the first impugned communication. The other communications which have been impugned here also are the consequential orders issued following the first impugned communication dated 17.12.2021.

17. Shri. Sethna, learned counsel for Respondent Nos.1 and 2 has supported the first impugned communication by relying upon provisions made in the EP Act, 1968, relevant Rules, the Enemy Property Rules, 2015, Government of India Notifications dated 10.09.1965 and 11.09.1965. Let us, therefore, consider the relevant provisions made in the EP Act, 1968, the said rules and the said notifications.

18. The EP Act, 1968 which came into force with effect from 20.08.1968 with an object of providing for the continued vesting of Enemy Property vested in the custodian of enemy property of India under the Defence of India Act, 1962, the Defence of India Act, 1971 and the Rules framed thereunder and for matters connected therewith.

19. Section 5, Section 5A and Section 8 of the EP Act, 1968 have been relied upon by the learned counsel for Respondent Nos.1 and 2 in order to support the contention that the provisions made in these sections sufficiently empower Respondent No.2 to issue the first impugned communication. For the sake of convenience, these provisions are reproduced thus:-

**Section 5**:- (1) *Notwithstanding the expiration of the Defence of India Act, 1962 and the Defence of India Rules, 1962, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of this Act, shall, as from such commencement, vest in the Custodian.*

(2) *Notwithstanding the expiration of the Defence of India Act, 1971 and the Defence of India Rules, 1971, all enemy property vested before such expiration in the Custodian of Enemy property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Enemy Property (Amendment) Act, 1977 shall, as from such commencement, vest in the Custodian.*

(3) *The enemy property vested in the Custodian shall, notwithstanding that the enemy or the enemy subject or the enemy firm has ceased to be an enemy due to death, extinction, winding up of business or change of nationality or that the legal heir and successor is a citizen of India or the citizen of a country which is not an enemy, continue to remain, save or otherwise provided in this Act, vested in the Custodian.*

**Explanation** :- For the purposes of this sub-section, “enemy property vested in the Custodian” shall include and always deemed to have been included all rights, titles and interest in, or any benefit arising out of, such property vested in him under this Act.

**Section 5A.**:- The Custodian may, after making such inquiry as he deems necessary, by order, declare that the property of the enemy or the enemy subject or the enemy firm described in the order, vests in him under this Act and issue a certificate to this effect and such certificate shall be the evidence of the facts stated therein.

5B. Nothing contained in any law for the time being in force relating to succession or any custom or usage governing succession of property shall apply in relation to the enemy property under this Act and no person (including his legal heir and successor) shall have any right and shall be deemed not to have any right (including all rights, titles and interests or any benefit arising out of such property) in relation to such enemy property.

**Explanation** :- For the purposes of this section, the expressions “custom” and “usage” signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law in the matters of succession of property.

**Section 8** :- (1) With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property till it is disposed of in accordance with the provisions of this Act];

(2) Without prejudice to the generality of the forgoing provision, the Custodian or such person as may be specifically

*authorized by him in this behalf may, for the said purpose :-*

*(I) carry on the business of the enemy ; (ia) fix and collect the rent, standard rent, lease rent, licence fee or usage charges, as the case may be, in respect of enemy property];*

*(ii) take action for recovering any money due to the enemy; (iii) make any contract and execute any document in the name of on behalf of the enemy;*

*(iv) institute, defend or continue any suit or other legal proceedings, refer any dispute to arbitration and compromise any debts, claims or liabilities;*

*(iva) secure vacant possession of the enemy property by evicting the unauthorised or illegal occupant or transpasser and remove unautorized or illegal construction, if any.*

*(v) raise on the security of the property such loans as may be necessary;*

*(vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;*

*(vii) transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties;*

*(viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose;*

*(ix) make payments to the enemy and his dependents;*

*(x) make payments on behalf of the enemy to persons other than those who are enemies of dues outstanding on the 25<sup>th</sup> October, 1962; [or on the 3<sup>rd</sup> December, 1971] and*

*(xi) make such other payments out of the funds of the enemy as may be directed by the Central Government.*

