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

WRIT PETITION NO.2724 OF 2021

1. Dolby Builders Private Ltd.,]
(Formerly known as JGB Builders Pvt. Ltd.)]
A company incorporated under the Companies]
Act, 1956 and having its registered office at]
Dainik Bhaskar, 501, Naman Corporate Link,]
5th Floor, C-31, G Block, Bandra-Kurla Complex,]
Bandra (East), Mumbai – 400 051.]
2. Mr. Girish Agarwal,]
Indian Citizen, having office at Dainik Bhaskar,]
501, Naman Corporate Link, 5th Floor, C-31,]
G Block, Bandra-Kurla Complex,]
Bandra (East), Mumbai – 400 051.] ...

Petitioners

Versus

1. The Municipal Corporation of Greater Mumbai]
a Statutory Corporation, constituted under the]
provisions of the Mumbai Municipal Corporation Act,]
1888 and having its office at Mahapalika Marg,]
Mumbai – 400 001.]
2. Executive Engineer, E Ward,]
Municipal Corporation of Greater Mumbai]
Building Proposal Department]
Byculla, Mumbai – 400 008.]
3. Commodore, Chief Staff Flag Officer Commanding Chief,]
Head Quarters, Western Naval Command,]
Mumbai – 400 005.]
4. The Flag Officer, Commanding Chief,]
Head Quarters, Western Naval Command]
Mumbai – 400 005.]
5. Commander, INS Trata,]
having his office at INS Trata, Worli, Mumbai-400018]
6. Union of India,]
Through the Principal Secretary, Ministry of Defence,]
having its office at Parivahan Bhavan,]
Parliament Street, New Delhi – 110 001.]
7. State of Maharashtra,]
Through Government Pleader,]
Department of Urban Development, Mantralaya,]
Mumbai – 400 032.] ... **Respondents**

Mr. Milind Sathe, Sr. Advocate, with Mr. Saket Mone and Mr. Abhishek Salian, i/by Vidhii Partners, for the Petitioners.
Mr. Aditya Thakkar, with Mr. D.P. Singh, for Respondent Nos.3 to 6.

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

RESERVED ON : 28th MARCH, 2023.

PRONOUNCED ON : 27th SEPTEMBER, 2023.

[In Chamber - Through Video Conference]

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

1. The petitioner no.1, a Private Limited Company, is the lessee of respondent no.1 in respect of land admeasuring 1972 square yards, equivalent to 1648.85 square meters, bearing City Survey No.775 of Worli Division, Plot No.49, situate at Ponchkhanwala Road Nos.3 and 4, Worli Estate, Scheme No.52, Mumbai – 400 005 *(hereinafter called as **"subject property"** for short)*. The petitioner no.2 is one of the shareholders of the petitioner no.1-Company and manages the affairs of the petitioner no.1-Company.

2. Petitioner no.1-Company is interested to reconstruct / re-erect a building consisting of Ground + Two Storeys on the subject property for the personal use of petitioner no.2 and his family but is unable to do so for the insistence of respondent no.1 to obtain a No Objection Certificate (NOC) from respondent

nos.3 to 5 before granting development permission as per rules and respondent nos.3 to 5 have refused to grant such NOC.

3. It is the case of the petitioners that what they are proposing to do on the subject property is nothing but recreation of the same structure with same height as it existed before its demolition in the year 2005. The petitioners submit that the subject property was leased to one Mr. Hellmut Sommer and Mrs. Joan Anna Sommer by a Lease Deed, which was executed in the year 1944, though the couple was in possession of the subject property since January 1938, pursuant to a Grant made in their favour in the year 1937, as reflected in the Lease Deed. The petitioners further submit that following the Grant made in favour of the said couple, the couple constructed a building on the subject property consisting of Ground + Two upper floors with an approximate height of 12 mtrs., which they named as "Summit". The petitioners further submit that water tanks had also been installed on the terrace of the building. The subject property, as contended by the petitioners, changed hands from one lessee to the other lessees over a period of time and ultimately, the property with the building came to be transferred by a Deed of Assignment dated 10th October 2003, executed by the then lessee in favour of petitioner no.1 and thereafter, petitioner no.1 acquired the leasehold rights in the subject property along with the building "Summit" standing thereon and became entitled to enjoy and develop the subject property in accordance with law. The petitioners further submit that in October 2003, there were different

shareholders of petitioner no.1 and its management was then in the hands of the erstwhile shareholders. The petitioners submit that the petitioner no.2 and two more persons purchased the shares from the erstwhile shareholders by Share Purchase Agreement dated 17th November 2011 and thus acquired cent percent shareholding in the petitioner no.1-Company, which resulted in placing the management of petitioner no.1 in the hands of petitioner no.2. The petitioners point out that the earlier shareholders of petitioner no.1 had, after demolition of the building "Summit" in the year 2005, made an attempt to redevelop the subject property but ended up in facing criminal inquiry on the accusation of forging of the NOC purported to be issued by the Naval Authorities. The petitioners, however, submit that the present management of petitioner no.1, headed by petitioner no.2, has got nothing to do with the alleged misdeeds of the erstwhile shareholders and the issues arising therefrom are entirely different, having no bearing upon the present petition.

4. It is the further case of the petitioners that petitioner no.1-Company, through its Architect, submitted an application dated 2nd March 2012 seeking permission under Section 44 of the Maharashtra Regional & Town Planning Act, 1966, *("**MRTP Act**" for short)*, for redevelopment of the property by construction of a multi-storeyed residential building on the subject property and as the proposal was for construction of a multi-storeyed building, the proposal attracted Notification dated 18th May 2011 of Ministry of Defence and, therefore, the petitioners sought NOC for redevelopment of the property from respondent

6. It is the further case of the petitioners that after going through the communication dated 9th March 2021, which is the impugned letter here, the petitioners learnt that respondent no.4 had refused to give his consent on the ground that the proposed construction was adjacent to the boundary wall of INS Trata, a Defence structure, and that the proposed construction would have a direct line of sight to the operational infrastructure of respondent no.4's unit, which was considered as a security hazard by respondent nos.3 to 5 and it was for these reasons that respondent nos.3 to 5 declined to grant NOC to the petitioners. The petitioners point out that in rejecting the application of the petitioners for grant of NOC, respondent nos.3 to 5 relied upon the Guidelines dated 18th May 2011, 18th March 2015 and 17th November 2015 issued by the Ministry of Defence, Union of India i.e. respondent no.6 herein. According to the petitioners, the reasons stated by respondent nos.3 to 5 in rejecting the application of the petitioners are based upon erroneous apprehension and are arbitrary in nature. They also submit that other structures with greater height existing in the vicinity of INS Trata are tolerated or allowed to be made, and this has resulted in giving unequal treatment to the petitioners.

