

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2711 OF 2020

M/s. Runwal Constructions

A registered Partnership Firm,
duly registered under the provisions
of the relevant provisions of the Indian
Partnership Act, 1932, acting through
Its partner Sanjay Daga having its
registered office at 5th Floor,
Runwal & Omkar Esquare,
Opp. Sion Chunabhatti Signal,
Sion (East), Mumbai 400 022.

... Petitioner.

Versus

1. Union of India

Through its Ministry of Defence
Room No. 234 – South Block,
Ministry of Defence, New Delhi
Through, Office of Union of India
Aayakar Bhavan, Maharshi Karve Road,
Churchgate, Mumbai,
Maharashtra 400 020.

2. Group Captain

Airforce Station, Sandoz Baugh (Post)
Kolshet Road, Thane (West)-400607
Through, Office of Union of India
Aayakar Bhavan, Maharshi Karve Road,
Churchgate, Mumbai,
Maharashtra 400 020.

3. Station Commander

Airforce Station, Sandoz Baugh (Post)
Kolshet Road, Thane (West)-400607
Through, Office of Union of India

Aayakar Bhavan, Maharshi Karve Road,
Churchgate, Mumbai,
Maharashtra 400 020.

4. Wing Commander

Airforce Station, Sandoz Baugh (Post)
Kolshet Road, Thane (West)-400607
Through, Office of Union of India
Aayakar Bhavan, Maharshi Karve Road,
Churchgate, Mumbai,
Maharashtra 400 020.

5. Thane Municipal Corporation

a statutory body, registered under
the provisions of Maharashtra
Municipal Corporation Act, 1949,
having its office at
New Administrative Building,
Mahapalika Bhavan, Almeda Road,
Chandan Wadi, Pachpakhadi,
Thane West, Thane,
Maharashtra 400 602.

6. State of Maharashtra

Through its Secretary,
Urban Development Department,
having his office at 1st Floor,
Mantralaya, Mumbai 400 032.
Through the Office of Government
Pleader, Appellate Side,
High Court, Bombay.

7. The Municipal Commissioner of

TMC, having his office at
New Administrative Building,
Mahapalika Bhavan, Almeda Road,
Chandan Wadi, Pachpakhadi,
Thane West, Thane,
Maharashtra 400 602.

- 8. Executive Engineer,**
TMC, Zilla Parishad Office,
Station Road, Talav Pali,
Opp. Thane West, Thane,
Maharashtra 400 601.
- 9. Ministry of Civil Aviation,**
Corporate Headquarters,
Rajiv Gandhi Bhavan,
Safdarjung Airport,
Block – A, New Delhi – 110 003.
Also at:
Aayakar Bhavan, 2nd Floor,
Maharshi Karve Road,
New Marine Lines,
Mumbai – 400 020.

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Mr. Pravin K. Samdhani, Senior Counsel with Mr. Saket Mone, Ms. Jayshree Ramchandran and Mr. Abhishek Salian i/b VIDHI Partners, for the Petitioner.

Mr. Y. R. Mishra a/w Mr. N. R. Bubna, for Respondent Nos. 1 to 4 and 9.

Mr. R. S. Apte, Senior Counsel a/w Mr. N. R. Bubna, for Respondent Nos. 5, 7 and 8.

Mr. Rajan S. Pawar, AGP, for Respondent No. 6.

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CORAM : R. D. DHANUKA &

V. G. BISHT, JJ.

Reserved on : 5th April, 2021.

Pronounced on : 6th May, 2021

JUDGMENT (PER : V. G. BISHT, J.)

Rule. Respondents waive service. By consent of parties, Petition is heard finally.

2 By this Petition under Article 226 of Constitution of India, the petitioner is challenging the Communications dated 14th March, 2017, June 2018, 6th July, 2018 and 5th October, 2018 issued by the respondent no.2 refusing to grant of NOC to it for construction of their building, letter dated 27th August, 2019 issued by the respondent no.5-Thane Municipal Corporation (herein-after referred to as “TMC”) directing the petitioner to obtain NOC from the Indian Air Force Station, Thane.

3 Brief facts are as under:-

The petitioner is a partnership concern, registered under the provisions of the Indian Partnership Act, 1932. The petitioner is engaged in the business of real estate development in the city of Mumbai and Thane.

4 By and under an Agreement for Development dated 29th

December, 2005 made between the Bombay Wire Ropes Limited, Warden Synplast Private Limited and M/s Runwal Constructions i.e. the petitioner in respect of the property at Kolshet Road, Thane admeasuring 1,55,697.71 square meters and the same was registered with the Sub-Registrar of Assurances at Thane on 28th June, 2006. Subsequently the Bombay Wire Ropes Limited executed a Power of Attorney on 28th June, 2006 in favour of the petitioner. The petitioner has received development permissions from the TMC from time to time.

5 According to the petitioner, since the proposed residential building as per sanctioned plans is located at a distance of more than 100 meters from the Indian Air Force Station at Thane and as such in law there is no restriction to develop the lands from a defence point of view. On 14th February, 2007 the Government of India issued a notification (Exh. B) under Sections 3 and 7 of the Works of Defence Act, 1903 (for short “Defence Act”) imposing the development restrictions in the areas to the extent of 100 meters from the Air Force Station at Thane.

6 On 13th January, 2010 a further notification (Exh. C) was issued by the Union of India under the provisions of Sections 3 and 7 of the Defence Act continuing the restrictions on the use of lands within 100 meters of the Indian Air Force Station at Thane. It is the case of the petitioner that from reading of the notifications dated 14th February, 2007 and 13th January, 2010, it is evident that the only restrictions imposed are to a distance of 100 meters from the Air Force Stations at Thane. In absence of any other notification under the Defence Act no other restrictions can be imposed for land use near the notified Air Force Station.

7 According to petitioner, on 18th May, 2011 a Circular (Exh. D) was issued by Ministry of Defence to Chief of Army, Navy and Air Force prescribing thereby a requirement of NOC for construction of building in the vicinity of Defence Establishment. The said circular mandates an NOC from the Defence Authority for construction of multi storey (more than four floors) building within 500 meters of any Defence Establishment. This circular unambiguously clarifies that the directions in the circular is only applicable to areas which are not regulated by the provisions and/or notifications under the

Defence Act. The property in question is governed by the notification dated 14th February, 2007 and 13th January, 2010 issued under Section 3 and 7 of the Defence Act. In such circumstances, the circular dated 18th May, 2011 is not applicable to the property in question with regards to the restrictions imposed on construction for security reasons of Air Force Station Thane.

8 Further, on 1st September, 2011, respondent no.4 erroneously relying upon the said circular dated 18th May, 2011 informed the respondent no.7 that in addition to the restriction as prescribed vide notification dated 13th January, 2010 there is a requirement of seeking special clearance for constructing multi storeyed buildings (having more than four floors) within 500 meters of Defence Establishment as specified in para (b) of the said circular dated 18th May, 2011. It is the case of the petitioner that though the condition for NOC for height is illegal and arbitrary, the petitioner without prejudice to its rights and conditions applied for NOC. On 7th August, 2013, the respondent no.2 was pleaded to grant NOC (Exh.F) for construction of upto Ground + 7 floor. Whilst granting the NOC it was observed that such NOC was granted in accordance

with letter of Air Head Quarter dated 13th July, 2013.

9 The petitioner further contends that after August, 2013 it decided to carry out some amendments in the proposed residential building as the land of the petitioner was clearly developable under the then prevailing Development Control Regulation of Thane. The petitioner thus decided to add 3 floors to the existing proposed building. Therefore, on 21st November, 2013 the petitioner had without prejudice requested the TMC to obtain NOC from the Air Force Authority on their behalf due to change in plans.

10 On 21st February, 2015 the respondent no.1 issued a circular providing guidelines with respect to the restrictions on construction activity in the vicinity of Defence Establishment. By the said circular, respondent no.1 clearly stated that in areas where construction activity was regulated by the Defence Act, the circular dated 18th May, 2011 shall not be applicable.

11 In the meantime, on 17th November, 2015 (Exh. K), the TMC approved the plans of the petitioner for ground + 10 floors and

granted permission to the petitioner for construction on the said property. For the purposes of the permission so granted, the TMC also sought charges towards development charges and accordingly the petitioner in good faith deposited such amount, believing that construction can commence after such payments are made but the TMC has not allowed the petitioner to commence construction till date, even after accepting such moneys.

12 It is the case of the petitioner that the TMC, however, imposed a condition on the petitioner to obtain NOC from the Air Force Department, in case petitioner intends to construct over four floors contrary to the prevailing law. According to the petitioner, the petitioner is not required to obtain such NOC in view of notifications dated 14th February, 2007 and 13th January, 2010 issued under Sections 3 and 7 of the Defence Act.

13 On 29th June, 2016 the respondent no.2 issued a Communication (Exh. M) to the TMC clarifying that there is no restriction or requirement of NOC from the Air Force Authority for any construction to be undertaken beyond 100 meters from Air

Force Station Thane. According to the petitioner though the proposed development by the petitioner is beyond 100 meters, no restriction was applicable, contrary to the correspondence dated 29th June, 2016, on 19th March, 2017 (Exh. N), respondent no.2 illegally laid additional restriction on the development of land beyond notification dated 14th February, 2007 and 13th January, 2010. The purported reason for laying down such illegal restriction was that the Air Force Station, Thane witnesses regular operations and the helipad at the Air Force Station, Thane which is earmarked for Prime Minister / other VVIP movements in Thane AOR.