*Explanation : In this sub-section and in sections 10 and 17, "enemy" includes an enemy subject and an enemy firm.*

*8A(1) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority or any law for the time being in force, the Custodian may, within such time as may be specified by the Central Government in this behalf, dispose of whether by sale or otherwise, as the case may be, with prior approval of the Central Government, by general or special order, enemy properties vested in him immediately before the date of commencement of the Enemy Property (Amendment and Validation) Act, 2017 in accordance with the provisions of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017.*

*(2) The Custodian may, for the purpose of disposal of enemy property under sub-section (1), make requisition of the services of any police officer to assist him and it shall be the duty of such officer to comply with such requisition.*

*(3) The Custodian shall, on disposal of enemy property under sub-section (1) immediately deposit the sale proceeds into the Consolidated Fund of India and intimate details thereof to the Central Government.*

(4) *The Custodian shall send a report to the Central Government at such intervals, as it may specify, for the enemy properties disposed of under sec-section (1), containing such details, (including the price for which such property has been sold and the particulars of the buyer to whom the properties have been sold or disposed of and the details of the proceeds of sale or disposal deposited into the Consolidated Fund of India) as it may specify.*

(5) *The Central Government may, be general or special order, issue such directions to the Custodian on the matters relating to disposal of enemy property under sub-section (1) and such directions shall be binding upon the Custodian and the buyer of enemy properties referred to in this sub-section and other persons connected to such sale or disposal.*

(6) *The Central Government may, by general or special order, make such guidelines for disposal of enemy property under sub-section (1).*

(7) *Notwithstanding anything contained in this section, the Central Government may direct that disposal of enemy property under sub-section (1) shall be made by the other authority or Ministry or Department instead of Custodian and in that case all the provisions of this Section shall apply to such authority or Ministry or Department in respect of disposal of enemy property under sub-section (1).*

(8) *Notwithstanding anything contained in sub-section (1) to (7), the Central Government may deal with or utilise the enemy property in such matters as it may deem fit.”*

20. A close perusal of the provisions made in Section 5 and Section



5A would show that they provide for continued vesting in the custodian of enemy properties which were vested before expiration of the Defence of India Act, 1962 and the Defence of India Rules, 1971. They further provide for continued vesting in custodian of enemy properties, which are vested in him before expiration of Defence of India Act, 1971 and the Defence of India Rules, 1972. They also provide for making of an enquiry by the custodian wherever he deems it necessary for the purpose of declaring that the property of the enemy or the enemy subject or the enemy firm described in the order vests in him and issue a certificate to that effect and the certificate would be the evidence of the facts stated therein. They further show that once the enemy property vests in the custodian, no enemy or enemy subject or enemy firm shall have any right to transfer any such vested property and if any transfer of such vested property is made, it shall be void and shall otherwise be deemed to have been void.

21. The provisions made in Section 8 indicate as to what measures the custodian must take with respect to the property vested in him with a view to preserve that property, till it is disposed of in accordance with the provisions of the Act. The power conferred therein also includes disposal of the property by sale or mortgage or lease or otherwise.

22. It would be clear from the above referred provisions that the

power that has been conferred upon the custodian is in respect of dealing with enemy property vested in him by taking necessary measures for its preservation till it is disposed of by sale, mortgage or lease or otherwise and also issue certificate, after making due enquiry declaring that the property of the enemy vests in him.

23. Aforestated provisions would show that, the power of the custodian is divided into two parts, first part relating to the continued vesting of the enemy property and measures to be taken by him for its preservation till it is disposed of by sale or mortgage or lease or otherwise and the second part relating to issuance of certificate, after holding due enquiry, declaring that a particular property of the enemy vests in him. These provisions do not confer any power upon the custodian to pass any interim order or make a request to the concerned authorities to issue directions for not transferring certain properties without approval of the custodian or stopping the construction work, which has been commenced after seeking due development permission from the Planning Authority. Whatever powers the custodian of enemy property has under the aforestated provisions, are available in respect of taking certain measures in relation to enemy property already vested in him or the enemy property about which a declaration has been made that it has vested in him in terms of Section 5A in view of provisions

made in Section 5 and Section 8 of the EP Act, 1968.

