

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10699 OF 2022

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| 1. Trinity Landmarks LLP, | |
| A Limited Liability Partnership, | |
| registered under the Limited Liability | |
| Partnership Act, 2010, | |
| bearing Registration No.AAA2431, | |
| A-102, ICC Trade Tower, | |
| Senapati Bapat Road, Pune – 411 016. | |
| 2. Shravan Agarwal, | |
| Designated Partner of Trinity Landmarks LLP, | |
| having its office at : A-102, ICC Trade Tower, | |
| Senapati Bapat Road, Pune – 411 016. | .. Petitioners |

Versus

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|---|--|
| 1. State of Maharashtra, | |
| Through the District Collector, Pune, | |
| Revenue Branch. | |
| 2. Pune Metropolitan Region Development Authority, | |
| Through its Chief Executive Officer, | |
| S.No.152-153, Maharaja Sayajirao Gaikwad | |
| Udyog Bhavan, Aundh, Pune – 411 007. | |
| 3. Union of India, | |
| Through Secretary, Ministry of Defence, | |
| 101-A, South Block, New Delhi – 110011 | |
| and | |
| Aayakar Bhavan, 2 nd Floor, Maharshi Karve Road, | |
| New Marine Lines, Mumbai 400 020. | |

4. Ministry of Civil Aviation, |
Corporate Head Quarters, Rajiv Gandhi Bhavan, |
Safdarjung Airport, Block-A, New Delhi-110003. |
and |
Aayakar Bhavan, 2nd Floor, Maharshi Karve Road, |
New Marine Lines, Mumbai 400 020. |
5. Chief of Air Staff, |
Air Headquarters, Indian Air Force, |
Vayu Bhawan, Rafi Marg, New Delhi – 110 106. |
6. Air Officer, Commanding-in-Chief, (“AOC-in-C”), HQ, |
South Western Air Command, |
Vayu Shakti Nagar (VSN), Lekawada, |
Gandhinagar, Gujarat – 382 009. |
7. Air Officer Commanding, |
Air Force Station, Lohegaon (ATS Section), |
Pune – 411 032. | .. Respondents

Dr. Milind Sathe, Senior Advocate, with Mr. Saket Mone, Mr. Subit Chakrabarty and Mr. Abhishek Salian, i/by Vidhii Partners, for the Petitioners.

Mr. Y.D. Patil, AGP for Respondent No.1-State.

Mr. Vijaykumar Dhakane, with Mr. Dinesh Adsule, for Respondent No.2-PMRDA.

Mr. Devang Vyas, Additional Solicitor General, with Mr. Pranav Thackur, for Respondent Nos.3 to 7.

CORAM : SUNIL B. SHUKRE AND RAJESH S. PATIL, J.J.

RESERVED ON : 8TH AUGUST, 2023.

PRONOUNCED ON : 20TH OCTOBER, 2023.

[In Court : At 2.30 p.m.]

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

1. RULE.

2. The petitioner no.1, a Limited Liability Partnership Firm, is the owner of the lands, the survey numbers of which are mentioned in paragraph no.(2.2) of the petition, situated at Bhugaon, Taluka Mulshi, District Pune (***“Subject Lands” for short***) and the petitioner no.2 is a Designated Partner of petitioner no.1–Firm.

3. The petitioners have commenced the development of the subject lands, which is a residential project under the name of “115 Hilltown”, (***“Petitioners’ Project” for short***), some time in or around the year 2014, after obtaining necessary approvals and permissions from respondent no.1, the then Planning Authority. Respondent no.1 issued a Commencement Certificate dated 23rd June 2014 for commencement of the Petitioners’ Project and accordingly, the petitioners started construction of structures in their Project. They completed construction upto plinth level in the month of July, 2016.

4. The grievance of the petitioners is that even though they are not required to obtain a No Objection Certificate (***“NOC” for short***), under Notification No.GSR 751 (E) dated 30th September 2015 (***“2015 Notification” for short***), they are being compelled to obtain NOC from respondent nos.4 to 7. The petitioners submit that this requirement was orally communicated to them, for the first time, only in the year 2016 and it was formally communicated to them in writing about two years thereafter i.e. when Plinth Checking Certificate dated 1st November 2018, which

imposed the condition of obtaining of NOC, was issued to them. The petitioners submit that as a result of the said condition, which was, in fact, not applicable to the Petitioners' Project, the petitioners are unable to proceed with the construction beyond plinth level. The petitioners submit that they were also coerced into furnishing an undertaking dated 12th September 2018, after the passage of four years from issuance of Commencement Certificate, for submission of NOC by them.

5. The petitioners state that when they approached respondent nos.3 to 7 for grant of NOC, their request was rejected vide communications dated 22nd March 2018, 9th May 2018, 17th May 2019, 27th November 2020 and 10th August 2022 (*"the impugned communications"*).

