

Ladda

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION No. 229 OF 2018

M/s Sunbeam Enterprises,	]	
a Partnership Firm duly	]	
registered under the Partnership	]	
Act, 1932 and having its registered	]	
office at 101, Mayflower, Opposite	]	
Pheonix Market City, L.B.S. Marg,	]	
Kurla West, Mumbai- 400 070.	]	<u>PETITIONER</u>

Versus

- | | | | |
|----|--------------------------------|---|--|
| 1) | The Municipal Corporation of |] | |
| | Greater Mumbai, a Statutory |] | |
| | Corporation constituted |] | |
| | under the provisions of the |] | |
| | Mumbai Municipal Corporation |] | |
| | Act, 1888 and having its |] | |
| | office at Mahapalika Marg, |] | |
| | Mumbai-400 001. |] | |
| | |] | |
| | |] | |
| 2) | The Chief Engineer, |] | |
| | Building Proposals, Municipal |] | |
| | Corporation of Greater Mumbai, |] | |
| | having his office at Municipal |] | |
| | Head Office Extension |] | |
| | Building Mahapalika Marg, |] | |
| | Mumbai-400 001. |] | |
| | |] | |
| | |] | |
| 3) | The Executive Engineer, |] | |
| | Building Proposals (ES)-I, |] | |
| | Municipal Corporation of |] | |
| | Greater Mumbai, Near Raj |] | |
| | Legacy Bldg., Paper Mill |] | |
| | Compound, L.B.S. Marg, |] | |
| | Vikhroli (West), |] | |
| | Mumbai-400 083. |] | |

- 4) The Flag Officer Commanding]
in-Chief (for CWO) Headquarters)]
Western Naval Command, Sahid]
Bhagat Singh Road, Mumbai-400 071.] **RESPONDENTS**

ALONG WITH
WRIT PETITION No. 3303 of 2018.

Lakshchandi Columbia Enterprises,]
A partnership Firm duly registered]
under the Indian Partnership Act,]
1932 and having its registered]
address at A101, Rizvi Park, S.V.]
Road, Santacruz (W), Mumbai-400 054;]
through its authorized Representative]
Mr. Ashwini Kumar Shrivastava.] **PETITIONER**

Versus.

- 1) Union of India,]
through its Ministry of Defence,]
Room No.234 – South Block,]
Ministry of Defence, New Delhi]
through office of Attorney]
General of India, Maharshi Karve]
Marg, Mumbai – 400 020.]
]]
2) Chief of Naval Staff,]
having his office at Integrated]
Head Quarters, Ministry of]
Defence (Navy),]
New Delhi-110011.]
]]
3) Chief Staff Officer,]
Flag Officer, Commanding]
in Chief, Head Quarters,]
Western Naval]
Command, Shahid Bhagat]
Singh Road, Mumbai-400 023]
]]
4) State of Maharashtra]
through its Secretary,]

- | | |
|---|----------------------------|
| Urban Development Department, |] |
| having its office at 1 st Floor, |] |
| Mantralaya, Mumbai 400 023. |] |
| |] |
| 5) Municipal Corporation of |] |
| Greater Mumbai, |] |
| A statutory body registered |] |
| under the provision of Mumbai |] |
| Municipal Corporation Act, 1888 |] |
| having its office at Mahapalika |] |
| Building, Mahapalika Marg, |] |
| Mumbai -400 001 through its |] |
| legal department. |] |
| |] |
| |] |
| 6) Executive Engineer, |] |
| Buildings Proposals II, |] |
| Eastern Suburbs, Raj Legacy |] |
| Building, Paper Mill Compound, |] |
| LBS Marg, Vikhroli (West), |] |
| Mumbai-400 083. |] |
| | <u>RESPONDENTS.</u> |

Appearances in WRIT PETITION No. 229 Of 2018:-

Mr. Denzil D'mello for Petitioner.
 Mr. Yashodeep Deshmukh a/with Ms. Vandana Mahadik for Respondent Nos. 1 to 3-MMC.
 Mr. Anil C. Singh, ASG a/with Mr. A.S. Khandeparkar, Ms. Aditya Thakkar, Ms. Geetika Gandhi and Mr. Pranil Sonawane for Respondent No.4 -Union of India.

Appearances in Writ Petition No. 3303 of 2018:-

Mr. Prasad K. Dhakephalkar, Senior Counsel a/with Kalpesh Joshi and Ms. Nisha Shah I/by M/s Kalpesh Joshi and Associates for the Petitioner.

Mr. Anil C. Singh a/with Mr. A.S. Khandeparkar,

Mr. Parag Vyas, Mr. Aditya Thakkar, Mr. Pranil Sonawane and Ms. Geetika Gandhi for Respondent Nos. 1 to 3.

Mr. Abhay L. Patki, Addl. Govt. Pleader for Respondent No.4- State.

Mr. Yashodeep Deshmukh a/with Ms. Vandana Mahadik for Respondent Nos.5 & 6 - MMC.

**CORAM : S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.**

RESERVED ON :- 1st and 2nd April, 2019

PRONOUNCED ON :- 21st June, 2019.

JUDGMENT [PER: B. P. COLABAWALLA, J.]

1. Rule. Respondents waive service. By consent of parties, rule made returnable forthwith and heard finally.

2. The grievance raised in the above writ petitions is the insistence of the Municipal Corporation of Greater Mumbai (for short the “**MCGM**” or the “**Planning Authority**”) [respondent Nos.1 to 3 in WP 229/2018 and respondent Nos.5 & 6 in WP 3303/2018] to obtain a No Objection Certificate (“**NOC**”) from the Indian Navy before granting the occupancy certificate or granting development permission for the construction carried out / to be carried out by the petitioners. The reliefs sought in Writ Petition No. 229/2018 read

thus:-

“(a) That this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of certiorari or any other appropriate writ, direction or order in exercise of its powers under Article 226 of the Constitution of India and after calling for the records and proceedings relating to the present case and after considering the same, this Hon'ble Court may be pleased to quash and set aside the impugned condition issued by the respondent Nos. 1 to 3 (Exhibit “G” to the petition) after considering the validity and propriety thereof;

(b) That this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, direction or order in exercise of its power under Article 226 of the Constitution of India and thereby direct Respondents Nos. 1 to 3 to issue the Occupancy Certificate in respect of the New Building known as “Laburnum” without insisting on the Petitioner complying with the impugned condition issued by the Respondents (Exhibit - “G” to the petition), for obtaining NOC from NAD, Ghatkopar;

(c) That this Hon'ble Court be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, direction or order in exercise of its power under Article 226 of the Constitution of India and thereby direct Respondents Nos. 1 to 3 to accept the Building Certificate in respect of the New Building known as “Laburnum” without insisting on the Petitioner complying with the Impugned condition issued by the Respondents (Exhibit- “G” to the petition), for obtaining NOC from NAD, Ghatkopar;”

3. As far as Writ Petition No. 3303/2018 is concerned, the reliefs sought therein are as under:-

“(a) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other writ, order or direction in the nature of mandamus and thereby be pleased to direct Respondent Nos. 5 and 6 to process and sanction all planning permission for construction of the composite development on the said Property bearing CTS No. 135 of Kurla-2 without insisting on a No Objection Certificate from Respondent Nos. 1 to 3 in accordance with the provision of MRTP Act 1966 and the prevailing Development Control Regulations;

(b) That this Hon'ble Court be pleased to issue a writ of certiorari and/or any other writ, order or direction in the nature of certiorari calling for the records and proceedings in respect of issuance of letters dated 23 October 2017 by Material Superintendent of Material Organization Ghatkopar West and letter dated 2 January 2018 issued by Respondent No. 3 refusing to grant NOC in favour of the Petitioner for construction of composite building on the said Property bearing CTS No. 135 of Kurla – 2 and after going through the legality, validity and propriety thereof be pleased to quash and set aside the same;

(c) That this Hon'ble Court be pleased to issue a writ of mandamus and/or any other writ, order or direction in nature of mandamus directing Respondent Nos. 1 to 2 to issue a formal No Objection Certificate for construction at the said Property bearing CTS No.135 of Kurla-2 in favour of the Petitioner to Respondent numbers 5 to 7;”

4. Though the facts in both the writ petitions are slightly different, since common arguments were advanced and the questions of law raised are almost identical in both the abovementioned writ petitions, they are disposed of by this common order and judgment.

FACTS IN WRIT PETITION NO. 229 OF 2018:-

5. The subject-matter of this writ petition is the piece and parcel of land bearing CTS No. 201/B, 201/B/1 to 201/B/6 of village Kurla Part II, Taluka Kurla, District M.S.D., Mumbai admeasuring approximately 743 square metres (for short “**the said land**”). The petitioner claims to be the owner and holder of development rights in respect of the said land. How the petitioner has obtained ownership and development rights in respect of the said land has been set out from Paragraphs 3.1 to 3.8 of the petition.

