

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3145 OF 2021

Union of India,		
Through Ministry of Defence,		
Southern Command Composite Signal Regiment,		
PIN – 918 401 C/o. 56 AFO		.. Petitioners

Versus

1. The State of Maharashtra,		
Through the Secretary,		
Ministry of Urban Development Department,		
Government of Maharashtra,		
Having office at Mantralaya Nariman Point, Mumbai.		
2. The Pune Municipal Corporation, Pune,		
Through Office of City Engineer,		
Building Development, Bandhkam Vibhag,		
Zone No.4, Pune Municipal Corporation, Pune.		
3. Kappa Realtors LLP,		
FP No.384 S No.25/1A, 25/1B and 28/3A,		
Jewel Tower Lane No.5, Koregaon Park,		
Pune – 411 001.		.. Respondents

ALONG WITH

INTERIM APPLICATION NO.1553 OF 2021

IN

WRIT PETITION NO.3145 OF 2021

1. Usha Shivaji Kshirsagar		
Age : 61 Yrs. Occ.: Business		

2. Sanit Shivaji Kshirsagar	]
Age : 38 yrs. Occ.: Business	]
3. Swapnil Shivaji Kshirsagar	]
Age : 31 yrs. Occ.: Business	]
4. Shivaji Ambadas Kshirsagar	]
Age : 67 yrs. Occ.: Business	]
All residents of B 1/24, Kumar Angan,	]
Airport Road, Yerwada, Pune – 411 006.	] .. Applicants

In the matter between

Union of India	] .. Petitioners
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Versus

The State of Maharashtra,	]
Through the Secretary,	]
Ministry of Urban Development Department and Ors.	] .. Respondents

Mr. Anil C. Singh, Addl. Solicitor General of India, with Mr. Parag A. Vyas, Mr. Aditya Thakkar, Ms. Karuna Yadav and Mr. Dharmesh Joshi, for the Petitioner.

Mr. G.S. Godbole, Sr. Advocate, with Mr. Kaustubh Thipsay, Mr. Rahul Soman, for the Applicants-Interveners in IA/1553/2021.

Ms. M.P. Thakur, AGP for Respondent No.1.

Mr. Abhijit P. Kulkarni for Respondent No.2-PMC.

Dr. Milind Sathe, Sr. Advocate, with Mr. Saket Mone, Mr. Abhishek Salian, i/by Vidhi Partners, for Respondent No.3.

CORAM : SUNIL B. SHUKRE AND M.W. CHANDWANI, J.J.

RESERVED ON : 12TH SEPTEMBER, 2023.

PRONOUNCED ON : 23RD OCTOBER, 2023.

[THROUGH HYBRID SYSTEM . In Chamber . at 10:45 a.m.]

JUDGMENT : (Per SUNIL B. SHUKRE, J.)

1. By this petition, Union of India, through Ministry of Defence, Southern Command Composite Signal Regiment, has sought quashing and setting aside of Commencement Certificates issued by respondent no.2 to respondent no.3 dated 20th September 2011, 30th May 2014, 10th May 2016, 12th October 2018, 26th November 2018, 18th December 2018 and 15th July 2019 and has further sought a direction to respondent nos.1 and 2 to take steps to stop further construction activities on plot bearing CTS Nos.233, Plot Nos.1, 2, 3A, 3B, 4 and 5 at Lohegaon, Pune, which is in close proximity to the Unit of Southern Command Composite Signal Regiment (*"SCCSR" for short*), and to restrain respondent no.3 from carrying out any construction within 100 mtrs. from the boundary of the SCCSR of the petitioner and demolish the constructed structure or building.

2. There is a preliminary objection taken to this petition on the ground that there is an inordinate delay and there are laches in filing the same. We are of the view that though there is some delay and also laches, unexplained as they are, in filing the petition, they by themselves would not restrict this court in entertaining this petition in view of the plenary power of this court under Article 226 of the Constitution of India, which enables this court to entertain a plea even after a great delay, if it requires a decision on merit and the decision has significant bearing upon similar issue involving larger public interest. The issue involved in this petition is about violation of restrictive circulars issued by the Ministry of Defence, which is of public importance and, therefore, it would require a

decision on merit. In this regard, we would like to draw support from the observations of the Apex Court in the case of *Supertech Limited Vs. Emerald Court Owner Resident Welfare Association and Ors.*¹, wherein it is observed that illegal constructions, if they are there, have to be dealt with strictly to ensure compliance with the rule of law. For this reason, we are entertaining the petition, brushing aside the preliminary objection. Now, let us proceed to deal with the grievance of the petitioner, which arises from facts stated in brief in the following paragraph.

