

(2023) 12 CAL CK 0005
In the Calcutta High Court
Case No : M.A.T. No. 1344 Of 2022

Commandant, Ordnance Depot, Alipore	APPELLANT
Vs	
Kolkata Municipal Corporation & Ors.	RESPONDENT

Date of Decision : 01-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 300A
Kolkata Municipal Corporation Building Rules, 2009 — Rule 3, 4, 7, 16
Kolkata Municipal Corporation Act, 1980 — Section 393, 396

Citation : (2023) 12 CAL CK 0005

Hon'ble Judges : Arijit Banerjee, j; Apurba Sinha Ray, J

Bench : Division Bench

Advocate : Nandlal Singhania, Vipul Kundalia, Debu Chowdhury, P. Chidambaram, Arindam Banerjee, A. Mitra, Biswajit Kumar, Anindya Kumar Mitra, Sourav Bhagat, Shruti Swaika, Deepan Sarkar, Yukti Agarwal, Ritwik Saha, Kumar Jyoti Tewari, A. Majumdar, Rajib Mukherjee, Shreyasi Bhaduri, Achinta Banerjee, Ranajit Chatterjee

Final Decision : Dismissed

Judgement

Arijit Banerjee, J

1. This appeal is directed against a judgment and order dated July 8, 2022, whereby the appellant's writ petition being WPA no. 13756 of 2021 was dismissed along with two connected applications.

2. The appellant/ writ petitioner had approached the learned Single Judge contending that Kolkata Municipal Corporation (in short 'KMC') ought not to have sanctioned a building plan in favour of the respondent no. 5 DSK Real Estates Limited (in short 'DSK'), permitting construction of a G+40 storied building at premises no. 34, Diamond Harbor Road, Kolkata. The ground urged by the writ petitioner before the learned Single Judge and also before us, was and is, that construction of such a high rise in the immediate vicinity of the Ordnance Depot situated at 40, Remount Road, Kolkata, is prohibited by the relevant Circulars

issued by the Ministry of Defence (in short MOD) and, in any event, would breach/ jeopardize the safety and security of such Depot. The prayers made before the learned Judge were for a direction on KMC to cancel the building plan sanctioned by it and also to direct KMC to issue restraint order upon DSK requiring it not to take further steps in furtherance of the sanctioned plan.

3. The arguments advanced by the parties before the learned Single Judge were essentially the same as have been made by the parties before us, which I will shortly advert to. The learned Judge considered the relevant Circulars issued by the MOD and the applicable case law. The learned Judge found that the restrictions imposed in the Circular of 2011, which may have prohibited the subject construction, were substantially done away with in the Circular of 2016. The learned Judge found that KMC had sanctioned the concerned building plan in accordance with and not in breach of the restrictions mentioned in the 2016 Circular. The concluding observations of the learned Single Judge are as follows:-

"76. This Court can neither impute personal knowledge nor assess the security hazards, as rightly pointed out by Mr. Singhania. The matter is also pending before the Government of India for a further review of the circular dated October 21, 2016. The decision of this Court is restricted to the question whether any illegality has been committed by the KMC, in granting a building permit to the respondent no.5 and whether the sanction has been granted in violation of the security restrictions imposed by the Government. This court does not find that the KMC has failed to abide by the security guidelines as laid down by the Ministry of Defence, Government of India, in its circular dated October 21, 2016.

77. Moreover, by an order dated October 1, 2021, the Union of India was specifically directed to answer in its affidavit and clarify the position by giving its own interpretation of its guidelines.

78. The Court does not find that the UOI has supported the contentions of the petitioner, in the affidavit. The relevant portions of the affidavit are quoted below:-

"7. That in the year 2016, Guidelines were once again amended by Ministry of Defence vide their notification ID 11026/2/2011/D (lands) dated 21st October 2016, which states as under.