6. The petitioners submit that in a meeting chaired by the Chief Operations Officer of the Air Force Station, Lohegaon, held on 26th November 2019, it was clarified that the requirement of obtaining of NOC under 2015 Notification would not apply to the projects which fell within the exception of clause 1.8 of Annexure-II to the Notification dated 14th January 2010 issued by respondent no.4 (*"2010 Notification" for short*), which included the Petitioners' Project and which fact has also been acknowledged by respondent no.2 in its communication dated 10th June 2020.

7. According to the petitioners, though their Project is situated at a distance of 19.40 kms. from Lohegaon Airport at Pune, their Project is not affected by

2010 Notification, as the permissible height of the structures falling within the radius of 20 kms. from Lohegaon Airport is upto 150 mtrs. above elevation point of Lohegaon Airport at 592 mtrs. Above Mean Sea Level (***“AMSL” for short***) and the height of the Petitioners’ Project is 742 mtrs., which includes elevation of 592 mtrs. AMSL of the Lohegaon Airport. They submit that the height of a structure, as per 2010 Notification, is required to be calculated with reference to the point of AMSL elevation of the notified airport like Lohegaon Airport and the Reference Point Elevation of Lohegaon Airport, Pune is 592 mtrs. AMSL.

8. The petitioners submit that at the time when all the permissions were granted to the petitioners for construction of their Project and even the commencement certificate was issued, 2015 Notification was not in existence, which, for the first time, covered National Defence Academy (***“NDA” for short***) airfield, and, therefore, the request of the petitioners for grant of NOC could not have been rejected by respondent nos.4 to 7 by applying 2015 Notification to the Petitioners’ Project. They also submit that, even otherwise, the Petitioners’ Project is squarely covered by the “Savings” clause i.e. clause 16 of 2015 Notification and the “Statement of Reasons” of 2015 Notification, which specifically exclude things done or omitted to be done prior to coming into force of 2015 Notification.

9. Petitioners submit that in spite of there being a clear case existing in favour of the petitioners showing that the petitioners are not required to obtain any NOC from respondent nos.4 to 7, the petitioners are being compelled to obtain the same and when the petitioners made an effort to obtain the same from

respondent nos.4 to 7, the petitioners were denied the NOC, which action of respondent nos.4 to 7, as submitted by the petitioners, is arbitrary and illegal. The petitioners have prayed for quashing of such arbitrary and illegal action on the part of respondent nos.3 to 7.

10. Respondent no.2 – Pune Metropolitan Region Development Authority is the present Planning Authority for the purpose of the Petitioners’ Project. It has opposed the petition and has submitted that obtaining of NOC by the petitioners from respondent nos.3 to 7 is necessary in the present case. Respondent nos.3 to 7 have also contested the petition stating that obtaining of NOC by the petitioners is necessary in the present case. They submit that 2010 Notification was in public domain and it applies to the Petitioners’ Project and, therefore, obtaining of NOC under the 2010 Notification and also 2015 Notification is a must for the petitioners. They submit that 2015 Notification has been issued in continuation of 2010 Notification and the Petitioners’ Project is not at all covered by its “Savings” clause i.e. clause 16 of 2015 Notification. Thus, these respondents submit that there is no merit in the petition.

11. Dr. Milind Sathe, learned Senior Advocate for the petitioners submits that the petitioners were not required to obtain any NOC from respondent nos.3 to 7 as the construction of the structures in the Petitioners’ Project, as per the development permission granted by the then Collector, Pune vide Commencement Certificate dated 23rd June 2014, would have a maximum height of 148 mtrs. from the reference datum, which was the point of elevation at 592

mtrs. AMSL of Lohegaon Airport, thereby making the total height to 740 mtrs. (592 mtrs. + 148 mtrs.). He submits that this height being below the permissible height of 742 mtrs. AMSL (592 mtrs. + 150 mtrs.), in terms of clause (1.8) of Annexure – II, read with item no.22 of Annexure–IIIC (*List of Defence Aerodromes*) of 2010 Notification, the Petitioners' Project did not require any NOC under 2010 Notification. He further submits that it was only after the change of Planning Authority and respondent no.2 taking over the charge as Planning Authority for the areas located at Bhugaon, Taluka Mulshi, District Pune, where the Petitioners' Project is situated, that the requirement of obtaining of NOC from respondent nos.3 to 7 in terms of 2015 Notification was prescribed by respondent no.2-Planning Authority. He points out that respondent no.2, at the time of issuance of Plinth Checking Certificate dated 1st November 2018 stipulated a condition for the first time that the petitioners should obtain NOC from respondent nos.3 to 7 in terms of 2015 Notification and the petitioners were even coerced to submit an undertaking that they would obtain such NOC, though the undertaking that was given by the petitioners was subject to the condition that such NOC would be obtained by the petitioners in case Aviation NOC is made applicable to all projects sanctioned prior to 2015 Notification. He submits that it was only thereafter that the petitioners approached respondent nos.3 to 7 with a request to issue NOC, if any, while explaining to them that no NOC for execution of Petitioners' Project was required under 2015 Notification. He submits that respondent nos.3 to 7 were informed by the petitioners that the height of their Project was below maximum permissible height of 150 mtrs. from

reference datum i.e. 742 mtrs. (592 mtrs. AMSL + 150 mtrs.). He further submits that the petitioners also informed respondent nos.3 to 7 that, even otherwise, their Project was protected by “Shielding” principle i.e. clause (4) under 2010 Notification. He further submits that, with all these explanations, the NOC was sought from respondent nos.3 to 7, but, the request was rejected by their communication dated 22nd March 2018 for the reason that *“the proposed construction infringes Obstacle Limitation Surface with respect to NDA airfield”*.