6. On the said land, the petitioner had applied for and obtained approvals from the MCGM from time to time for construction of a new multi-storied building called “Laburnum” comprising of stilts plus ground plus 6 upper floors. According to the petitioner, it has complied with all the terms and conditions of the approvals granted by the MCGM to the petitioner from time to time and has since completed construction of the entire new building “Laburnum” in accordance with the plans approved from time to time by respondent Nos. 1 to 3 (the Planning Authority) and has provided all the essential utilities that were to be provided by the petitioner in the said building.

7. Once this building was completed, the petitioner through its architect submitted the building completion certificate to the Assistant Engineer of the MCGM and made an application to issue the occupancy certificate in respect of the said building. According to the petitioner, at this juncture and for the first time, the MCGM has arbitrarily, extraneously and illegally imposed an unreasonable condition (and which according to the petitioner was not insisted upon earlier) requiring the petitioner to check whether the said land and the said building falls within 500 metres from the National Armaments Depot boundary (for short **“NAD”**) and accordingly obtain from NAD a NOC. The MCGM would not issue the occupancy certificate in respect of the said building without the aforesaid NOC. This is the basic grievance in Writ Petition No. 229 of 2018.

FACTS IN WRIT PETITION NO. 3303 OF 2018:-

8. This petition is filed by the petitioner, which is a partnership firm duly registered under the provisions of Indian Partnership Act, 1932 and claims to be the owner of the property being the piece of land admeasuring 3424.80 square metres bearing CTS No.135 of village Kurla-II on LBS road and Rajubadekar Road, Kurla (West), Mumbai 400070 within the Registration District and

sub-District of Mumbai (for short **“the said property”**). According to the petitioner, they have acquired and purchased the said property through its erstwhile owner “Jivan Limited”. In this petition, respondent No.1 is the Union of India, respondent No.2 is the Chief of Naval Staff and respondent No.3 is an Officer of respondent No.2. Respondent No.3 has issued communications rejecting the petitioner's application for NOC for construction on the said property. Respondent No.5 is the MCGM and is the Planning Authority. In Paragraph 6.1, it is averred how the petitioner got right, title and interest in the said property from its erstwhile owner – Jivan Limited. The said property is on the north-west side of the Material Organization Depot of respondent No.3 at Ghatkopar (West), Mumbai (for short **“the said Depot”**). In between the said property and the said Depot is a road of 24.40 meters (to be widened). A slum is also located between the said property and the said Depot.

9. It is the case of petitioner that after the circular issued by the Defence Authorities dated 18th May, 2011, the petitioner (under the provisions of Right to Information Act, 2005) enquired whether the said Depot had imposed any restriction on the development of the plots in its vicinity. According to the petitioner, by a reply dated 24th June, 2011, the petitioner was informed that the aforesaid Depot had

neither imposed nor was planning to impose a restriction on the said property and which is located at the north-west corner of the said Depot.

10. After receiving the aforesaid responses, the petitioner through its Architect's letter dated 13th October, 2011 applied for development permission for reservation of Judicial Officers' Housing on the said property and submitted the necessary documents in that regard. Thereafter, paragraphs 6.2 to 6.11 of the petition narrate the correspondence that has taken place between the petitioner and the registry of this Court regarding the proposal about the designated site reserved for law courts, judicial officers and law court housing as part of a large reservation on the said property. After all this correspondence, respondent No.6 (Executive Engineer of MCGM) vide its letter dated 14th June, 2017 addressed to the petitioner and its Architect, granted permission to develop the said property reserved for judicial officers' housing by insisting handing over 50% built up area (not less than 1428.29 square meters) to the Registrar (High Court) and payment of premium as may be decided by the Government from time to time as per its policy. Whilst granting the permission for developing the said property, respondent No.6 vide condition No. 25 also mentioned that the petitioner shall submit a

NOC from the Naval Administration Department as the said property was in the vicinity of the said Depot. Thereafter, respondent No.6 addressed a letter dated 27th September, 2017 to the Chief Staff Officer (respondent No.3 herein) for granting its no objection for the proposed composite development. In response to the aforesaid letter, respondent No.3 vide its letter dated 2nd January, 2018 and for the reasons stated therein, conveyed and recorded that NOC cannot be granted for the proposed composite development. The non-granting of the NOC and condition No.25 imposed by the MCGM for getting the aforesaid NOC, is the subject matter of this writ petition.

11. As can be seen from the aforesaid two petitions, the real dispute in both the petitions are with reference to the condition imposed by the MCGM for obtaining the NOC of the Naval Authorities. In Writ Petition No. 229 of 2018, the condition for getting the NOC was imposed at the time when the petitioner applied for the occupancy certificate whereas in Writ Petition No. 3303 of 2018 the condition for obtaining the NOC was imposed at the outset when permission for development was granted by the Planning Authority.

12. It is in this backdrop, that we have heard Mr. D'mello, the

learned Counsel appearing for the petitioner in W.P. No.229 of 2018, Mr. Dhakephalkar, the learned Senior Counsel appearing for the petitioner in Writ Petition No.3303 of 2018, and Mr. Anil Singh, the learned ASG appearing for the Naval Authorities (respondent No.4 in W.P. No. 229 of 2018 and respondent Nos. 1 to 3 in Writ Petition No. 3303 of 2018).

13. Mr. D'mello, the learned Counsel appearing on behalf of the petitioner in W.P. No. 229 of 2018, and Mr. Dhakephalkar, the learned Senior Counsel appearing on behalf of the petitioner in W.P. No.3303 of 2018, submitted that the condition imposed upon the petitioners, namely, for obtaining a NOC from the Naval Authorities, is on the basis of a letter/circular dated 18th May, 2011, which was issued by the Ministry of Defence to the Chiefs of the three Armed Forces (Army, Air Force and Navy), which lays down the internal procedure and guidelines to be followed by the Defence Authorities regarding construction to be carried out in the vicinity of a Defence Establishment. These guidelines are subsequently modified by circulars dated 18th March, 2015 and 17th November, 2015 respectively. Both the Counsel submitted that the condition imposed by the Planning Authority, namely, for obtaining the NOC, was completely arbitrary and without any backing in law as there was no

statutory provision, either in the Maharashtra Regional and Town Planning Act, 1966 (for short the **“MRTP Act”**), or the Mumbai Municipal Corporation Act, 1888 (for short the **“MMC Act”**), or the Development Control Regulations for Greater Mumbai, 1991 (for short the **“DCR, 1991”**) for imposing such a condition. Both the Counsel submitted that even otherwise, the guidelines which have been issued by the Defence Ministry clearly reveal that in the absence of any statutory provision in the local Municipal Laws requiring a NOC of the Defence Authorities, a discretion vests in the Station Commander or any higher officer to decide whether a building which is constructed within a 500 metre radius of the Defence Establishment is likely to create any security hazard for the Defence. According to the petitioners, it is an admitted position that apart from the construction which forms the subject-matter of both these petitions, there are other buildings which have been constructed within the 500 metre radius and at no point of time the Station Commander or any higher officer, had taken any objection in writing taking exception to any construction of the said buildings within the aforesaid radius of 500 metres. This being the case, it was submitted that the Planning Authority could not have imposed the aforesaid condition of obtaining the NOC from the Naval Authorities either before granting the development permission or for grant of an

Occupancy Certificate.

14. It was then submitted that under Section 3 of the Works of Defence Act, 1903 (for short **“the WOD Act”**) restrictions upon the use and enjoyment of land in the vicinity of any Works of Defence or of any site intended to be used or to be acquired for any such work, can be imposed in order that such land may be kept free from buildings and other constructions. This can be done by making a declaration by the Central Government that it is necessary to impose restrictions under the signature of the Secretary to the Central Government or some other officers duly authorized to certify its order. Such a declaration has to be published in the Official Gazette and pursuant to such a declaration, the Collector has to give public notice of the substance of such declaration at a convenient place in the locality. Only on following such a mandatory procedure, can the Central Government impose restrictions upon use and enjoyment of the land in the vicinity of any Works of Defence. Both the learned Counsel submitted that in the present case no such declaration under Section 3 of the WOD Act has been issued. Since this mandatory provision was not followed, there was no question of the Planning Authority imposing the aforesaid condition of getting a NOC on the basis of the circular dated 18th May, 2011 read with circulars dated

18th March, 2015 and 17th November, 2015 respectively.

15. In furtherance of the above submission, it was canvassed by the petitioners that the aforesaid circulars, though make a reference to the WOD Act and disclose that the same are issued pursuant to Section 3 of the WOD Act, the said circulars are not a “declaration” by way of a notification issued under the said Act and are merely internal administrative procedural guidelines issued by the Ministry of Defence to the Chiefs of the three Armed Forces and therefore cannot bind the Planning Authority. This is, more so, since the said circulars have not been addressed to the Planning Authority at all, was the submission. Restricting development on the basis of the said circulars, and which, according to the petitioners, have no legal sanctity, cannot override the power of the Planning Authority to grant development permission / occupancy certificate, was the submission. Both the learned Counsel submitted that it is a well settled principle of law that administrative and policy matters cannot override legislations. Thus, the aforesaid circulars are contrary to the provisions of the MRTP Act, the MMC Act and the DCR, 1991 and thus no credence ought to be given thereto by the Planning Authority. According to the petitioners, there is no provision in the MRTP Act, MMC Act or the DCR, 1991 which

empowers the Planning Authority to insist upon a person/developer to obtain the NOC from the Navy as a condition precedent before granting development permission or occupancy certificate.

