

Wadhwa

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1215 OF 2023

1. **SHIVAJI NAGAR SHIVKIRAN
CO-OPERATIVE HOUSING
SOCIETY LTD,**
a co-operative housing society duly
registered under the Maharashtra Co-
operative Societies Act, 1960 having
office at Bldg Nos 6 & 7, Shivaji
Nagar, Dr Annie Besant Road, Worli,
Mumbai-400 025.
2. **SUGEE DEVELOPERS PVT LTD,**
a company incorporated under the
Companies Act, 1956 and having its
office at 3rd Floor, Nirlon House, Opp
Sasmira College, Dr Annie Besant
Road, Worli, Mumbai – 400 030.

... PETITIONERS

~ VERSUS ~

1. **MAHARASHTRA HOUSING AND
AREA DEVELOPMENT
AUTHORITY,**
a Statutory Authority constituted under
the provisions of the Maharashtra
Housing & Area Development Act,
1976 having office at Griha Nirman
Bhavan, Kala Nagar, Bandra (East),
Mumbai – 400 051.

2. **THE EXECUTIVE ENGINEER, BP CELL, GREATER MUMBAI, MHADA,**
having office at Griha Nirman Bhavan,
Kala Nagar, Bandra (East), Mumbai –
400 051.
3. **UNION OF INDIA,**
Ministry of Defence, through
(a) The Flag Officer
Commanding-In-Chief,
Western Naval Command.
(b) The Commander, Executive Officer,
INS Trata,
served through the Ministry of Law
& Justice, having its office at CGO
Building, Queens Road, Marine Lines,
Mumbai.

... RESPONDENTS

APPEARANCES

FOR THE PETITIONER	Mr Ravindra Kadam, Senior Advocate, <i>with Rohan Kadam, Sanjay Kadam, Sanjeel Kadam, Soham Salvi, Netra Jagtap, i/b Kadam & Co</i>
FOR RESPONDENT NO 1- MHADA	Mr PG Lad, <i>with Sayli Apte & Shreya Shah.</i>
FOR RESPONDENT NO 3	Mr Devang Vyas, Senior Advocate, <i>with Amogh Singh, Rahul Arora & Sheelang Shah</i>

**CORAM : G.S.Patel &
Kamal Khata, JJ.**

DATED : 5th January 2024

ORAL JUDGMENT (*per GS Patel J*):

1. **Rule.** By consent, returnable forthwith.

2. The Petition raises a question of public law to the limited extent that it involves the actions of two public authorities, but that question arises in the extremely peculiar and unique facts and circumstances of this case. We have seen the prayers in the Petition with Mr Kadam's assistance, and we find that there is no larger and broader relief sought nor any challenge to the jurisdictional remit of the public authorities in question. The entire relief is therefore restricted to the Petitioner's project.

3. The area in question is the well-known and much sought after Worli area. Specifically, the site is just to the east, on an internal road from the Worli Sea Face. At the northern end of the Worli Sea Face there is a defence installation known as Site-II of INS Trata. From there to the northwest of Site-II is the main INS Trata installation. A public road lies between the two locations and traverses eastward to meet Dr Annie Besant Road.

4. The site may best be seen by a reproduction of the Google Earth satellite image that Mr Kadam has provided us. A copy is annexed to this order.

5. The Petitioners' project site is a proposed redevelopment under Reg. 33(5) of the Development Control Regulations, 2034 ("DCR"). The property is owned by Maharashtra Housing and

Area Development Authority (“**MHADA**”). The whole of DCR 33 is a series of special provisions that create exemptions from the otherwise universally applicable FSI norms. DCR 33(5) relates to the development and redevelopment of housing schemes of MHADA. It inter alia provides what additional FSI may be available for such projects.