12. Learned Senior Advocate for the petitioners further submits that the petitioners made further correspondence with respondent nos.3 to 7, trying to explain the situation obtaining at site and even suggested that aeronautical study may be conducted so that things would become clear. The petitioners also gave an intimation to respondent nos.3 to 7 stating that their Project was not affected by 2015 Notification and if there was any statutory provision under which NOC was required, the petitioners be informed of the same, so submits learned Senior Advocate. He further submits that the only response that the petitioners got was that the proposed construction infringed Obstacle Limitation Surface with respect to NDA airfield and, therefore, no NOC could be granted. He points out that the petitioners were also informed by respondent nos.3 to 7 that their Project was not covered under the “Shielding” principle, as set out in 2010 Notification, and thus, by the further communications impugned herein, the request of the petitioners to grant NOC to them for completing their Project was rejected for the same reason that their Project infringed Obstacle Limitation Surface with respect to NDA

airfield in terms of 2015 Notification and that their Project was not found as eligible for getting the benefit of “Shielding” principle under 2010 Notification.

13. Learned Senior Advocate for the petitioners further submits that the approach of respondent nos.3 to 7 in the matter is arbitrary and unreasonable inasmuch as 2015 Notification itself was not applicable to the Petitioners’ Project with the petitioners having been granted development permission vide Commencement Certificate dated 23rd June 2014, which contained no condition for obtaining of NOC by the petitioners from respondent nos.3 to 7. He submits that the Petitioners’ Project having commenced before issuance of 2015 Notification, the Petitioners’ Project is not covered by 2015 Notification and that there is no clause in 2015 Notification which gives retrospective effect to it. He also submits that, even otherwise, the Petitioners’ Project is covered by Clause (16) - “Savings” of 2015 Notification, which saves the structures which had received height clearances under 2010 Notification.

14. Learned Senior Advocate for the petitioners further submits that the NOC has been refused to be granted by respondent nos.3 to 7 only on the ground that it is situated within a radius of 2.2 kms from NDA airfield, but, at the time when 2010 Notification was issued, no restriction whatsoever for construction of buildings near or in the vicinity of NDA airfield was imposed. He also submits that as the request of the petitioners for grant of NOC has been rejected only on the basis of 2015 Notification, now, by adding some more reasons, by way of affidavit-in-reply, respondent nos.3 to 7 cannot seek to place restrictions upon

the Petitioners' Project by taking recourse to 2010 Notification, which, even otherwise, is not applicable to the Petitioners' Project, as the maximum height of the proposed structures, is well below the maximum permissible height of 742 mtrs. AMSL under 2010 Notification for the projects falling within the radius of 20 kms. from outer boundary of Lohegaon Airport.

15. Learned Senior Advocate for the petitioners further submits that neither 2010 Notification nor 2015 Notification provide for grant of compensation, as is mandatorily required under Section 9B of the Aircraft Act, 1934 (*"Aircraft Act" for short*), and, therefore, both these notifications issued under Section 9A of the Aircraft Act cannot be treated as having any force of law. He submits that right to make construction on one's own property is a part of constitutional right to property under Article 300A of the Constitution of India and, therefore, if such right is to be taken away or restricted, it has to be done by a legislation or statutory enactment and by giving reasonable compensation for abridgement or deprivation of such right, as held in the case of *T. Vijayalakshmi and Ors. Vs. Town Planning Member and Anr.*¹. He further submits that since the petitioners have already been granted planning permission in terms of Commencement Certificate dated 23rd June 2014, it cannot be revoked or modified except as provided under Section 51 of the Maharashtra Regional & Town Planning Act, 1966 (*"MRTP Act" for short*), which expressly provides that if it is to be revoked or modified, reasonable compensation, as prescribed in sub-section (2) of Section 51 of the MRTP Act, must be paid to the owner of the land.