16. Without prejudice to the aforesaid arguments, Mr. D'mello as well as Mr. Dhakephalkar both submitted that the construction that was undertaken / to be undertaken in the vicinity of the Defence Establishments, was not a sensitive area of such Defence Establishments. They submitted that in W.P. No. 229 of 2018 the construction was sought to be carried out in the vicinity of the National Armaments Depot, whereas in W.P. No. 3303 of 2018, the development was sought to be done in the vicinity of a Material Organization Depot. Neither of these Defence Establishments could be termed as vital or strategic installations making them sensitive areas which would pose any serious security threats by the construction sought to be carried out by the petitioners in both the above writ petitions. The issue of security is only a bogey raised by the Naval Authorities to somehow justify their action of refusing to grant the NOC and therefore, ought not to be taken cognizance of by this Court for the purposes of refusing the reliefs to the petitioners. In support of this argument, the learned counsel relied upon decisions of two Division Benches of this Court in the case of **[i]**

Tirandaz Subha Niketan & Ors Vs. UOI & Ors. [W.P. No.3013 of 2018 decided on 27th February, 2019] and [ii] Sea Kunal Corporation Pvt. Ltd. Vs. Municipal Corporation of Greater Mumbai & Ors. [W.P. No.3217 of 2018 decided on 27th February, 2019].

17. In addition to the aforesaid arguments, as far as the W.P. No. 229 of 2018 is concerned, Mr. D'mello submitted that in the facts of this case, the petitioner had submitted the plans, etc., of their building known as "Laburnum" vide its letter dated 27th June, 2014. The Planning Authority vide its letter dated 20th March, 2014 had issued its Intimation of Disapproval ("**IOD**") under Section 346 of the MMC Act. Thereafter, the Planning Authority had also issued a Commencement Certificate ("**CC**") dated 22nd August, 2014 upto the plinth level and the same was extended upto the first floor and thereafter a full CC as per the approved plans was granted on 21st February, 2015. The petitioner also applied for amendment of the plans which were duly approved. On the basis of all this, the petitioner proceeded to construct the said building comprising of stilts plus ground plus 6 upper floors and completed the same in all respects. Accordingly, the petitioners' Architect, vide their letter dated 8th October, 2016, submitted the completion reports and

certificates along with a notice of completion of work as per section 356A of the MMC Act. The petitioners' Architect therefore requested for grant of full Occupancy Certificate/building completion certificate at the earliest. Mr. D'mello submitted that it is only at this time, and for the first time, that the condition for getting the NOC from the Naval Authorities was imposed. He submitted that such a condition was never imposed by the Planning Authority upon the petitioners at the time of granting development permission or even thereafter, until the building was fully completed. He therefore submitted, that at least as far as the petitioner in W.P.No.229 of 2018 is concerned, it would be highly inequitable to impose such a condition at such a late stage. Had the condition been imposed earlier, they would have probably applied for the necessary NOC and if the same was not granted, they would have abandoned the project and not incurred huge costs and expenses for constructing the aforesaid building. He therefore submitted that even on equitable grounds the aforesaid condition imposed by the Planning Authority ought to be struck down and the Planning Authority ought to be directed to grant a full occupancy certificate to the petitioner in relation to the building known as "Laburnum" constructed by the petitioner in accordance with the approved development plans.

18. For all the aforesaid reasons, the learned Counsel appearing for the petitioners submitted that there was absolutely no justification for imposing a condition for getting a NOC from Naval Authorities either for grant of occupancy certificate or for granting development permission of their respective constructions. In these circumstances, both the learned Counsel submitted that their respective writ petitions be allowed in terms of the prayer clauses contained therein.

19. On the other hand, Mr. Anil Singh, the learned ASG appearing on behalf of the Naval Authorities [respondent No.4 in WP 229/2018 and respondent Nos.1 to 3 in WP 3303/2018], submitted that there was no merit in any of the contentions canvassed on behalf of the petitioners. He submitted that it was totally incorrect on the part of the petitioners to contend that the condition imposed by the Planning Authority, namely, for obtaining the NOC was completely arbitrary and without the backing of any law. In this regard, Mr. Singh placed reliance on Section 46 of the MRTP Act, as also Regulation 16 of DCR, 1991. Mr. Singh submitted that on a correct and proper interpretation of Section 46 of the MRTP Act, it cannot be seriously contended that the Planning Authority, whilst imposing any condition, cannot consider aspects such as security,

etc. He submitted that it was the inherent duty of the Planning Authority to apply its mind before giving development permission and to keep in mind the pros and cons of such permission.

20. Mr. Anil Singh submitted that as per Regulation 16 of the DCR, 1991 the Planning Authority may refuse to grant permission for use of land if the proposed development is not in “public interest”, a term which has a very wide connotation. Mr. Singh submitted that when one reads Section 46 of the MRTP Act with Regulation 16 of DCR, 1991, it is clear that not only the Planning Authority has the power, but also a duty to consider all aspects, and especially the aspect of safety and security before granting any development permission. This is something that the Planning Authority has to take into consideration at all times. In the facts of the petitions before us, Mr. Anil Singh submitted that this is exactly what was done by the Planning Authority and therefore no fault can be found with the actions of the Planning Authority on insisting for the NOC of the Naval Authorities either before granting any development permission, or even before granting the occupancy certificate.

21. Mr. Singh submitted that the duty imposed upon the Planning Authority to take these concerns into consideration while

granting building permissions is independent of and not subject to the Defence Authorities raising such concerns. This is for the simple reason because this duty / responsibility pertains to public interest and the security of the nation. If the Planning Authority does not do so, then, there would a complete dereliction of duty by the Planning Authority either at the time of granting development permission or even at the time of granting the occupancy certificate. Looking to all this, Mr. Singh submitted that it was totally incorrect on the part of the petitioners to contend that there was no provision in law to entitle the Planning Authority to impose a condition for obtaining the NOC from the Naval Authorities before either granting development permission or the occupancy certificate, as the case may be.

22. As far as the guidelines / circulars issued by the Ministry of Defence are concerned, Mr. Singh submitted that the same would be binding on the Planning Authority even if no notification was issued under the WOD Act. In furtherance of this argument, Mr. Singh submitted that the reliance placed by the petitioners on the provisions of Section 3 of the WOD Act are wholly misplaced. He submitted that Section 3 of the WOD Act provides for issuance of a declaration and a notice. According to Mr Singh, if the Central Government is of the opinion that it is necessary to impose a

restriction upon the use and enjoyment of land in the vicinity of the Defence Establishments and the said land is to be kept free from buildings and other constructions, a declaration can be issued. Under Section 3, even the Central Government can acquire the property in national interest. In the instant cases, Mr. Singh submitted that the Central Government have not thought it fit to issue a declaration as contemplated under Section 3 of the WOD Act. However, that does not mean that the Defence Authorities do not have a right and a duty to object to any construction within its vicinity and which, in its opinion, may pose a security threat. This is also the duty of the Planning Authority under the provisions of the MRTP Act and the DCR, 1991, was the submission. Mr Singh therefore submitted that simply because no declaration under Section 3 of the WOD Act was issued, the same would not disentitle the Naval Authorities from insisting that their NOC be obtained for any construction activity within their vicinity.

23. Mr. Singh then submitted that so far as Section 3 of the WOD Act is concerned, it has no relevance when the Planning Authority, for any construction within the vicinity of a Naval Establishment, insists that a NOC be obtained from such Establishment. In a given case, even if there is no notification under

Section 3, the Planning Authority can always insist for a NOC from the Naval Authorities, if the property is located within the vicinity of the Naval Authorities. In fact, as far as Section 3 is concerned, the Planning Authority nowhere figures in the picture and the present petitions have been filed against the Planning Authority questioning their power to insist upon obtaining the NOC from the Naval Authorities. While considering the said aspect, it is not necessary to place any reliance on the provisions of Section 3 of the WOD Act. Mr Singh submitted that the dispute which forms the subject-matter of the above petitions, is against the Planning Authority as according to the petitioners, the Planning Authority has no right whatsoever to insist for a NOC from the Naval Authorities. This being the case and viewed from this angle, Mr. Singh submitted that the entire argument of the petitioners based on Section 3 of the WOD Act is wholly misconceived and misplaced.