".....Reference Circular of even number dated 18 May 2011 read with amendments issued vide Circulars of even number dated 18 Mar 2015 and 17 Nov 2015 regarding grant of No Objection Certificate (NOC) from the Local Military Authorities (LMA) for construction of buildings in the vicinity of defence establishments.

2. In view of the large number of representations received from elected representatives to review the guidelines issued in 2011 as difficulties are being faced by public in constructing buildings on their own land and pending finalization of amendments to the Works of Defence Act 1903, the Government

has decided to amend guidelines issued under Circular dated 18 Mar 2011 read with Circulars dated 18 Mar 2015 and 17 Nov 2015 in consultation with Services, in the following manner.

a) Security restrictions in respect of Defence establishments/installations located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 meters from the outer wall of such Defence establishments/ installations to maintain clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone of 10 meters will require prior No Objection Certificate (NOC) from the Local Military Authority (LMA)/Defence establishments."

8. That the NOC Guidelines issued vide MOD Letter No. 11026/2/2011/D(Lands) dated 21.10.2016 are presently under review."

79. The interpretation of the effect of the circular dated October 21, 2016 by the KMC and the respondent No. 5 & 6, is correct. However, the Ministry of Defence and the Government of India are always entitled to assess the security issue and further review the guidelines of 2016 and issue necessary directives. This Court sitting in judicial review, cannot go beyond the contents of the policy/guidelines of 2016.

80. Admittedly, the circular dated October 21, 2016, is pending a review before the Ministry of Defence. The Works of Defence Act, 1903 is also under review. Any decision taken by the competent authority will prevail.

81. The decisions of the Kerala High Court, Bombay High Court and the Delhi High Court, do have a persuasive value. It has been stated in all the decisions that the mandatory restriction in respect of Part A is only upto 10 metres and no further restriction has been imposed by the circular dated October 21, 2016.

82. However, this Court for its own reasons, holds that the submissions of the petitioner of an existing height restriction of three storeys upto a distance of 500 metres from the outer wall of the defence establishments under Part A, is not a correct interpretation. The amending circular of 2016 substituted paragraphs 1(a) and 1(b) of the circular dated May 18, 2011. Height restriction has been imposed for buildings to be constructed within the vicinity of a separate class of defence stations which are mostly near the border areas and listed under Part B of the Annexure, to the guidelines of 2016. The KMC did not err in granting the building permit. Such action was not in violation of the security restrictions. The guidelines of 2016 will prevail and no injunction can be granted by this Court, in respect of the construction. This is not a case where the municipal laws mandated consultation with the LMA, before grant of sanction. As such, KMC was not required to seek the observations of the LMA, on security implications under the guidelines of 2016."

4. The learned Judge thus dismissed the writ petition.

5. Hence this appeal by the writ petitioner.

6. We have heard learned Counsel for the parties at length. However, the issue is very short.

7. The Ministry of Defence, Government of India, issued a Circular dated May 18, 2011, indicating guidelines for issuance of 'No Objection Certificate' (in short 'NOC') for building constructions. The Circular is set out hereunder:

"No. 11026/2/2011/D(Lands)

Government of India

Ministry of Defence

New Delhi, the 18th May, 2011

To,

The Chief of Army Staff

The Chief of Air Staff

The Chief of Naval Staff

New Delhi

Subject: Guidelines for issue of 'No Objection Certificate (NOC)' for building constructions.

Of late, issue of NOC for construction on lands adjacent to Defence Establishments has generated avoidable controversies particularly in two recent cases viz., Sukna and Adarsh. Various issues involved in these two cases were reviewed and the matter has been considered in detail in the Govt. in consultation with the Services. It is felt that Works of Defence Act, 1903 which imposes restrictions upon use and enjoyment of land in vicinity of Defence Establishments needs to be comprehensively amended so as to take care of security concerns of defence forces. While the process of amendment has been put in motion and may take some time, it was felt necessary to issue instructions in the interim to regulate grant of NOC. The objective of these instructions is to strike a balance between the security concerns of the forces and the right of public to undertake the construction activities on their land. Following guidelines are therefore laid down:-

(a) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders / private parties.