6. There is no controversy or issue about the provisions of DCR 33(5).

7. The essence of the Petitioners’ case is that MHADA has demanded that the Petitioners obtain a No Objection Certificate (“**NOC**”) from the 3rd Respondent, the Union of India through its Ministry of Defence, itself through the Flag Officer Commanding-in-Chief, Western Naval Command, and the Commander, Executive Officer of INS Trata. That Central Government NOC has been refused. It is Mr Kadam’s case, as we shall presently see, that no such NOC was ever necessary; the two other special planning authorities, namely the Municipal Corporation of Greater Mumbai (“**MCGM**”) and the Slum Rehabilitation Authority (“**SRA**”), do not insist on this; the state government has issued a notification or direction to the MCGM and SRA (but not addressed to MHADA) not to seek such an NOC; the Defence Circulars prescribing distance restrictions were withdrawn or substituted by a much lower distance restriction, which, though later said to be “in abeyance”, could not have had the effect of reviving the earlier distance limitations.

8. There are two Affidavits filed by the 3rd Respondent, the Union of India. We will first briefly set out the relevant dates and then proceed to the rival submissions. We do so bearing in mind that there are undoubtedly concerns voiced by Mr Vyas, learned ASG for the Union of India, that cannot readily or easily be brushed aside.

9. The plot in question is CTS No 999 of Shivaji Nagar and relates to buildings Nos 6 and 7. These buildings have already been demolished. There are as many as 96 families who are today out in transit accommodation.

10. On 18th May 2011, the Defence Ministry issued guidelines regarding NOCs to be granted for building construction. A procedure was described in regard to multistorey buildings of more than four floors within 500 meters of defence establishments. On 17th November 2015 there came to be issued a corrigendum, but the details of this are not immediately important for our purposes today. On 27th May 2019, MHADA submitted a proposal to the Commander-in-chief for a defence NOC. The response was for a Google map to identify the precise location. This was submitted. Later in 2019, the Petitioners applied to MHADA for redevelopment permission.

11. In August 2020, the MCGM classified both buildings in the C-1 (dilapidated, dangerous and ruinous condition) category and directed that the buildings be evacuated and demolished. In September 2020, MHADA also classified the buildings as such. Then on 4th November 2020, MHADA wrote to the 2nd

Respondent inviting comments on the proposed redevelopment. On 26th August 2021, the Executive Engineer of MHADA sanctioned the plans for the proposed building and issued an Intimation of Approval (“**IoA**”). On 6th October 2021, the Executive Engineer commissioned a distance survey from the Institute of Remote Sensing, Anna University (“**IRS**”). This report was forwarded to the Flag Officer Commanding-in-Chief.

12. Meanwhile, the 96 families in these two buildings were evacuated in April 2022 and shifted to transit. Until 12th August 2022, several months after the 2nd Respondent had sought comments from the Defence, there being no reply, the 2nd Respondent issued permission for shore piling. Then on 17th October 2022, the 2nd Respondent issued a show cause notice to the Petitioner. This was premised on the basis that the 2nd Respondent had received a letter of 29th September 2020 from the Station Commander INS Trata objecting to the redevelopment. The objection specifically was that the project property was at the distance of 470 meters of the boundary wall of Site-II. The Station Commander claimed that this permission had been earlier refused on 11th March 2021. There is some controversy about this 11th March 2021 letter, but we prefer not to enter into that terrain because it is quite unnecessary in our view.

13. On 21st October 2022, the Petitioners replied to the show cause notice. They pointed out that the Defence Circular did not apply since the IRS survey had reported the distance to be beyond the 500 meters. There was nothing to show that the property was

within the prescribed distance. The decision had in any case not been taken within 4 months. On 16th November 2022, MHADA wrote to the Commander-in-Chief intimating him of the IRS findings and emphasizing that redevelopment was necessary because 96 families had been dishoused.

14. On 23rd December 2022, the Defence Ministry issued fresh guidelines for granting NOCs for buildings proposed their defence establishments. These now set the distance limitations at 50 meters from the boundary wall of the establishment. INS Trata is listed as one of those establishments at page 114 of the Petition.