14 The respondent no.2 further clarified that as per policy, a clear straight approach and take off path of upto 750 meters is required to be maintained for safe conduct of operations by helicopters. To ensure this operation, no constructions should be permitted in the straight line of approach and take off funnel. The respondent no.2 further mentioned that the respondent no.1 has approached higher authorities for clarification regarding restriction on new construction based on necessary horizontal and vertical

clearance and till the time clarifications are not provided, the TMC was directed not to grant further NOC. The TMC was accordingly informed (Exh. U) by respondent no.2 vide its letter dated June, 2018.

15 On 6th July, 2018 (Exh.W) the respondent no. 2 issued a clarification in response to the letter dated 30th June, 2018 of the TMC (Exh. V) informing that though Air Force Station, Thane falls within 100 meters restricted zone, as per policy (CASO Volume-III) a clear straight approach and take off path upto 750 meters is required to be maintained, however, the said policy is contrary to the Defence Act and the notifications issued therein and thus, ought to be set aside to the extent that it completely contradicts the notifications.

16 The petitioner then further contends that a joint meeting was held in Mantralaya on 5th June, 2019 and it was discussed and finalized in the said meeting that the petitioner was to submit a copy of the final set of maps for issuance of amended permission. The petitioner accordingly submitted the final set of maps via letter

dated 7th August, 2019.

17 Another meeting came to be held on 5th July, 2019 between the respondent no.2, respondent no.3, respondent no.6, respondent no.7, respondent no.8, other Officers and the petitioner. In the said meeting, the Urban Development Department, Government of Maharashtra held that till date, no notification had been issued by the Defence authorities imposing restrictions on construction activity in the helipad funnel zone. Furthermore, it was held that until the time the Defence Department issues notification with regards restriction on construction activity in the helipad funnel zone area, the TMC may grant development permission after taking necessary undertaking from the developer. However, the commencement certificate for such construction can be issued only after an NOC is obtained from the Defence Department. This decision, according to petitioner, is contrary to the scheme of Defence Act, more particularly, the notifications issued under Section 3 read with Section 7 of the Defence Act dated 14th February, 2007 and 13th January, 2010.

18 According to the petitioner, it is worthwhile to mention that part of the land of the petitioner is affected by the restrictions imposed by the notifications dated 14th February, 2007 and 13th January, 2010 under the scheme of the Defence Act. The petitioner is entitled to receive compensation for the part of the land which is directly affected by the aforesaid two notifications.

19 Finally, on 27th August, 2019 (Exh.CC), the TMC was pleased to issue sanction of development permission for amended plans. To the utmost shock of the petitioner, condition No. 10 of the aforesaid sanction required the petitioner to obtain NOC from Defence Authority before carrying out construction work on the said property, which otherwise in law the petitioner is not required to take as the land of the petitioner does not fall within 100 meters which is prescribed limits as per notifications dated 14th February, 2007 and 13th January, 2010 issued by the Government of India under Defence Act.

20 The petitioner lastly contends that in the circumstances, the petitioner is unable to develop the said land. The illegal and

arbitrary condition imposed by the TMC vide letter dated 27th August, 2019 appear to flow from the letters/circulars/directions dated 14th March, 2017, June 2018, 6th July, 2018 and 5th October, 2018 issued by the respondent no.2 to the TMC, which are completely contrary to the notifications dated 14th February, 2007 and 13th January, 2010. Therefore, the present Petition.

21 The TMC vide its affidavit-in-reply submits that the Ministry of Defence in exercise of the powers conferred under Sections 3 and 7 of the Defence Act has imposed restrictions upon construction of building and other structures within the limit of 100 meters from the crest of the outer parapet/boundary wall of Air Force Stations and installations vide Government of India Gazette Notification S.R.O.4 dated 13th January, 2010. Similarly, live hedges, tress/rows or clumps of trees or orchards shall not be maintained, planted added to or altered within the 100 meters restricted zone.

22 The plot under question falls partly within 100 meters boundary from the outer parapet of Air Force Station, Thane.

Approximately 6923.40 sq. meters (16%) of the plot area is within 100 meters No Development Zone. Balance 35630 Sq. meters (84%) of plot is outside the No Development Zone and on the said portion of plot, there are no restrictions on Development other than those development provided by the sanctioned development plan and DCR and Planning Authority i.e. TMC has sanctioned building permission on the unrestricted portion of land for allowed user as per the procedure laid down by MR & TP Act, 1966 and sanctioned DC Rules.

23 It is next contended that, however, vide letter Ref. No. 26W/S 515/1/WKs dated 14th March, 2017 (Annexure 'B'), the Station Commander, Air Force Station, Thane informed that Air Force Station Thane falls within Mumbai Air Space and the helipad at Air Force Station, Thane witnesses regular operations. Moreover, this helipad is earmarked for Prime Minister and other VVIP and VIP movements in Thane AOR. As per policy, a clear straight approach and take off path upto 750 meters is required for safe conduct of operations by helicopters. Therefore, to ensure safe helicopter operations of this base, no construction should be

permitted in the approach and take off funnel.

24 According to TMC, the Chief Secretary convened a joint meeting on 5th July, 2019 with Air Force Authorities to resolve the issue of restriction of development and as decided in the meeting, the petitioner filed an affidavit with the office of TMC stating that it will abide to submit NOC from Defence Department before seeking commencement Certificate for his construction project. Considering the affidavit of the petitioner, the TMC issued the permission for development vide permission No. TMC/TDD/3166/19 dated 27/08/2019 with a condition to obtain NOC from the Defence Department before Commencement Certificate vide condition No. 10.

25 The respondent-TMC lastly contends that the petitioner has filed present petition *inter-alia* challenging the imposition of condition No. 10 requiring NOC from Defence Department for constructions buildings which are within funnel zone. Section 47 of MR & TP Act provides for Appeal if an applicant is aggrieved by condition subject to which development permission is granted.

Since the petitioner has not taken recourse to file any Appeal, the same has become time barred. Moreover, there is no case on merits and therefore, present Petition is liable to be dismissed.

26 It appears from the record that the petitioner then filed the limited affidavit-in-rejoinder to the affidavit-in-reply filed by the TMC contending that in no manner giving an undertaking to the TMC at the behest of the petitioner amounts to the petitioner giving up its right to agitate that such NOC is not required to be obtained as per extant law.

27 The respondent nos. 1 to 4 vide their affidavit-in-reply contend that the present Petition is not maintainable as the petitioner has efficacious alternate remedy to challenge the condition imposed while granting the development permission by the TMC. According to them, the plot in question is within 500 meters from the Air Force Station, Thane where Indian Air Force is operating a helipad which is fit for operation by all classes of helicopters. This helipad is extensively used for military operations, training purposes and is also earmarked for VIP/VVIP movements.

28 It is contended that this helipad is also used for rescue purposes in the event of natural calamities. Thus, any construction within 750 meters of approach/take off path diverging by 15 degrees from both sides from the edges of the helipad will adversely affect the operation of helipad of Air Force Station, Thane. To ensure safe helicopter operations, it is mandatory that no construction should be permitted in the approach and take off funnel up to 750 meters. Accordingly, the said requirement has been intimated to the TMC as well as the petitioner. It is further contended that in view of the several helicopters meeting with accidents due to obstructions while landing, the Government of Maharashtra issued guidelines emphasizing a clear radius around a helipad vide G.R. dated 25th January, 2018 (Exh. A).

29 It is further contended that the notifications/letters/circulars (of the Defence Ministry and Air Force Authority) which are questioned by the petitioner, cannot be ignored by the Planning Authority and even if no declaration as alleged under Section 3 of the Defence Act was issued, the same would not disentitle the Air Force Authorities from insisting that their NOC be obtained for any

construction activity within their vicinity. Since there is no substance in the Petition, the same deserves to be dismissed with costs in the interest of justice.

30 It then appears from the record that respondent nos. 1 to 4 again filed affidavit-in-reply on 9th October, 2020. According to them, Thane region has several strategically important and sensitive establishments including Bhabha Atomic Research Centre, Tarapur Atomic Power Station, Bombay High Oil Fields, Oil Rigs, Power Grids etc. which are very important from the point of view of national security. To deal with any national security contingency, Air Force Station, Thane is a critical military establishment.

31 The operation of heavy helicopters require flight path to be clear of any obstruction upto 750 meters and a mandated glide slope of 3 degree on approach would provide height of 39.3 meters above the ground at a distance of 750 meters from helipad landing point. The safety requirement warrants that there should be a safety margin of 50 meters between any obstruction and the mandated glide slope. Therefore, to ensure safe flying of

helicopters no construction can be permitted in the flight path of heliport operational at Air Force Station Thane. The substantial part of petitioner's plot comes within flight take off and landing path of heliport at Air Force Station Thane.

32 The respondents then contend that the heliport at Air Force Station Thane is registered as heliport with Indian Air Force but has not yet been registered as heliport with Ministry of Civil Aviation. Though a distance of 100 meters is required to be maintained from any Defence Establishment but the same is not sufficient for a heliport. GR dated 25th January, 2018 shows that civilian helicopters with much less load also require larger obstruction free area around them.

33 According to the respondents, to ensure safety of aircrafts, the Government of India has prohibited construction of building or structures in the vicinity of aerodromes in exercise of power under Section 9A of Aircraft Act, 1934 (for short "Aircraft Act"). The proposal to notify heliport at Air Force Station Thane is pending with Ministry of Civil Aviation and the said heliport is likely to be

notified soon. On issuance of notifications, restrictions including those stated herein-above will apply and it will not be possible to carry out any construction as is sought by the petitioner. If any construction is permitted, as is prayed by the petitioner, the heliport operational at Air Force Station Thane shall be rendered dysfunctional and security of region shall be adversely affected.