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

(c) 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.

(d) NOC once issued will not be withdrawn without the approval of the Service Hqrs.

2. These instructions will not apply where constructions are regulated by the provisions of the existing acts / notification viz., Cantonments Act, 2006, Air Craft Act, MoCA, 1934, Gazette Notification SO 84(E) dated 14.01.2011 (as revised from time to time), Works of Defence Act, 1903, etc. In such cases provisions of the concerned Act / Notification will continue to prevail.

(Dr. A.K. Singh)

Director (L&C)

Copy to:

DGDE; DRDO; Coast Guard HQ;

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

8. A modification was made to the aforesaid notification by the MOD, by issuing a Circular dated March 18, 2015, which is not relevant for the present purpose.

9. A further amendment was made to the 2011 guidelines by a Circular dated November 17, 2015. This is also not relevant for our purpose.

10. Finally, a Circular dated October 21, 2016, was issued by MOD amending guidelines issued by the Circular dated May 18, 2011, read with the Circulars dated March 18, 2015, and November 17, 2015. This Circular must be set out in its entirety:

"No. F.11026/2/2011/D(Lands)

Government of India

Ministry of Defence

New Delhi, the 21st October, 2016

To,

The Chief of Army Staff

The Chief of Air Staff

The Chief of Naval Staff

Subject: Guidelines for issue of 'No Objection Certificate (NOC) for building constructions' – regarding

Reference Circular of even number dated 18.05.2011 read 'with amendments issued vide Circulars of even number dated 18.03.2015 and 17.11.2015 regarding grant of No Objection Certificate (NOC) from the Local Military Authorities (LMA) for construction of buildings in the vicinity of defence establishments.

2. In view of the large number of representations received from elected representatives to review the guidelines issued in 2011 as difficulties are being faced by public in constructing buildings on their own land and pending finalization of amendments to the Works of Defence Act, 1903, the Government has decided to amend guidelines issued under Circular dated 18.05.2011 read with Circulars dated 18.03.2015 and 17.11.2015, in consultation with Services, in the following manner:-

a) Security restrictions in respect of Defence establishments / installations located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 meters from the outer wall of such Defence establishments/installations to maintain clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone of 10 meters will require prior No Objection Certificate (NOC) from the Local Military Authority (LMA)/Defence establishments.

b) Security restrictions in respect of Defence establishments/installations located at 149 stations as listed in Part B of Annexure to this circular shall apply upto 100 meters from the outer wall of such Defence establishments/installations to maintain clear line of sight for effective surveillance. Any construction or repair activity shall not be permitted within 50 meters. Further, a height restriction of 03 meters (one Storey) shall be applicable for the distance from 50 meters to 100 meters. Any construction or repair activity within such restricted zone between 50 to 100 meters will require prior No Objection Certificate (NoC) from the Local Military Authority (LMA) /Defence establishments.

3. It is further provided that where local municipal laws require consultation or approval or NoC from the LMA/Station Commander before a building plan is approved, compliance to such statutory requirements shall continue to be applicable.

4. The procedure for issuance of NOC shall be the same as contained in Circular dated 18.05.2011.

Encl.: As above

Yours faithfully,

(G.C. Srivastava)

Deputy Director (Lands)

Copy to:

1. DG, DGDE, New Delhi
2. CC(R&D), DRDO, New Delhi
3. Coast Guard HQ,
4. Ordnance Factory Board (through D(Fy-II))
5. CGDA
6. DGQA"

11. Learned Advocate appearing for the appellant submitted that the concerned Ordnance Depot is authorized to store several tons of armoury, clothings, spares etc. Presently the Depot has huge inventory of all types of war time equipments. Location of the Depot is vital from strategic, security and logistic point of view.