7. The petitioners submit that there was another set of guidelines issued vide circular dated 21st October 2016 by the Ministry of Defence, imposing similar restrictions. The petitioners further submit that after the afore-stated guidelines, new Guidelines dated 23rd December 2022 came to be issued by the Ministry of Defence, superseding the aforesaid guidelines, and by these

new guidelines, certain restrictions came to be imposed in terms of clauses 2(i) and 2(v), wherein "INS Trata" is listed at item no.10 as "Defence Establishments under management of Navy". By these restrictions, development of lands lying upto 50 mtrs. from the outer wall of such Defence Establishments has been prohibited. The petitioners also point out that there are three more circulars dated 4th February 2016, 20th April 2016 and 7th November 2016 issued by the State of Maharashtra based upon the aforestated guidelines and circulars issued by the Ministry of Defence.

8. According to the petitioners, all these guidelines and circulars, though in the nature of executive instructions, are invalid as they do not follow the procedure prescribed in Works of Defence Act, 1903, *(hereinafter called as **"Act 1903"** for short)*, and therefore, all circulars are ultra vires the Act 1903. The petitioners also submit that these restrictions imposed by the afore-stated circulars violate petitioners' right to use and enjoy the property, under Article 300A of the Constitution of India, in an unreasonable manner and have rendered the subject property sterile, thereby violating the provisions relating to grant of compensation for deprivation of the right to enjoy the property under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Thus, the petitioners have prayed for quashing and setting aside of the afore-stated circulars and also the impugned letter dated 9th March 2021 and have further prayed for issuing directions to respondent No.1 for processing and deciding the application of the

nos.3 and 4. The petitioners submit that respondent nos.3 and 4, however, rejected the request of the petitioners to grant NOC in favour of the petitioners by their letter dated 9th July 2012. The petitioners submit that then they changed their plan regarding redevelopment of the subject property and made a new proposal for reconstruction / re-erection of a bungalow with the same height as the original building "Summit", instead of a multi-storeyed structure, and, therefore, petitioner no.1-Company submitted a fresh application on 6th June 2019 to respondent no.1-MCGM for grant of permission for reconstruction/ re-erection of a similar bungalow. The petitioners submit that even though this application uses the terms such as "construction" and "development", the tenor of the application would indicate that the petitioner no.1 had, in fact, intended to seek permission for reconstruction / re-erection of a building with same height as the building which existed earlier. The petitioners also submit that they had written to respondent no.4 on 10th June 2019 about the said proposal and had sought formally his NOC.

5. It is the further case of the petitioners that respondent no.1-MCGM did not respond to the application of the petitioner no.1-Company, dated 6th June 2019, nor respondent nos.3 and 4 and, therefore, petitioner no.1 filed a writ petition being Writ Petition No.3083 of 2019, which was disposed of with directions issued to respondent no.1 as well as respondent nos.4 to 6 on 10th February 2020. By this order, as pointed out by the petitioners, respondent no.1 was directed to forward the application of petitioner no.1

dated 6th June 2019 to respondent nos.4 to 6 within a period of one week and respondent nos.4 to 6 were directed to render their final decision on the application within a period of four weeks of receipt of the application. The petitioners submit that in spite of these directions, the respondent no.1 as well as respondent nos.4 to 6 did not do anything and, therefore, again about a period of one year thereafter, the petitioners filed another writ petition being Writ Petition (Lodging) No.790 of 2021 on 25th February 2021 and also a Contempt Petition (Lodging) No.13597 of 2021 against respondent nos.3 to 5. The petitioners submit that during the pendency of these petitions, the petitioners learnt about exchange of correspondence between respondent nos.1 and 4 about the proposal of petitioner no.1 and it was then that the petitioners learnt that certain documents and affidavits were required by respondent nos.3 to 5, which compliance was made by the petitioners. The petitioners submit that, even then, respondent nos.3 to 5 did not communicate anything to the petitioners and when hearing of these petitions began before this court, respondent nos.3 to 5 informed the court that they had already taken a decision on the application of petitioner no.1 on 9th March 2021, thereby rejecting the same. With this information supplied to the High Court, nothing remained in the said petitions and, therefore, this court disposed of both the petitions with a direction to respondent nos.3 to 5 to forward a copy of the decision dated 9th March 2021 to the petitioners, which was complied with by respondent no.4.

petitioners dated 6th June 2019 in accordance with law, without the requirement of any NOC from respondent nos.3 to 5, and for grant of necessary permissions and approvals for reconstruction / re-erection of the subject property. In the alternative, the petitioners have also sought a direction to respondents-authorities to acquire the subject property of the petitioners in accordance with law and grant compensation to the petitioners in lieu of acquisition of the subject property.

9. The petition is strongly opposed by respondent no.6-Union of India, which is the main contesting party here, on various grounds, as stated in the reply filed on behalf of the Union of India. Although this reply has been filed on behalf of Union of India, it takes care of all the concerns expressed by respondent nos.3, 4 and 5. According to it, the circulars challenged herein and the entire policy of seeking NOC or obtaining clearance from the Defence Authority are in the interest of safety and security of the nation and is a matter of larger public interest. They submit that objective of these guidelines is to strike a balance between the security concern of the Armed Forces and the members of public to undertake construction activities on their land and, therefore, the contesting respondents justify and support the guidelines as well as the impugned order. They also state that the proposed construction has a potential of posing security risk to the establishment at INS Trata, as it would come in direct line of sight to the operational infrastructure of the Defence Establishment. They also submit that, even though, as submitted by the petitioners, there are some other

structures and buildings in the vicinity of INS Trata, which are multi-storeyed or high-rise structures, those structures have not been viewed by the Defence Experts as hazardous from security view point of INS Trata - Defence Establishment. Therefore, there cannot be any case made out for giving unequal treatment to the petitioners in the matter.

10. These respondents have also submitted a Confidential Note to this court, wherein are given the details of the nature of the structures within the premises of INS Trata and nature of activities being conducted therefrom, a redacted copy of which has already been furnished to the learned Senior Advocate for the petitioners. Relying upon the Confidential Note, the contesting respondents have sought to justify rejection of the application of the petitioners for grant of NOC for reconstruction / re-erection of a bungalow comprising Ground + Two Storeys, with water tanks on the terrace, on the subject property.

11. The contesting respondents further submit that the circular dated 21st October 2016 is applicable only to the Military Establishments and, therefore, it has no relevance here as the issue involved in this petition is of a proposed construction having potential to adversely affect the security interest of Naval Establishments.