24. As far as the arguments of the petitioners regarding the fact that the constructions that were undertaken/to be undertaken in the vicinity of the Naval Establishments was not a sensitive area, Mr. Singh submitted that this argument cannot be countenanced by this Court. Mr. Singh submitted that whether the security issue raised by the Navy is merely a bogey or a matter of substance is not a question

which we can decide in a petition under Article 226 of the Constitution of India. This aspect should be squarely left to the Defence Authorities. It is not for this Court to pronounce on the aforesaid aspect, as it is completely in the realm of the Defence Establishments. It is not for this Court to pronounce upon the decision of the Navy that the point of defence raised by them is justified or not, especially in the absence of any *mala fides* being alleged for non-granting of the NOC. Mr Singh submitted that in the facts of both the aforesaid petitions, no *mala fides* have been even alleged let alone pleaded and established. This being the case, whether the constructions posed a security threat or otherwise is not something that this Court would examine in its writ jurisdiction. The Writ Court does not possess any expertise in such cases, was the submission. In these circumstances, he submitted that it was wholly incorrect on the part of the petitioners to contend that the constructions that were undertaken / to be undertaken in the vicinity of the Naval Establishments was not a sensitive area. Merely because the construction was to be carried out near to a National Armaments Depot or a Material Organization Depot, does not make these Naval Establishments any less sensitive. He submitted that security of the Armed Forces and its Establishments is of paramount importance for the security and safety of the nation.

He submitted that times have currently changed. Terrorism is on the rise and the State is no longer fighting a known enemy and the nature of the threat to the security of the nation has undergone a vast change over the last decade with terrorism emerging as a source of major and unconventional danger. The assessment of such threats has heightened and accordingly the necessary precautionary measures have to be taken against them. A prime example of such an attack, Mr. Singh submitted, was the terrorist attack that took place in this City on 26th November, 2008 in which approximately 164 people died and at least 300 people were injured. Over and above this, damage to property worth crores of rupees was inflicted. When one looks at the whole picture, it would be futile even to suggest that there cannot be any security threat to a National Armaments Depot or Material Organization Depot of the Naval Authorities. In these circumstances, Mr. Singh submitted that the issue of the perception of a security threat to these establishments cannot be decided either by the petitioners or the Planning Authority or this Court exercising its writ jurisdiction under Article 226 of the Constitution of India.

25. Mr. Singh then submitted that the argument of the petitioners that merely because some buildings have come up within

the vicinity of these establishments, cannot be a ground to strike down the actions of the Planning Authority to insist upon the NOC of the Naval Authorities in relation to the construction which forms the subject-matter of the above two petitions. Mr. Singh submitted that firstly one has to consider when these buildings had come up and when development permissions were granted for the same. Depending on when these buildings came up, the threat perceptions at the time would have been quite different from what the current state of affairs are. Secondly, he submitted that even otherwise, if the Planning Authority has granted development permissions and allowed the constructions without taking into consideration the fact that these constructions are in the vicinity of Naval Establishments, the same cannot give any right to the petitioners. If the Planning Authority has granted this permission in the dereliction of their duty, the Naval Authorities cannot be penalized and punished for the same. He submitted that two wrongs do not make a right and this Court under Article 226 of the Constitution of India would not issue a mandate or direction to perpetuate a wrong any further.

26. With reference to Mr. D'mello's argument that the building known as Laburnum is already constructed by the petitioners, Mr. Singh submitted that when it comes to the safety and

security of the nation, the argument of equity can have no role to play. He submitted that merely because the Planning Authority did not impose the condition for obtaining the NOC from the Naval Authorities at the time when it granted an IOD or CC, does not in any way derogate from the fact that such NOC is required in public interest. This is to ensure the safety and security of the nation. If the same was not insisted upon by the Planning Authority at the time of granting IOD or CC, does not mean that the Planning Authority is thereafter precluded for all the time to come on insisting for the said NOC. Mr. Singh submitted that it is now well settled that when public interest is pitted against private interest, public interest would prevail. He submitted that in W.P. No. 229/2018, even though the condition was imposed before granting the occupancy certificate to the building known as Laburnum, the same was imposed by the Planning Authority in public interest. Once this is the case, then the argument of Mr. D'mello on the issue of equity cannot be countenanced. Mr. Singh submitted that this argument has been canvassed only to invoke the sympathy of this Court and ought not to be taken cognizance of when one looks at the larger picture, namely, the safety and security of the Naval Establishments and in turn that of the nation. For all the aforesaid reasons, Mr. Singh submitted that there was no merit in the above writ petitions and the same ought to

be dismissed. In support of all the aforesaid arguments, Mr. Singh relied upon the following decisions:-

- [a] Akbar Travel of India (Pvt) Ltd. vs. Union of India & Ors **[(W.P.) No.656 of 2009]**
- [b] TCI Industries Limited vs. Municipal Corporation of Greater Bombay **[(2011 SCC OnLine Bom 1671 : (2012) 5 Bom CR 353]**
- [c] Hindustan Petroleum Corporation Ltd. vs. Municipal Corporation of Greater Mumbai **[2012 SCC OnLine Bom 560: (2012) 114 (3) Bom LR 1383 : (2012) 5 Bom CR 379]**
- [d] Oswal Agro Mills Ltd. vs. Hindustan Petroleum Corpn. Ltd. **[(2014) 2 SCC 491]**
- [e] Union of India vs. State of Maharashtra **[2016 SCC OnLine Bom 2570: (2016) 4 Bom CR 549 (for short “the Adarsh case”)]**

27. We have heard the learned Counsel for the parties at length and have perused the papers and proceedings in both the writ petitions. The first issue that we are called upon to decide and which is really the main issue is whether the Planning Authority could insist upon the NOC of the Naval Authorities, either before granting the development permission or before granting the occupancy certificate. As mentioned earlier, it was the contention of the petitioners that the Planning Authority could not have imposed the aforesaid condition, in view of the fact that the circulars issued by the Defence Ministry had no force of law and therefore on that basis,

the Planning Authority (MCGM) could not have insisted upon the petitioners to obtain a NOC from the Naval Authorities. In this regard, it would be apposite to refer to the aforesaid Circulars. The first Circular that was issued by the Ministry of Defence is dated 18th May, 2011 which reads thus:-

“No. 11026/2/2011/D(Lands)
Government of India
Ministry of Defence
New Delhi, 18th May, 2011.

To,
Chief of Army Staff
Chief of Air Staff
Chief of Naval Staff
New Delhi.

Subject :- Guidelines for issue of 'No
Objection Certificate(NOC)
for building constructions.

Of late, issue of NOC for construction on lands adjacent to Defence Establishments had generated avoidable controversies particularly in two recent cases, viz., Sukna and Adarsh. Various issues involved in these two cases were reviewed and the matter has been considered in detail in the Govt., in consultation with the Services. It is felt that Works of Defence Act, 1903 which imposes restrictions upon use and enjoyment of land in vicinity of Defence Establishments needs to be comprehensively amended so as to take care of security concerns of defence forces. While the process of amendment has been put in motion and may take some time, it was felt necessary to issue instructions in the interim to regulate grant of NOC. The objective of these

instructions is to strike a balance between the security concerns of the forces and the right of public to undertake the construction activities on their land. Following guidelines are therefore laid down:

(a) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders/private parties.

(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 storey 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 objection/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 AHO/MoD.

(c) Objection/views/NOC shall not be given by any authority other than Station Commander to the local municipality or State Government agencies and shall not be given directly to private parties/builders under any circumstances.

(d) NOC once issued will not be withdrawn without the approval of the Service Hqrs.

2. 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.

(Dr. A.K.Singh)
Director (L & C)

Copy to :
DGDE:DRDO:Coast Guard HQ;
CGDA;DGQA:OFB (through D (Fy-II))

28. As can be seen from the aforesaid circular, these Guidelines / circular was necessary pending comprehensive amendment of the Works of Defence Act, 1903. Whilst the aforesaid amendments were pending, it was felt necessary to issue instructions in the interim to regulate the grant of NOC. In principle, this Circular contemplates that in places where local Municipal Laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from the next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to the State Government agencies or to Municipal Authorities. The other guideline that is

mentioned is that where the local Municipal Laws do not so require, and yet the Station Commander feels that any construction coming up within 100 meters (for multi-storey buildings of more than four storeys the distance shall be 500 meters) radius of a 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 objection/views to the local municipality or State Government agencies.

29. After this Circular was issued, a clarificatory Circular dated 18th March, 2015 was once again issued by the Ministry of Defence. This clarificatory Circular dated 18th March, 2015, inter alia, clarified that NOC from the Local Military Authority (LMA)/Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent local municipal authority prior to 18th May, 2011. However, it was clarified that this exception shall not apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 18.5.2011. It was clarified that the other provisions of the Circular dated 18th May, 2011 will remain unchanged.

30. Thereafter, a third Circular dated 17th November, 2015 was issued and it was styled as “Guidelines for issue of No Objection Certificate for building constructions”. This Circular reads thus:-

“No. 11028/2/2011/D(Lands)
Government of India
Ministry of Defence
New Delhi, dated 17th November, 2015.

To,
The Chief of Army Staff
The Chief of Air Staff
The Chief of Naval Staff

Subject :- Guidelines for issue of 'No Objection Certificate (NoC) for building constructions' regarding.

