

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.11039 OF 2014

- 01 Lt.Col.Anand Rajaram Gore,
age: 74 years, Occ: Retired,
R/o C/o PO MIRC, Solapur Road,
Ahmednagar.
- 02 Mrs.Mansi Madhukar Sathye,
age: 55 years, Occ: Housewife,
R/o 2-Parag Sudarshan Colony,
Thane.
- 03 Mr.Vinay Ganesh Phatak,
age: 60 years, Occ: service,
R/o Chaitany Sudarshan Colony,
Thane.
- 04 Mr. Vishwasrao Khaserao Mane
Age 60 yrs, Occ. Business
R/o N-162 Industrial Estate
Walunj, Aurangabad.
- 05 Mr. Mahdukar Pandharinath Deshpande
Age 75 yrs. Occ. Agriculture
R/o N-3 CIDCO, Aurangabad
- 06 Medini Anand Gore
Age 43 years, Occ. Business
R/o C/o PO MIRC, Solapur Road,
Ahmednagar
- 07 Ravindra Anand Gore
Age 37 years, occ. Business
R/o C/o PO MIRC, Solapur road,
Ahmednagar
- 08 Lt. Col. Rajendra Prasad
S/o Genda Lal Sharma
Age 49 years, occ. Army Service
R/o Records The Pioneer Corps
Agram Post, Bangalore 07
- 09 M/s LSVS Developers LLP
Duly Registered Partnership Firm
Through its Partner
Shri Satish Waman Giri

Age 41 years, occ. Business
R/o 601 Lotus Residency,
Opp. Karishma
Kothrud, Pune

Petitioners

Versus

- 01 The Union of India
Through its Chief Secretary
Ministry of Defence
Government of India
New Delhi.
- 02 The Director General
Defence Estates, Ministry of Defence
Government of India,
Raksha Sampada Bhavan
Ulaan Baatar Marg,
Delhi Cant 100
Delhi
- 03 The Army Head Quarters
Pune area, Pune 900 449
Through its Officiating Station Officer (Land)
- 04 Composite Training Bn.,
The Mech. Infantry Regiment Centre
Pin 900476, C/o 56 APO.,
Through its Maj/Adj. For Co.,
- 05 The Commandant H.Q.
The Mechanised Infantry
Regiment Centre
Pin 900476, C/o 56 APO.
- 06 The State of Maharashtra
Through the Collector,
Ahmednagar.
- 07 The SDO, Ahmednagar
- 08 The Assistant Director of
Town Planning,
Ahmednagar

Respondents

Mr.R.R.Mantri, advocate holding for Mr.R.R.Sancheti, advocate for petitioners.

Mr.S.B.Deshpande, Assistant Solicitor General for Respondents No.1 to 5.

Mr.S.B.Yawalkar, A.G.P. for Respondents No.6 to 8.

CORAM : R.M.BORDE &

K.K.SONAWANE, JJ.

Reserved on :23rd March, 2018.

Pronounced on : 06th June, 2018.

ORDER (Per R.M.Borde, J.):

1 Petitioners are objecting to the communications dated 15.04.2013, 29.04.2013, 10.08.2013 along with communications dated 25.09.2012 and 18.05.2011 insisting upon the petitioners to secure 'No Objection Certificate' from the Defence Authorities prior to commencement of the construction over the subject land belonging to the petitioners. Petitioners contend that such no objection certificate is not at all required in view of provisions of Defence of Works Act, 1903 and the Respondent-authorities cannot create any obstacles in the construction activity by the petitioners in furtherance of the permission accorded by the appropriate planning authority.