34 The respondent nos. 1 to 4 again filed third affidavit-in-reply dated 1st December, 2020 in furtherance to earlier affidavits and contended that restriction of 750 meter flight path clear of all obstructions imposed by them is on account of Civil Aviation Requirements issued by Department of Civil Aviation under the provisions of Aircraft Act and Rules framed thereunder. The land affected by this restriction will also include the land affected under notifications issued under Defence Act. No other restriction affecting land of petitioner is imposed by them.

35 They have further contended that pursuant to order passed by this Court, the Officer of Air Force Station Thane have measured affected land on Google Earth application and found that

approximately 111086.11 sq. meters area out of total plot of land owned by petitioner is affected because of restriction of 750 meters flight path of heliport operational at Air Force Station Thane. This calculation will be required to be verified by the Officer of Revenue and Survey Department of Government of Maharashtra in conjunction with the TMC after following applicable statutory procedure. After reiterating the contentions of the earlier affidavits, the respondents contended that there is no substance in the petition and the same deserves to be dismissed with costs in the interest of justice.

36 The petitioner by way of affidavit-in-rejoinder contends that the Aircraft Act does not contemplate a blanket restriction of 750 meters . Unless a notification is issued under Section 9(A) of the Aircraft Act by the Competent Authority after following all the mandatory procedure as stipulated under the said Act, no restriction of 750 meters or any other area can be imposed. It is also admitted position that the Air Force Station, Thane as on date is not registered or declared as heliport under the Aircraft Act. Further, no notification under the Aircraft Act has been issued with

regard to Air Force Station Thane. Therefore, no restriction can be imposed by respondent nos. 1 to 4 with respect to Air Force Station Thane. They are insisting for keeping clear area of 750 meters apparently without any authority of law as there exists no Notification under the provisions of Section 9(A) of the Aircraft Act.

37 Furthermore, it is worthwhile to mention that between the helipad and the property of the petitioner, there exists a thickly populated slum on the Defence land for which no action of whatsoever nature has been initiated by the respondent nos. 1 to 4 which clearly shows the arbitrary and unreasonableness on their part to single out the petitioner and also shows that the alleged threat of security risk is nothing but clearly a figment of imagination of the respondent authorities. Lastly, according to petitioner, there exists a road namely Akbar Camp Road between the helipad and the property of the petitioner. The width of the road is approximately 40 meters and is used by heavy truck and trolleys on day today basis. Pointing out from the affidavit dated October, 2020 of the respondents at para 3 wherein it is stated a

mandated glide slope of 3 degrees at a distance of 750 meters maximum height permissible is 39.3 meters, the petitioner contends that the road which is adjacent to the Defence Establishment and the vehicles plying thereon are falling within the first degree impact and therefore contention so raised is clearly fallacious.

38 After the submissions of both the parties were heard by this Court, the learned counsel for respondent nos. 1 to 4 and for respondent no. 9 filed affidavit-in-reply of respondent no.9 - Ministry of Civil Aviation alongwith annexures. Since other side has no objection, the same were taken on record.

39 According to respondent no.9, Section 9(A) of the Aircraft Act empowers Central Government to prohibit or regulate construction of buildings, planting of trees etc. for the safety of aircraft operations by issuing directions through publication in the Official Gazette of India. Accordingly, Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015 published vide G.S.R. 751(E) dated 30th September, 2015 as

amended vide Notifications No. 610(E) dated 14th June, 2016 and No. 770(E) dated 18th December, 2020 (hereinafter referred as 'Height Rules') have been issued to regulate the height of the buildings or structures around aerodromes.

40 The respondent no. 9 then contends that the request of IAF/MoD for inclusion of Airfields/Helifields in Schedule V of GSR 751(E) was examined and AAI pointed out that the Rules laid down in GSR 751(E) have been drafted for fixed wing Aircraft based on the provisions of OLS contained in ICAO Annex 14, Volume-I. However, OLS for Heliports are altogether different and laid down in ICAO Annex 14, Volume-II. In view of this, the helipads were not included in Schedule V of GSR 751(E).

41 It is further contended that the security requirement of different IAF helipads may be different. Hence, as per clause 5(2) of Height Rules, NOC in respect of Defence aerodromes shall be issued by the Authorized Officer in accordance with the said rules, subject to such other conditions as the said authorized officer may deem fit. If required, IAF/MoD may issue a separate notification

for their helipads. Amendment to Height Rules were published through 770(E) dated 18th December, 2020 and is available in public domain. MoCA vide letter No. AV-24011/28/2017 dated 08th February, 2021 has also informed MoD that the helipads proposed by IAF could not be included in Schedule-V of GSR 751(E).

42 Mr. Samdhani, learned senior counsel for the petitioner, submits that the TMC without application of mind is insisting upon an NOC from Defence Authority as a prerequisite before carrying out any construction in the said property of the petitioner albeit in law as stipulated in notifications dated 14th February, 2007 and 13th January, 2010 issued under Defence Act. The petitioner is not required to obtain such NOC. This action on the part of the TMC is arbitrary, illegal and without authority of law. According to learned counsel area of the petitioner falls partly within 100 meters boundary from the outer parapet of Air Force Station, Thane which is notified by the Central Government under Annexure A of the Circular dated 14th February, 2007 and 13th January, 2010. The aforesaid notifications categorically state that all areas falling

around Air Force Station Thane notified in Annexure A need to maintain restriction only 100 meters from the boundary of the Defence Establishment. Therefore, as the proposed residential building of the petitioner is beyond 100 meters from Defence Establishment, TMC's requirement of an Air Force NOC for the petitioner is contrary to the Notification dated 14th February, 2007 and 13th January, 2010.

43 The learned senior counsel then would submit that the proposed construction of the petitioner is about approximately about 500 meters away from the helipad and governed by the MRTP Act and Development Control Regulations (for short, 'DCR'). In the course of correspondence exchanged between the petitioner, the respondent Defence Authorities, took various inconsistent stand. On 01/09/2011 the Defence Authorities issued a communication to the TMC stating that as per the Defence circular dated 18th May, 2011, NOC will be required for carrying out construction within 500 meters, in addition to the 100 meters restrictions imposed by the notifications, whereas on 29/06/2016, the respondent Defence Authorities stated that there is no need of

NOC to be obtained for carrying out construction activities beyond 100 meters from the Air Force Station, Thane.

44 On 14/03/2017 the respondent Authorities imposed restriction upto 750 meters in the flight path at Air Force Station, Thane, however, the letter does not mention under which Act, Rules or Regulations the restriction of 750 meters in the flight path is imposed. In the month of June 2018, the Defence Authorities referring to a letter of the TMC, informed that the matter regarding imposing of restriction of 750 meters is pending with the Higher Authority and appropriate decision will be taken with regard to the same whereas on 06/07/2018 the respondent Defence Authority reiterated restriction of 750 meters by referring to the CASO policy and lastly, on 14/09/2020, 09/10/2020. On 01/12/2020 the respondent Defence Authorities filed affidavits in the present matter wherein they have sought to initially rely on the policy of the State of Maharashtra dated 20th January, 2018 and subsequently have solely relied upon the provisions of the Aircraft Act i.e. Section 9(A) purportedly justifying the imposition of restriction.

45 The learned senior counsel then vehemently submitted that none of the aforesaid letters and the stand taken by the respondent Defence Authorities refer to any primary legislation and/or delegated piece of legislation disclosing source of power or authority to impose such restriction. Needless to say, the entire act of imposing restriction by the Defence Authorities beyond 100 meters is clearly without any authority of law. Interestingly, according to the learned senior counsel, in the course of filing of the affidavits (all the three affidavits) the Defence Authorities have given up stand taken earlier and have placed sole reliance on 750 meters restrictions under the Aircraft Act. They have not placed reliance on any of the circulars and admittedly there is no notification issued under Section 9(A) of the Aircraft Act.

46 The learned senior counsel would submit that the planning authority cannot reject and/or impose condition on development permission on the basis of proposed revision in policy and to buttress his submission, the learned senior counsel placed reliance in **S.N. Rao and Ors. Vs. State of Maharashtra** ¹ and more

¹ (1988) 1 SCC 586

particularly para 8 of the judgment. Since it is the case of the respondent-Defence Authorities that restriction of 750 meters is being imposed on account of Civil Aviation requirement but then admittedly the Air Force Station Thane, as on date, is not notified as a Heliport by the Civil Aviation Ministry and no notification under Section 9(A) of the Aircraft Act has been issued. Therefore, no restrictions can be imposed on the said property relying on the Aircraft Act, 1934.

47 The learned senior counsel then invited our attention to the provisions contained in Part-II, III IV and V of the Defence Act and would submit that reasonable restrictions can be imposed on a citizens rights guaranteed under Article 19(1)(g) and 300-A only by enacted law. Defence Act is a central legislation enacted for the purpose of imposing restriction upon the land in the vicinity of Defence Establishment and for determining compensation in cases where such restrictions are imposed. Thus, Defence Act occupies the field and is a Code in itself which deals with restriction, computation, reference, compensation and ultimately the payment of the compensation.