12. Mr. Milind Sathe, learned Senior Advocate for the petitioners submits that the impugned circulars issued by the Ministry of Defence, under Article 73 of

the Constitution of India, are ultra vires the Act 1903 for the reason that they have been issued without following procedure prescribed in the Act 1903. He submits that these circulars impose restrictions on the use of the subject property, which is a field already occupied by Act 1903, and therefore, it is imperative that the procedure, as prescribed under Section 3 read with Section 7 of the Act 1903, is followed before imposing such restrictions. He further submits that even for imposing such restrictions on the use of the land in terms of provisions made under the Act 1903, it is necessary that the land owner is duly compensated. He further submits that in the present case, neither the procedure, as prescribed under the Act 1903, has been followed nor any compensation has been paid to the petitioners. He also submits that the executive instructions, as contained in the impugned circulars, can be issued only to supply the gaps in the legislation and not for by-passing the legislation which occupies the field. In the present case, the impugned circulars do have the effect of ignoring provisions made in the Act 1903.

13. The learned Senior Advocate for the petitioners further submits that the impugned circulars are violative of right of the petitioners under Article 300A of the Constitution of India, as the right of the petitioners to construct residential house in the residential area has been adversely impacted, without following due procedure of law.

14. Learned Senior Advocate for the petitioners further submits that reliance of the contesting respondents upon the provisions made in Regulation 16(n) of the Development Control Regulations for Greater Mumbai, 1991, ***(DCR 1991)***, which lays down that the construction must not be permitted in "public interest", is misplaced as the construction in the present case is governed by Development Control and Promotion Regulations for Greater Mumbai, 2034, ***(DCPR 2034)***, and not DCR 1991. He further submits that Regulation 18 of DCPR 2034 provides for "Requirement of Site" and Regulation 18(1) is almost in pari materia to Regulation 16(n) of DCR 1991 but, Regulation 18(1) deletes the words "or is not in the public interest", which words are to be found in Regulation 16(n) of DCR 1991. He, therefore, submits that respondent no.1-MCGM is required to grant development permission to the petitioners only by taking into consideration the factors as stipulated in Section 46 of the MRTP Act and also DCPR 2034, sanctioned by the Government of Maharashtra on 8th May 2018, which do not contain any condition for obtaining NOC from the Defence Authorities. He also submits that all the judgments relied upon by the contesting respondents do not have any application to the facts of the present case as all of them rely upon Regulation 16(n) of DCR 1991. He also submits that even otherwise, the petitioners have only proposed to reconstruct/re-erect same structure with same height and not proposed to develop or construct something for the first time and, therefore, the impugned circulars which apply to development or construction being made for the first time, do not apply to the proposal of the petitioners. He further submits that if old structure of same

height as the proposed structure was not considered as a security hazard and tolerated as it is, any insistence by respondent no.1 for NOC or refusal to grant NOC by respondent nos.3 to 5 would be manifestly arbitrary, especially when there is no law requiring obtaining of NOC by the petitioners in this case.

15. The learned Additional Solicitor General of India ***(ASGI)***, refuting all the submissions made on behalf of the petitioners, states that safety and security of Naval Establishments, like that of respondent nos.3 to 5, are more important than anything else as larger public interest can be well served only when Nation's Defence Establishments remain safe and secured. He further submits that even though DCPR 2034 would have application to the present case, one can see that there is an implicit condition, which can be read into it, of taking into consideration larger public interest while granting development permission by the Municipal Corporation. He submits that in the present case, the subject property is just adjacent to the boundary wall of respondent nos.3 to 5 and the proposed construction has been perceived by the officers of respondent nos.3 to 5, who are experts in the field of safety and security of the Nation, as having a direct line of sight to the operational infrastructure of INS Trata, which is not the case with other constructions and structures standing in the vicinity of INS Trata. He further submits that opinion of the experts cannot be questioned in any court of law on merits.

16. Learned ASGI further submits that denial of NOC to the petitioners was as per the parameters indicated in the impugned circulars and these circulars having been issued in larger public interest, cannot be assailed on any ground. He also submits that one of the impugned circulars, which is of the date of 21st October 2016 is applicable only to Army Units and it is not applicable to Naval Establishments and, therefore, challenge posed to this circular by the petitioners deserves to be ignored.

17. Learned ASGI further submits that the right to property, as envisaged under Article 300A of the Constitution of India, being not absolute and being subject to reasonable restrictions, it cannot be said that by the impugned circulars, there has occurred any violation of right of the petitioners under Article 300A. He further submits that the restrictions imposed under the impugned circulars being in public interest would have to be seen as reasonable restrictions upon the right of the petitioners to enjoy the property, as contemplated under Article 300A. He also submits that it is necessary to take into consideration, in the present case, the changed security scenario post 2008 terrorist attack in Mumbai and considering it, this court must dismiss the petition. In support of his contentions, he has taken us through various judgments, as mentioned in a compilation of documents which has been provided to this court.

18. Before we deal with the questions arising from the rival arguments, we feel it necessary to state here that even though the petitioners have challenged the circulars dated 18th May 2011, 18th March 2015, 17th November 2015, 23rd December 2022 and 21st October 2016, issued by the Ministry of Defence as being ultra vires the Act 1903, we need not examine the challenge made to the circular dated 21st October 2016 of the Ministry of Defence because now it is a well established position, after admission given by respondent nos.3 to 5 in their reply, that this circular is applicable only to the Military Establishments and not to the Naval Establishments. The petition also challenges the vires of the circulars dated 4th February 2016, 20th April 2016 and 7th November 2016 issued by the State of Maharashtra, but we are of the view that this challenge is now rendered redundant in view of the fact that the circular dated 7th November 2016 withdraws the circulars dated 4th February 2016 and 20th April 2016 and provides that for granting permission for construction, guidelines contained in the Defence Department's circular dated 21st October 2016 be followed and also the fact that now there is an admission by respondent nos.3 to 6 that circular dated 21st October 2016 issued by the Ministry of Defence itself is not applicable to the facts of the present case. We, therefore, clarify that whenever we would use the expression "impugned circulars" hereinafter, it would be only in the context of the circulars dated 18th May 2011, 18th March 2015, 17th November 2015 and 23rd December 2022 issued by the Ministry of Defence.

19. The arguments canvassed on behalf of both sides primarily raise following questions :

(i) Whether the impugned circulars dated 18th May 2011, 18th March 2015, 17th November 2015 and 23rd December 2022 issued by Ministry of Defence are ultra vires the Works of Defence Act, 1903?;

(ii) Whether in the facts and circumstances of this case, would it be proper on the part of respondent no.1-MCGM to insist upon production of NOC from respondent nos.3 to 5 by the petitioners in order to process and decide the application dated 6th June 2019 made by the petitioners to the respondent no.1 for grant of development permission ?