¹ (2006) 8 SCC 502

16. Mr. Devang Vyas, learned Additional Solicitor General of India (*“ASGI” for short*), appearing on behalf of respondent nos.3 to 7, submits that even though the only reason given for rejection of the request of the petitioners for grant of NOC is of the Petitioners’ Project infringing Obstacle Limitation Surface with respect to NDA airfield in terms of 2015 Notification, the fact remains that to the Project of the petitioners 2010 Notification is applicable, the Project having been situated within 20 kms. radius of outer boundary of Lohegaon Airport and thus the petitioners were required to obtain NOC under 2010 Notification. He submits that the Authority may not have rejected request of the petitioners for grant of NOC on the ground of applicability of 2010 Notification in an express manner, however, such silence of the Authority could not be taken as no objection granted by the Authority under 2010 Notification, which was having the force of law, as it was issued in exercise of powers conferred under Section 9A of the Aircraft Act upon the Government of India. He further submits that 2010 Notification and 2015 Notification were in public domain and the petitioners, being reputed builders, were presumed to know the restrictions imposed by these notifications and if the petitioners did not make any effort to comply with the requirements of these notifications, the petitioners have to blame themselves. He also submits that NDA Airport is not a new airport and Lohegaon Airport is existing since prior to independence and, therefore, the petitioners ought to have exercised due care and caution in embarking upon their Project, which they did not.

17. Learned ASGI further submits that reference datum has different connotations in 2010 Notification and, therefore, it cannot be understood as simply referring to Elevation Point Above Mean Sea Level. He submits that various factors are required to be taken into consideration for determining the height restrictions and as such, height restrictions for different places would differ depending upon other factors which are required to be taken into consideration for understanding the concept of “reference datum” under 2010 Notification. He also submits that this is necessary for the reason that at NDA, pilot training is imparted, for which purpose, small glider like aircrafts are used, which being low flying air crafts, without having any advanced navigational instruments, require more visibility and that is the reason why height restrictions for different places would differ. He also submits that the petitioners were under a duty to make enquiry as to what was the reference datum in terms of 2010 Notification and they cannot assume that the building of the Petitioners’ Project was below 150 mtrs.

18. Learned ASGI points out that all these averments are already made in the reply of respondent nos.3 to 7, to which there is no denial made by the petitioners. He further submits that NDA is a necessary party, but it has not been made as party-respondent.

19. Learned ASGI further submits that the matters relating to height and distance restrictions are all technical and they must be left to the wisdom of the experts, i.e. the Authorities like respondent nos.4 to 7, and when these Authorities

have found that NOC cannot be granted to the petitioners, the matter ends for the petitioners. He also submits that the appeal filed by the petitioners before the Defence Authorities has also been rejected by the order passed on 10th August 2022 and, therefore, now, there is nothing left in this petition and it is required to be dismissed for want of merit.

20. Before we deal with the main objection raised by respondent nos.3 to 7 in relation to the Petitioners' Project, which is based upon 2015 Notification, we would like to consider the other objection, i.e. preliminary objection, taken by respondent nos.3 to 7, which is about maintainability of this petition for want of joining NDA as a necessary party. In this regard, Dr. Milind Sathe, learned Senior Advocate for the petitioners submitted that NDA, being a Training Academy of respondent no.3, is not a legal entity and, therefore, could not have been made a party-respondent to this petition. He also submits that it is only respondent nos.3 to 7, who would have had the necessary authority and expertise in deciding the issue of grant of NOC or otherwise, for construction of buildings situated near or in the vicinity of NDA airfield and, therefore, joining of NDA as a party to this petition would have served no purpose. We are completely in agreement with these submissions for the reasons adduced in their support by learned Senior Advocate and, therefore, the preliminary objection so taken by respondent nos.3 to 7 is rejected.

21. Now, we would examine the legality or otherwise of the impugned communications. All these notifications dated 22nd March 2018 , 9th May 2018,

17th May 2019, 27th November 2020 and 10th August 2022 are based upon 2015 Notification and speak about the proximity of the Petitioners' Project to NDA airfield, which proximity has, according to respondent nos.3 to 7, attracted 2015 Notification to the Petitioners' Project. All these communications state that the height of the Petitioners' Project is such as it infringes Obstacle Limitation Surface with respect to NDA airfield and that the Petitioners' Project cannot get the benefit of the "Shielding" principle, as stated in Clause (4) of 2010 Notification.

22. Considering the reasons stated in the impugned communications, it would be necessary for us to carefully examine the 2015 Notification first. On going thorough this notification, we find that it has been issued in supersession of 2010 Notification by the Central Government in exercise of it's powers under Section 5, read with Section 9A, of the Aircraft Act. It would, therefore, have a force of law and it would be binding upon all persons to whom it applies. The question here is – whether it would also apply to the Development or Planning Permissions granted and the constructions started prior to coming into force of the said notification, which has come into force on 30th September 2015 with it's publication on the same date, as informed, in the Gazettee of India? Our answer to the question would be in the negative for the reason that this notification does not contain any clause which makes it retrospectively applicable even to the constructions which had commenced as per the planning permissions granted before coming into force of the said notification. It has, however, one "Savings" clause, Clause No.16, which saves the past actions. It says that the height

clearances granted under 2010 Notification and S.O. 1589(E) dated 30th June 2008 would not be affected by 2015 Notification, if the structures were completed within their validity period of eight years or twelve years for the buildings and the structures like masts, chimney etc. as the case may be. It also has a proviso, which clarifies two aspects of the matter – (i) when the construction work is started during the initial validity period of NOC under 2010 Notification but not completed within that period, re-validation of such NOC would be necessary in terms of 2010 Notification and (ii) when no construction is commenced during the initial validity period of NOC granted under 2010 Notification, re-validation in terms thereof would not be considered and the height of the structures would be re-assessed in accordance with 2015 Notification. This proviso thus deals with only those situations which arise from grant of NOC under 2010 Notification. It does not contemplate any situation where the NOC under 2010 Notification was not required. It does not say that NOC would be required under 2015 Notification even when it was not required under 2010 Notification, for continuing with the construction of a structure for which the Development Permission was granted prior to coming into force of 2015 Notification or Rules framed thereunder.