48 It is submitted by the learned senior counsel that only way to impose restrictions on enjoyment of the property in the vicinity of Defence Establishment is by invoking powers under the Defence Act. Further, in the present case the Defence Authorities have imposed restrictions of 100 meters by issuing notifications dated 14th February, 2007 and 13th January, 2010. Thus, imposition of 750 meters by writing letters in the form of executive instructions is ultra-vires the Defence Act and without any notification under the Defence Act. If the law requires a thing to be done in a particular manner, it must be done in that manner or not done at all. To buttress his point of view, the learned senior counsel placed reliance in **Babu Varghese and Ors. Vs. Bar Council of Kerela and Ors.**² and more particularly paragraph 31 and 32 of the judgment.

49 Elaborating further, the learned senior counsel would submit that the impugned communications and insistence of the Defence Authorities requiring their NOC for development by the petitioner and imposition of 750 meters of flight path from the helipad, affecting and impacting the petitioner's entire property is plainly

² (1999) 3 SCC 422

without the authority of law and violative of Article 19(1)(g) and 300-A of the Constitution of India. The impugned communications are in the nature of executive instructions and Article 19(1)(g) and 19(6) do not permit executive instructions to take place of law. The requirement is of an enacted law occupying the field. To substantiate this, the learned senior counsel placed his reliance in **Bishambhar Dayal Chandra Mohan Vs State of Uttar Pradesh and Ors.**³ and more particularly paragraph 20, 22, 26, 27 and 41, **Hindustan Time and Ors. Vs. State of UP and Anr.**⁴ and more particularly paragraph 21 to 24, **State of Bihar and Ors. Vs. Project Uchcha Vidya**⁵ and more particularly paragraph 67 to 71 and **Paul Monoj Pandian Vs. P. Veldurai** ⁶ and more particularly paragraph 46, 47 and 48.

50 The learned senior counsel then would submit that an immovable property has a bundle of rights within it. Right to develop, right to construct and right to exploit the full potential by development and construction are a part of the bundle of rights in

3 (1982) 1 SCC 39 para 20,22,26,27 and 41

4 (2003) 1 SCC 591

5 Appeal(Civil) 6626-6675 of 2001 dt. 03/01/2006

6 (2011)5 SCC 214

a property and vested in the owner. Any deprivation or interference with or restriction or imposition of any fetter on any of the rights mentioned above, in the absence of law (enacted legislation) would be violative of Article 300-A of the Constitution of India. The impugned communications are executive instructions and not enacted law.

51 It is submitted that by the impugned communications the petitioner's rights to property are interfered with, impacted and sought to be taken away. The impugned communications, in these circumstances, are plainly and clearly violative of Article 300-A of the Constitution of India and are thus liable to set aside and *or* quashed. To further his submission, the learned senior counsel has placed reliance on **Hari Krishna Mandir Trust Vs. State of Maharashtra**⁷ (para 96), **B.K. Ravichandra and Ors. Vs. Union of India**⁸ (paras 21-28), **State of West Bengal and Ors. Vs. Sunit Kumar Rana**⁹ (para 25) and **Kailash Prasad Yadav & Anr. Vs. State of Jharkhand and Anr.**¹⁰ (paras 7-10).

⁷ 2020 SCC Online 631

⁸ Civil Appeal No. 1460 of 2010 order dated 24/11/2020

⁹ (2004) 4 SCC 129

¹⁰ (2007) 3 SCC 769

52 The learned senior counsel then lastly would submit that the impugned communications be set aside directing the TMC not to impose any restriction beyond 100 meters covered by the Defence Act or under the MRTTP and DCR and further the Defence Authorities be directed to take steps towards ascertaining the compensation in respect of the lands affected under the Defence Act by virtue of notifications dated 14th February, 2007 and 13th January, 2010.

53 Mr. Mishra, learned counsel for the respondent nos. 1 to 4 and 9, at the very threshold submits that the petitioner has efficacious alternate remedy under Section 47 of the Maharashtra Regional Town Planning Act, 1966 (for short, 'MRTTP Act') to challenge conditions imposed while granting development permission.

54 The learned counsel then submits that IAF is using concerned helipad since last 50 years for military operations, training purposes, VIP/VVIP movements and for rescue purposes in the event of natural calamities. In order to ensure safe helicopter

operations, it is mandatory that no construction should be permitted in the approach and take off funnel upto 750 meters and this restriction is imposed after expert evaluation since the concerned plot is within 500 meters from the Air Force Station, Thane where Indian Air Force is operating helipad. Any construction within 750 meters of approach/take off path diverging by 15 degrees from both sides from the edges of the helipad will adversely affect the operation of Air Force Station Thane. The respondents have withheld NOC for only that building which is directly within flight path and is likely to create security hazard.

55 The learned counsel then would submit that the TMC being the Planning Authority has rightly asked the petitioner to obtain NOC from the Defence Establishment. The inherent duty of the Planning Authority is to apply its mind before giving development permission and to keep in mind the pros and cons of such permission. Whilst imposing any condition, it cannot ignore aspects of such security etc. and may refuse to grant permission for use of land if the proposed development is not in “public interest”. The learned counsel then pointed out Section 46 of the MRTP Act

and would submit that Section 46 of the MRTP Act read with DCR 1994 and New Unified Development Control Regulation, it would be 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.

56 In support of his submission, the learned counsel has placed reliance in **Sunbeam Enterprises Vs. Municipal Corporation of Greater Mumbai and others**,¹¹ wherein it is held that MRTP Act 1966 and DCR Rules authorizes the Planning Authority to ask the builders and developers to get NOC from the Defence Authority, if the construction is to be carried out in the vicinity of Defence area and/or Defence installation. It is mandatory on the part of the Planning Authority to insist on the NOC of the Defence Establishment while considering the proposal of building permission. In this regard, the learned counsel further placed reliance in **TCI Industries Ltd Vs. Municipal Corporation of Greater Mumbai**¹² and referred paras 15 to 19 to the effect that a restricted meaning cannot be given to Section 46 of the MRTP Act so as to

¹¹ 2019 SCC Online Bom 1059

¹² 2011 SCC Online Bom 1671

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.

57 The learned counsel further placed reliance in **SSV Developers Vs Union of India**¹³ wherein it is held that the decision to grant or withhold NOC taken by experts, who have resolved and decided that for reasons of security and protection of defence and naval establishment NOC should not be granted. It is not for the Court to substitute its opinion with their views.

58 The learned counsel then would submit that in the present case distance is fixed by experts at 750 meters. The steps are being taken by the concerned Air Force Authorities to issue notification to that effect. Since the Defence Authorities have acted lawfully in

¹³ 2013 SCC Online Bom 1602

denying the NOC, it is submitted that the petitioner has no case on merits and therefore, the petition is liable to be dismissed with costs.

59 In his rejoinder argument, Mr. Samdhani, the learned senior counsel for the petitioner, reiterated his earlier submissions and pointedly assailed the stand taken by the respondents of their experts having fixed distance of 750 meters without any justification. According to learned senior counsel, none of the Senior Authorities relevant for the purposes has filed his/her affidavit on record justifying the basis and source for imposing distance of 750 meters restriction on any construction within 750 meters from the edges of the helipad. According to learned senior counsel, admittedly there is no notification till date issued under Section 9 (A) of the Aircraft Act and hence under such circumstances it would be meaningless to say that the steps are being taken for issuance of notification to that effect. As and when any such notification is published, the same will be dealt with appropriately by the petitioner.

60 As far as Section 46 of the MRTP Act is concerned, the learned senior counsel would submit that the TMC being Planning Authority is bound by the MRTP Act as well as DCR. In the instant case, the Government of Maharashtra legislated unified regulations dated 2nd December, 2020 which *inter-alia* provided in Regulation No. 10.2.5(iii) and 10.2.5(iv), a ban on construction upto 750 meters in the approach and take off funnel zone Air Force Station Thane. However, by a corrigendum dated 9th December, 2020, the aforesaid two provisions have been deleted. This being so, with regards the said land, there is no restriction of whatsoever nature as per the MRTP Act or DCR. Thus, the TMC cannot impose the condition on the petitioner to obtain NOC from the Defence Establishment prior to issuance of commencement certificate.

61 Mr. Apte, learned senior counsel for respondent nos. 5, 7 and 8, has advanced the submissions in consonance with the affidavit-in-reply filed on behalf of the said respondents.

REASONS AND CONCLUSION

62 The short question that falls for consideration is whether the respondent-TMC though granted sanction of development of subject plot is justified in insisting for NOC from the Defence Department prior to issuance of CC (Condition No.10) vide Amended Permission Certificate VIP No. S05/0096/15-TMC/ TDD/ 3166/19 dated 27th August, 2019?

63 Before we analyze, appreciate and assess the contentions of rival parties, certain admitted facts need to be highlighted. It is apparent from the contents of para-5 of the affidavit-in-reply of the TMC that subject plot partly falls within 100 meters boundary from the outer parapet of Air Force Station, Thane. Approximately 6923.40 sq. meters (16%) of the said plot is within “No Development Zone”. Balance 35630 Sq. meters (84%) of plot is outside the “No Development Zone” and on the said portion of plot, there are no restrictions on Development other than those provided by the sanctioned development plan and DCR. It is also an admitted fact that the TMC has sanctioned amended building permission consisting of ground and 23/24 upper floors on 27th August, 2019 with a condition, which is impugned, to obtain NOC

of the Defence Authorities. As far as certain portion of subject plot i.e. 6923.40 sq. meters (16%) of total plot falling within 100 meters from the outer parapet of Air Force Station Thane is concerned, we would be dealing with that in the later part of our discussion.