20. In order to answer the first question, it would be necessary to consider the nature of the impugned circulars and restrictions that they seek to impose.

Circular dated 18th May 2011

By this circular, Ministry of Defence has laid down certain guidelines for issuance of NOC for building constructions. These guidelines impose following restrictions :

(a) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey his views after seeking approval from next

the proposed construction is in line with and/or behind, i.e. in the shadow or shield of the existing building, then the comments of the LMA are not required.

Circular dated 23rd December 2022

22. By this circular, all earlier circulars like the circulars dated 18th May 2011, 18th March 2015 and 17th November 2015 and also letter dated 21st October 2016 of Ministry of Defence are superseded and fresh guidelines for issuance of NOC for construction of buildings in the vicinity of Defence Establishments are prescribed.

23. It would be seen that the above referred circulars, impugned herein, have been issued by the Ministry of Defence and they are in the nature of executive instructions issued under Article 73 of the Constitution of India. It would be further seen that they impose certain restrictions upon the land owners to seek permission from the Planning Authority to develop their lands and thus, create a restrictive impact upon the right of the land owners to develop their property, which is a part of their right to enjoy the property as per their free will, subject to the laws regulating the development of the property.

24. It has been held in the case of *B.K. Ravichandra and Ors. Vs. Union of India and Ors.* that although the right to property is not a fundamental right protected under Part III of the Constitution of India, it remains a valuable

1 *2020 SCC OnLine SC 950*

constitutional right. The importance of this right has been explained in the case of *Delhi Airtech Services Pvt. Ltd. Vs. State of U.P.*[1] in following words:

> *"30. "It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression of the Government. Jefferson was of the view that liberty cannot long subsist without the support of property." Property must be secured, else liberty cannot subsist" was the opinion of John Adams. Indeed, the view that property itself is the seed bed which must be conserved if other constitutional values are to flourish is the consensus among political thinkers and jurists."*

25. Such being the nature of the right to property, the Supreme Court has in the case of *State of Rajasthan Vs. Basant Nahata*[2] held that, no person can be refrained from dealing with his property in any manner he likes, absent any substantive provisions contained in a parliamentary or legislative act. It further held that, in fact, imposition of any restrictions on the right to property without any authority of law would be opposed to one's right to property, as envisaged under Article 300A of the Constitution of India.

26. In the case of *T. Vijayalakshmi and Ors. Vs. Town Planning Member and Anr.*[3], the Apex Court held that the right to property of a person includes a right

1 (2011) 9 SCC 354
2 (2005) 12 SCC 77
3 (2006) 8 SCC 502

higher authority, not below the rank of Brigadier or equivalent, within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal Authorities and under no circumstances shall be conveyed to builders/private parties.

(b) Where the local municipal laws do not so require, yet the Station Commander feels that any construction coming up within 100 meter (for multistorey building of more than four storeys, the distance shall be 500 meters) radius of defence establishment can be a security hazard, he should refer the matter immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey his objection/ views to the local municipality or State Government agencies. In case the Municipal Authority/State Government do not take cognizance of the said objection, then the matter may be taken up with higher authorities, if need be through AHQ/MoD.

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

. These guidelines also clarify that the above restrictions will not apply where constructions are regulated by the provisions of the existing Acts / Notifications such as Cantonments Act, 2006, Air Craft Act, MoCA, 1934 Gazette Notification SO 84(E) dated 14th January 2011 (as revised from time to time), Works of Defence Act, 1903 etc. and that in such cases, provisions of the concerned Act / Notification would continue to prevail.

Circulars dated 18th March 2015 and 17th November 2015

21. Circular dated 18th March 2015 issued by the Ministry of Defence adds a proviso under para 1(b) of circular dated 18th May 2011 to the effect that NOC from Local Municipal Authority / Defence Establishment, *("LMA" for short)*, would not be required in respect of a construction for which permission had been issued by the competent LMA prior to the date of the circular of 18th May 2011. It, however, clarifies that this proviso shall not apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 18th May 2011.

Circular dated 17th November 2015 issued by the Ministry of Defence provides that Defence may, after obtaining comments from LMA and giving due consideration to such comments, decide whether to approve a proposal for construction or not. It further provides that LMA would be required to give comments within thirty days. The circular further provides, inter alia, that in case

to construct a building and that such a right, however, can be restricted by reason of legislation. In para 15, it held thus :

> "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."

27. In the case of *Hari Krishna Mandir Trust Vs. State of Maharashtra and Ors.*[1] Also, the Apex Court has held that the right to property may not be a fundamental right any longer, but it is still a constitutional right under Article 300A of the Constitution of India. It has also been described to be a human right and it has been held, in the light of the mandate of Article 300A of the Constitution, that no person can be deprived of his property save by authority of law. This law has also been followed by a Division Bench of this court in the case of *Runwal Constructions Vs. Union of India, through Ministry of Defence and Ors.*[2].

1 *(2020) 9 SCC 356*
2 *2021 SCC OnLine Bom 668*

28. It would be clear from the above referred judgments that right to property under Article 300A of the Constitution of India is a valuable right and it has been equated with a human right, enabling a property owner to enjoy his property at his free will, though within the limits of law operating in the field. It is further clear 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 under the authority of law.

29. In the present case, as rightly submitted by learned Senior Advocate for the petitioners, in the matter of imposing restrictions upon use and enjoyment of land in the vicinity of Works of Defence, there is already a Central Legislation, the Works of Defence Act, 1903 occupying the field. It has twin objects, firstly, to provide for imposing restrictions upon the use and enjoyment of land in the vicinity of Works of Defence in order that such land may be kept free from buildings and other obstructions and secondly, to provide for determining the amount of compensation to be made on account of such imposition. A perusal of this Act 1903 would show that it lays down a detailed scheme about the kind of restrictions that may be imposed and the procedure for imposing such restrictions and also provides for payment of compensation to the property owner on account of imposition of the restrictions on his property. The salient features of the Act 1903 may be stated briefly as under :

Part-I makes provisions for short title and extent of the Act and definitions of the specific terms used in the Act.

Part-II deals with imposition of restrictions, payment of damages and compensation and the procedure to be adopted for doing so.

Part-III makes provision for reference to Court and procedure to be followed in that regard.

Part-IV deals with the issues arising from apportionment of compensation.

Part-V provides for the manner of payment of compensation or depositing the same in court, investment of money deposited in court and in other cases, payment of interest.

Part-VI includes provisions relating to service of notices, penalties, enforcement of compliance and other miscellaneous aspects including rule making power of the Central Government.