15. As a result of this, on 5th January 2023, the Petitioners asked MHADA to grant a plinth NOC and this followed a few days later on 13th January 2023. The Petitioners began work. Not long thereafter, on 23rd February 2023 the Defence Ministry issued a circular apparently keeping the new guidelines (with the revised 50 meter prohibition) in abeyance. On 3rd March 2023, the 2nd Respondent, MHADA's Executive Engineer issued a stop work notice to the Petitioners citing this 23rd February 2023 circular. In March 2023, the Petitioners demanded that the stop work notice be withdrawn but it was permitted only to construct to the plinth level and on condition that the IoA permission granted by MHADA would be held in abeyance pending a full permission from the 3rd Respondent the Union of India. Hence this Petition.

16. The first Affidavit in Reply is of the 3rd Respondent and is of 7th November 2003. Paragraphs 9 to 13 of this Affidavit at pages 208 to 211 read thus:

“9. I say that, with respect to para no. 4.20 to 4.24, in spite of refusal of defence NOC being intimated way back on 11th March 2021, Respondent No. 2, EE-BP Cell, Greater Mumbai issued the shore pilling approval to the petitioners vide letter dated 12th August 2022. Accordingly, Petitioner No. 2 started the construction work. When it was realised by INS Trata that the construction has started on the subject property, immediately an objection was raised against the ongoing construction work vide INS Trata letter dated 29th September 2022 wherein the EE-BP cell was directed to issue a stop work notice to Petitioner No. 2.

10. I say that, the Ministry of Defence issued a New Defence Circular dated 23rd December 2022 wherein it was stated that defence NOC is not required, if a proposed construction is located beyond 50 mtrs radius of the defence establishments. In light of this New Defence Circular, Petitioner No. 2 requested MHADA to grant plinth CC which was issued by EE-BP Cell on 13th January 2023. The Defence Circular dated 23rd December 2022 was later kept in abeyance vide another Defence Circular issued by the Ministry of Defence vide Defence Circular No. F11026/20/2011/D dated 23rd February 2023. Thus, in light of the latest circular dated 23rd February 2023, the Commanding Officer, INS Trata again wrote to EE-BP cell to issue the impugned Stop Work Notice which has been accordingly issued on 3rd March 2023.

11. I say that, the denial of NOC dated 11th March 2021 was as per the guidelines mentioned in the Defence Circulars dated 18th May 2011, 18th March 2015 and 17th November 2015. Clearly, the proposed construction is at

approximately 400 mtrs from the Defence Establishment, if the distance is measured from Site-II of INS Trata. Furthermore, the proposed construction site does not fall under the shadow shield area and has a height of 198.7 mtrs and consists of basement + ground floor +1st to 4th floor podium parking +5th floor as amenities +40 floors of residential apartments. Such a huge structure will have a direct view of the operations of INS Trata which cannot be permitted for security reasons. Hence, denial of NOC is completely justifiable.

12. I say that, even though Maharashtra Regional & Town Planning Act (MRTP ACT, 1966), Development control Regulation for Greater Bombay (DCR) 1991, Development Control & Promotion Regulation (DCPR) 2034 may not mention the requirement of defence NOC, however as per Section 154 of the MRTP Act, the State Government is authorised to issue directions to the Planning Authority, and accordingly Urban Development Department (UDD) has taken note of Ministry of Defence orders and issued necessary directives to the planning authorities. The Petitioner is not deprived of his constitutional right under Article 300-A of the Constitution as the ownership rights of the property remains with the Petitioner. The Government is well within its right to impose reasonable restrictions and the right to property as envisaged in Article 300(A) is not absolute. No right is absolute and all rights come with reasonable restrictions so as not to impinge upon another's right of enjoyment or security.

13. I say that, the issue of validity of circular as well as the need for defence NOC from the Defence Establishment has been deliberated in detail in UOI Vs State of Maharashtra (Adarsh Case) as well as SSV Developers and TCI's case, wherein the Hon'ble Court has held that NOC from the Defence Establishment is necessary and in fact

mandatory for the planning authority to insist whilst considering the proposals for building purpose. State of Maharashtra Circulars dated 04th February 2016 and 20th April 2016, have reiterated/amplified Ministry of Defence guidelines dated 18 March, 2015 and 17 November, 2015.