24. Now let us turn our attention to the Government of India Notifications dated 10.09.1965 and 11.09.1965, which are reproduced for the sake of convenience as under:-

**GOVERNMENT OF INDIA**  
**MINISTRY OF COMMERCE**  
**NOTIFICATION**  
**New Delhi,**  
**the 10<sup>th</sup> September, 1965**

No.12/2/65-E.pty-In exercise of the powers conferred by sub rule (1) of 133-V of the Defence of India Rules, 1962, the Central Government hereby orders that all immovable property in India, belonging to or held by or managed on behalf of all Pakistan nationals, shall vest in the Custodian of Enemy Property for India with immediate effect.

2. Nothing in this notification shall apply to any such property, belonging to or held by managed on behalf of such of the Pakistan nationals as are employed in the different Missions of the Government of Pakistan in India.

Sd/-  
B.D. Jayal  
Jt. Secretary to Government of India

**GOVERNMENT OF INDIA**  
**MINISTRY OF COMMERCE**  
**NOTIFICATION**

New Delhi,  
the 11<sup>th</sup> September, 1965

No.12/2/65-E.pty-In exercise of the powers conferred by sub rule (1) of 133-V of the Defence of India Rules, 1962, the Central Government hereby orders that the properties in India, detailed in the schedule annexed hereto, belonging to or held or managed on behalf of all Pakistan nationals, shall vest in the Custodian of Enemy Property for India, with immediate effect.

2. Nothing in this notification shall apply to any property, belonging to or held by managed on behalf of such of the Pakistan nationals as are employed in the different Missions of the Government of Pakistan in India.

**THE SCHEDULE**

1. All lockers and safe-deposits in the Vaults of :
  - (a) Commercial Bank :
  - (b) Exchange Banks :
  - (c) Any body or person doing banking business: and
  - (d) Any other body or person renting out lockers :
  
2. All negotiable instruments such as promissory notes shares debentures and other government securities.
  
3. All vessels and vehicles including automobiles and air-crafts.

Sd/-  
B.D. Jayal  
Jt. Secretary

25. A bare perusal of the above referred notifications would show that they are, in essence, in the nature of declarations that all immovable and movable property in India belonging to all Pakistani Nation shall vest in the custodian of enemy property with immediate effect. There is a schedule annexed to notification dated 11.09.1965 and it gives description of the movable properties belonging to or held or managed on behalf of all Pakistan nationals, which have been declared to be vested in the Custodian of Enemy Property for India, with immediate effect. In other words, Notification dated 10.09.1965 provides for immediate vesting in the custodian of the immovable property situate in India belonging to Pakistan Nationals and Notification dated 11.09.1965 provides for immediate vesting in the custodian of all movable properties belonging to all Pakistan nationals.

26. These notifications only relate to the immovable and movable properties of Pakistan nationals vested in the custodian with effect from 10.09.1965 and 11.09.1965. The EP Act, 1968 provides for continued vesting of such properties in the custodian of enemy property. But these notifications do not give any clue about the power of the custodian to make a request for issuance of prohibitory or injunctive orders by the concerned authorities.

27. If we go through the Defence of India Act, 1962 and the rules

framed thereunder or Instruction No.2 of 2010 or the Defence of India Act, 1971 and the rules framed thereunder or the Enemy Property Rules, 2015 or Government of India notification dated 18.12.1971, we would find that none of them changes the position as regards the power of the custodian or to be precise the absence of power of the custodian to issue any communication requesting the authorities to pass prohibitory or injunctive orders. The EP Act, 1968 has been amended by the Amending Act notified on 21.03.2018. Even the amended provisions do not create any such power in the custodian. We, therefore, find that Respondent No.2, who has issued the first impugned communication could not have issued the same as he has no such power to call upon the authorities to issue any prohibitory or injunctive orders. One may say that the first impugned communication is only in the nature of a request made to the local authorities, and therefore, nothing much can be read into such a request. A careful perusal of the language used in the first impugned communication, would, however, belie the contention. It begins with a word of request, but the request made is to issue direction to all concerned officials and it is of such a nature that it lends the communication an authoritative character. The use of the words “with a request” is only courteous way of issuing a direction and this is confirmed by the various directions

issued in consequence by the concerned Tahsildar, which are there in the communications impugned herein. Thus, the first impugned communication dated 17.12.2021 issued by Respondent No.2 is in the nature of a direction, which has been complied with by the concerned Tahsildar. But this direction, as can be seen from the above referred provisions of law and the rules having the force of law is without any backing of law, and therefore, would have to be held as illegal and without jurisdiction.