I am directed to refer to Circular of even number dated 18.5.2011 vide when guidelines for issue of No Objection Certificate (NOC) for building constructions were issued. Consequent to representations/ references received with regard to restrictions placed by these guidelines on building construction in the vicinity of Defence Establishment where high rise buildings/structures already exist within 500 meters of the periphery, it has been decided to issue following amendments to guidelines by adding a second proviso under para 1 (b) of Circular of even number dated 18.5.2011 as follows :

“Wherever buildings/structures of four storeys or more already exist within 500 metres of the periphery of any Defence establishment and the construction proposed is in line with or behind i.e. in the shadow or shield of such building/structure, the State Government/Municipal Corporation may, after obtaining comments from the LMA and giving due consideration to the same, decide whether to

approve such proposals or not. LMA shall give his comments within a period of 30 days from the date of receipt of a reference from the State Government/Municipal Corporation. This order will be implemented prospectively.”

2. In respect of proposals for construction between the boundary of the defence establishments and the existing structure as indicated above and within 500 metres of the defence establishments, the guidelines contained in Circular dated 18.5.2011 with regard to NOC from the LMA shall continue to apply. Other provisions of the Circular dated 18.5.2011 and 18.3.2015 will also remain unchanged.

(Surya Prakash)
Director (L & C)

Copy to :

1. DG, DGDE, New Delhi
2. (R &D), DRDO, New Delhi
3. Coast Guard HQ,
4. Ordinance Factory Board (through D (Fy-II)
5. CGDA
6. DGQA”

31. For the sake of completeness, we must mention here that a further Circular dated 21st October, 2016 was issued by the Ministry of Defence. The reason why we are mentioning this Circular is because it mentions security restrictions in respect of Defence Establishments / installations located at 193 stations as listed in Part “A” of Annexure to this Circular and security restrictions in respect of Defence Establishments / installations located at 149 stations as listed in Part “B” of Annexure to this Circular. At the very outset, we

may mention that this Circular does not apply to the facts of the present case as the same applies only to the Military and has not been issued with reference to any Naval Establishments.

32. As can be seen from the aforesaid Circulars, the same have been issued to ensure the security and safety of the Defence Establishments, and in our case more particularly the Naval Establishments. The question that arises is whether it was correct on the part of the Planning Authority to insist on the NOC of the Naval Establishments before granting any development permission or the occupancy certificate. In this regard, we are unable to agree with the argument canvassed on behalf of the petitioners that there are no provisions either under the MRTP Act, MMC Act or the DCR, 1991 which would enable the Planning Authority to impose such a condition. Section 46 of the MRTP Act clearly stipulates that the Planning Authority, in considering an application for development permission, shall have due regard to the provisions of any draft of final plan sanctioned under this Act. The first proviso to Section 46 stipulates that if the Development Control Regulations for an area over which a Planning Authority has been appointed or constituted, are yet to be sanctioned, then in considering an application for permission referred to in sub-section (1), such Planning Authority

shall have due regard to the provisions of the draft or sanctioned Regional plan, till the Development Control Regulations for such area are sanctioned. In the facts of the present case, with reference to the MCGM being the Planning Authority, the DCR, 1991 have been brought into force pursuant to a notification issued by the Urban Development Department of the Government of Maharashtra dated 20th February, 1991. These Regulations apply to any building activity and development work in areas under the entire jurisdiction of the MCGM. Regulation 16 of DCR, 1991 stipulates the requirements of sites and stipulates that no land shall be used as a site for the construction of buildings unless certain conditions are satisfied as more particularly set out in the said Regulation. Regulation 16 in its entirety reads thus :-

16. Requirements of Sites:-

No land shall be used as a site for the construction of buildings—

(a) if the Commissioner considers that the site is insanitary or that it is dangerous to construct a building on it or no water supply is likely to be available within a reasonable period of time;

(b) if the site is within 9 m. from the edge of the water mark of a minor water course, or 15 m. from the edge of the water mark of a major water course, unless arrangements to the satisfaction of the Commissioner are made to drain the flow of the water course;

Provided that where a water course passes through low-lying land without well-defined banks, the commissioner may permit the owner of the property to restrict or divert the water course to an alignment and cross section determined by him (Commissioner).

(c) if the site is not drained properly or is incapable of being well drained;

(d) if the building is proposed on any area filled up with carcasses, excreta, filthy and offensive matter, till the production of a certificate from the commissioner to the effect that it is fit to be built upon from the health and sanitary point of view;

(e) if the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the health and safety of the inhabitants of the neighbourhood;

(f) if the Commissioner is not satisfied that the owner of the building has taken the required measures to safeguard the construction from constantly getting damp;

(g) if the level of the site is lower than the Datum Level prescribed by the Commissioner depending on topography and drainage aspects. This shall not be less than Reduced Level of 27.55 m of the Town Hall Datum;

(h) if situated—

(i) within the inner funnel of vision marked on Sheet numbered as Part II of Ward D of the Development Plan 1981-2001;

(ii) within the outer funnel of vision marked on the sheet quoted in (c) above and the building proposed to be erected is above Reduced Level of 75.44 m. (247.45 ft.) with reference to the Town Hall Datum.

(i) if the building is nearer to the centre line of a National Highway, State Highway or Major District Road than 24.5 m.

in the case of residential buildings and 36.5 m. in the case of other buildings;

(j) if it is situated—

(i) within 2438 m. from an international civil airport unless the application for development permission is accompanied by a certificate of consent from the Civil Aviation Authorities,

(ii) within 1829 m. from any other civil airport unless the application for development permission is accompanied by a certificate of consent from the Civil Aviation Authorities,

(k) for assembly use for cinemas, theatres, places of public worship, residential hotels, lodging and boarding houses, unless the site has been previously approved by the Commissioner and the Commissioner of Police;

(l) unless it derives access from an authorised street/means of access described in these Regulations:

(m) for industrial use other than a service industry unless the application is accompanied by a no objection certificate from the appropriate officer of the Industries Department of the Government of Maharashtra according to the prevailing Industrial Location Policy.

(n) if the proposed development is likely to involve damage to or have deleterious impact on or is against urban aesthetics or environment or ecology and/or on historical/architectural/ aesthetical buildings and precincts or is not in the public interest."

(emphasis supplied)

33. As can be seen from the above reproduction, Regulation 16(e) stipulates that no land shall be used as a site for the construction of buildings if the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the

health and safety of the inhabitants of the neighbourhood. Similarly, Regulation 16(n) stipulates that no land shall be used if the proposed development is likely to involve damage to or have deleterious impact on or is against urban aesthetics or the environment or ecology and/or historical/architectural/aesthetical buildings and precincts or is not in the public interest. The words “public interest” have a very wide connotation. It can hardly be disputed that ensuring safety and security of our Naval Establishments is certainly in public interest. When this is the position, we are clearly of the opinion that it is not only the power but also the duty of the MCGM to consider the security aspects in public interest before granting permission to develop any land. The security aspect is a fundamental necessity that the Planning Authority and the public bodies who are entrusted with the task of deciding on the location of residential areas, must be alive to at all times. The Court cannot permit any compromise or leniency on these issues, especially with reference to security by any public bodies or even individuals. Taking into consideration the aspect of security of our Naval Establishments and that of the public is a mandatory duty of the MCGM (the Planning Authority) before sanctioning any plan or permitting any development.

34. We must mention that this aspect came up for consideration before this Court in the case of **TCI Industries Limited (supra)**. Paragraphs 15, 17, 18 and 19 of this decision clearly lay down that a restricted meaning cannot be given to Section 46 of the MRTP Act so as to divest the Planning Authority of its power to consider any other aspect such as security etc. and has to restrict itself to the provisions of the draft or final regional or development plan sanctioned under the Act. Under Section 46 of the MRTP Act, the Planning Authority is required to examine the aspect about granting development permission in an appropriate manner and by considering all the relevant aspects. It can hardly be contended that the Planning Authority cannot consider any other thing except giving due regard to the provisions of the draft or final regional or development plan as mentioned in Section 46 of the Act. In fact, it is the inherent duty of the Planning Authority to apply its mind before giving development permission and it is required to keep in mind the pros and cons of such development permission. They cannot blindly shut their eyes and give sanction only on the basis that except what is provided in Section 46 they are not required to call for any other information. In fact, if the Planning Authority did so, it would be failing in its duty. Paragraphs 15, 17, 18 and 19 of the decision given by this Court in **TCI Industries (supra)** culls out this proposition

and reads thus :-

“15. So far as Municipal Corporation is concerned, the same is a Planning Authority under the provisions of the MRTP Act, 1966. The Planning Authority is required to process the development permission as provided under Section 46 of the MRTP Act. Section 46 provides as under:

“46. Provisions of Development plan to be considered before granting permission.- The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under this Act.”

15.1 Section 51 of the MRTP Act deals with power of revocation and modification of permission to development. Section 154 provides about the control by State Government which reads as under:

“154. Control by State Government.- (1) Every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act.

(2) If in, or his connection with, the exercise of its powers and discharge of its functions by the Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority, and the State Government, the decision of the State Government on such dispute shall be final.”

15.2 So far as the Development Control Regulations for Greater Mumbai, 1991 are concerned, the relevant provisions of Regulation 16 provide as under:

“16. No land shall be used as a site for the construction of buildings.-

(a) if the Commissioner considers that the site is insanitary or that it is dangerous to construct a

building on it or no water supply is likely to be available within a reasonable period of time.