3. SCCSR is situated on a plot bearing Survey No.233A, which is a Defence plot and the plot is in possession of the Local Military Authorities or LMA i.e. SCCSR. Respondent no.3 having got necessary permissions and Commencement Certificate dated 8th August 2008 started construction of the building on CTS No.233, Plot Nos.1, 2, 3A, 3B, 4 and 5 at Lohegaon, Pune (***Plot of Respondent No.3*** for short) and when the construction was substantially made, petitioner noticed that the construction was in close proximity to the plot occupied by SCCSR so much so that the distance of plinth of the building from boundary of SCCSR was found to be merely 1.5 mtrs. and the distance of pillars of the building was found to be 9.5 mtrs. from the boundary of SCCSR. On further enquiry, the petitioner noticed that the construction activity was going on without No Objection Certificate (***NOC*** for short) of SCCSR Authorities.

¹ (2021) 10 SCC 1

4. According to the petitioner, respondent no.3 is constructing a 49 mtrs. high rise commercial building, namely, "Ganga Trueno", on plot of respondent no.3, near the boundary of SCCSR. The petitioner states that SCCSR is a Military Establishment and it has been set up for imparting various kinds of training to the soldiers, which ranges from basic discipline to the advanced weapon skills and so on and therefore, existence of a building so near the boundary of SCCSR endangers safety and security of the SCCSR and the training activities, which go on there. The petitioner submits that for such activities, a certain degree of confidentiality is required to be maintained. The petitioner further submits that because of the construction of the building on plot of respondent no.3, which is going on, there is also a threat created to the confidentiality of the activities of SCCSR.

5. Petitioner submits that the construction of the building "Ganga Trueno" cannot be made without prior NOC of SCCSR, which is required under the Guidelines issued vide circular dated 18th May 2011 issued for grant of NOC by Ministry of Defence, Government of India, as modified by the Circular dated 18th March 2015 and 17th November 2015, issued by the Ministry of Defence and further modified by the Circular dated 21st October 2016. Petitioner submits that respondent no.2 has, however, granted development permission and issued commencement certificates without requiring respondent no.3 to produce NOC from the petitioner and thus, the said guidelines are violated by respondent no.2 while issuing various sanctions to respondent no.3.

6. Petitioner submits that the construction activity of respondent no.3 was noticed by the petitioner in July, 2019 and, therefore, by the letter dated 16th July 2019, SCCSR informed its Head Quarter at Kirkee (*Khadki*) about it. Petitioner states that thereafter, Head Quarter, Kirkee sent a letter on 25th July 2019 to respondent no.3 along with copies of the said circulars requiring of respondent no.3 to submit NOC from the LMA i.e. SCCSR's Head Quarter at Kirkee, and making a request to respondent no.3 to not proceed with any further construction work. The petitioner states that it also approached Yerawada Police Station on 1st August 2019 for registration of complaint against respondent no.3, but, it was told that the petitioner would have to take up the issue with respondent no.2—the Planning Authority. The petitioner states that it also took up the issue with respondent no.2, but respondent no.2 informed it that the development permission has been granted as per the Development Control Rules of respondent no.2 and that there was also a NOC submitted by respondent no.3, which was issued by Indian Airports Authorities in relation to the aviation requirements. Petitioner submits that meanwhile there was a correspondence between SCCSR and Head Quarter Commandar and the petitioner also made another request to respondent no.3 to not go ahead with the construction of the building, but to no avail. On the contrary, the petitioner submits that respondent no.3 informed it that the construction of the building did not violate any of the distance restrictions under the said circulars, nor was there any requirement of respondent no.3 to obtain NOC from SCCSR. However, rejecting the stand of respondent no.3, SCCSR felt that its NOC was a must and accordingly, it

requested respondent no.2 to take steps for stopping the construction work, withdrawing the commencement certificates and demolishing the construction so far made. However, it is further submitted, respondent no.2 did not respond in any manner and, therefore, the petitioner has filed this petition with the prayers mentioned in para 1 of this judgment.

7. Respondent no.1 – the State of Maharashtra is a formal party and it has not filed any reply. Respondent no.2 submits that it has approved the building proposal of respondent no.3 in accordance with and in compliance with the mandate of Section 44 of the Maharashtra Regional & Town Planning Act, 1966 (*“MRTP Act” for short*) and Development Control Regulations of Pune and its record also shows that respondent no.3 submitted NOC from the Ministry of Defence, bearing Outward No.Air HQ/S. 17726/4/ATS(PC-MCMXXXIII) dated 28th August 2015 for building height of 18 mtrs. and Revised NOC from Ministry of Defence bearing Outward No.SWAC/S 2551/4/1/ATS dated 16th June 2017 for building height of 49.50 mtrs. and, therefore, the objection taken by the petitioner may not sustain in the eye of law. It further submits that even going by the circulars, relied upon by the petitioner, which are yet to culminate into any notification, one would find that the restrictions in those circulars are not applicable to the present case because the plans are sanctioned in the year 2008, prior to the issuance of the circular dated 18th May 2011. It submits that the circular dated 18th May 2011 is not applicable to the building permission granted before the date of circular, and here it is of the date of 8th August 2008. It

further submits that the circular dated 21st October 2016, which amends the circular dated 18th May 2011, would also not apply to the case in hand.