17. We believed that this Affidavit did not sufficiently address the issues. Mr Vyas readily agreed to take instructions and to file a further Affidavit. This was specifically on the basis of Mr Kadam's argument that, as can be seen from the plan, there were several projects much closer to the two INS Trata sites and in respect of which either permissions have been granted or, at any rate had not been refused. We believe this required an explanation.

18. This led to the filing of the further Affidavit in Reply. It is dated 12th December 2023. We believe this Affidavit provides the necessary factual context. In paragraph 3 there is a listing of 22 construction projects within the radial distance. The first of these Harsiddhi Heights, is said to be one where an NOC has been issued but in respect of which there is legal action. The one at item No2 has an NOC, but it is of 1st February 1995 before the two Defence Circulars in question. Items 3, 4 and 5 have NOCs of 2009, 2017 and 2016, respectively. Item 5 in particular, Shandilya Terrace is of 2016 after the 2011 and 2015 circulars and is a ground and 24-storey building which is closer in proximity even on the plan that is shown to us than the Petitioners site. From items 6 to 21 there are various projects mentioned, but the statement in the table is that the details of the NOC are not available.

19. Independently of the arguments before us today, we are informed that the two Defence Circulars in question of 2011 have been struck down by an order and judgment of a co-ordinate bench of this court and that an SLP is pending.¹ *Dolby Builders v MCGM*. We only note this.

20. The important factor for our purposes is the substitution of the 2011 and subsequent circulars with a 500-meter distance restriction by the December 2022 circular at page 102 prescribing a 50-meter distance. If the December 2022 circular is in operation, then there is no question of an NOC even being sought. The issue arises because in February 2023, the December 2022 revised circular was apparently held in abeyance. We do not see how this holding in abeyance and that too for an indefinite period could serve to revive an earlier restriction. Further this could only operate prospectively and could not possibly affect a permission previously granted. Yet that is precisely what seems to have happened in this case and this is why we say that there are extremely peculiar facts and circumstances of no wider or more general applicability.

21. In any event, the settled legal position would be that in the time window between the December 2020 circular reducing the distance requirement and the abeyance notification of 26th December 2023, the Petitioners' rights had crystallized, and these cannot now be undone. That aspect of the law is not contentious.

1 *Dolby Builders Pvt Ltd v Municipal Corporation of Greater Mumbai & Ors*, 2023 SCC OnLine Bom 2110.

*Goan Real Estate & Construction Limited & Anr v Union of India Through Secretary, Ministry of Environment & Ors.*²

22. Indeed, and this may be the purest speculation on our part, even if the December 2022 circular was now to be repealed it is still doubtful whether a permission granted on the basis of December 2022 could be set at nought because that would operate the repeal retrospectively.

23. As we noted, since there is an SLP pending, we are making no observations in regard to the circulars of 2011 (all the subsequent circulars of 2015, 2016 and 2022) which are part of the judgment in *Dolby Builders Pvt Ltd v Municipal Corporation of Greater Mumbai & Ors.*³

24. Importantly, on 3rd November 2023, the State Government informed the MCGM and SRA that these Circulars of the Defence can no longer be applied. This is in the Additional Affidavit of 2nd December 2023 filed by the Petitioners at Exhibit 'A' at page 220. It is indeed peculiar that two of the three authorities dealing with building and real estate development do not think it is necessary to seek the NOC but a third one does. We pose this question: suppose the plot was not owned by MHADA or was not a DCR 33(5) redevelopment at all, but the project as proposed was exactly the same, then how could it come to pass that no such NOC was required? The requirement of an NOC cannot possibly be linked to

2 (2010) 5 SCC 388.

3 2023 SCC OnLine Bom 2110.

which authority is demanding it. If the NOC is required from the Defence, it must be required irrespective of which authority makes that requisition.

25. Third, and this is the other peculiarity and singularity of the matter, is the precise location of the plot especially in the context of the other projects and the further Affidavit that has been filed by the Defence. As we have noted there is one significant project, Shandilya Terrace, of ground and 24 for which there is a positive act of the grant of an NOC. There are also other projects for which no NOC has been required or given. The one which is in dispute, even if ignored, will make no difference.