2 The land out of Survey No.122/2 of Darewadi and S.No.248/2 of Nimbodi, divided into difference plots, was owned by petitioner no.1 and his partners i.e. petitioners no.2 to 5 and his wife Late Mrs.Vijaya Gore. On demise of Smt.Vijaya Gore, petitioners no.6 and 7, being her heirs, succeeded to the said property. Plot No.6/8 was owned by petitioner no.8. Petitioner no.9 is a duly registered partnership firm of which Mr.Giri is the partner. Mr. Giri has been granted general power of attorney on behalf of other petitioners. Petitioners no. 1 to 7 have entered into development agreement in respect of plot nos. 6/1 to 6/4, 6/6 and 6/7, whereas petitioner no. 8 Lt. Col. Rajendra Prasad has entered into development agreement in respect of plot no. 6/8 with petitioner no. 9. Petitioner no. 9 has purchased amenity space area in

survey no. 122/2 of Darewadi.

3 According to the petitioners, the property is situate at about 7 kms. from Ahmednagar town and is in the vicinity of defence area. The petitioners applied for NA permission for conversion of user of land to the Collector, Ahmednagar. The petitioners, on execution of Development Agreement with petitioner no. 2, applied to Sub-Divisional Officer, Ahmednagar for grant of permission for construction of houses/flats. The Sub-Divisional Officer was communicated by the Lt. Col. Administration of Cantonment on 15.04.2013 objecting to the proposed construction by the petitioners. It is conveyed by the defence authorities to the Sub-Divisional Officer that the entire plot on which construction is proposed, is within 130 meters from the defence land boundaries. It is further informed that no construction within 100 meters from defence land and no construction of multi-storeyed building above 4 floors from the periphery of the premises inside 500 meters would be permissible as per the instructions from the Head Quarter, Pune sub-area and Government of India letter dated 18.05.2011. It is further informed that since the construction was of ground plus seven configuration, which might be a security risk to army activity inside defence land and against policy decision vide letter quoted above, no objection certificate from the local military authorities was insisted. The Sub-Divisional Officer on 20.04.2013 directed the Tahsildar to enquire into the matter and tender a report in furtherance of the letter received from the defence authorities. The petitioners have also been communicated by the defence authorities that there should be no construction within 100 meters from Defence Installation / Establishment and no construction of more than four storeyed building inside 100 meters to 500 meters radius. It is further informed that any construction in the vicinity of defence land would require no objection certificate from the local military authorities in accordance with Works of Defence Act, 1903.

4 According to the petitioners, the Town Planning Department granted construction permission in favour of the petitioners as per the plans submitted by them on 30.04.2013. In view of the objection raised by the defence authorities, petitioners approached the District Collector by tendering an application on 26.05.2013 urging him to look into the matter and issue necessary instructions as regards grant of permission to raise construction over the property belonging to them. According to the petitioners, the defence authorities cannot raise any objection in respect of the construction since the notification, as required under the Works of Defence Act, 1903, has not been issued. Similar application was tendered to the Sub-Divisional Officer also. On 07.07.2013 the petitioners were called to attend enquiry in respect of proposed construction by the defence authorities. It was insisted upon the petitioners to tender an undertaking that they would not raise any construction within 100 meters area from the boundaries of defence land on 10.08.2013. Petitioners approached the defence authorities and informed that in the vicinity of defence land there is no sensitive communication center, storage of arms, ammunitions etc. and MIRC has its school building, recreation area and there is no defence installation or any sensitive infrastructure developed in the vicinity. There is no reason to object to the proposed construction.

5 The respondents however refused to accord permission in favour of the petitioners although the Town Planning authorities were in favour of grant of such permission. The Sub-Divisional Officer also had not raised any objection for raising construction by the petitioners. However, since the defence authorities have objected, the petitioners are not in a position to utilise the property for construction activity. The petitioners have also annexed copy of the order passed by the Sub Divisional Officer on 28.03.2014 according construction permission, as requested by him.

6 An affidavit-in-reply has been presented on behalf of respondents no.6 and 7 by the Sub Divisional Officer, Ahmednagar. The Sub Divisional Officer has contended in the affidavit-in-reply that in order to grant construction permission as well as approval from the Assistant Town Planning Officer, Ahmednagar, the petitioners were requested to obtain no objection from Respondent No.4-MIRC. According to the Sub Divisional Officer, as per the guidelines provided by the Defence Department dated 18.05.2011, no objection from the Military authorities is warranted and since such no objection has not been received, claim of the petitioners cannot be considered. The Sub Divisional Officer, in fact, tendered a communication to the Military authorities (MIRC) requesting to offer their comments in respect of proposed construction by the petitioners. However, no objection, as required under the policy, has not been received from the military authorities.