8. Respondent no.3 states that various projects similarly situated in the vicinity have not been objected to by the petitioner and, therefore, the petitioner is acting arbitrarily. It is further submitted that there is no security threat, in fact, to the SCCSR Unit by the construction of respondent no.3. It further submits that there is no condition mentioned in the Commencement Certificate dated 8th August 2008 requiring obtaining of NOC from the LMA. It is further submitted that since there is no condition stipulated in the Commencement Certificate dated 8th August 2018 regarding obtaining of NOC and since respondent no.3 has started construction by making huge investments, the doctrine of legitimate expectation applicable to case of respondent no.3 would prevent the petitioner from stopping the present construction. It is also submitted that third party rights are already created and now, if any interference in the construction is to be made and that too without hearing the third parties, in whose favour the flats have been allotted, grave prejudice would be caused to those persons.

9. Respondent no.3 further submits that the circular dated 18th May 2011 has been modified by the circular dated 18th March 2015, which clearly states that the circular dated 18th May 2011 is not applicable to the constructions which are made prior to issuance of the circular. It is further submitted that the circular dated 21st October 2016 is not applicable to the construction of

respondent no.3. It is further submitted that in any case the circulars are only internal instructions, not binding upon respondent no.3, or, for that matter, respondent no.2, and they do not have any force of law with these circulars having been issued without any declaration, as required under Section 3 of the Works of Defence Act, 1903 (*"Defence Act"* for short). On these grounds, the respondent no.3 seeks dismissal of the petition.

10. Mr. Anil Singh, learned Additional Solicitor General of India (*"ASGI"* for short), has submitted that security threat perception of the LMA like Commandar of SCCSR is what matters ultimately in such cases and since the construction that is going on is very near to the boundary of SCCSR, it violates the mandate of Circular dated 18th May 2011, as modified by the later circulars. He submits that vital training programmes are conducted at SCCSR and their confidentiality is required to be maintained. He submits that, taking into consideration such special requirements of SCCSR, the circular dated 21st October 2016 issued by the Ministry of Defence imposes certain security restrictions in respect of SCCSR prohibiting any construction or repair activity within 10 mtrs. from the boundary of SCCSR. He further submits that, considering the security requirements of Defence Establishments like SCCSR, the circular dated 18th May 2011, as modified from time to time, would require respondent no.3 to obtain NOC from it, but the same has not been obtained by respondent no.3. He submits that it was also necessary for respondent no.2 to insist upon respondent no.3 to obtain such NOC but respondent no.2, in violation of the security restrictions

imposed by the said circulars, granted various permissions and sanctions and also issued commencement certificates from time to time. Learned ASGI further submits that certain amendments to the Defence Act are under consideration and till those amendments are introduced legislatively, the executive instructions issued by the aforesaid circulars would be binding upon all authorities including respondent nos.2 and 3. He relies upon some case law.

11. Dr. Milind Sathe, learned Senior Advocate for respondent no.3 submits that the circular dated 18th May 2011 has been modified by the circular dated 18th March 2015 by adding a proviso under paragraph 1(b) of the circular dated 18th May 2011, which is to the effect that NOC from Local Military Authority / Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent Local Municipal Authority prior to 18th May 2011 i.e. the date of the circular. He further submits that the circular dated 18th May 2011 was further amended by the circular dated 17th November 2015, but the amendment that was made was of different nature, whereby a second proviso under paragraph 1(b) of the circular dated 18th May 2011 was added and it did not change the first proviso added to the circular dated 18th May 2011 by the circular dated 18th March 2015. He further submits that the circulars dated 18th May 2011, 18th March 2015 and 17th November 2015 were further amended by the circular dated 21st October 2016, but even the circular dated 21st October 2016 did not change the position which was brought into effect by circular dated 18th March 2015, whereby circular dated

18th May 2011 was not made applicable to the construction for which permission had been issued by the competent Municipal Authority prior to 18th May 2011. He thus submits that all these circulars would only show that to the construction for which permission has been granted by the Planning Authority before 18th May 2011, there would be no requirement of NOC to be brought from the LMA or Defence Establishment. He submits that, in the present case, it is not in dispute that the first commencement certificate was issued by the Municipal Corporation, i.e. respondent no.2, on 8th August 2008 and that was the starting point of the construction, even as per the stand of respondent no.2. He further submits that it is for this reason that the construction of respondent no.3 is not at all affected by the circular dated 18th May 2011 and if that is so, the further circular dated 17th November 2015 would not affect the construction of respondent no.3. Thus, learned Senior Advocate for respondent no.3 submits that there is no justification whatsoever for the petitioner to seek cancellation of the commencement certificates, stopping of further construction work and demolition of the construction already made.