23. On the contrary, Section 1 of sub-section (2) of the Aircraft Act lays down that the rules framed under the said notification, which are Ministry of Civil Aviation (Height Restrictions for Safeguarding of Aircraft Operations) Rules, 2015, would come into force on the date of their publication in the Official

Gazettee, which is 30th September 2015, as informed at the Bar. It would then mean that 2015 Notification came into force only with effect from 30th September 2015 and, therefore, it's applicability would be to those structures where Planning Permissions were granted on and after 30th September 2015, unless otherwise provided therein, which is, however, not the case therein. On a careful perusal of this notification, we could not come across any such provision by which retrospective operation of 2015 Notification to the constructions commenced prior to coming into force of the said notification, *de-hors* the 2010 Notification, could be construed nor respondent nos.3 to 7 pointed out to us any such retrospective operation of 2015 Notification. There is no provision made in the said notification, which would indicate even by necessary implication that the 2015 Notification would have retrospective operation. It is well settled law that when any statute or rule takes away or affects vested rights or pre-existing rights or creates new obligations or imposes new debts or attaches new disabilities to past transactions or considerations, it would have to be construed as having prospective operation, unless by express provision of law made therein, the statute or rule is given retrospective effect. (*See State Bank Staff Union, Madras Vs. Union of India and Ors.*¹ and *Zilesingh Vs. State of Haryana and Ors.*²).

24. The effect of 2015 Notification is of affecting pre-existing rights acquired by the land owners by virtue of planning permissions granted to them before issuance of the said notification and it also has the effect of imposing new

¹ AIR 2005 SC 3446 - Appeal (Civil) No.3396 of 2001 – decided on 15th September 2005

² (2004) 8 SCC 1 - Appeal (Civil) No.6638 of 2004 – decided on 7th October 2004

restrictions in relation to NDA airfield, which was not covered under 2010 Notification, and, therefore, 2015 Notification cannot be read as having retrospective operation unless expressly or impliedly provided therein. However, as stated by us earlier, there is no such express or implied provision made in the said notification making it retrospectively applicable to planning permissions granted earlier without any requirement of NOC under 2010 Notification. In the present case, the Development or Planning Permission granted on 23rd June 2014 was without any condition of the petitioners obtaining any NOC from the Defence Authority, much less under 2010 Notification. We, therefore, find that merely on the basis of 2015 Notification, respondent nos.3 to 7 could not have rejected the request of the petitioners for grant of NOC. At the most, they could have said that 2015 Notification did not have any retrospective operation and commencement of construction of the Petitioners' Project having started in June, 2014, *de-hors* the requirement of NOC under 2010 Notification, as per the Commencement Certificate dated 23rd June 2014, no NOC was required to be issued by them. But, that did not happen and what was not applicable to the Petitioners' Project was sought to be made applicable erroneously and even arbitrarily and, therefore, on this ground alone, the impugned communications deserve to be quashed and set aside.

25. An argument has been made on behalf of respondent nos.3 to 7 that even though 2015 Notification supersedes 2010 Notification, it has to be understood that till the supersession of 2010 Notification occurred, the 2010 Notification was

in force and, therefore, at-least, under 2010 Notificaiton, which was in public domain, the petitioners were required to obtain NOC from Lohegaon Airport Authorities as the Petitioners' Project fell within the radius of 20 kms. from Lohegaon Airport.

26. We must state it hear that the impugned communications do not give any reason of the Petitioners' Project having been affected by the height restrictions under 2010 Notification and it is only by way of an affidavit-in-reply filed by respondent nos.3 to 7 that this ground now has been adduced. It is well settled law that legality or otherwise of an order has to be decided only in the light of the reasons stated in the order and it is not permissible for an Authority passing such an order to supplement the reasons by stating them in an affidavit-in-reply in order to justify the order. A useful reference in this regard may be made to the case of *Mohinder Singh Gill and Anr. Vs. Chief Election Commissioner, New Delhi and Ors.*¹. Therefore, it would not be permissible for respondent nos.3 to 7 to now also give the reason of 2010 Notification for denying NOC to the petitioners.