Out of the above-referred Parts, the provisions contained in Part-II, for the purpose of answering the issue involved in first question, are more relevant and more significant are those which are prescribed under Section 3 and Section 7 in Part-II of the Act 1903.

30. Section 3 lays down that whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders. It also mandates that such declaration shall be

published in the Official Gazette and shall give the details of the land being subjected to restrictions together with a sketch plan of the land.

31. Section 7 prescribes that from and after the publication of the notice under Section 3, sub-section (2), such of the following restrictions, as the Central Government may in its discretion declare in the notice, shall attach with reference to such land, namely :

> "7(a) Within an outer boundary which, except so far as is otherwise provided in section 39, sub-section (4), may extend to a distance of two thousand yards from the crest of the outer parapet of the work:
>
> (i) no variation shall be made in the ground-level, and no building, wall, bank or other construction above the ground shall be maintained, erected, added to or altered otherwise than with the written approval of the General Officer Commanding the District and on such conditions, as he may prescribe;
>
> (ii) no wood, earth, stone, brick, gravel, sand or other material shall be stacked, stored or otherwise accumulated."

32. There are other conditions prescribed in Section 7 as well. Sections 12 and 13 of Part-II are also material as they provide for making of inquiry into the quantum of compensation to be paid and passing of an award for payment of compensation on account of any damage caused or to be caused under Section 6 and also for restrictions imposed under Section 7.

33. It would be thus clear that the Act 1903 is a comprehensive legislation and a complete Code, dealing with the restrictions to be imposed upon the use and enjoyment of the land in the vicinity of work of defence, the procedure to be followed for imposing the restrictions and compensating the property owner for imposing restrictions upon his right to property. Such being the nature of the Act 1903, it would be further clear that it is an enactment completely occupying the field of curtailing right to enjoy property of land-owners in the vicinity of Defence Establishments. It then follows that if any restrictions are to be imposed for use and enjoyment of the land in the vicinity of Defence Establishments, it must be done by issuing a declaration imposing restrictions by following the procedure prescribed in various provisions of Part-II, which also includes provision for payment of compensation for the abridgment of right of the property owner to use and enjoy his property. After-all, Act 1903, being a complete Code in the matter of restrictions to be imposed upon right to enjoy property, already occupies the field and, therefore, if any restrictions are to be imposed, they must be in accordance with this law, which occupies the field.

34. In the case of *Satwaratna Co-op. Housing Society Ltd. & Anr. Vs. Bharat Petroleum Corporation Ltd. & Ors.*[1], the Apex Court has held that in the absence of any law which provides for a buffer zone between a refinery and the residential building, the owner of the land cannot be prevented from the right to use the land effectively including the right to carry out redevelopment and/or reconstruction in accordance with law and the rules and regulations with regard

1 2022 SCC OnLine SC 703

to the construction of buildings. We have already referred to the cases of *B.K. Ravichandra and Ors. and T. Vijayalakshmi (Supra)*, which have held that right to property, which includes a right to construct a building, can be restricted only by reason of a legislation. In this case, at the cost of repetition, we must say that a comprehensive legislation governing the field of imposition of restrictions on use and enjoyment of land in the vicinity of Defence and Naval Establishments already occupies the field and, therefore, it has to be said that if any restriction is to be imposed, it must be by following the procedure prescribed under the legislation which occupies the field.

35. In the present case, the executive instructions issued in terms of the impugned circulars do not follow the procedure prescribed under the Act 1903; in particular, the procedure as prescribed under Section 3 of the Act 1903. There is no declaration issued by following the said procedure imposing restrictions upon use and enjoyment of land in the vicinity of INS Trata and therefore, the impugned circulars are inconsistent with the provisions of the Act 1903. Learned ASGI, however, submits that even the impugned circulars, being in the nature of executive instructions, can be relied upon pending consideration of intended amendments and/or approval of those amendments to the Act 1903. He relies upon the cases of *S.S.V. Developers and Ors. Vs. Union of India, through Ministry of Defence and Ors.*[1], *Sunbeam Enterprises Vs.*

1 *2013 SCC OnLine Bom 1602*

Municipal Corporation of Greater Mumbai and Ors.[1] and *TCI Industries Ltd. Vs. Municipal Corporation of Greater Mumbai and Ors.*[2].

36. The submission of learned ASGI now would have to be considered in the light of the law explaining the nature and effect of executive instructions issued by the Central Government under Article 73 of the Constitution of India or under Article 162 of the Constitution of India by the State Government. In the case of *P.H. Paul Manoj Pandian Vs. P. Veldurai*[3], it was held that there are two limitations; firstly, if any Act or law has been made by the State Legislature conferring any function on any other authority, the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him and, secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor. It was further held that once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. It was also held that it is well recognized that in the absence of any parliamentary legislation on the subject, the State Government has the jurisdiction to act and to make executive orders. It was further held that if any such orders were issued because of absence of

1 *2019 SCC OnLine Bom 1059*
2 *2011 SCC OnLine Bom 1671*
3 *(2011) 5 SCC 214*

the legislation, such orders by themselves would not offend the provisions of the Constitution, or any law, unless they were contrary to any express provisions of the Constitution or were repugnant to any enactment or the appropriate legislature. It was also held that when any legislation would exist, still such executive power can be exercised to fill in the gaps by issuing various departmental orders. Relevant observations of the Supreme Court, as they appear in paras 46 and 48, are reproduced thus :-

> "46. Under Article 162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations on the exercise of such executive power by the government are two fold; first, if any Act or law has been made by the State Legislature conferring any function on any other authority, in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.
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> 48. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare State, the functions of the executive are ever widening, which

cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is coterminous with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State executive can make regulations and issue government orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated 16-11-1951 on the ground that it contained administrative instructions."

37. Insofar as concerned deprivation of right to property or placing any restrictions upon the right to property, as envisaged under Article 300A of the Constitution of India, by taking recourse to the executive power of the State Government under Article 162 of the Constitution, there is a direct judgment on the point. 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 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. The Supreme Court has further held that, the word "law" in the context of Article 300A must mean an Act of Parliament or of a State Legislature, a rule or a statutory order, having the force of law, that is positive or

1 *(1982) 1 SCC 39*

State-made law. It is further held that, the State Government cannot, while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Relevant observations of the Apex Court, as they appear in para 41 of the judgment, are reproduced here for the sake of convenience :-

"41. There still remains the question whether the seizure of wheat amounts to deprivation of property without the authority of law. Article 300-A provides that no person shall be deprived of his property save by authority of law. The State Government cannot, while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by authority of law and not by a mere executive fiat or order. Article 162, as is clear from the opening words, is subject to other provisions of the Constitution. It is, therefore, necessarily subject to Article 300-A. The word "law" in the context of Article 300-A must mean an Act of Parliament or of a State Legislature, a rule, or a statutory order, having the force of law, that is positive or State-made law."