12. Dr. Sathe, learned Senior Advocate for respondent no.3 submits that, even otherwise, the said circulars, even if construed as executive instructions though they are not, would not have any applicability to the present case for the reason that the field of placing of restrictions upon right to enjoy property is already occupied by the Defence Act and there being no declaration whatsoever issued by the Government of India in exercise of its powers under Section 3 of

Defence Act, he further submits, in the absence of any such declaration, executive instructions cannot be pressed into service for taking away right to enjoy property.

13. Mr. Girish Godbole, learned Senior Advocate for the applicants-intervenors, supporting respondent no.3, submits that the intervenors are some of the third parties who are suffering due to interim order passed by this court on 7th April 2021, issuing a direction to restrain the respondent no.2 from issuing an occupancy certificate. He submits that these applicants have booked commercial premises in the project "Ganga Trueno" and have executed registered Articles of Agreement with respondent no.3 for purchase of the commercial premises. He further submits that these applicants paid a total consideration of Rs.3,98,49,000/- and that was after obtaining substantial loan of Rs.3 crores in total from Janaseva Sahakari Bank, Pune. He submits that on the one hand, these applicants are under a liability to pay monthly installments to the bank towards repayment of the loan amounts taken by them and on the other, these applicants are unable to get the commercial premises in view of the order passed by this court on 7th April 2021. He further submits that these applicants, though necessary parties, have not been deliberately joined as party-respondents to this petition and, therefore, he submits that this petition is liable to be dismissed for non-joinder of necessary parties. He submits that the order dated 7th April 2021 deserves to be recalled. He also prays for issuance of direction to respondent no.2

for issuing occupancy certificate in respect of the commercial premises agreed to be purchased by these applicants.

14. As regards the contention that this petition should be dismissed for non-joinder of necessary parties, we would say that we are not upholding the contention as after having granted hearing to the intervenors, the element of prejudice to them is removed and, therefore, the contention is rejected.

15. Now, we would deal with the main controversy as revealed by the rival arguments, for which purpose it would be necessary for us to examine the contents of the circulars relied upon by the petitioner and their overall effect upon the construction undertaken by the respondent no.3.

16. The whole objection of the petitioner hinges upon circular dated 18th May 2011, which contains guidelines for issuance of No Objection Certificate for building construction. It would be convenient if the circular is reproduced here. It reads thus;

*"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 (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 higher authorities now below the rank of Brigadier or equivalent within four months of receipt of such request or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to the State Government agencies or to the Municipal Authorities, and under no circumstances, shall be conveyed to builders / private parties.*
- (b) Where the local municipal laws do not require, yet the Station Commander feels that any construction coming up within 100 mtrs. (for multi-storey building of more than four storeys, the distance shall be 500 mtrs.) radius of Defence Establishment can be a security hazard, it should refer the matter immediately to its next higher authorities 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 the higher authorities, if need be through AHQ/MOD.

- (c) Objection / views / NOC shall not be given by any authority other than the Station Commander to the local municipality or State Government agency 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 / Notifications viz., Cantonments Act, 2006, Aircraft Act, MOCA, 1934, Gazette Notification S.O. 84(E) dated 14-01-2011 (as revised from time to time), Works of Defence Act, 1903, etc. In such cases, provisions of the concerned Act / Notification will continue to prevail.

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

Copy to :

DGDE; Coast Guard HQ;

CGDA; DGQA; OFB [through D(Fy-II)]"

17. A bare perusal of the above referred circular dated 18th May 2011 would show that where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander, in the manner laid down in paragraph 1(a) of the circular, may convey his views. It further lays down that by following the said procedure, approval could be granted and if it is not granted, the objection or views would be conveyed to the State Government agencies or Municipal Authorities and not to the builders or

private parties. It further lays down that where local municipal laws do not require any such consultation and yet the Station Commander feels that any construction coming up within 100 mtrs. or in case a multi-storey building of more than four storeys is within 500 mtrs. radius of Defence Establishment and is a security hazard, the Station Commander shall refer the matter immediately to his next higher authority in the chain of command and then the higher authority may inform its opinion or command to the Station Commander, who shall, in turn, convey the same to the State Government or the Local Authorities.

18. It is the contention of learned ASGI that the present case is covered by the guidelines contained in paragraphs 1(a) and also 1(b) of the said circular dated 18th May 2011 because it falls within 100 mtrs. radius of the boundary of SCCSR and it is these guidelines which mandate obtaining of NOC by respondent no.3 from the petitioner. He also submits that these guidelines mandated respondent no.2 to stipulate the condition in the first Commencement Certificate dated 8th August 2008 regarding obtaining of NOC by respondent no.3 from the petitioner. He also relies upon Regulations 13.1(a), (d) and (e) of the Development Control and Promotion Regulations for Pune Municipal Corporation (*"DCPR-2017" for short*).

19. Insofar as clauses (a), (d) and (e) of Regulation 13.1 of DCPR-2017 are concerned, we do not think that they require any NOC to be obtained from LMA or Defence Establishment before granting any development permission. These

clauses illustrate the sites, which are not eligible for construction of a building and these sites are such as (i) are insanitary or incapable of being well drained or dangerous to construct a building on it; (2) to become a source of annoyance to the health and comfort of the inhabitants of the neighbourhood when used for construction of a building; (3) where the building, when constructed, would not conform to the land use proposals in the development plan or Zoning Regulations.