64 Similarly, there is no quarrel from the side of respondent nos. 1 to 4 and 9 about a notification dated 14th February, 2007 issued under Sections 3 and 7 of the Defence Act whereby the land surrounding the Thane helipad upto the distance of 100 meters from the outer parapet are put under “No Development Zone”. Again this position was reiterated and maintained by another notification dated 13th January, 2010.

65 According to the petitioner, the proposed construction is about approximately 500 meters away from the helipad and is governed by the provisions of MRTP Act and DCR. The learned senior counsel for the petitioner during the course of argument invited our attention to various correspondences exchanged between the petitioner and the respondent-Defence Authorities and

tried to impress upon us a hostile and inconsistent stand adopted against petitioner by the Defence Authorities vis-a-vis their own notifications. We propose to go through those communications.

66 First communication in the line of correspondence is a letter dated 1st September, 2011 written by Wing Commander, Chief Administrative Officer of Air Force Station Thane stating that as per the Defence circular dated 18th May, 2011 NOC will be required for carrying out construction within 500 meters, in addition to the 100 meters restrictions imposed by the notifications dated 14th February, 2007 and 13th January, 2010.

67 The said circular (Exh.D) dated 18th May, 2011 is on record. We have carefully perused the said letter written by Director (L & C), Government of India, Ministry of Defence to Chief of Army Staff, Chief of Air Staff and Chief of Naval Staff, New Delhi. This letter reads as under:-

No. 11026/2/2011/D(Lands)
Government of India,
Ministry of Defence,

New Delhi, the 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
Certificate (NOC)” for building constructions.

Of late, issue of NOC for construction on lands adjacent to Defence Establishments has 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 multistory building of more than four storeys the distance shall be 500 meters) radius of defence establishment can be a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey its 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 AHQ/MoD.

(c) Objections/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, Gazettee 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.

Sd/-

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

Copy to :

DGDE; DRDO; Coast Guard HQ;
DGDA; DGQA; OFB [through D(Fy-II)]”

68 The learned senior counsel for the petitioner makes an

eminent sense when he argues that this communication dated 18th May, 2011 has no application in respect of land covered by the notification issued under Sections 3 and 7 of the Defence Act. We are in total agreement with the learned senior counsel. If this communication is read carefully then it provides various guidelines to be followed while granting “No Objection Certificate”(NOC) for building constructions, coming up within 100 meters (for multistorey building of more than four storeys the distance shall be 500 meters) radius of Defence Establishment inasmuch as the same may pose a security hazard.

69 If the instruction at Sr. No.2 are read carefully then there remains no manner of doubt as is argued by learned senior counsel for the petitioner, that the instructions contained in the said communication shall not apply to the constructions where those constructions are regulated by the provisions of existing acts/notifications viz. Cantonments Act, 2006, Air Craft Act, MoCA, 1934, Gazettee Notification SO 84(E) dated 14.01.2011 (as revised from time to time), Works of Defence Act, 1903, etc. It further clarifies that in such cases provisions of the concerned

Act/Notifications will continue to prevail. Here we remind ourselves that there is already notification of 100 meters issued under Sections 3 and 7 of the Defence Act and this being so unarguably will prevail over this correspondence dated 18th May, 2011.

70 We are very much clear in our mind that while issuing the communication dated 1st September, 2011 (Exh.E) by the Wing Commander, Chief Administrative Officer, Air Force Station Thane to the TMC, it failed to convey the correct interpretation and requirement of the instructions/guidelines contained in the letter dated 18th May, 2011 as analyzed by us herein-above. Therefore, in our considered opinion, this circular had no bearing or relevance to the case of petitioner.

71 The next communication is dated 29th June, 2016 written by Group Captain, Station Commander, Air Force Station Thane to the TMC informing that as per the Government notification dated 13th January, 2010, no construction should be permitted within the restricted zone of 100 meters from the outer parapet of Air Force

boundary and beyond the notified zone of 100 meters, no restriction is required to be imposed as per the Defence Act. This letter further requested the TMC that cases for construction beyond 100 meters henceforth are not required to be sent to their office for issue of NOC and the same be dealt at their end as per the laws of land. Thus, this letter was perfectly in-tune with the notification dated 14th February, 2007 and 13th January, 2010 issued under the Defence Act.

72 Now, we come across the impugned communication (Exh. N) dated 14th March, 2017. The impugned communication runs as follows:

“ **Exhibit-N**

Tele : 25868501/7202

Fax : 022-25868089

Air Force Station Thane
Kolshet Road,
Sandoz Baug (PO)
Thane (W) – 400 607.
14 Mar 17

26W/S 515/1/Wks

The Municipal Commissioner,
Thane Municipal Commission
Thane.

**ISSUE OF NOC WITHIN RESTRICTED ZONE AIR
FORCE STATION THANE**

1. Reference is made to our letter No. 26w/s 515/1/

Wks dated 29 June 16.

2. AF Stn Thane falls within Mumbai Air Space and the helipad at Air Force Station, Thane witnesses regular operations. Moreover, this helipad is earmarked for Prime Minister/other VVIP/VIP movements in Thane AOR. As per policy, a clear straight approach and take off path upto 750 meters is required for safe conduct of operations by helicopters. To ensure safe helicopter operations at this base, no construction should be permitted in the approach and take off funnel.

3. This Station has approached higher formations for clarifications regarding restrictions for new construction based on necessary horizontal as well as vertical clearance. Till such time, no further NOCs may be granted. Latest clarifications will be communicated as soon as the same are received from higher formations.

4. This is for your information and further necessary action, please.

Sd/-
(Manu Kapoor)
Group Captain,
Station Commander,
Air Force Station, Thane.

Copy to : DC, Thane
Executive Engineer, TMC
Asstt Director Town Planning, TMC.”

73 By virtue of above impugned communication intriguingly enough, the respondent no.2 took a somersault and informed the TMC that since Air Force Station Thane falls within Mumbai Air Space and the helipad at Air Force Station, Thane witnesses regular operations and further that since it is earmarked for Prime

Minister/other VVIP/VIP movements, as per policy, a clear straight approach and take off path upto 750 meters is required for safe conduct of operations by helicopters. This being so and in order to ensure safe helicopter operations at its base, no construction should be permitted in the approach and take off funnel. Second part of the impugned communication shows that the concerned Air Force Station Thane had approached higher formations for clarifications regarding restrictions for new construction based on necessary horizontal as well as vertical clearance and informed the TMC that till such time, no further NOCs should be granted.

74 Two significant and salient aspects from the above communication can be quickly noted. First, Air Force Station Thane at its end was of the opinion that since Air Force Station Thane is earmarked for Prime Minister/other VVIP/VIP movements and as there is a policy which requires a clear straight approach and take off path upto 750 meters for safe conduct of operations by helicopters, no construction should be permitted in the approach and take off funnel. Second, to get clearance of restrictions required to be imposed on the construction activity upto 750

meters from the approach and take off funnel of the helicopter operations, they sought clarification from the higher authorities that is to say the stamp of approval of higher authorities to impose said restrictions.

75 The learned senior counsel for petitioner argued with splendid precision that there is no source of power or authority disclosing and supporting the claim thereby freezing the construction activity till 750 meters from the helipad. According to him it is also not made clear as to under which Act/Rule/Regulation/Notification or Circular, 750 meters long flight path is claimed.

76 If this communication is read in its proper perspective then one does not get much foresight to understand that there was no Act or Notification which will regulate and restrict the construction activity upto 750 meters from helipad. Rather, it shows the absence of Notification, Regulation or existence of any Act so empowering the Defence Authorities to put restrictions. That is why the defence authority stipulated in all the communications that clarifications

are being sought by them from the higher formations. We find much substance in the contention of learned senior counsel that the respondent no.2 was not within its right to issue such a communication to the TMC.

77 It then appears from the record that vide letter dated 22nd May, 2018 addressed to The Station Commander, Air Force Station, Thane, the TMC sought clarification as to the need of NOC. The respondent-Authorities vide letters (impugned) dated June, 2018 and 6th July, 2018 reiterated the same stand i.e. no construction is permissible upto 750 meters from the helipad. The impugned communications (Exh. U and W) read as under:

Exhibit -U

Air Force Station Thane
Kolshet Road, Sandoz Baug
Thane (W) – 400607.
7 June 18

AFSW/S 515/1/12/Wks

Municipal Commissioner
Thane

**ISSUANCE OF NOC WITHIN RESTRICTED ZONE AIR
FORCE STATION THANE**

Sir,

1. Reference is made to our letter of even reference

dated 14 Mar 17 and your letter No. TMC/TDD/775 dated 22 May 18.

2. The case for restriction on construction within the approach and take off path upto 750m for safe conduct of operation by IAF helicopters has been taken up with higher formation. The decision is still under consideration.

3. In view of the above, till any decision is arrived no NOCs may be granted for construction of any building within the approach and take off path upto 750m.

4. Your cooperation in this regard is highly solicited.

Yours faithfully,

Sd/-

Group Captain
Chief Administrative Officer
Air Force Station, Thane.

Annexure: As stated.

Copy to : Asstt Director Town Planning Chief Planner
HQ SWAC (C Wks O).

.....

Exhibit -W

Tele : 25868501/201

Fax : 022-25868089

Air Force Station Thane
PO Sandouz Baugh
Kolshet Road,
Thane (W) – 400 607.
06 Jul 18

26W/S 515/1/12/Wks

Municipal Commissioner,
Thane.