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 Law[1] as per the theory of Legal Positivism propounded by Scholars Jeremy Bentham and John Austin.

39. In the cases of *TCS Industries Ltd., S.S.V. Developers* and *Sunbeam Enterprises*, the view taken is that even if there is no notification issued under Section 3 of the Act 1903, the Planning Authority can always insist for NOC from the Defence Department if the property is situated just adjacent to the Defence Establishment. In the case of *S.S.V. Developers*, it has been held that the guidelines issued by the Ministry of Defence vide its circular dated 18th May 2011 for issuance of NOC for building constructions are not arbitrary as the authorities issuing the guidelines found that the Works of Defence Act, 1903, which imposes restrictions upon use and enjoyment of the lands in the vicinity of Defence Establishments, needs to be comprehensively amended so as to take care of security concerns of Defence Forces and the process of amendment, already put in motion, may take some time and as such, in the interregnum, guidelines providing for necessary safeguards vis-a-vis Defence Establishments can be issued by the Ministry of Defence,

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

which guidelines include regulation of grant of NOC. It is further observed that the objective of these instructions is to strike a balance between security concerns of the Defence Forces and the right of public to undertake construction activities on their lands and, therefore, even if the municipal laws do not so require, yet the Station Commander feels that any construction coming up within 100 meter (for multistorey building of more than four storeys, the distance shall be 500 meters) radius of defence establishment could be a security hazard, he can, after seeking confirmation from his own higher authority in the chain of his command, refuse to grant NOC for construction of such building.

40. In our respectful submission, the view so taken in the afore-stated cases of *TCI Industries Ltd., S.S.V. Developers* and *Sunbeam Enterprises* does not take into consideration the law settled in this regard by the Supreme Court in the cases discussed earlier, in particular the cases of *P.H. Paul Manoj Pandian* and *Bishambhar Dayal Chandra Mohan*, which cases have been followed by another Coordinate Bench of this court very recently in the case of *Runwal Constructions*. Then there is also a body of law subsequently developed by the Apex Court in the cases of *B.K. Ravichandra, Satwaratna Housing Society* and *T. Vijayalakshmi*, which hold the field today and lay down in no uncertain terms that in the absence of any law providing for curtailment of right to enjoy the property, which is a valuable right under Article 300A of the Constitution of India, no person can be subjected to any restriction upon his right to construct a

Urban Development Department and Ors.[1] and *Vikram Delite Co-operative Housing Society and Ors. Vs. Union of India, through the Ministry of Defence and Ors.*[2]. It would be, therefore, necessary for us to consider these cases as well.

43. In the case of *Hindustan Petroleum Corporation Ltd.*, the permissions and clearances granted to Oswal Mills Pvt. Ltd. for change of land use and construction of high rise structures were challenged. The challenge so posed to the change of land use and construction of high rise structures was examined in the light of the provisions made under Section 46 of the MRTP Act and Regulation 16(n) of DCR 1991 and it was held, by relying upon the ratio of the case of *S.N. Rao Vs. State of Maharashtra*[3], that the Planning Authority granting development permission need not always confine itself to the factors stated in Section 46 of the MRTP Act and that Section 46 of the MRTP Act does not stand in the way of the authority, considering such material or fact additionally, if it is relevant, for taking its decision to grant sanction or refuse sanction of any Development Plan. It was also held that the security as well as health aspects are crucial and can be appropriately considered as falling within the sweep of the expression "in the public interest" used in Regulation 16(n) of DCR 1991. This case does not deal with the validity or otherwise of executive instructions imposing restrictions upon use and enjoyment of the land when a legislation governing the subject already occupies the field and, therefore, to this extent,

1 *2016 SCC OnLine Bom 2570*
2 *2022 Bom OnLine 6700*
3 *(1988) 1 SCC 586*

this case may not be of any assistance to respondent nos.3 to 6. But, the law laid down by the Apex Court in the said case of *S.N. Rao* that a Planning Authority can always consider any other relevant material or relevant factors, in addition to the factors stated in Section 46 of the MRTP Act, for granting or refusing to grant sanction to any Development Plan, would be binding and would have to be applied in the facts and circumstances of each case. More or less similar is the ratio of the cases of *Oswal Agro Mills Ltd., Union of India, through the Indian Army, Gorakhnath Shankar Nakhwa* and *Vikram Delite Co-op. Housing Society Ltd.* insofar as they concern the additional factors which are required to be taken into consideration by the Planning Authority while granting development permissions. These cases do not specifically deal with the validity of the impugned circulars questioned here on the ground that they are ultra vires the Act 1903 and, therefore, in this regard, they would be of no help to respondent nos.3 to 6. But, as regards the view that they have taken about the Planning Authority, while granting development permission, considering in it's discretion relevant factors in addition to the factors stated in Section 46 of the MRTP Act, there is no quarrel, although in what cases such additional factors should be considered or should not be considered would be a question of fact to be decided by the Planning Authority in the facts and circumstances of each case.

44. In the present case, we have already found that the impugned circulars have not been issued in accordance with the provisions made in Section 3,

residential house in the residential area. The meaning of the word "law" has been explained in the case of *Bishambhar Dayal Chandra Mohan*, which we have already discussed earlier, and it does not include a circular issued in exercise of executive power of the Central Government or the State Government at a time when the relevant legislation already occupies the field. This subsequent body of law, together with the law settled by the Apex Court in the cases discussed earlier, which were prior to the judgments in the cases of *TCS Industries Ltd., S.S.V. Developers* and *Sunbeam Enterprises*, now constitutes an authoritative pronouncement for a proposition that restrictions upon use and enjoyment of land can be imposed only under an authority of law and when a relevant law, like the Act 1903, is occupying the field already, by device of executive instructions, no restrictions can be imposed on use and enjoyment of the land, though by the executive instructions only gaps in legislation can be filled. Therefore, we are of the view that the said cases of *TCS Industries Ltd., S.S.V. Developers* and *Sunbeam Enterprises* relied upon by respondent nos.3 to 6 would render no assistance to them.