26. We do not think that it is possible to accept an argument that in the application of a set of circulars there can be any pick-and-choose approach. This would lead straightaway to an Article 14 challenge on the grounds of arbitrariness and discrimination and would undoubtedly succeed.

27. There is also the aspect of the well-established doctrine of proportionality which requires that a proper balance be struck between competing needs, demands or equity.

28. We should not be misunderstood to have held that the requirements of the defence are immaterial or irrelevant. Indeed, they are not, and none can suggest otherwise. But it is not for a court to suggest what should be the prescribed distance. That is a matter solely within the remit of the executive of the Union of

India. The reasons why a particular establishment is noted as sensitive and as requiring a safety distance are also not justiciable matters for a court to consider. It may well be that the Defence believes that a particular installation requires greater safety and security than another. Those are not reasons that lend themselves to judicial review. But once those distances, limitations, restrictions, and norms are prescribed, they must at least be applied uniformly. That is all that we hold.

29. Accordingly, and confining ourselves to the peculiar facts and circumstances of the case, we proceed to make Rule absolute in terms of prayers clauses (a), (b) and (c). It goes without saying that all permissions to be granted have to be in accordance with law and in conformity with all applicable building regulations.

30. The Petition is disposed of in these terms. There will be no orders as to costs.

(Kamal Khata, J)

(G. S. Patel, J)



List of Buildings within 500 mtrs from Site II (INS TRATA)

BUILDING NO.	BUILDING NAME	NO. OF FLOORS AS PER MOM BUILDING INFORMATION	SHORTEST DISTANCE FROM SITE II in METERS	SHORTEST DISTANCE FROM SITE II in YARDS	BUILDING HEIGHT in METERS	REMARKS
1	SHADLYA TERRACE	STILT + 24 FLOORS	300	329.18	100.75	Completed (Heavy RCC given for 118 mtrs)
3	SPORTFIELD	G+5	148	170.12	33.00	Completed
4	PRIYA	G+15	131	142.88	50.39	Completed
6	PRATIKSHA	G+10	156	170.34	38.00	Completed
7	HEEMES HOUSE	G+10	125	136.25	33.00	Completed
16	GODREJ BAY VIEW	G+12	11	12.09	38.30	Completed
20	RED ROSE	G+10	195	212.55	41.15	Completed
22	SURANA APARTMENT	G+7	263	291.01	25.91	Completed
52	RK SADAN	G+10	485	539.55	38.00	Completed
57	HARISIDDHI HEIGHTS	G+12	12	13.08	62.46	Completed
58	SEA FACE CHS	G+7	12	13.08	20.00	Completed
67	ANAR NAGAR CHS	G+7	0	0	24.00	Completed (adjoining plot)
68	SURANA REGENCY	G+7	0	0	24.00	Completed (adjoining plot)
69	NEW SEALINK CHS	G+7	0	0	24.00	Completed (adjoining plot)
71	PRENA	G+13	285	308.85	42.35	Completed
73	PROPOSED INDIAN COAST GUARD BUILDING	G+25	175	190.75	105.00	UNDER CONSTRUCTION
75	ONGOING CONSTRUCTION (INDIAN COAST GUARD)	G+20	260	281.1	105.00	UNDER CONSTRUCTION
77	SIDDHISAGAR CO-OP HOUSING SOCIETY	G+11	173	187.49	36.00	Completed
76	RAHEJA LEGEND	G+39	462	503.58	130.83	Completed
78	DESAI OCEANIC	G+12	118	128.52	41.15	Completed
79	VRAJ TOWERS	G+10	334	362.55	135.25	Completed
80	SIDDHIVINAYAK HORIZON	B+G+26	435	469.15	189.83	Completed
81	OBEROI 360 WEST TOWER A	S2	404	440.88	155.9	Completed
HIS (spanning plot of Shiv Khuri) same as above layout						Heavy RCC given for 234 mtrs.

74	Proposed Re-development (Shiv Khuri Society)	470	511.8	UNDER CONSTRUCTION (DISTANCE FROM SITE II AS PER MOM)
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