.... ..

(e) If the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the health and safety of the inhabitants of the neighbourhood;

... ..

(n) If the proposed development is likely to involve damage to or have deleterious impact on or is against urban aesthetics or environment or ecology and/or historical/architectural/aesthetical buildings and precincts or is not in the public interest.”

15.3 Section 3 of the Works of Defence Act, 1903 provides as under:

“3. Declaration and notice that restrictions will be imposed.- (1) Whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders.

(2) The said declaration shall be published in the Official Gazette and shall state the district or other territorial division in which the land is situate and the place where a sketch plan of the land, which shall be prepared on a scale not smaller than six inches to the mile and shall distinguish the boundaries referred to in Sec. 7 may be inspected, and the Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality.

(3) The said declaration shall be conclusive proof that it is necessary to keep the land free from building and other obstructions.”

15.4 So far as helicopter is concerned, it is also considered as an aircraft under the Aircraft Act, 1934. The Act also prescribes certain provisions in connection with security of the Airport and aircraft. Section 9A of the Aircraft Act, 1934 empowers the Central Government to prohibit or regulate construction of buildings, planting of trees, etc.

17. So far as Section 46 of the MRTP Act is concerned, in our view, it is not possible for us to give such a restricted meaning as canvassed by the learned counsel for the petitioner. Under Section 46 of the MRTP Act, the Planning Authority is required to examine the aspect about granting development permission in an appropriate manner and by considering the relevant aspects. While granting development permission, one of the things which the Planning Authority is required to consider is to the provisions of the draft or final plan sanctioned under the Act meaning thereby that if any provision in respect of anything in the draft or final plan published by means of notice or same is sanctioned under the Act, the Planning Authority cannot ignore the same and it has to be taken into consideration. It is impossible for us to accept the say of Mr. Kapadia that the Planning Authority cannot consider any other thing except giving due regard to the provisions of the draft or final plan as mentioned in Section 46 of the MRTP Act. In our view, Section 46 of the MRTP Act cannot be given such a restricted meaning and it cannot be said that under Section 46, the Planning Authority cannot consider any other aspect such as security etc. It is not possible for us to accept the submission of Mr. Kapadia that Section 46 of the MRTP Act is to be read in such a restrictive manner.

18. It is required to be noted that it is in fact the inherent duty of the planning authority to apply its mind before giving development permission and the planning authority is required to keep in mind the pros and cons of such development permission. For example, if there is a fire brigade station or refinery or any sensitive object is located

at the place nearby the area for which development permission is sought, the planning authority cannot shut its eyes and is blindly give sanction only on the basis that, except what is provided in Section 46, they are not required to call for any other information. On the contrary, it is the duty of the planning authority to call for such information otherwise they will be failing in their duty and they are not required to sanction blindly by shutting their eyes to the relevant aspect of the matter. In view of the same, it is not possible for us to accept the submission of Mr. Kapadia that except what is provided under the MRTTP Act and the D.C. Regulations, the planning authority is not empowered to call for any other information and to straightaway grant permission and is not required to call for any other information except the one provided under Section 46 of the MRTTP Act or under the D.C. Regulations.

19. In view of what is stated above, no fault can be found with the Corporation in insisting for NOC from the Defence Department. Even as per the D.C. Regulation 16(n), the Planning Authority may refuse to grant permission of using the land if the proposed development is likely to involve damage or to have a deleterious impact on or is against the aesthetics or environment or ecology and/or historical/architectural/aesthetical building and precincts or is not in the public interest. In our view, public interest cannot be read in line of what is mentioned under Regulation 16 regarding environment as public interest have wide connotation and if any particular development activity is found to be not in public interest, in a given case, the development authority can refuse such permission. The public interest, therefore, is to be read independently to the earlier part of the said Regulation i.e. ecology, architectural aspects etc. Reading the provisions of Section 46 of the MRTTP Act, it cannot be said that the insistence of the planning authority of NOC of a particular department which, according to the Planning Authority is in public interest, such insistence cannot be said to be de hors the provisions of the Act and the Regulations."

(emphasis supplied)

35. We must mention that the decision of this Court in **TCI Industries (supra)** was thereafter followed by another Division Bench of this Court in the case of **SSV Developers & Anr. vs. Union of India through Secretary [2014 (2) Bom. C. R. 541]**. We must mention that Mr. D'mello tried to distinguish these judgments on the ground that in the facts of this case, the condition was imposed at the time of granting development permission whereas in the facts of his case the building was fully complete and only at the time of applying for the occupation certificate that the condition for NOC was imposed. We are afraid that this argument can be of no assistance to Mr. D'mello. As mentioned earlier, the Planning Authority has to have due regard and take into consideration the issue of security of the Naval Establishments. Even assuming that the Planning Authority had not issued or imposed such a condition at the time of granting the development permission, the same would make no difference. The issue of security would not change merely because it was insisted upon at the time of the granting of occupancy certificate. Here, it is the question of security of the Naval Establishments and not that of the Planning Authority. If the Planning Authority has failed to do what in fact was its duty, the same cannot in any manner jeopardize the security of the Naval establishments. We, therefore, find that this argument of Mr. D'mello and which is an argument in

equity, would not carry his case any further. In any event, we are clearly of the opinion that when it comes to the safety and security of the nation, we can hardly take into consideration equitable grounds and/or considerations for relaxing the aforesaid condition.

36. As far as the reliance placed by the petitioners on the provisions of Section 3 of the WOD Act is concerned, we agree with the argument canvassed by Mr. Singh that it has no relevance to the insistence of the Planning Authority for getting a NOC from the Naval Authorities. In a given case, even if there is no Notification under Section 3, the Planning Authority can always insist for a NOC from the Naval Authorities, if the property is located within the vicinity of the premises of the Naval Authorities. In fact, according to us, when one takes into consideration the provisions of Section 46 of the MRTP Act, read with Regulation 16(e) and (n) of the DCR, 1991, this would be a duty that is enjoined on the Planning Authority. What is important to note is that as far as Section 3 is concerned, the Planning Authority nowhere figures in the picture. What is challenged in the present proceeding is the insistence of the Planning Authority to obtain a NOC from the Naval Authorities. While considering this aspect, we find that the reliance placed on the provisions of Section 3 of the WOD Act, is wholly misplaced.

37. As far as arguments of the petitioners regarding the fact that the respective constructions were not in the vicinity of Naval Establishments which was a sensitive area, we are afraid, we cannot countenance this argument. Whether the issue of security raised by the Navy is merely a bogey or a matter of substance, is not a question which we can decide in the petition under Article 226 of the Constitution of India. This aspect has to be left squarely to the discretion of the Defence Authorities. It is not for this Court to pronounce on the aforesaid aspect as it is completely in the realm of the Defence Establishments. The issue of security and safety of the nation is left best to the experts in that field and it is neither the petitioners nor the Planning Authority and least of all this Court that would give any finding in that regard. This is more so, when there is not even a case of mala fides pleaded, much less established, either against the Naval Authorities or the MCGM. This being the position, whether the constructions which form the subject matter of the above petitions pose a security threat or otherwise, in the absence of mala fides, is not something that this Court can examine in its writ jurisdiction. As mentioned earlier, the writ Court does not possess any expertise in such cases and it would be fraught with danger if we were to embark on this exercise.

38. We also agree with Mr. Singh that merely because the respective constructions were to be carried out near the National Armaments Depot or the Material Organization Depot does not make these Naval Establishments any less sensitive. The security of the armed forces and its establishments are of paramount importance for the security and safety of the nation. We cannot lose sight of the fact that indeed the times have changed. Terrorism is on the rise and the State is no longer fighting a known enemy. The fact that the nature of threat to the security of the nation has undergone a vast change over the last decade with terrorism emerging as source of major and unconventional danger need not be over emphasized. Due to this, the assessment of such threats have heightened and accordingly the necessary precautionary measures have to be taken against them. The Court cannot shut its eyes to the terrorist attacks that took place in the City on 26th November, 2008 and which created complete panic and chaos and brought the City to a virtual standstill, not to mention that countless lives were lost and damage to property that ran into crores of rupees. When one looks at the entire picture and from this perspective, then all the more, we are of the view, that the Writ Court would loathe to embark upon the exercise and examine whether there is any genuine security threat

or otherwise. As mentioned earlier, in the absence of any *mala fides* being alleged, we have no reason to believe that the NOC was withheld by the Naval Authorities without good reason. In these circumstances, we are clearly of the view that the perception of security threat to the aforementioned Depots cannot be decided by us under Article 226 of the Constitution of India.

39. As far as the argument of the petitioners regarding some buildings having already come up within the vicinity of these Establishments and therefore Naval Authorities ought not to have withheld their NOC, we find this argument to be wholly misconceived. Firstly, there is nothing on record to show when these buildings came up and when the development permissions were granted for the same. One must not lose sight of the fact that it is quite possible that the threat perception at the time when these permissions may have been granted by the Planning Authority were quite different from the current state of affairs. It is therefore wholly incorrect to place reliance on these vague allegations that since some buildings have come up within the vicinity of these two Depots, NOC could not have been withheld by the Naval Authorities in relation to the construction which forms the subject matter of the above two writ petitions.