**ISSUE OF NOC WITHIN RESTRICTED ZONE OF AIR
FORCE STATION, THANE**

1. Reference is made to your letter No.TMC/TDD/1522

dated 30 Jun 18.

2. The points brought out in your above quoted letter was deliberated at this office. It is intimated that as per Govt of India, MoD SRO No.04 dated 13 Jan 10 published in Part-II Section 4 of Gazette Notification dated 23 Jan 10, Air Force Station Thane falls within the 100 mtr restriction zone. As per notification, no construction is permitted within the restricted zone of 100 mtr from the outer parapet of Air Force boundary. However, as per policy (CASO Volume-III) a clear straight approach and take off path upto 750 mtr is required for safe conduct of operations by IAF helicopters. To ensure safe helicopter operations at this base, no construction should be permitted in the approach and take off funnel higher than the specified height.

3. On the basis of above a letter was sent to your office vide our letter 26W/S 515/1/Wks dated 14 Mar 17, for non grant of permission for construction of any building within the approach and take off path upto 750 mtr. The case has been taken up with higher authorities for clarification on the subject.

4. In view of the above, no permission be granted within the restricted zone mentioned in para 2 and 3 above.

5. Your cooperation in this regards will be highly solicited.

Yours' sincerely,

sd/-

(Jose Mathai)

Group Captain

Station Commander

Air Force Station, Thane.

Copy to :

Assistant Director of Town Planning, TMC Thane

Air HQ (SO to DG (Wks)
HQ SWAC IAF (C Wks O).

.....

78 It appears from the communication (Exh. U) of June 18 that the TMC was informed about the pendency of the decision in respect of restriction on construction within the approach and take off path upto 750 meters before higher formations.

79 On the other hand, if the communication (Exh.W) dated 6th July, 2018 is to be seen then it would be seen that the Defence Authorities by giving reference to CASO policy claimed that within a length of 750 meters from the helipad no construction should be permitted and that the case has been taken up with higher authorities for clarification on the subject.

80 Thus, for the first time the respondent- Authorities took recourse to CASO policy which was not disclosed on record and secondly, the higher authorities were still seized of the matter on the date of said communication. It is quite interesting to note here that the said CASO policy which was taken recourse of by the

Defence Authorities was conveniently given up by them by filing their second affidavit dated 9th October, 2020 inasmuch as the said affidavit-in-reply nowhere even remotely refers the said CASO policy. On the contrary, it avers that to ensure safety of aircrafts, the Government of India has prohibited construction of building or structures in the vicinity of aerodromes in exercise of power under Section 9A of Aircraft Act. The affidavit-in-reply further avers that the proposal to notify heliport at Air Force Station Thane is pending with Ministry of Civil Aviation and is likely to be notified soon.

81 From the impugned communication as well as the averments so extracted from the second affidavit-in-reply, which is more than clear that every thing was in air or vacuum. Even on the date of filing of affidavit, Air Force Station, Thane regarding which much hype and hoopla is made concerning security hazard was yet to be registered with Indian Air Force by the Ministry of Civil Aviation. Needless to say everything was in abstract.

82 It is also interesting to note from the third affidavit-in-reply dated 1st December, 2020 that they found that 111086.11 sq.

meters of petitioner's land is affected by restriction of 750 meters flight path which includes the land covered by notification by 100 meters under the Defence Act. It also gave up the alleged CASO policy and circular issued by Government of Maharashtra dated 20th January, 2018 which was referred by them in their first affidavit-in-reply. They categorically averred that restriction of 750 meters flight path clear of all obstructions imposed by them is on account of Civil Aviation Requirements issued by Department of Civil Aviation under the provisions of the Aircraft Act and Rules framed thereunder. The land affected by this restriction will also include land affected under notifications issued under the Defence Act. No other restriction affecting land of petitioner is imposed by them.

83 The sum and substance of third affidavit-in-reply is that the Defence Authorities want to cover the case of petitioner under Section 9A of the Aircraft Act apart from the notification issued under the Defence Act.

84 We do not find any difficulty in holding that the respondent-

Defence Authorities have not placed reliance on any of the circulars and admittedly there is no notification under Section 9A of the Aircraft Act in order to justify their claim. We have already pointed out herein-above from the affidavit-in-reply of respondent-Authorities that heliport at Air Force Station Thane is yet to be registered as heliport with Civil Aviation. Therefore, we are not in agreement with learned counsel for respondent-Authorities that under Section 9A of the Aircraft Act the respondent-Authorities are well within their right to prohibit the proposed construction activity of the petitioner.

85 Even otherwise, we are satisfied that none of the letters / correspondence (quoted and referred extensively herein-above) refer to any primary legislation and/or delegated piece of legislation on disclosing their source of power or authority to impose such restriction (of 750 meters). The respondent- Defence Authority's fervent plea to impose restriction beyond 100 meters, needless to say, is clearly without any authority of law.

86 Here it is also relevant to note Sections 3 and 7 of the

Defence Act. Section 3 of the Defence Act reads as under:-

Section 3. Declaration and notice that restrictions will be imposed –

(1) Whenever it appears to the ^a[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 or 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 ^b[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 section 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 buildings and other obstructions.

[a] Substituted for the words "Local Government" by A.O. 1937(1-4-1937).

[b] Substituted for the words "Local Gazette"ibid.

Section 7 of the Defence Act reads as under:

Section 7. Restrictions –

From and after the publication of the notice mentioned in section 3, sub-section (2), such of the following restrictions as the ^a[Central Government] may in its discretion declare therein shall attach with reference to such land, namely:--

(a) Within an outer boundary which, except so far as is otherwise provided in section 39, sub-section (4), may extend to a distance of two thousand yards from the crest of the outer parapet of the work, –

(i) no variation shall be made in the ground-level, and no building, wall, bank or other construction above the ground shall be maintained, erected, added to or altered otherwise than with the written approval of the ^b[General Officer Commanding the District], and on such conditions, as he may prescribe;

(ii) no wood, earth, stone, brick, gravel, sand or other material shall be stacked, stored or otherwise accumulated:

Provided that, with the written approval of the ^e[General Officer Commanding the District] and on such conditions as he may prescribe, road-ballast, manure and agricultural produce may be exempted from the prohibition:

Provided also that any person having control of the land as owner, lessee or occupier shall be bound forthwith to remove such road-ballast, manure or agricultural produce, without compensation, on the requisition of the Commanding Officer;

(iii) no surveying operation shall be conducted otherwise than by or under the personal supervision of a public servant duly authorised in this behalf, in the case of land under the control of military authority, by the Commanding Officer and, in other cases, by the Collector with the concurrence of the Commanding Officer; and

(iv) where any building, wall, bank or other construction above the ground has been permitted under clause (i) of this sub-section to be maintained, erected, added to or altered, repairs shall not, without the written approval of the ^b[General Officer Commanding the District], be made with materials different in kind from those employed in the original building, wall, bank or other construction.

(b) Within a second boundary which may extend to a distance of one thousand yards from the crest of the

outer parapet of the work, the restrictions enumerated in clause (a) shall apply with the following additional limitations, namely:--

(i)^d[no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall bank or other construction shall be erected:]

Provided that, with the written approval of the ^a[General Officer Commanding the District] and on such conditions as he may prescribe, huts, fences or other constructions of wood or other materials, easily destroyed or removed, may be maintained, erected, added to or altered:

Provided also, that any person having control of the land as owner, lessee or occupier shall be bound forthwith to destroy or remove such huts, fences or other constructions, without compensation, upon an order in writing signed by the ⁶[General Officer Commanding the District]; and

(ii) live hedges, rows or clumps or trees or orchards shall not be maintained, planted, added to or altered otherwise than with the written approval of the ^b[General Officer Commanding the District] and on such conditions as he may prescribe.

(c) Within a third boundary which may extend to a distance of five hundred yards from the crest of the outer parapet of the work, the restrictions enumerated in clauses (a) and (b) shall apply with the following additional limitation, namely:--

no building or other construction on the surface, and no excavation, building or other construction below the surface, shall be maintained or erected :

Provided that, with the written approval of the Commanding Officer and on such conditions as he may

prescribe, ⁷[a building or other construction on the surface may be maintained and] open railings and dry brush-wood fences may be exempted from this prohibition.

[a] Substituted for the words “Local Government” and “General Officer Commanding the Division” by A.O. 1937, (1-4-1937)

[b] Substituted for the words “General Officer Commanding the Division” by the Indian Works of Defence (Amendment) Act, 1921 (11 of 1921), S.3.

[c] Substituted for the words "General Officer Commanding the Division, District or Brigade", *ibid.*

[d] Substituted for the words, “no building wall bank of other construction of permanent materials above the ground shall be maintained or erected” by the Indian Works of Defence (Amendment) Act, 1940 (28 of 1940), S.2 (27-11-1940).

[e] Inserted, *ibid.*

87 There is no dispute to the fact that the Government of India, Ministry of defence duly published the notifications (Exh. B) dated 14th February, 2007 and 13th January, 2010 under Sections 3 and 7 of the Defence Act. The aforesaid two notifications categorically state that all areas falling around Air Force Station Thane notified (Annexure A) need to maintain restriction only for a distance of 100 meters from the boundary of the Defence Establishment.