27. Even if we assume, for the sake of argument, that 2010 Notification is applicable to the Petitioners' Project, still, in our considered view, the Petitioners' Project cannot be said to be affected even by 2010 Notification. A careful perusal of 2010 Notification would show that it applies to Lohegaon Airport and that it does not mention in any of its annexures NDA airfield, thereby indicating that it

¹ (1978) 1 SCC 405

did not apply to NDA airfield. It further shows that insofar as Lohegaon Airport is concerned, NOC needs to be obtained where the height of the structure is more than 150 mtrs. above the reference datum upto a distance of 20 kms. from the Reference Point, which is the outer boundary of Lohegaon Airport and the datum for Outer Horizontal Surface shall be the aerodrome elevation, as defined in Annexure-II of 2010 Notification. Clauses (1.8) and (1.6.7) of Annexure-II to 2010 Notification are relevant in this regard and they are reproduced as follows :-

“(1.8) The No Objection Certificate needs to be obtained from the competent authority in all cases wherein the requested height of the structure etc. Is more than 150 meters above the reference datum upto a distance of 20 kilometers from the reference point.

(1.6.7) The datum for Outer Horizontal Surface shall be the aerodrome elevation, as defined in this Annexure.”

28. The above referred clauses would show that permissible height of any structure under 2010 Notification would be 150 mtrs. above the reference datum upto a distance of 20 kms. from Lohegaon Airport and the datum for Outer Horizontal Surface is an aerodrome elevation, as defined in Annexure-II to 2010 Notification. The aerodrome elevation in terms of clause (1.6.7) is to be found in Annexure-IIIC as item no.22. It shows Lohegaon Airport's aerodrome elevation Above Mean Sea Level as 592 mtrs. and that means, a structure having a height upto 150 mtrs. above 592 mtrs. i.e. total 742 mtrs., situated within 20 kms.

radius from outer boundary of Lohegaon Airport, would be a permissible structure requiring no NOC from the Defence Authorities. Obtaining of NOC under clause 1.8 of 2010 Notification is mandatory when the structure is situated within 20 kms. radius from outer boundary of the Reference Point, which is Lohegaon Airport here, and has a proposed height which goes beyond 742 mtrs., which is not the case here. In fact, the building proposal of the petitioners shows that the height of the proposed structures is not going to be more than 148 mtrs. above the elevation point of 592 mts. AMSL, making the total height of the proposed structures to be of 740 mtrs. AMSL, and these facts have been repeatedly informed by the petitioners to respondent nos.3 to 7, as seen from the communications placed on record, including the communication dated 27th September 2017 and these facts have not been disputed by respondent nos.3 to 7 in any manner. That being so, we find that the Petitioners' Project would not be adversely affected in any manner by 2010 Notification. It would then follow that there is no breach of undertaking given by the petitioners, with the undertaking made subject to the condition that NOC would be procured, if required under Aviation Rules.

29. It is argued on behalf of respondent nos.3 to 7 that the term "Reference Datum" has to be understood by taking into consideration elevations at different points as it has different connotations for different places depending upon the needs of low flying trainee aircrafts with elementary navigational aids and, therefore, the petitioners cannot assume that the total height of the structures

comprising their project would be within the permissible height restrictions. It is also submitted that averments made in this regard in the reply of respondent nos.3 to 7 have not been denied by the petitioners. While it is true that the petitioners have not denied these averments, we find that these averments themselves are inconsistent with the relevant clauses of 2010 Notification. We have already reproduced earlier the relevant clauses, which are Clauses (1.8) and (1.6.7) of Annexure-II to 2010 Notification and they clearly indicate that for the purpose of Lohegaon Airport, the “reference datum” is as per the elevation of Lohegaon Airport (Item No.22) given in Annexure-IIIC (*List of Defence Aerodromes*). This would also be clear from what is stated in Clause (1.6.7), which provides that *“the datum for Outer Horizontal Surface shall be the aerodrome elevation, as defined in this Annexure”*. If this is so, no Authority can possibly argue something which is not provided in the rule, which is 2010 Notification, which has the force of law. The argument is, therefore, rejected.

30. It is also argued on behalf of respondent nos.3 to 7 that paragraph 1 of 2010 Notification imposes general restrictions by stating that no building or structure shall be constructed or erected and no tree shall be planted on any land within the limits specified in Annexures I and II from Civil and Defence Aerodromes and Aeronautical Communication Stations listed in the further annexures and, therefore, even under this paragraph, the petitioners are required to obtain NOC for the reason that the Petitioners’ Project falls within 20 kms. radius of outer boundary of Lohegaon Airport. We must say it here that the

reason for rejection of request of the petitioners for grant of NOC was not any of the restrictions stated in 2010 Notification nor was it for Lohegaon Airport. The reason for such rejection was based only upon 2015 Notification and the fact that the Petitioners' Project was situated in the vicinity of NDA airfield. Be that as it may, assuming, just for the sake of argument, that there are general restrictions placed upon buildings or structures to be constructed near or in the vicinity of Lohegaon Airport and those restrictions were applicable to the Petitioners' Project, even then what is required is that the buildings or structures so as to be covered by them must be of the kind which come within the limits specified in Annexures I and II of 2010 Notification. This would become more clear by carefully reading paragraph 1 of 2010 Notification, which is reproduced for the sake of convenience as under :-

"1. No building or structure shall be constructed or erected and no tree shall be planted on any land within the limits specified in Annexure I and II from Civil and Defence Aerodromes and Aeronautical Communication Stations listed in Annexures – IIIA, IIIB, IIIC, IIID and IIIE without obtaining "No Objection Certificate"."