40. Even otherwise, we find this argument to be without any merit for the simple reason that if the Planning Authority has granted development permissions and allowed the constructions without taking into consideration the fact that these constructions are in the vicinity of the Naval Establishments, the same cannot give any right to the petitioners. As mentioned earlier, it is the duty of the Planning Authority to ensure that all aspects of the matter are to be considered (including security) before granting development permission to any person. If the Planning Authority has granted some permission in dereliction of their duty, the Navy cannot be penalized and punished for the same. This is more so, when one takes into consideration that this is a security issue and the petitioners cannot take advantage of any alleged wrong done by the Planning Authority in the past. Two wrongs do not make a right and this Court under Article 226 of the Constitution of India cannot issue a mandate or a direction to perpetuate the wrong any further.

41. It would not be out of place to mention that all the arguments that have been canvassed before us by the petitioners have been considered by another Division Bench of this Court in the case of **Union of India vs. State of Maharashtra (supra)** [for short

the “**Adarsh case**”]. This Court in a very detailed judgment has not only considered the entire law on the subject, but has dealt with all the arguments that have also been canvassed before us. Paragraph 77 of Adarsh’s case clearly sets out the issues that this Court was called upon to decide and reads thus:-

77. We have recorded the above submissions in great details, lest, we are accused of not correctly depicting the submissions as they were canvassed before us. We have carefully considered the rival submissions advanced by the learned counsel appearing for the parties. We have also carefully perused the material on record. In our opinion, following questions fall for our determination.

(i) Whether, in the facts and circumstances of the case, NOC of Defence Establishment is necessary?

(ii) Whether communication dated 5.4.2000 addressed by HQ, MG&G Area to Collector Mumbai at Exhibit ‘T’ page 334, constitutes NOC of Defence Establishment?

(iii) Whether it is mandatory duty of respondent no. 3-MMRDA being the Planning Authority to impose condition of obtaining NOC from Defence Establishment?

(iv) Whether Respondent no. 3-MMRDA could have waived condition (v) in communication dated 11.7.2005 and condition no. 5 in communication dated 6.9.2005 granting permission to carry out construction upto plinth level only and in fact waived those conditions?

(v) Whether the petitioner is to necessarily invoke the provisions of the Works of Defence Act, 1903 or whether they can invoke provisions of MR&TP Act, and 1991 DCR?

(vi) Whether the building constructed by respondent no. 4 poses a security threat to Defence Establishment?

(vii) Whether the Petition is liable to be dismissed on the ground of gross delay and laches?

(emphasis supplied)

42. Whilst considering points (i) & (iii), this Court first examined the correspondence on record and thereafter the statutory provisions and more particularly section 46 of the MRTP Act and Regulation 16 of the DCR, 1991. It also relied upon the decisions of **TCI Industries (supra)** and **SSV Developers (supra)** [amongst others]. It thereafter answered points (i) and (iii) by opining that the NOC of Defence Establishment was necessary and in fact it was the mandatory duty of the Planning Authority to insist for the NOC of Defence Establishment while considering a proposal for building permissions. The relevant portion reads thus:-

“91. Section 46 of the MR&TP Act reads thus:

“46. Provisions of Development plan to be considered before granting permission-The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan [or proposals] [published by means of notice] [submitted] or sanctioned under this Act.”

92. Perusal of Section 46 extracted herein above shows that while considering the application for permission, the Planning Authority has to have due regard to the provisions of any draft or final plan or proposal published by means of notice submitted or sanctioned under the Act. Scope of Section 46 was considered by the Apex Court in the case of *S.N. Rao* (supra). In paragraph 8, it was observed thus:

“8. There can be no doubt that if there be any other material or relevant fact, Section 46 does not stand in the way of such material or fact being considered by the Municipal Corporation for the grant or refusal to grant sanction of any development plan. In the unreported decision of the High Court, the relevant fact that was taken into consideration was the draft revised development plan, even though the

plan was not published. In the instant case, however, at the time the Municipal Commissioner rejected the plan submitted by the respondent No. 5, there was no draft revised development plan in existence. It was in contemplation. If there had been such a plan, the Municipal Commissioner would be entitled to rely upon the same in rejecting the plan submitted by the respondent No. 5. But, as there was no such draft revised plan as has been stated before this Court even by the Counsel for the Municipal Corporation, the Municipal Commissioner was not justified in merely relying upon a proposal for the preparation of a draft revised plan. An order rejecting a development plan submitted by the owner of the land should be supported by some concrete material. In the absence of any such material, it will be improper to reject the plan on the ground that there is a proposal for revision of the draft plan or that such a revision is under contemplation. We are, therefore, of the view that the ground for rejecting the plan submitted by the respondent No. 5 was not tenable and the appellant authority was justified in allowing the appeal.”

93. Thus, the Apex Court has categorically held that if there is any other material or relevant fact, Section 46 does not stand in the way of such material or fact being considered by the Municipal corporation for grant or refusal to grant sanction of any development. We have already extracted paragraphs 17 and 18 of TCI Industries Judgment. The said decision was quoted with approval in *SSV Developers* (supra) as also in paragraph 49 of *HPCL Ltd* (supra). The decision of this Court in *HPCL* is confirmed by the Apex Court in *Oswal Agro Mill Limited* (supra).

94. In view of the aforesaid pronouncement, we are firmly of the view that NOC of Defence Establishment is necessary and in fact it is mandatory duty of the planning Authority to insist for NOC of Defence Establishment while considering proposal for building permissions. Questions no. (i) and (iii) are answered accordingly.”

43. Thereafter, this Court in Adarsh’s case considered point (v) regarding invocation of section 3 of the WOD Act. Whilst

answering this point (and which has also been raised before us) this Court held as under:-

“Whether the petitioner is to necessarily invoke the provisions of the Works of Defence Act, 1903 or whether they can invoke provisions of MR&TP Act, and 1991 DCR?

102. This aspect was also considered by the Division Bench of this Court in *TCI Industries Limited* (supra). In paragraph 20, it was observed thus:

“20. 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. It is not possible for us to agree with Mr. Kapadia that unless notification under Section 3 of the Act is issued, the Respondents have no right whatsoever to object for the development carried and/or for refusing to grant 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.”

103. In paragraph 31, the Division Bench referred to the decision of this Court in the case of *Lok Holding and Construction Limited* (supra) and observed thus;

“31. Reference is also made to the decision of the Division Bench of this Court in the case of *Lok Holding and Construction Limited v. Municipal Corporation of Gr. Bombay*, which is an unreported decision dated 10th August, 2011. In the aforesaid case, the Division Bench has held that if notification under Section 3 is not issued, the Corporation should not have relied upon the NOC from the Defence establishment. So far as the facts of the said case are concerned, it is required to be noted that IOD and OC were already issued in favour of the petitioner of that petition for construction of building and the same were granted by the Corporation after the petitioner therein produced a letter dated 23rd January, 2009 signed by the Administrative

Officer, Central Ordnance Depot giving no objection to the sanction of the building plan submitted by the petitioner. Subsequently it was pointed out that the said letter was forged letter and the permission which was granted was withdrawn. The action was challenged before this Court. The Division Bench in its judgment has noted the fact that earlier a notification in relation to the defence establishment was actually issued by the Collector but it was subsequently cancelled. Observing the said aspect, the Division Bench came to the conclusion that no notification, therefore, was in existence which was earlier issued. The Division Bench, therefore, held that refusal of development permission on the basis of the instructions given by the State Government to grant development permission without NOC from the defence is not just and proper especially when statutory enactment is occupying the field i.e. Works of Defence Act, the Government may not have the power to issue such instructions in respect of the defence establishment wherein there was no notification as contemplated by the provisions of the said Act. The Division Bench gave certain directions after taking an overall view of the matter. In the aforesaid case, no law has been laid down by the Division Bench in its unreported judgment. In any case, on going through the aforesaid judgment, we are of the opinion that no law has been laid down by this Court nor provisions of Section 46 of the MRTP Act nor D.C. Regulation 16 were under consideration of the Division Bench. It, therefore, cannot be said that any law has been laid down by the Division Bench while making certain passing observations in the judgment.”

104. Now, we will deal with the decision of *Lok Holding and Construction Ltd* (supra) to which one of us (R.G. Ketkar, J.) was a party. Mr. Seervai submitted that the Division Bench in *TCI Industries Limited* wrongly held that no law has been laid down by the Division Bench in that case. We do not agree with this submission for more than one reason. In the case of *Lok Holding and Construction Ltd* (supra), IOD and Commencement Certificate were cancelled by the Corporation, principally, on two grounds, namely, firstly, access to the plot of the petitioner was not available and secondly, objection was raised by the Defence Authority for raising construction on the plot on security grounds. As far as the first ground is concerned, the petitioner relied upon the decree

passed by Competent Court in their favour granting access to the petitioner's plot where construction was proposed to be made. As far as the second ground is concerned, in paragraph 4, the Division Bench observed thus:

“In our opinion, as there is a statutory enactment occupying the field, viz. The Works of Defence Act, 1903, the government may not have the power to issue such instructions in respect of defence establishment in relation to which there is no Notification as contemplated by the provisions of the said Act.”