88 As per Section 7 of the Defence Act, from and after the publication of the Notice mentioned in Section 3(2), restrictions as mentioned in the said Section may be imposed by the Central Government. Such restrictions may include as per clause (a) no

variation on the ground level or restriction on a construction, erection, alteration etc. to any building wall etc. otherwise than with the written approval of the General Officer Commanding of the District and on such conditions as he may prescribe within an outer boundary extending upto a distance of 2000 yards from the crest of the outer parapet of Defence Work.

89 Similarly, as per clause (b) within a second boundary which may extend to a distance of 1000 yards from the crest of the outer parapet of the Defence Work, in addition to the restrictions enumerated under clause (a) above, certain other restrictions will apply, as such, no building, wall or other construction of the permanent materials above the ground level shall be maintained, otherwise than with the written approval of the General Officer Commanding of the District and on such conditions as he may prescribe.

90 Similarly, further as per clause (c) within a third boundary which may extend to a distance of 500 yards from the crest of the outer parapet of the Defence Work, in addition to the restrictions

enumerated in clause (a) and (b) and additional limitation will apply i.e. no building or other constructions on the surface and no excavation, building or other construction below the surface shall be maintained or erected; with the written approval of the General Officer Commanding and on such conditions as he may prescribe, a building or other construction on the surface may be maintained and open railings and dry brush wet fences may be exempted from this prohibition.

91 The combined reading of Sections 3 and 7 would make it clear that the Defence Authorities exercised their right of restriction by issuing notifications dated 14th February, 2007 and 13th January, 2010 by clearly specifying that all areas falling around Air Force Station need to maintain restriction only 100 meters from the boundary of the Defence Establishment. It is relevant to note here that the notifications came to be issued after considering all relevant factors pertaining usage of the Air Force Station after following due process as prescribed under the provisions of the Defence Act. The said notification still hold field or any restriction or requirement imposed which are contrary and in addition to the

said notifications dated 14th February, 2007 and 13th January, 2010 are illegal and contrary to law and those are beyond the scope of the Defence Act.

92 This being so and the fact that the proposed residential building of the petitioner is beyond 100 meters from the Defence Establishment, the respondents' requirement of an Air Force NOC from the petitioner is contrary to the notifications dated 14th February, 2007 and 13th January, 2010.

93 In our view, the reasonable restrictions can be imposed on a citizens rights guaranteed under Article 19(1)(g) and Section 300A only by enacted law. The Defence Act is a central legislation enacted for the purpose of imposing restriction upon the land in the vicinity of Defence Establishment and for determining compensation in cases where such restrictions are imposed. The Defence Act occupies the field and it deals with restriction, computation, reference, compensation and ultimately the payment of the compensation. The only way to impose restrictions on enjoyment of the property in the vicinity of Defence Establishment

is by invoking powers under the Defence Act.

94 In case of **Babu Verghese and Others (Supra)** the Hon'ble Apex Court at para 31 observed that it is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The Hon'ble Apex Court traced the origin of his decision in **Taylor V. Taylor**¹⁴ which was followed by Lord Roche in **Nazir Ahmad V. King Emperor**¹⁵, who stated as under:

“[W]here a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.”

95 In the present case, the Defence Authorities have imposed restrictions of 100 meters by issuing notifications dated 14th February, 2007 and 13th January, 2010. Thus, imposition of restriction of 750 meters by writing letters is not more than the executive instruction and is thus ultra-vires the Defence Act and without any notification under the Defence Act or for that matter the Aircraft Act. The imposition of the restriction is not in the manner prescribed under Section 9A of the Aircraft Act and is in

¹⁴ (1875) 1 Ch D 426 : 45 LJCh 373

¹⁵ (1936) 63 IA 372 : AIR 1936 PC 253

violation of the principles laid down by the Hon'ble Apex Court in case of **Babu Verghese (Supra)**. In our view, it quite clear that if law requires doing of an act in and under particular manner, it must be done in that manner or not at all.

96 The learned senior counsel also took great pains in criticizing the impugned communications and insistence of the Defence Authorities requiring their NOC for development by the petitioners and imposition of restriction of 750 meters of flight path from the helipad, affecting and impacting the petitioner's entire property which is plainly without the authority of law and violative of Article 19(1)(g) and 300A of the Constitution of India. According to learned senior counsel, the impugned communications are in the nature of executive instructions and that Article 19(1)(g) and 19(6) do not permit executive instructions to take place of law. The learned senior counsel advanced his submissions in the light of ratio laid down in **Bhishambhar Dayal Chandra Mohan and Others V. State of Uttar Pradesh and Others (Supra)**, **Hindustan Times and Others V. State of U.P. and Another (Supra)**, **State of Bihar and Others V. Project Uchcha Vidya (Supra)** and **P. H. Paul Manoj Padian**

V. P. Veldurai (Supra).

97 At paragraph 17 in the case of **Bhishambhar Dayal Chandra Mohan and Others V. State of Uttar Pradesh and Others (Supra)**, the Hon'ble Apex Court observed that the quintessence of our Constitution is the rule of law. The State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts.

98 In **State of M.P. v. Thakur Bharat Singh**¹⁶ the Hon'ble Apex Court repelled the contention that by virtue of Article 162, the State or its officers may, in the exercise of executive authority, without any legislation in support thereof, infringe the rights of citizens merely because the legislature of the State has power to legislate in regard to the subject on which the executive order is issued. It was observed:

“Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority.”

¹⁶ AIR 1967 SC 1170

99 In paragraph 41 the Hon'ble Apex Court further observed that the State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article-300A must mean an Act of Parliament or of a State legislature, a rule, or a statutory order, having the force of law. It also referred the judgment given in **Bhishambhar Dayal Chandra Mohan and Others V. State of Uttar Pradesh and Others (Supra)**. In **State of Bihar and Others v. Project Uchcha (Supra)**, at paragraph 67 the Hon'ble Apex Court again referred the judgment given in **Bishambhar Dayal (Supra)**.

100 In **P.H. Paul Manoj Pandian v. P. Veldurai (Supra)**, the Hon'ble Apex Court held as under:

"Para- 46

Under [Article 162](#) of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations of the

exercise of such executive power by the Government are two fold; first, if any Act or Law has been made by the State Legislature conferring any function on any other authority - in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the Legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.”

Para-47

Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the Executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.

Para-48

The powers of the executive are not limited merely to the

carrying out of the laws. In a welfare state the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is coterminus with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State Executive can make regulations and issue Government Orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the Legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated November 16, 1951 on the ground that it contained administrative instructions.”

101 From the above pronouncement, it does not take much prescience to understand that once a law occupies the field, it will not be open to the State Government or Central Government, as the case may be, to prescribe in the same field by an executive order. Quint essentially, the requirement is of enacted law occupying the field. In the case in hand, at the cost of repetition, there is notification issued under the Defence Act occupying the field and therefore, by no stretch of imagination or under the garb of executive powers, the Defence Authorities could have ventured

to impose restrictions of 750 meters by indulging into unwarranted various correspondence.

102 We have carefully gone through the decisions of the Hon'ble Apex Court in case of **Harikrishna Mandir Trust v. State of Maharashtra and Others (Supra)**, **B.K. Ravichandra and Ors. V. Union of India and Ors. (Supra)**. In almost all the decisions (Supra), it has been held by the Hon'ble Apex Court that the right to property may not be fundamental right any longer, but it is still a constitutional right under Article 300A and a human right and in view of the mandate of Article 300A, no person is to be deprived of his property save by authority of law. In other words, we may say that the right to property though may not be a basic feature of the Constitution or a fundamental right but has now come to be considered to be not only a constitutional or statutory right, but also a human right. Viewed thus, we hold that the impugned communications are plainly executive instructions and not enacted by law. This has directly resulted into interference with the petitioner's right to property without authority of law. The impugned communications, in the circumstances, are plainly and

clearly violative of Article 300A of the Constitution of India.

103 It appears from the record that on 5th June, 2019, a joint meeting under the chairmanship of Chief Secretary of Government of Maharashtra was held with respect to the restriction of development by Air Force Authorities. The said meeting was attended by Principal Secretary, Urban Development Department, Chief Administrative Officer of Air Force Station Thane and Director of petitioner-company. The minutes of the meeting would show that as no notification was issued by the concerned authority in respect of limitation of construction within the proposed funnel zone, it was found to be not proper to reject the development proposal received by the TMC. It was further noted that, however, in view of the planning of helipad funnel zone necessary from the point of view of the Defence Department, the TMC should not be held responsible and there is no objection for giving approval to the petitioner subject to execution of indemnity bond by the petitioner. But the commencement certificate will be issued after the NOC is received from the department.

104 Similarly, another meeting was held on 5th July, 2019 under the chairmanship of the Chief Secretary and the said persons attended the said meeting. The minutes of the meeting would show that until the notification is issued by the Defence Department regarding helipad funnel zone, the proposal of development in respect of land in the said areas should be sanctioned subject to the indemnity bond of the developer. However, the commencement certificate of such construction proposal will be issued after the NOC is obtained from the Defence Department.

105 The above noted minutes of the meetings are also assailed by the petitioner in the present petition. According to learned senior counsel for the petitioner, an undertaking was given under a hope that the Defence Authorities would be reasonable in issuing NOC in the absence of any power to freeze construction. Since the Defence Authorities have been unreasonable or without authority or power withheld the NOC or insisted on NOC the petitioner was constrained to challenge the minutes of the said meetings as the UDD has no power or authority under the MRTP Act to impose any

such condition unless the same exists in the development plan. We have already pointed out during the earlier part of our discussion that how the proposed restriction of 750 meters on account of Civil Aviation requirement is in the vacuum or air.