20. It is thus clear that the sites covered by the aforesaid clauses are basically those which are not eligible for construction of a building and, therefore, there is no question of granting of any development permission for construction of any building on such sites. These provisions do not refer to grant of development permission after obtaining of NOC. Apart from that, these sites do not refer to any Defence Establishment situated nearby. Therefore, we are of the view that, by virtue of the aforesaid provisions made in Regulation 13.1 of DCPR-2017, the present case would not be governed by the requirement of paragraph 1(a) of the circular dated 18th May 2011.

21. As regards requirement of paragraph 1(b) of the circular dated 18th May 2011, we find that it does not say that any NOC should be obtained by the land owner making construction or any application for grant of NOC should be made by such a person. It only says that if the Station Commander is of the opinion that any construction coming up within 100 mtrs. or 500 mtrs. (for multi-storey

building of more than four storey) within radius of Defence Establishment is a security hazard, the Station Commander may seek opinion of the higher authority in the chain of command and if higher authority is convinced that the construction is objectionable, it may, through the Station Commander, convey its objection or views to the LMA or the State Government, expecting some action to be taken by the Municipal Authority or the State Government. It further says that if no cognizance of the objection is taken, the matter may be taken up with the higher authorities. It does not say about the consequence of not accepting the objection of the LMA regarding such construction activity by the Municipal Authority or the State Government. Here again there is no requirement of prior NOC being obtained by the land owner making construction in the vicinity of the Defence Establishment.

22. It, therefore, follows that the guidelines stated in para 1(b) of the circular dated 18th May 2011 by themselves do not impose any direct restriction upon undertaking construction of any building within the distances of 100 mtrs. or 500 mtrs. from the Defence boundary, as the case may be, and they only give authority to the Commanding Officers, in the facts and circumstances of each case, to take an objection or to take an appropriate decision. They also do not give any clear guidance as to what course of action in law may be taken by the Defence Authorities when objection is taken and not accepted by the State Government or LMA. There is no clarity in these guidelines, if or not the Defence Authorities would get any right to stop the construction work and also seek its

demolition. Even if it is assumed, for the sake of argument, that once an objection to the construction being made in the vicinity of Defence Establishment goes unheard by the State Government or the Municipal Authority, the LMA would get a right to stop the construction and even seek its demolition; still it would have some restrictive operation in view of the circular dated 18th March 2015. Let us, therefore, consider the circular dated 18th March 2015, relevant paragraph of which is extracted as here-in-below :-

“2. The recommendations arising from the review undertaken have been duly considered by the Ministry and it has been decided to modify the aforementioned Circular dated 18.05.2011 by adding a proviso under para 1(b) to the effect that NOC from LMA/Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent local municipal authority prior to 18.05.2011 (date of circular). However, this proviso shall not apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 18.05.2011.”

23. The above addition of proviso to paragraph 1(b) of the circular dated 18th May 2011 would make it clear that circular dated 18th May 2011 is not applicable to the construction of a building for which permission has been granted by the competent Municipal Authority prior to 18th May 2011. In this sense, the right to stop construction, which we are assuming for the sake of argument, is restricted only to constructions for which development permission is

granted post 18th May 2011 circular. In the present case, permission to the construction of the building “Ganga Trueno” was granted in the year 2008, when the Commencement Certificate, in terms of Section 44 of the MRTP Act, was issued on 8th August 2008. That being so, it is now clear that the present construction work of the building “Ganga Trueno” is not affected by the circular dated 18th May 2011 in any case and, therefore, it would not be necessary for respondent no.3 to obtain NOC from SCCSR for going ahead with the construction in terms of the circular dated 18th May 2011 read with circular dated 18th March 2015. Respondent no.2 has also admitted in it’s reply that the permission for starting of construction of the building “Ganga Trueno” came with Commencement Certificate dated 8th August 2008 and that only means that for completing the construction of the building “Ganga Trueno”, no NOC from the authorities of SCCSR is required.

24. Circular dated 18th May 2011 has been further modified by the circulars dated 17th November 2015 and 21st October 2016. But, these circulars, upon their careful perusal, only show that one additional proviso as “second proviso to paragraph 1(b)” of the circular dated 18th May 2011 and some additional restrictions have been introduced to circular dated 18th May 2011 by way of amendments. These amendments are only in respect of the addition, as suggested in circular dated 17th November 2015, and additional security restrictions, as suggested in clauses (a) and (b) of paragraph 2 of the circular dated 21st October 2016. But, they are not in supersession of the circular dated 18th May 2011 or

the circular dated 18th March 2015 and, therefore, the first proviso added by circular dated 18th March 2015 below paragraph 1(b) of the circular dated 18th May 2011 remains unaffected. That would show that the exemption granted to the buildings constructed or being constructed as per the permission granted before 18th May 2011 shall continue to operate. That means, even under the circulars dated 17th November 2015 and 21st October 2016, no NOC is required where development permission is granted before 18th May 2011. As stated earlier, permission for making construction of the building “Ganga Trueno” in the present case came with Commencement Certificate of 8th August 2008 and, therefore, the present construction is out of the purview of the circular dated 18th May 2011, read with circular dated 18th March 2015, and also the circulars dated 17th November 2015 and 21st October 2016.