(emphasis supplied.

105. Perusal of the extracted portion shows that this Court did not record positive finding that in the absence of Notification under the said Act, the Government has no power to issue instructions contained in letter dated 4.11.2010. It was observed that “Government may not have power to issue such instructions in respect of Defence Establishment in relation to which there is no Notification as contemplated by the provisions of the said Act.” Secondly, provisions of Section 46 and DCR 16 were also not brought to the notice of this Court. We, therefore, respectfully agree that the observations made in paragraph 31 by the Division Bench in TCI Industries Ltd that the said decision does not lay down any law as also the provisions of Section 46 of the MR&TP Act and DCR 16 were not brought to the notice of the Division Bench in that case.

106. In the light of the aforesaid decisions, we are clearly of the opinion that the provisions of the 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. Question no. (v) is answered accordingly.”

44. With reference to point (vi) as to whether the said Adarsh Building posed a security threat, this Court inter alia opined as follows:-

“107. We have carefully gone through assertions in paragraphs 3(iii), (iv), (v), (a) to (h) as also the photographs annexed at Exhibit-B Collectively (Pages 48 to 57 of Writ Petition).

108. In the case of *TCI Industries Ltd*, the Division Bench of this Court observed in paragraph 37 as under:

“37. Considering the case law cited by both the sides, we are of the opinion that whether the security point raised by Navy is merely a bogey or is a matter of substance is not a question which we can decide in a petition under Article 226 of the Constitution of India and this aspect should be squarely left to the defence authority. It is not for this court to pronounce the aforesaid aspect as it is completely in the realm of the defence department. It is also not for this Court to pronounce upon the decision of the Navy that the point of defence raised by them is justified or not.....”

109. 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.”

110. In the case of *Narangs International Hotels Pvt Ltd* (supra), the Division Bench of this Court observed in paragraph 11 thus:-

“11. Having considered the rival contentions, we are of the opinion that this is a case where this court cannot interfere with the impugned order which rejects the security

clearance on the basis of the report of the Intelligence Bureau. We have perused the report of the Intelligence Bureau. We have no reason to disbelieve it. We cannot sit in appeal over the said report. This case involves the security of India and more particularly the security of the Airports. Intelligence Bureau is an expert body. The petitioners have not alleged any malafides. It is impossible to say that any extraneous reasons have persuaded the Intelligence Bureau to submit the report or that respondent 1's action is malafide."

115. As held by the Division Bench of this Court in *TCI Industries* (supra) and *Akbar Travel of India (Pvt) Ltd* (supra) as also *Nagangs International Hotels Pvt Ltd* (supra) whether the security point raised by the petitioner is merely a bogey or a matter of substance is not a question which the Court can decide in a petition under Article 226 of the Constitution of India. This aspect should be squarely left to the Defence Authority. It is not for this Court to pronounce the aforesaid aspect as it is completely in the realm of the Defence Department. 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. The writ court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the security concern expressed by the petitioner is not bonafide. In the present case, security of CMS is involved and we are not prepared to accept that for any extraneous reason the present petition is instituted.

116. It has come on record and is not disputed that Oyster and Dolphin buildings came up in late 1960. Both buildings are 12 storeyed high rise buildings. Earlier these buildings were occupied by military personnel and today they are occupied by civilians. The fact that the nature of threat to the security of nation has undergone a vast change over the last decade with terrorism emerging as a source of major and unconventional danger need not be over emphasized. The assessment of such threats has heightened and the precautionary measures taken against them are expanded. In 2007 blast in local train in Mumbai occurred. On 26.11.2008 a terror attack occurred in Mumbai. Times have changed. People have changed. Technology has advanced. New techniques are employed. Increase of terrorism is accepted

international phenomenon. Respondent no. 4 has also not seriously disputed the specific assertions made in paragraphs 3(iii) to (v). The photographs at Exhibit B collectively produced on record substantiates the perception expressed by the petitioner. Having regard to location of the Adarsh building, we are satisfied that the building constructed by respondent no. 4 poses a security threat to the Defence Establishment. Point no. (vi) is answered accordingly.”

45. As can be seen from the above discussion, all the points that were canvassed before us have already been considered in great detail in several decisions of this Court. Considering all these facts as well as the law laid down by this Court, we are unable to accept any of the submissions made on behalf of the petitioners.

46. This now only leaves us to deal with the two decisions relied upon by the petitioners in the case of **[i] Tirandaz Subha Niketan (supra)** and **[ii] Sea Kunal Corporation Pvt. Ltd. (supra)**. In the case of **Tirandaz Subha Niketan (supra)** what was challenged was a letter dated 14th November, 2017 issued by the Executive Engineer of the MCGM directing the petitioners to stop work at the subject property and for quashing the letters issued by the Ministry of Defence refusing to grant NOC to the petitioners for construction of the building. The facts of this case would reveal that the subject property was situated at a distance of approximately 200 meters from the Naval Civil Housing Colony. The argument of the

petitioners and which found favour with the Division Bench, was to the effect that since the subject property was being constructed within the vicinity of a residential colony of the Naval Authorities, it would not strictly fall within the meaning of a Defence Establishment and merely because the said residential colony, could be in the future, used for some other operations, could not offer a justification for imposing restrictions on construction on the petitioner's property. It is in these circumstances that the Division Bench, inter alia, held that the said residential colony was not a sensitive naval station, and indeed if it were so, then restrictions could have been imposed by respondent No.3. In fact, the Division Bench categorically held that it was not the case of the respondents that the Navy Civilian Housing Colony contained any defence installations. Considering that the proposed construction of the petitioners was located near the Naval Housing Colony, the restrictions which were sought to be imposed under the guise of the circulars issued by the Ministry of Defence on the ground of security could not be sustained, was the finding. We find that it was in the peculiar facts in the case of **Tirandaz Subha Niketan (supra)** that the Division Bench of this Court came to the conclusion that there could not be any perceptible security threat to any Naval Establishment because a Naval Housing Residential Colony could not, in the strict sense, be termed as a

Defence Establishment. We fail to see how this decision can be of any assistance to the petitioners. In the facts of the present case, the construction which forms the subject matter of both the above petitions are not within the vicinity of any Naval Housing Colony but in the vicinity of a National Armaments Depot and the Material Organization Depot. In the facts before us, it can hardly be disputed that the National Armaments Depot and the Material Organization Depot are certainly Defence Establishments. This being the case, we find that the reliance placed on this decision is wholly misplaced and is clearly distinguishable on facts. We may hasten to add that in this judgement we have not examined as to what exactly would be a "Defence Establishment" but at some point of time we feel that some Court will have to go into this issue so as to resolve it once and for all.

47. As far as the decision in **Sea Kunal Corporation Pvt. Ltd. (supra)** is concerned, the same was dealing with the Colaba Military Station. According to the Petitioner, this Military Station did not form part of the list of defence establishments to which the Ministry of Defence had imposed any restrictions vide its Circular dated 21st October, 2016. Furthermore, the Division Bench held that the Circular dated 18th March, 2015 issued by the Ministry of Defence clarified that the conditions contained in its earlier Circular dated

18th May, 2011 were not to be made applicable to those permissions granted prior to the said date. As a matter of fact, the Division Bench came to the conclusion that the revised plans of the impugned construction were approved on 15th October, 2009 only with a stipulation of obtaining the NOC from the High Rise Committee above 70 meters. It came to a categorical finding that the construction of the petitioners commenced prior to 18th May, 2011 and there was no amendment to the plans thereafter. It is in these facts and circumstances that the petition came to be allowed. In fact, the Division Bench categorically held that in the backdrop of the facts of the case, the petitioner's construction would fall within the relaxation conferred by the Ministry of Defence itself in its Circular dated 18th March, 2015. This being the factual position, the Division Bench did not even examine the issue as to whether the building of the petitioner ought to be considered as a security hazard or otherwise. We are afraid that even this decision does not in any way support the case of the petitioners before us. It is nobody's case that the construction of the petitioners before us had been approved and there were no amendments to the said approval / plans prior to 18th May, 2011. In fact, as narrated in the facts above, permission for development granted to the petitioners was much after the Circular dated 18th May, 2011. This being the case, the relaxation granted by

the Circular dated 18th March, 2015 would not apply in the facts of the present case, and therefore, the reliance placed even on this decision is wholly misconceived and does not carry the case of the petitioners any further.

48. In view of the detailed discussion in this judgement and for all the reasons stated herein, we find no merit in either of the petitions. Rule is accordingly discharged and the writ petitions are dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B. P. COLABAWALLA, J)

(S. C. DHARMADHIKARI, J)

Radhakishan
S. Ladda

Digitally signed
by Radhakishan
S. Ladda
Date:
2019.06.21
16:50:02 +0530