12. He submitted that the Station Commander, Kolkata Military Station, vide letter dated March 31, 2015, had informed the concerned respondents that due to security concern, NOC cannot be issued for construction of the building in question. However, when the construction of the building started on the basis of plan sanctioned by KMC, the appellant through his advocate's notice dated July 12, 2021, called upon the respondents to stop the ongoing construction. However, DSK by its letter dated August 6, 2021, replied that it was entitled to continue with the construction and there was no requirement for obtaining NOC from the LMA.

13. Learned Counsel submitted that Flat owners/occupants of the building in question will have a direct line of sight to the core depot catering to the Indian Army in general and Eastern Command of the Indian Army in particular. It was because of such security threat, that the LMA had refused to issue NOC. Such security threat still remains and subsists as on date. None of the subsequent security assessments returned a finding that the already assessed security threat had ceased to exist. Therefore, mere introduction of the 2016 guidelines, which are in any event clarificatory and in addition to the 2011 guidelines, would not render nugatory the earlier security assessment by the LMA.

14. Learned Advocate for the appellant then submitted that on a combined reading of the Circulars dated May 18, 2011, March 18, 2015, November 17, 2015 and October 21, 2016, it would appear that: (i) the respondents misinterpreted the 2016 guidelines by reading the same in isolation. The 2016

Circular was supplemental to the Circulars of 2011 and 2015. The guidelines of 2016 revisited the earlier guidelines only to the extent of horizontal distance of the proposed construction from the outer boundary wall of the Ordnance Depot. The 2016 guidelines do not deal with height restrictions. Therefore, as far as the height restriction is concerned, the guidelines of 2011 would be applicable. (ii) The 2016 guidelines were not intended to supersede the 2011 guidelines which are still in force. (iii) The guidelines of 2011 and 2016 have to be read harmoniously, keeping in mind their real objective i.e., safety and security of military establishments in close vicinity of high-rise buildings. (iv) The security threat which was prevailing earlier cannot be said to have vanished due to issuance of the 2016 Circular. (v) The height restriction is necessary for clear line of sight for effective surveillance.

15. Learned Advocate submitted that there is no concept of negative equality. The fact that some builders were permitted to construct high-rise buildings in the vicinity of the Depot does not mean that DSK must also be permitted to raise a high-rise building in violation of the aforesaid Circulars.

16. It was then submitted that the Army is an expert in the field of national security. The entire Depot would be visible from the terrace / upper storeys of the concerned building. Right to build/ develop property may be a constitutional right or even a human right, but subject to the issue of national security. In this connection learned Advocate relied on a decision of the Bombay High Court in the case of Vikram Delite Co-op, Hsg. Soc. Ltd., a Co-operative Housing Society, through its Treasurer Vithal D. Patel and Ors. v. Union of India, through its Secretary to the Ministry of Defence and others, reported at 2022 SCC OnLine Bom 6700 (paragraphs 43,44,48, 51, 74, 75 and 93).

17. Learned Advocate emphasized that safety and security of the nation and the Military establishment of the country is of paramount importance. There is an inherent danger in allowing high-rise buildings being constructed near military establishments in view of the potential threats to the military units. With the advancement of modern technology and sophisticated weaponry being available to the terrorists and anti-national elements, permitting construction of high-rise buildings in close proximity to military establishments/units may provide a 'billet' for perpetrators of anti national activities. In this connection learned Advocate refer to the following decisions:-

(i) Union of India, through the Indian Army v. State of Maharashtra through the Secretary, Urban Development Department and Ors., reported at (2016) SCC OnLine 2570.

(ii) Unreported decision of Bombay High Court in the case of TCI Industries Limited v. The Municipal Corporation of Greater Bombay in writ petition no. 2859 of 2006.

(iii) Union of India & Ors. v. State of H.P. & Ors., reported at 2015 SCC OnLine HP 1232.

(iv) Ex-Army's Protection Services Private Limited v. Union of India & Ors., reported at (2014) 5 SCC 409.