7 The respondents have relied upon the guidelines issued by the Government of India, Ministry of Defence on 18.05.2011, it is recorded in the communication that while the process of amendment to the Works of Defence Act, 2003, has been put in motion and may take some time, it was felt necessary to issue instructions in the interim to regulate grant of No Objection Certificate. The objective of the instructions is to strike balance between the security concern of the Forces and right of the public to undertake construction activity on their land. Paragraph (b) of the guidelines, which is relevant for consideration, reads thus:

(b) Where the local municipal laws do not so require, yet the Station Commander feels that any construction coming up within 100 meter (for multistorey building of more than four storeys the distance shall be 500 meters) radius of defence establishment can be a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. In case the

next higher authority is also so convinced, then the Station Commander may convey its objections/views to the local municipality or State Government agencies. In case the municipal authority/State Government do not take cognizance of the said objection, then the matter may be taken up with higher authorities, if need be through AHQ/MoD.”

In paragraph no.2 of the Instructions, it is recorded that these Instructions will not apply where constructions are regulated by the provisions of the existing acts/notification viz., Cantonments Act, 2006, Air Craft Act, MoCA, 1934. Gazette Notification SO 84 (E) dated 14.01.2011 (as revised from time to time), Works of Defence Act, 1903, etc. In such cases provisions of the concerned Act/Notification will continue to prevail.

8 According to the petitioners, restrictions, as pointed out, will not apply since the provisions of Defence of Works Act, are attracted. The petitioners contend that since there is no notification issued within contemplation of Section 3 of the Act, no obstruction can be created in the proposed construction activity by the Military activities. It is further contended that the scheme of Defence of Works Act provides for detailed procedure and also makes a provision in case of imposition of restrictions to determine the amount of compensation and pass an award. The observance of the provisions of the Act of 1903 would be obligatory.

9 It is the contention of the petitioners that since no notification is issued under Section 3 of the Act, the respondent-authorities cannot object to the construction activity by the petitioners.

10 In reply to the contentions raised by the petitioners, it is asserted on behalf of Respondent-Union of India that apart from the provisions of Works of Defence Act, 1903, the directives of the Ministry of

Defence and the notifications issued from time to time also will have applicability. It is contended that considering the security aspects, which is of prime importance, it cannot be said that insistence upon obtaining no objection from defence establishment is unwarranted. It is further contended that it cannot be said that as no declaration under Section 3 of Works of Defence Act is issued, the Defence is not entitled to insist upon no objection certificate. The paramount consideration is security of the Country and same cannot be ignored by anyone including the planning authority, State Government or by any other authority.

11 Reliance is placed on the judgment in the matter of **TCI Industries Limited Vs.1 Municipal Corporation of Greater Bombay & others**, 2012 (5) Bom.C.R. 353. In paragraph 20 of the judgment, it is observed thus:

“ Section 3 of the Works of Defence Act, 1903, provides for issuance of declaration and notice. As per the said provision, if the Central Government is of the opinion to impose restriction upon use and enjoyment of land in the vicinity, said land is to be kept free from buildings and other obstructions, a declaration can be issued. It is, however, required to be noted that in the instant case, the premises which are in possession of the petitioner are concerned, there is some construction which has already taken place since long, which is of course not high rise building and the respondent has not tried to insist upon demolition of the same, the question for their NOC arose when petitioner wanted to develop the property by constructing high rise building. Under section 3 of the said Act, even the Central Government can acquire the property for national interest. In the instant case, the defence has not thought it fit to issue such a declaration but has tried to assert its right under the provisions of the MRTP Act and the Development Control Regulations by which they have not agreed to give NOC in view of the security reasons. It, therefore, cannot be said that simply because no declaration under section 3 of the Act is issued, the defence was