25. There is one more circular dated 4th February 2016, issued by the Urban Development Department, Mantralaya, Mumbai, which states that the first proviso to paragraph 1(b) of the circular dated 18th May 2011, added thereto by the circular dated 18th March 2015, shall not apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 2011. This circular speaks of only the amendment made to the construction with regard to height and, therefore, it would have its application where there are height restrictions. In the present case, the basic circular is of 18th May 2011, which speaks about obtaining of comments from the Defence Authorities before construction permission is granted in case of a building having

particular storeys. Same is true about the circulars dated 18th March 2015 and 17th November 2015. The circular dated 21st October 2016 does speak about height of the building, not in terms of height restrictions but in terms of the distance of the building from the Defence boundary, and says that for a building which is of less than four storeys and which is situated within 100 mtrs. radius of Defence boundary, NOC is required and for a building, which comprises four storeys or more, which is situated within 500 mtrs., NOC would be required. The circular dated 21st October 2016 does not impose any height restrictions as such, but takes a particular height of the building; for example, a building having four storeys or more and a building having less than four storeys as the relevant criteria for determining the requirement of NOC. The criteria is that lesser is the distance from the Defence boundary, lesser is the height of building, which would require compliance and higher is the height of the building, higher is the distance from the Defence boundary which would require compliance or obtaining of NOC. But, in the present case, the height of the building has not been increased after 17th November 2015 and, therefore, the said circular of the Government of Maharashtra would have no relevance to the facts of the present case. We are, therefore, of the opinion that the circular dated 4th February 2016 of the Government of Maharashtra would have no relevance in the present case.

26. There is one more circular dated 7th November 2016 issued by the Government of Maharashtra, which reiterates the instructions given by the Ministry of Defence vide it's circular dated 21st October 2016. We have already

held that insofar as the requirement of NOC in the present case is concerned, the circular dated 21st October 2016 does not lay down that the NOC would be required even for construction of a building, the permission for which has been granted prior to the circular dated 18th May 2011, read with circular dated 18th March 2015, and that height of the building has not been increased after 17th November 2015. Thus, even this circular would have no significance for the purposes of the present case. Same is the position about the circular dated 20th April 2016 issued by the Government of Maharashtra.

27. There is yet another circular dated 23rd December 2022, which has been issued in supersession of the guidelines issued vide circulars dated 18th May 2011, 18th March 2015, 17th November 2015 and 21st October 2016, regarding grant of NOC from the LMA. This circular contains some modified guidelines, but we need not take their cognizance for the reason that paragraph 2(iii) thereof clearly states that NOC from LMA / Defence Establishment would not be required in respect of a construction for which permission was issued by the competent authority prior to 18th May 2011, though it also clarifies that NOC would be required, if there is a proposal for amendment of the construction permission with regard to height. In the present case, it is an established fact, as seen from the reply of the Competent Authority, i.e. respondent no.2, that there is no amendment sought to the construction permission with regard to height by respondent no.3 prior to 23rd December 2022. Therefore, the circular dated 23rd December 2022, which has been issued in supersession of the aforesaid

circulars and which does not provide for any retrospective operation, will have no application to the facts of the present case.

28. Thus, we find that even going by the own contentions of the petitioner, the construction of the building “Ganga Trueno” is not, in any manner, affected by the circular dated 18th May 2011 or the later circulars issued by the Government of India and Government of Maharashtra and, therefore, we are of the opinion that there is no merit in this petition.

29. Learned ASGI has relied upon the observations of a Coordinate Bench of this Court at Nagpur in the case of *Sri. Aurobindo Society, through it's Secretary Sunil Wasudeorao Badwe, Dharampeth, Nagpur Vs. Union of India, Ministry of Defence, New Delhi and Ors.*¹ to say that the circular dated 21st October 2016 has been kept in abeyance by the Army Authorities and, therefore, the present case would be governed by the communication dated 23rd February 2023 issued by the Director (Lands), Ministry of Defence. We are of the considered view that these observations, made in paragraph 6 of the Judgment, would be of no assistance to the case of the petitioner for the reason that the basic circular, which would have otherwise applied to the facts of the present case, is itself not applicable and if there is any communication issued subsequently on 23rd February 2023, that communication would have no connection to the facts of the case as it would have it's effect only prospectively.