106 In the instant case, at the time the TMC put the rider while approving the final building plan there was no draft policy (of 750 meters) in existence. It was at the most in contemplation as was canvassed throughout by respondent nos. 1 to 4 and 9. If there had been such a concrete policy, the TMC would be entitled to rely upon the same and ought to have rejected the plan submitted by the petitioner. But as there was no such policy, as repeatedly raised by respondent nos. 1 to 4 and 9, the TMC was not justified in putting riders merely relying upon a would be proposal for the drawing of a draft policy prohibiting construction of 750 meters in the approach and take off funnel (of operations by helicopters.

107 Section 46 of the MRTP Act stipulates the factors which are required to be considered prior to granting development permission. The TMC being a planning authority is bound by the

MRTTP Act as well as the DCR. We may note that in the present case the Government of Maharashtra, initially legislated unified regulations dated 2nd December, 2020 which *inter-alia* provided in Regulation No. 10.2.5(iii) and 10.2.5(iv), a ban on construction upto 750 meters in the approach and take off funnel zone Air Force Station Thane. However, by a corrigendum dated 9th December, 2020, the aforesaid two provisions came to be deleted. This being so, with regards to the subject plot there is no restriction of whatsoever nature of MRTTP Act or the DCR. This being so, any instructions issued or power exercised which is not empowered under the DCR is ultra-vires the MRTTP Act as well as the DCR.

108 In this regard, the learned senior counsel for the petitioner has placed reliance in the case of **S.N. Rao and Ors. (Supra)** wherein the Hon'ble Apex Court at para 8 observed that:

“Para-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 appellate authority was justified in allowing the appeal.”

109 We have repeatedly pointed out that as on the date of taking undertaking from the petitioner or for that matter asking the petitioner to furnish NOC from the respondent-Defence Authorities there was nothing on record to show that there was ban on construction upto 750 meters in the approach and take off funnel zone of Air Force Station Thane. In our considered opinion, the TMC could not have imposed a condition (Condition No. 10) for development permission on the basis of statement made by the Defence Authorities that their proposal regarding restriction on

construction upto 750 meters is under consideration before the Defence formation. Thus, the decisions of the UDD dated 5th June, 2019 and 5th July, 2019 are clearly without any authority and powers available under the MRTP Act or the DCR.

110 Mr. Mishra, learned counsel for the respondent-Defence Authorities, strenuously attempted to justify the imposition of the condition by the TMC by placing reliance on three judgments, namely, **TCI Industries Limited (Supra)**, **S.S.V. Developers and Ors. (Supra)** and **Sunbeam Enterprises (Supra)**. In the case of **TCS Industries Limited (Supra)** this Court held that 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. 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. This Court further noted the DC Regulation 16(n), and held that in the light of this Regulation 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 or architectural or aesthetical building and precincts or is not in the public interest. This judgment was also followed by this Court in the case of **S.S.V. Developers and Ors. (Supra)** and **Sunbeam Enterprises (Supra)**.

111 We have carefully gone through the judgments relied upon by the learned counsel for the respondent-Defence Authorities and in our considered opinion the said judgments will not bail out the respondent-Defence Authorities for the following reasons.

112 There was no notification, like in the present case, under the Defence Act holding the field. Similarly, there was no equivalent DCR in the case of TMC equal to regulation 16(n) of DCR 1991 applicable in Mumbai. On the contrary, the property of the petitioner in the present case is situated in Thane which is governed by unified Development Control and Promotion Regulations for Maharashtra Stat (“unified DCR”) promulgated by the State of Maharashtra under Section 31 of the MRTP Act.

Initially, which is not disputed by the learned counsel for the respondent that the unified DCR in regulation 10.2.5(iii) and (iv) provided for restriction of 750 meters in the approach and take off path for safe operations of helicopter which was subsequently deleted by corrigendum dated 9th December, 2020. A copy thereof is very much available on record for perusal.

113 It may be seen from the unified DCR filed on record by learned senior counsel for the petitioner that regulation 3.1.11 provides for restrictions on carrying out construction in areas where notification under the Defence Act is in force. Regulation 3.1.1 also provides for certain restrictions for carrying out construction, however, there is no restriction for Thane District as provided under regulation 16(n) which was applicable to the city of Mumbai.

114 Apart from above, in the case of **TCI (supra)** a circular under Section 154 of MRTP Act was relied upon which was not challenged and admittedly there was no challenge in that case to any of the circulars or communications. In the case in hand,

however, various correspondence/circulars have been challenged by the petitioner herein. The learned counsel for respondent-Defence Authorities, therefore, cannot fly against the material on record and similarly, the Defence Authorities cannot vindicate their claim under the garb of ratio laid down in the decisions (Supra) relied on by them which is clearly not applicable to the case in hand.

115 Lastly, by way of feeble attempt, Mr. Mishra, learned counsel for respondent nos. 1 to 4 and 9, during the course of argument submitted that the petitioner has efficacious alternative remedy under Section 47 of MRTP Act to challenge conditions imposed while granting development permission. Therefore, on this ground alone the petition should not be entertained and ought to be rejected. This submission of Mr. Mishra, learned counsel for respondent-Defence Authorities, is seriously contested by Mr. Samdhani, learned senior counsel for the petitioner, by submitting that the Appeal under Section 47 of the MRTP Act is neither alternative nor efficacious inasmuch as the relief of challenge to the communications issued by Defence Authorities and to the decision

of the UDD is unavailable by way of appeal. This counter of learned senior counsel can't be easily outwitted. We refuse to buy the submission of learned counsel for respondent-Defence Authorities for the reasons to follow hereinafter.

116 Section 47 of the MRTP Act provides that any applicant aggrieved by an order granting permission on conditions or refusing permission under Section 45 may, within 40 days of the date of communication of the order to him, prefer an appeal to the State Government or to an officer appointed by the State Government in this behalf.

117 The discussion made by us so far would demonstrably show that the imposition of condition by the TMC was based on the outcome of meetings held by Chief Secretary, Government of Maharashtra which were attended by all concerned including the petitioner. Also the condition (10) was imposed in the backdrop of various communications issued by respondent-Defence Authorities from time to time. We have in the earlier part of our discussion minutely gone through those communications and concluded that

those communication do not stand to judicial scrutiny and consequently failed to muster our stamp of approval.

118 In this premise, there was no legal foundation at all to impose any sort of condition by the TMC much less the condition no.10. This being clear obtaining situation there was no remedy but to challenge those communications and the condition (10) imposed by the TMC flowing therefrom by the petitioner. The petitioner has precisely done that and therefore, cannot be shown door under the pretentious defence of efficacious alternate remedy under Section 47 of MRTP Act, which in the facts and circumstances of the case is far fetched and is not available. We, therefore, reject this submission.

119 Mr. Samdhani, learned senior counsel for the petitioner, lastly submitted that respondent nos. 1 to 4 and 6 be directed to initiate action under Section 8 to 17 of the Defence Act and pay compensation to the petitioner under the provisions of Defence Act with respect to the subject plot affected by the 100 meters restriction vide Notifications dated 14th February, 2007 and 23rd

January, 2010.

120 At the very beginning we had pointed it out from the affidavit-in-reply of the TMC that subject plot partly falls within 100 meters from the outer parapet of Air Force Station Thane. Approximately 6923.40 sq. meters (16%) of the said plot is within the “No Development Zone”. Balance 35630 sq. meters (84%) of plot is outside the “No Development Zone” and on the said portion of plot, there are no restriction on Development other than those provided by the sanctioned development plan and DCR. Needless to say the Competent Authority will have to ascertain and determine the part of subject land which is directly affected by the restrictions imposed by notifications dated 14th February, 2007 and 13th January, 2010 under the scheme of the Defence Act which is the complete code in itself. We find merit in the submission of learned senior counsel that the petitioner is entitled to receive compensation for the part of land which is directly affected by the aforesaid two notifications. Needless to say, the scheme of acquisition of compensation is provided under the Defence Act from Section 8 to 17 and further Reference to Court from Section

18 to 28. The respondent nos. 1 to 4 and 6 will have to undertake an exercise in this regard.

121 In the result, we pass the following order.

ORDER

i) The impugned Communications dated 14th March, 2017, June 2018 and 6th July, 2018 passed by the Defence Authority are quashed and set aside.

ii) It is declared that restrictions imposed on the basis of the policy CASO Volume-III is contrary to Notifications dated 14th February, 2007 and 13th January, 2010 issued under the Works of Defence Act, 1903.

iii) Decisions dated 5th June, 2019 and 5th July, 2019 taken by Urban Development Department, Government of Maharashtra are quashed and set aside.

iv) Condition No.10 of development permission dated 27th August, 2019 requiring the petitioner to obtain NOC from the Defence Authority prior to carrying out any construction is quashed and set aside.

v) Respondent Nos. 5, 7 and 8 are hereby directed to process and sanction of planning permission for construction in respect of subject property without insisting the NOC from Respondent Nos. 1 to 4 and 6 within eight weeks from the date of receipt of authenticated copy of this Judgment.

vi) Respondent nos. 1 to 4 and 6 are further directed to initiate action under Section 8 of the Works of Defence Act, 1903 and to pay compensation to the petitioner under the provisions of the Works of Defence Act, 1903 in respect of the part of the subject property which is affected by the Notifications dated 14th February, 2007 and 13th January, 2010.

vii) Rule is made absolute in aforesaid terms.

viii) There shall be no order as to costs.

(V. G. BISHT, J.)

(R. D. DHANUKA, J.)