not entitled to insist for their NOC. So far as section 3 of the Act is concerned, it has no relevancy so far as insistence of the planning authority regarding no objection from the Defence Department is concerned. In a given case, even if there is no notification under section 3 of the Defence Act, the planning authority can always insist for NOC from the Defence Department, if the property is located just adjacent to the premises of the petitioner. So far as section 3 of the Defence Act is concerned, the planning authority nowhere figures in the picture and the petition has been filed against the planning authority against their insistence of NOC from the Defence Department. While considering the said aspect, it is not necessary to place any reliance on the provisions of section 3 of the Act as in future if the Defence is of the opinion that if any declaration is issued for acquiring the property, it can always proceed on that basis. In that eventuality, the planning authority nowhere figures in the picture. Today the dispute of the petitioner is against the planning authority as according to the petitioner, the planning authority has no right whatsoever to insist for NOC from the Defence Department. While considering the said aspect, it is not necessary that unless there is declaration under section 3 of the Act, the planning authority cannot insist for any NOC or might even refuse to grant NOC on the ground of public interest. It is not possible for us therefore to accept the argument of Mr.Kapadia that unless there is a declaration under section 3 of the aforesaid Act, it is not open for the Navy to raise the point of security which, according to him, is nothing but a bogey and concocted version of the Navy.”

12 The view expressed by the Division Bench of this Court in the matter of **TCI Industries Limited** (*supra*), has been followed in the matter of **S.S.V. Developers Vs. Union of India & others (Writ Petition No.646 of 2013)**, decided on 23.12.2013 at Mumbai). In the matter of Writ Petition No.452/2012, decided on 29.04.2016 by the Division Bench of this Court, the same view has been reiterated. The aforesaid judgment relates to construction of Adarsh Co-operative Housing Society Building raised in Colaba area of Bombay. Reiterating the view that the issues

concerning security interest raised by the defence are of paramount consideration, the Division Bench of this Court has refused to accept the contentions of the Society as regards legality of the construction. While answering the issue as to whether, it would be obligatory to invoke the provisions of the Works of Defence Act, 1903 or whether they can invoke provisions of MR & TP Act, and 1991 DCR, the Division Bench, referring to the observations made in the case of **TCI Industries Limited**, has observed that the provisions of Defence of Works Act are not sole repository for prohibiting construction activities near Defence Establishment and the petitioner can certainly invoke Section 46 and DCR 16. It would be appropriate to refer to the observations made by the Division Bench in the case of **Akbar Travel of India (Pvt) Ltd** :

“ 99. In the case of Akbar Travel of India (Pvt) Ltd (supra), the Division Bench has observed in paragraph 31 thus :

31. We cannot transgress the limits of writ jurisdiction by sitting in judgment over the actions of Intelligence Agencies. These agencies manned by experts, who are in the best position to judge the security interests. Ultimately, sensitive and vital installations have to be safeguarded and protected from entry of persons who are considered to be undesirable and a security risk.

Precisely, such are the inputs in the reports which have been received and if the Bureau has acted upon the same, then, we cannot sit in judgment over their decision. The writ Court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the inputs do not endanger the security of the Airport nor public interest demand that the ground handling operations of the petitioner be prohibited. These are matters which are better left to the authorities in charge of security of the vital installations as they are in-charge of laying down standards and norms for protecting and safeguarding them. They act in public interest and when no malafides are alleged, their actions ought not be interfered.”

13 In our view, considering insistence of the defence authorities to issue no objection certificate, regard having to the security interest, we do not find that the view taken by the respondents is erroneous or arbitrary. There are no *mala fides* alleged against the respondents.

14 For the reasons recorded above, we do not find any reason to cause interference in the matter. It would be open for the petitioners to take steps in observance of the procedure and the directives issued in that behalf including directives of the defence authorities insisting upon the no objection certificate. Writ Petition is devoid of substance.

15 In the result, writ petition stands dismissed.

K.K.SONAWANE
JUDGE

R.M.BORDE
JUDGE

adb/