¹ Writ Petition No.1850 of 2023 decided on 19th July 2023

30. There is one more perspective from which the controversy involved in the present case is required to be examined. All the circulars above referred to, which are issued by the Ministry of Defence, are in the nature of guidelines and none of them appears to be issued in the name of the “President”. Article 77(1) of the Constitution of India mandates that all executive actions of the Government of India shall be expressed to be taken in the name of the “President”. Similar were the facts involved in the case of *Jambo Plastics Pvt. Ltd. and Anr. Vs. Chief Quality Assurance Establishment (Warship Equipment), Ministry of Defence, Bangalore and Ors.*¹, before the learned Single Judge of the Karnataka High Court, where the circular in question, the same circulars dated 18th May 2011, 17th November 2015 and 21st October 2016, not issued in the name of the President, were at issue. In that case, the question was as to whether the circulars dated 18th May 2011, 17th November 2015 and 21st October 2016 constituted an order affecting right of the parties or not? The learned Single Judge, relying upon the decision of the Apex Court in the *State of Uttaranchal and Anr. Vs. Sunil Kumar Vaish and Ors.*², held that these circulars or guidelines not having been issued in the name of the President, as required under Article 77(1) of the Constitution of India, could not be relied upon by the Union Government to impose any restrictions as long as the Works of Defence Act, 1903 was in operation and was not amended. The learned Single Judge in his judgment reproduced the relevant observations of the Apex Court in the said case of *State of Uttaranchal (Supra)*, which read thus :-

1 *Writ Petition No.40510 of 2017, decided on 29th August 2023*

2 *(2011) 8 SCC 670*

“24. The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2)...”

31. Having regard to the aforestated observations of the Apex Court, which have been followed by the learned Single Judge in the case of *Jambo Plastics Pvt. Ltd. (Supra)*, we have no hesitation to hold that all the aforestated circulars, which have been relied upon by the petitioner, not having been issued in the name of the President, as mandated by Article 77(1) of the Constitution of India, have not culminated into an order affecting right of the petitioner to enjoy his property as per his free will, subject to limitations of law. These circulars, which have been relied upon by the petitioner, would not, therefore, confer any right upon the petitioner to seek any prohibition upon ongoing construction and even demolition of the construction of the building already made.

31. There is yet another aspect of the matter which we must take into consideration. In the case of *Dolby Builders Pvt. Ltd. and Anr. Vs. The Municipal Corporation of Greater Mumbai and Ors.*¹, the issue involved was about power of the Union of India to curtail right to enjoy property of land owners situated in the vicinity of Defence Establishments by imposing restrictions thereupon by the executive instructions. This court, while deciding the issue, took into

¹ OOCJ Writ Petition No.2724 of 2021 – decided on 27th September 2023

consideration the nature of the right to property, a constitutional and human right, as explained in the following cases :

- *B.K. Ravichandra and Ors. Vs. Union of India and Ors.*¹
- *Delhi Airtech Services Pvt. Ltd. Vs. State of U.P.*²
- *State of Rajasthan Vs. Basant Nahata*³
- *T. Vijayalakshmi and Ors. Vs. Town Planning Member and Anr.*⁴
- *Hari Krishna Mandir Trust Vs. State of Maharashtra and Ors.*⁵
- *Runwal Constructions Vs. Union of India, through Ministry of Defence and Ors.*⁶
- *Satwaratna Co-op. Housing Society Ltd. & Anr. Vs. Bharat Petroleum Corporation Ltd. & Ors.*⁷

32. This court, considering the above referred law, held that right to property under Article 300A of the Constitution of India is a valuable right, equated with a human right, and it enables a property owner to enjoy his property as per his free will, though within the limits of law operating in the field. This court further took the view, in deference to the said case law, that right to property under Article 300A of the Constitution of India includes right to construct a building and if any restrictions are to be imposed upon the same, it can be done only by authority of the law. This court, following the law laid down by the Apex Court in the case of

1 2020 SCC OnLine SC 950

2 (2011) 9 SCC 354

3 (2005) 12 SCC 77

4 (2006) 8 SCC 502

5 (2020) 9 SCC 356

6 2021 SCC OnLine Bom 668

7 2022 SCC OnLine SC 703

*Bishambhar Dayal Chandra Mohan and Ors. Vs. State of Uttar Pradesh and Ors., along with connected matters*¹, held that no person can be deprived of his property save by authority of law and the deprivation of property must come under the authority of law and that the word “law” in the context of Article 300A must mean an Act of Parliament or of a State Legislature or a Rule or a Statutory Order having the force of law, which is a State-made law or a positive law. This court then held, considering the judgment of the Apex Court in the case of *P.H. Paul Manoj Pandian Vs. P. Veldurai*², that when a Central or a State Legislation occupies the field, the field of placing restrictions upon right to enjoy land or property situated in the vicinity of Defence Establishments, no restrictions can be imposed upon right to enjoy property by a mere executive instruction and if at all they are to be imposed, they must be imposed by following the procedure prescribed in the legislation occupying the field.