31. It would become clear from the above referred paragraph that it has to be read along with Annexures I and II so as to find out whether a building or a structure is falling within the limits specified in those annexures. For the present case, Annexure-II, read with Annexure-IIIC, is relevant and more relevant are the Clauses (1.8) and (1.6.7), along with Item No.22 of Annexure-IIIC. By

considering these provisions, we have already found that the overall height of the structures of the Petitioners' Project does not exceed the permissible limit and, therefore, it would be incorrect to say that the Petitioners' Project is covered by general restrictions contained in paragraph 1 of 2010 Notification.

32. It is also submitted on behalf of respondent nos.3 to 7 that the petitioners, being reputed builders, were supposed to know existence of 2010 Notification, which was already in public domain, and, therefore, were required to make compliance with it. It is further submitted that these are technical matters which can be decided only by the experts in the field i.e. respondent nos.3 to 7. We do not agree with the submissions for the reasons; firstly, the Petitioners' Project is not covered by the restrictions under 2010 Notification and, therefore, there is no requirement for the petitioners to obtain NOC for their Project from respondent nos.3 to 7 so as to proceed further in the matter; secondly, the 2010 Notification having been issued by the Government of India in exercise of its powers under Section 9A(1) of the Aircraft Act, the Central Government was required under sub-section (3) thereof to serve its copy on the owner or the person having the control of the building or structure, as the case may be, i.e. the petitioners, and was also required to determine and pay the compensation in terms of Section 9B of the Aircraft Act, but none of these requirements have been fulfilled by respondent nos.3 to 7 in the present case; thirdly, there was no condition imposed in 2014 Commencement Certificate about obtaining of NOC under 2010 Notification; and, fourthly, occasion to respect opinion of expert would arise only

when the expert is required to give opinion in terms of 2010 Notification and that occasion has not arisen here due to non-applicability of 2010 Notification to the Petitioners' Project. It is, therefore, not possible to draw any adverse inference against the petitioners only on the basis of the fact that 2010 Notification was in public domain at the time when the planning permission was granted.

33. It is also argued on behalf of respondent nos.3 to 7 that there is a delay in filing of this petition because the petitioners had preferred an appeal before the respondent no.1 in 2018. We find that there is no substance in the argument for the reason that the last rejection to the petitioners' request for grant of NOC came vide communication dated 10th August 2022 and this petition has been filed immediately thereafter.

34. It is submitted by learned Senior Advocate for the petitioners that if it is held that their Project attracts 2010 Notification, still, their Project would be saved by the "Savings" - clause no.16 thereof. It is further submitted by him that the Petitioners' Project is covered by "Shielding" principle under 2010 Notification, which is denied by respondent nos.3 to 7. There is no need for us to consider these submissions in view of what is held by us earlier.

35. The sum and substance of the above referred discussion is that 2015 Notification is not applicable to the Petitioners' Project as the planning permission was granted to them in June, 2014 and the petitioners have started their construction immediately thereafter and had completed construction upto

plinth level by September 2015. The reason why 2015 Notification is not applicable to the Petitioners' Project is already given by us, and it is stated again at the cost of repetition that it has no retrospective operation. The 2015 Notification prejudicially affects right of the petitioners to make construction, which is a part of right to property of a person under Article 300A of the Constitution of India, and such right can be restricted only by reason of a legislation, as held in the case of *T. Vijayalakshmi (Supra)*. The exercise of right to construct a property begins when planning permission is granted. In the present case, the planning permission was granted vide Commencement Certificate dated 23rd June 2014. This permission created a vested right in the petitioners to make construction in terms of the planning permission and though it is regulated under the relevant town planning law, in the present case, Maharashtra Regional & Town Planning Act, 1966 and relevant Development Control Regulations applicable to Pune, it cannot be taken away except under the authority of law. It is also well settled law that the building plans or planning permissions are required to be dealt with in terms of the existing law and doctrine of legitimate expectation in such a case would have a role to play. This is what the Apex Court has held in the said case of *T. Vijayalakshmi (Supra)* and it's relevant observations are reproduced as follows :-

“15. The law in this behalf is explicit. Right of a person to construct residential houses in the residential area is a valuable right. The said right can only be regulated in terms of a regulatory statute but unless there exists a clear provision, the same cannot be taken away. It is also a trite

law that the building plans are required to be dealt with in terms of the existing law. Determination of such a question cannot be postponed far less taken away. Doctrine of legitimate expectation in a case of this nature would have a role to play.”

. It would be clear now that without any authority of law, that is without any retrospective operation of 2015 Notificaiton, the notification could not have been pressed into service against the petitioners by respondent nos.3 to 7. In other words, it could have been done so only when 2015 Notification indicated its retrospective operation expressly or by necessary implication. That is not the case here.