41. There is one more case, the case of *Lok Holding and Construction Ltd. & Ors. Vs. Municipal Corporation of Greater Mumbai & Ors.*[1], which is decided by a Coordinate Bench of this court. In this case, the order dated 16th March 2011 passed by the Executive Engineer of the Bombay Municipal Corporation cancelled the IOD and CC granted in favour of the petitioners for construction of building on property bearing CTS Nos.153, 153/1 to 3 of Village Malad (East)

1 *2011 SCC OnLine Bom 1855*

on the basis of the objection raised by the Defence Authority that the proposed structure would cause danger to the Defence Establishment. A letter dated 23rd January 2009, taking such objection by the Defence Establishment, was found to be on record. In the context of these facts, a view was expressed by the Division Bench that as there was a statutory enactment occupying the field, such as the Works of Defence Act 1903, the Government "**may** not have the power" to issue such instructions in respect of Defence Establishment in relation to which there is no notification, as contemplated by the provisions of the Act 1903. This view has been found by another Division Bench of this court in the case of *S.S.V. Developers* and others and also the case of *Sunbeam Enterprises* as laying down no law, there being use of the words "**may** not have" in *Lok Holding and Construction Ltd.*, thereby indicating that there was no authoritative pronouncement of law in that case. There is no reason for us to express our disagreement with these observations but, this issue has now been rendered only academic in view of the law settled by the Apex Court in its various judgments and discussed earlier.

42. Learned ASGI has also relied upon the cases of *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*

1 *2012 SCC OnLine Bom 560*
2 *(2014) 2 SCC 491*
3 *2022 SCC OnLine Bom 6703*

read with Section 7, of the Act 1903 and there being already occupation of the field by the Act 1903, no restrictions could have been imposed upon use and enjoyment of the subject property by mere executive instructions and, therefore, we find that the impugned circulars are ultra vires the provisions of the Works of Defence Act, 1903 and as such are invalid, deserving to be quashed and set aside by this court. The first question, *i.e. Whether the impugned circulars dated 18th May 2011, 18th March 2015 and 17th November 2015 issued by Ministry of Defence are ultra vires the Works of Defence Act, 1903*, is answered accordingly.

45. Now let us proceed to answer the second question which is about the need for respondent no.1-MCGM to insist upon the petitioners to obtain NOC from respondent nos.3 to 6 before their application dated 6th June 2019 can be considered and decided by it.

46. According to learned Senior Advocate for the petitioners, there exists no such need in the present case for the reason that the proposed building has similar height as the building which existed on the subject property since about 1938 or 1940 and INS Trata having been set up and commissioned by respondent nos.3 to 6 in the year 1991-92, at which time, the old building of the same height as the proposed building was already standing. He also submits that the application of the petitioners is governed by DCPR 2034 and not by DCR 1991 and that there is a slight difference between these two regulations in

the sense that Regulation 16(n) of DCR 1991 uses the words "or is not in the public interest", which words have been deleted from Regulation 18 of DCPR 2023, which is otherwise in pari materia to Regulation 16(n) of DCR 1991. He also submits that there are other structures and buildings existing in the vicinity of INS Trata, which have much more height than the proposed building of the petitioners and some of these buildings are just adjacent to the boundary wall of INS Trata. He submits that if the other adjacent or nearby buildings do not pose any security threat to INS Trata and the old building standing on the subject property was also not considered to be any security hazard, it would be illogical to say that in the facts and circumstances of this case, any NOC from respondent nos.3 to 6 would be necessary. This is all disagreed to by learned ASGI. He submits that even though the present application for grant of development permission is governed by DCPR 2034 and the relevant regulation thereof, the Regulation 18(1), deletes the words "or is not in the public interest", such public interest can be read into the provisions of Section 46 of the MRTP Act, if one considers the exposition of law made by the Apex Court in the case of *S.N. Rao*. He further submits that in a case where security interest of Naval Establishment or Defence Establishment is involved, there cannot be any comparison between one building and other buildings in the vicinity as, ultimately, the Defence Authorities, being experts in the field, would have a decisive vote. He submits that if they find that comparison between two sets of buildings is ill-founded and one set of building poses a security threat while the other set of buildings does not, such opinion has to be accepted by the

Planning Authority. He, thus, submits that *de hors* the impugned circulars, respondent no.1-MCGM would be well within its rights to insist upon NOC to be issued by respondent nos.3 to 5 in the present case.

47. There can be no second opinion about the fact that security of a Defence Establishment and Naval Establishment is of paramount importance and there could be no compromise with it. It is also not in doubt that in the matter of security, Defence Authorities are the experts and their opinion has to be accepted. It would then mean that it is not for the common citizens like the petitioners to make forays into the field which is an exclusive preserve of the Defence Authorities and make an attempt to formulate an opinion, by making comparison between certain buildings situated in the vicinity of the Defence Establishment and Naval Establishment. It is not open to any commoner to say that in his opinion one building in the vicinity of the Defence or Naval Establishment poses security threat while the other does not to the Defence or Naval Establishments because the other taller buildings situate nearby are tolerated by the Defence Authorities. But, this is only a general rule and there can be peculiar facts and circumstances of a case which may provide for an exception to the general rule. In a given case, the facts and circumstances could be so glaring that only one conclusion, which follows them as a logical corollary, can be drawn and if any other conclusion is reached, it could be viewed as so absurd that no sensible person could ever have reached it. This proposition of law is a part of Wednesbury principle, which says that a decision

will be said to be unreasonable in the Wednesbury sense if, (i) it is based on wholly irrelevant material or wholly irrelevant consideration; (ii) it ignores a very relevant material which ought to have been taken into consideration or (iii) it is so absurd that no sensible person could ever have reached it. *(See Associated Provincial Picture Houses Ltd. Vs. Wednesbury Corporation*[1] *and Chairman All Railway Rec. Board and another Vs. K. Shyam Kumar and others*[2]*).*

48. In the present case, however, the comparison sought to be made by learned Senior Advocate for the petitioners between proposed building of the petitioners and the other taller buildings situated nearby or in the vicinity of INS Trata so as to justify construction of a much shorter building is uncalled for as there is no specific material available on record to enable the court to find the distinction made by respondent nos.3 to 5 in these two sets of buildings to be absurd. We are, therefore, of the opinion that reliance placed by the petitioners upon the comparison between two sets of buildings standing in the vicinity of INS Trata in order to justify their case in incorrect.