28. Mr. Sethna, learned counsel for Respondent Nos.1 and 2 submits that even though the above provisions of law do not expressly confer any such power upon Respondent No.2 to issue a direction for prohibiting transfer of the property involving enemy interest without his approval and stopping the ongoing construction of the buildings, such power can be implied from Section 8 of the EP Act, 1971 and also Rules 3 and 4 of the Enemy Property Rules, 2015. We beg to defer with him. We have already seen the nature of provisions contained in Section 8 of the EP Act, 1968, which only confer power upon the custodian to take various measures necessary for preserving the enemy property till its disposal as per law and they do not contain any such power as to pass any prohibitory or injunctive order. Besides the power conferred by Section 8 in the custodian of enemy property is in respect

of the property vested in the custodian and not in respect of the property, which is yet to be vested in the custodian. In the present case, there is not a single document, which would show that the subject property was vested in the custodian either under the Defence of India Act, 1962 and the Rules framed thereunder or under the Defence of India Act, 1971 or Rules framed thereunder or the aforesaid notifications.

29. During the course of argument, we also made a query to the learned counsel for Respondent Nos.1 and 2 as to whether or not the subject property has been already vested in the custodian to which the learned counsel, upon seeking instructions, informed the Court that the subject property has not been so far vested in the custodian, though enquiry under Section 11 of the EP Act, 1968 has been initiated. Section 11 of the EP Act, 1968 enables the custodian to send the notice in writing to a person which he may believe to be capable of giving information concerning any enemy property and require him to give that information. This provisions of law only shows that it comes as an aid to the custodian to identify certain property to be enemy property and then issue a certificate of declaration that such property vests in him under Section 5A of the EP Act, 1968.



30. Even the notice dated 17.12.2021 only states that the Assistant Custodian has knowledge that there is an enemy interest involved in the subject property, and therefore, it calls upon the persons named therein to submit their objections together with necessary evidence to support their objections. This notice does not state anywhere that there is any enemy property, which has vested in him. It would then follow that, enquiry being made by the Assistant Custodian is only at its preliminary stage and he is yet to issue a certificate of declaration that the subject property is the enemy property and hence, vests in it in terms of Section 5A of the EP Act, 1968. The power under Section 8 of the EP Act, 1968, as stated earlier, would come into picture only after the enemy property would vest in him and that being so, at such a preliminary stage, the powers of the Assistant Custodian under Section 8 of the EP Act, 1968 cannot be construed as including power to issue interim directions, even by necessary implications.

31. Thus, we find that the first impugned communication is illegal and without jurisdiction and that would mean that all the consequential communications, whereby the prohibitory and injunctive orders have been issued by the Additional Tahsildar would also have to be held as without any jurisdiction and liable to be set aside and we do set aside them. Similarly, Mutation Entry No.518 in Form No.6 of

Village Mahajanwadi, Taluka and District : Thane, would be liable to be set aside and we do set it aside. The consequent remarks made in 7/12 extract of land bearing Survey No.24/8/A of Village Mahajanwadi, Taluka and District : Thane would also have to be deleted and we do direct that it be done.

32. The petition is allowed accordingly in the above terms.

33. Rule is made absolute in the above terms. No costs.

34. Learned counsel for Respondent Nos.1 and 2 makes a request for staying the effect and operation of the judgment, which is opposed by the learned Senior Counsel for the Petitioners. The request is accepted and the effect and operation of the judgment is stayed for a period of two weeks from today.

**(RAJESH S. PATIL, J.)**

**(SUNIL B. SHUKRE,J.)**