33. This court, in *Dolby Builders Pvt. Ltd. (Supra)*, also distinguished the cases of *S.S.V. Developers and Ors. Vs. Union of India, through Ministry of Defence and Ors.*³, *Sunbeam Enterprises Vs. Municipal Corporation of Greater Mumbai and Ors.*⁴ and *TCI Industries Ltd. Vs. Municipal Corporation of Greater Mumbai and Ors.*⁵ relied upon by Ministry of Defence and held that those cases would not be applicable to the facts of the case in hand. These cases are also referred to by the petitioner here. But, the situation of this case, on facts and law, being

1 (1982) 1 SCC 39

2 (2011) 5 SCC 214

3 2013 SCC OnLine Bom 1602

4 2019 SCC OnLine Bom 1059

5 2011 SCC OnLine Bom 1671

substantially similar as that of *Dolby (Supra)*, these cases would not be applicable here for the same reasons as stated in *Dolby (Supra)*.

34. There were some other cases which were relied upon in *Dolby (Supra)*.

These cases are as under :-

- *Hindustan Petroleum Corporation Ltd. Vs. Municipal Corporation of Greater Mumbai*¹,
- *Oswal Agro Mills Ltd. Vs. Hindustan Petroleum Corporation Ltd. and Ors.*²,
- *Gorakhnath Shankar Nakhwa and Ors. Vs. Municipal Corporation of Greater Mumbai and Ors.*³,
- *Union of India, through Indian Army Vs. State of Maharashtra, through Urban Development Department and Ors.*⁴
- *Vikram Delite Co-operative Housing Society and Ors. Vs. Union of India, through the Ministry of Defence and Ors.*⁵.

35. The aforestated cases are also relied upon by the petitioner in the present case. These cases were found to be of not any assistance to the Ministry of Defence in the case of *Dolby (Supra)* in view of the fact that a Central Legislation was occupying the field and, therefore, curtailment of right to property could not have come through the executive instructions. Similar is the position here and, therefore, the said cases would render no assistance to the petitioner here.

1 2012 SCC OnLine Bom 560

2 (2014) 2 SCC 491

3 2022 SCC OnLine Bom 6703

4 2016 SCC OnLine Bom 2570

5 2022 Bom OnLine 6700

36. In *Dolby (Supra)*, this court also considered the provisions of the Works of Defence Act, 1903 and held that it was a comprehensive legislation and a complete Code dealing with the restrictions to be imposed upon the use and enjoyment of land in the vicinity of Works of Defence Act and, therefore, the procedure, as prescribed therein for imposing restrictions and also compensating the property owner for such restrictions, must be followed and this cannot be done by any executive instructions. The relevant observations of this court are to be found in paragraph 38 of the judgment in *Dolby Builders Pvt. Ltd. (Supra)*, which paragraph is reproduced as below :-

38. The sum and substance of the above referred discussion is that now it is well settled law that when a Central or State legislation occupies the field; in the present case, the field is of placing of restrictions upon use and enjoyment of land or property situated in the vicinity of Defence Establishments, including Naval Establishments, such restrictions cannot be imposed by a mere executive fiat and if at all they are to be imposed, they must be imposed by following the procedure prescribed under the legislation occupying the field; in the present case the Act 1903, and that deprivation of right to property or curtailment of the right to property, as envisaged under Article 300A of the Constitution of India, can be done only under the authority of law and the word “law”, in the context of Article 300A, must mean an Act of Parliament or a State legislature, or a rule or a statutory order, having the force of law, which, in

other words, is a State-made law or a Positive Law¹ as per the theory of Legal Positivism propounded by Scholars Jeremy Bentham and John Austin.”

37. In the present case, we have found that the aforestated circulars of the Ministry of Defence are not even in the nature of executive instructions. Rather, they fall under a category of only departmental circulars binding upon the officers of the department and not the outsiders or third parties. This category is even below the category of executive instructions of the Central Government, which instructions would operate until otherwise provided by Parliament, as provided under Article 73(2) of the Constitution of India. It would then follow that the law applicable to the executive instructions in a case where the field is already occupied by the Central Legislation, as in the present case, would be applicable with even greater force to the office circulars which are not issued in the name of the “President”, contrary to mandate of Article 77(1) of the Constitution of India. For this reason also, the aforestated circulars cannot be relied upon by the petitioner so as to make an attempt to restrict the right of the petitioner to enjoy it’s property, which includes right to make construction in accordance with the permission granted in that regard by the Competent Authority, which permission is already granted to the petitioner way back on 8th August 2008.

38. We thus find that there is no merit in the petition. The petition stands dismissed. The interim order dated 7th April 2021 is vacated. Respondent No.2 is

¹ See ‘Positive Law’, Black’s Law Dictionary (5th Edn.), West Publishing Co. 1979

directed to issue occupancy certificate in accordance with law within eight weeks from the date of the judgment.

39. Interim Application No.1553 of 2021 is disposed of in the above terms.

(M.W. CHANDWANI, J.)

(SUNIL B. SHUKRE, J.)