49. The matter, however, does not end here. There is another ground taken by the petitioners in support of their submission that this is a peculiar case wherein NOC of respondent nos.3 to 5, irrespective of what is stated in the impugned circulars or any other considerations, is not necessary. They submit that the height of the proposed building is same as that of the old building,

1 (1948) 1 KB 223
2 Civil Appeal Nos.5675-5677 decided by Supreme Court on 6th May 2010

which was constructed way back in the year 1938 or 1940 and which was in existence even in the year 1991-92, when INS Trata as a Naval Establishment was set up and commissioned. Learned Senior Advocate for the petitioners submits that if the old building of the same height was not the security hazard for INS Trata since its very inception till the year 2005, when it came to be demolished, and the new proposed building is also of the same height, it sounds illogical and absurd that a similar building with similar height, which is to come up by reconstruction and re-erection, would suddenly become a security risk. Learned ASGI has, however, holds a different opinion. According to him, issuance of NOC is a requirement of the restrictions contained in the impugned circulars and the impugned circulars being in the nature of executive instructions would bind everybody, and the NOC is a must in the present case. He also submits that now INS Trata has undergone change as regards its own security requirements, especially after 2008 terrorist attack in Mumbai, which is pointed out in the Confidential Note given to this court, and, therefore, the petitioners cannot say that there is no requirement of issuance of NOC by respondent nos.3 to 6.

50. This case, we must say, is undoubtedly governed by DCPR 2034 and the applicable rule is Regulation 18. Regulation 18(1) of DCPR 2034 is substantially in pari materia to Regulation 16 (n) of DCR 1991, but it deletes the words "or is not in the public interest", which were used in Regulation 16(n) of the earlier DCR of 1991. Regulation 18 of DCPR 2034 also does not explicitly provide for

obtaining of NOC from the Defence Authorities in such cases. However, there is a general rule regulating grant of permissions for developmental and construction activities, as prescribed in Section 46 of the MRTP Act. It lays down the factors to be taken into consideration by the Planning Authority for grant or refusal of sanction of the Development Plan. These factors are such as the provisions of the draft or sanctioned original plan, in case Development Control Regulations for that particular area are not in force, and if there is no draft or sanctioned original plan, the factors that are required to be taken into consideration are those as contained in the Development Control Regulations applicable to the area under the Planning Authority, as specified by the Government by a gazette/notification, till the Development Control Regulations for such area are sanctioned. Interpreting this provision of law, the Apex Court in the case of *S.N. Rao* has held that if there will be any other material or relevant factors, Section 46 of the MRTP Act does not stand in the way of such material or factors being considered by the Municipal Corporation for grant of sanction or refusal to grant sanction of any Development Plan. In other words, the Planning Authority can always take into consideration, apart from the factors stated in Section 46, any other material or factor which is relevant for the purpose of exercising discretion by the Planning Authority in the matter of grant or refusal of the development permission. Of course, if Development Control Regulations are in force, the provisions made therein would also have to be taken into consideration in such a matter.

51. In the present case, DCPR 2034 are in force and apply to the application made by the petitioners for grant or sanction of development permission. These regulations would be relevant here for respondent no.1 to consider and decide the application of the petitioners. They do not contain any provision for obtaining of NOC from respondent nos.3 to 5 or Defence Establishments. But, as the law discussed earlier would indicate that in an appropriate case, additional factors which would also include NOC from Defence Establishments could also be considered by the Planning Authority, if they are relevant. Such additional factor or material must be relevant for ensuring that the development of a land occurs in a safe and secure manner, which serves the object of the property owner to use and enjoy his property in a reasonable manner on the one hand and which does not harm the health, safety and security of the inhabitants of the buildings in the neighbourhood. What is 'relevant' in such a case would be question of fact which would have to be decided in the peculiar factual situation of a particular case. What is relevant in one case need not necessarily be relevant in another case and vice-a-versa. Therefore, if any security concern expressed by the Defence Establishment in the vicinity is to be addressed properly by the Planning Authority, the Planning Authority would have to decide whether it is relevant or whether it is absurd in a particular case, owing to the glaring nature of facts. It is only by applying the test of relevancy and absurdity that the Planning Authority would have to take its decision regarding need for issuance of NOC by the Defence Authorities before any development permission is granted or refused by it, when it comes to exercising

it's discretion in taking into consideration additional factors, not explicitly mentioned in Section 46 of the MRTP Act or DCPR 2034.

52. Applying this test to the present case, we find that the facts of this case are so glaring that it would be illogical and even absurd to say that same building with same height at the same place as the earlier building which existed in the vicinity of INS Trata would become a security hazard upon its construction. What was not a hazardous structure from security view point would not become so only because it is constructed anew without any increase in height. Of course, the respondent nos.3 to 6 have tried to justify their stand by tendering to the court the Confidential Note but on going through the same, we do not find any such glaring material as would cause a topsy-turvy in the security hazard perception emerging from the proposed building with same height. The respondent no.1-MCGM has, however, insisted upon the petitioners to obtain NOC from respondent nos.3 to 6 before their application for grant of development permission could be decided one way or the other. In our opinion, the facts and circumstances of this case, as discussed earlier, indicate that such insistance of respondent no.1 is unreasonable by application of the Wednesbury principle. These facts and circumstances unambiguously and unmistakably show in a logical way that if a similar building which existed in the past did not cause any security hazard to INS Trata, then there is no way that substitution of the said building by another building would suddenly result in a security risk for INS Trata.

53. There has been one argument advanced on behalf of the petitioners about one possible way to interpret the impugned circulars as applicable to only new developmental and construction works and not to the works of reconstruction and re-erection of the buildings after they are demolished. There has been another argument about the impugned circulars being violative of principle of rule of law, as contemplated in Articles 14 and 21 of the Constitution of India and there being legitimate expectations of the petitioners regarding operation of provisions of law in a reasonable manner allowing the petitioners to exercise their right to property in a reasonable way. Having given our answers to the questions framed above for the reasons stated earlier, we do not think that now it is necessary for us to deal with these points of argument and, therefore, now we would not consider them.

54. In the result, we find that this petition deserves to be partly allowed. Accordingly, we pass the following order :-

(i) Petition is partly allowed.

(ii) The Circulars dated 18th May 2011, 18th March 2015, 17th November 2015 and 23rd December 2022, issued by respondent nos.3 to 6, are quashed and set aside.

(iv) The impugned letter dated 9th March 2021 issued by respondent no.4-Flag Officer, Commanding-in-Chief, as a consequence, is also quashed and set aside.

(v) Respondent no.1-MCGM is directed to process the application of the petitioners dated 6th June 2019, without the requirement of any NOC from respondent nos.3 to 5, and take an appropriate decision thereon in accordance with law within a period of four months from the date of the order.

(vi) Petition is disposed of in the above terms.

55. At this stage, learned counsel for respondent nos.3 to 6 requests for grant of stay to the effect and operation of this Judgment and Order. We do not think it necessary to grant the request of the learned counsel for respondent nos.3 to 6 for the reason that time of about four months has been granted to respondent no.1-MCGM for taking an appropriate decision on the application of the petitioners dated 6th June 2019 and, therefore, the said request is rejected.

(M.W. CHANDWANI, J.) **(SUNIL B. SHUKRE, J.)**