. Even in the case of *Bishambhar Dayal Chandra Mohan and Ors. Vs. State of Uttar Pradesh and Ors., along with connected matters*¹, the Supreme Court has held that when Article 300A of the Constitution of India provides that no person shall be deprived of his property save by authority of law, the deprivation of property must come under the authority of law. It then follows that in the absence of any provision made in 2015 Notification, expressly or impliedly denoting it's retrospective operation, the notification cannot be applied to the Petitioners' Project and, therefore, the petitioners could not be insisted upon procurement of any NOC in terms of 2015 Notification. As regards 2010 Notification, we have already stated that it is not the reason given in the impugned communications for rejecting request of the petitioners for grant of NOC. We have also found that even if it is assumed that 2010 Notification was

¹ (1982) 1 SCC 39

relevant for the purpose of determining the question of need for obtaining NOC or otherwise in the present case, the NOC under 2010 Notification even then is not required as the total height of the Petitioners' Project is below the limit of height restrictions contained in 2010 Notification.

36. There is one more perspective from which the issue involved in the present case is required to be examined, as rightly submitted by Dr. Sathe, learned Senior Advocate for the petitioners. He has urged that the issue involved in the petition is required to be examined from the angle of Section 51 of the MRTP Act, which confers powers upon the Planning Authority to revoke or modify the development permission granted by it. He has submitted that if the impugned communications are not quashed and set aside, the result would be implied revocation of the development or planning permission granted by the Planning Authority. He submits that such revocation, however, can be there only in accordance with the provisions contained in Section 51 of the MRTP Act. He points out that there is a provision made in sub-section (2) of Section 51 for grant of compensation and there is also a provision under Section 9B of the Aircraft Act for grant of compensation. In such a case, he submits, without making any complianec with these provisions of law, no restrictions can be placed upon the Petitioners' Project. On going through the provisions of sub-section (2) of Section 51 of the MRTP Act and Section 9B of the Aircraft Act, we find substance in the argument of learned Senior Advocate for the petitioners. These provisions of law do indicate that whenever a development permission is to

be revoked or any restrictions on the right to enjoy a property are to be placed by invoking powers under Section 9A of the Aircraft Act, compensation is required to be mandatorily paid to the land owner or the property owner in terms indicated therein. The impugned communications, however, do not speak anything about the compensation to be paid to the petitioners. Even otherwise, the impugned communications, based upon 2015 Notification, cannot be sustained in the eye of law as 2015 Notification itself is not applicable to the Petitioners' Project. We have also found that even under 2010 Notification, the Petitioners' Project is not affected as its overall height is below the permissible limit of height restrictions.

37. Thus, we find substance in the petition. For the reasons stated above, in our view, the impugned communications cannot be sustained in the eye of law and they deserve to be quashed and set aside. We further find, for the reasons stated above, that the impugned condition in the Plinth Checking Certificate dated 1st November 2018, requiring the petitioners to obtain NOC from respondent nos.3 to 7, is illegal in the facts and circumstances of this case and, therefore, it must go. Accordingly, the petition is allowed in terms of prayer clauses (a), (b) and (c), which read as under :-

- (a). That this Hon'ble Court be pleased to issue a writ of certiorari or any other writ, order or direction in the nature of certiorari or any other writ, order or direction to call for the papers and proceedings culminating into the condition/ noting with respect to seeking NOC under the Notification GSR 751 (E) dated 30th September 2015 in the Plinth

Checking Certificate dated 1st November 2018 and after going through the legality, proprietary and validity of the same, be pleased to quash the said noting/condition;

- (b) That this Hon'ble Court be pleased to issue a writ of mandamus or any other writ, order or direction in the nature of mandamus or any other writ, order or direction, directing respondent no.2 not to insist on grant of NOC under the 2010 or the 2015 Notification and grant permission, thereby permitting the petitioners to resume and carry out development activity on the lands, revise plans, if required, as per law and allow the developer to utilise the full potential of the plot till its final completion;
- (c) This Hon'ble Court be pleased to issue a writ of certiorari or any other writ, order or direction in the nature of certiorari or any other writ, order or direction to call for the papers and proceedings culminating into rejections of NOC dated 22nd March 2018, 9th May 2019, 17th May 2019 and 27th November 2020 and the rejection letter dated 10th August 2022 and after going through the legality, proprietary and validity of the same, be pleased to quash the same."

38. Rule is made absolute in the above terms. No costs. Petition is disposed of.

39. At this stage, learned counsel for the respondent-Union of India prays for staying the effect and operation of this judgment for a period of four weeks, which prayer is opposed by learned counsel for the petitioners stating that, even otherwise, some time is going to be taken for resuming the development activity.

40. Considering the rival submissions, we direct that there shall be stay to the effect and operation of the impugned judgment and order for a period of three weeks from today.

(RAJESH S. PATIL, J.)

(SUNIL B. SHUKRE, J.)