(v) Digi Cable Network (India) Pvt. Ltd. & Ors. v. Union of India & Ors., reported at AIR 2019 SC 455.

(vi) K.S. Puttaswamy (Retired) & Anr. v. Union of India & Anr., reported at (2019) 1 SCC 1.

I will revert to these decisions later in this judgment, if necessary.

18. Learned Advocate for the appellant finally submitted that there was no delay on the part of the appellant in approaching the writ Court. As national security is involved in the present case, it is not for the Court to decide whether or not something is in the interest of the State. The decision must be left to the executive. In a situation of the possibility of national security being jeopardized, a party cannot insist on strict compliance of the principles of natural justice. National interest must prevail over private economic interest. Learned Advocate submitted that the appeal should be allowed.

19. Mr. Mitra and Mr. Chidambaram learned Sr. Advocates appearing for the respondents nos. 5 and 6 i.e., DSK and Tata Housing Development Company Limited respectively, submitted that prior to issuance of the 2016 guidelines, DSK had applied for sanction of a building plan. In view of the objection of the LMA and the 2011 guidelines, such application was not allowed. After the 2016 guidelines came into being, on September 14, 2017, DSK once again applied for sanction of building plan in view of the relaxation of restrictions. On September 25, 2017, KMC sanctioned the building plan. The sanction was granted taking into account the 2016 guidelines. The construction has been made strictly adhering to the sanctioned building plan.

20. It was submitted that by the time the appellant approached the learned Single Judge, 18 floors had already come up. The learned Judge by order dated October 1, 2021, declined to pass an order of injunction. However, the learned Judge directed by way of interim measure that no construction be made beyond 20 floors. On November 9, 2021, the earlier interim order passed in the writ petition was modified and construction was allowed up to 23 floors.

21. Learned Sr. Advocates drew our attention to a letter dated February

27, 2017, addressed by the LMA to the Commissioner of KMC, enclosing the 2016 guidelines, and requesting KMC to adhere to the said guidelines whilst granting sanction of plans. The relevant building plan was sanctioned by KMC in accordance with the 2016 guidelines.

22. Learned Sr. Advocates then drew our attention to the affidavit affirmed on behalf of the MOD on December 9, 2021, where in it is stated that the 2011 guidelines have been amended by the 2016 guidelines. Clause 2(a) of the 2016 guidelines has been set out in such affidavit which is to the effect that the

restriction is applicable only for construction within 10 meters from the outer wall of a defence establishment included in part – A. It is also stated in the said affidavit that the 2016 Circular is under review by the Government.

23. It was then pointed out that on December 9, 2021, a further order was passed by the learned Single Judge directing that no further construction be made beyond 23 floors till January 7, 2022. Aggrieved by that order, the present appellant filed an appeal being MAT no. 1333 of 2021. The restraint order dated December 9, 2021, expired by efflux of time on January 7, 2022.

On February 9, 2022, MAT 1333 of 2021 was disposed of by the Division Bench observing that the appeal had become infructuous since the order dated December 9, 2021, ceased to exist after January 7, 2022.

24. Learned Advocate submitted that at the time of admission of the present appeal no interim relief was granted to the appellant. An affidavit has been filed by DSK stating that the 43 storied building is complete except for a small portion of the roof. On February 1, 2023, an order was passed by this Court directing not to issue completion certificate in respect of the concerned building without leave of the Court.

25. Learned Counsel submitted that it is not in dispute that the concerned building plan is in conformity with the applicable law i.e., KMC Act, 1980, and the Rules and Regulations framed thereunder. The 2016 guidelines have been made a part of the KMC law by way of Circular no. 6 dated January 2, 2017. Hence, KMC while sanctioning a building plan is duty bound to ensure compliance with the said guidelines, which it has done.

26. It was then submitted that the 2016 guidelines are an amendment to the 2011 guidelines as modified from time to time. Once, the 2016 guidelines came into force, the restrictions prescribed under the 2011 guidelines, in so far as they were inconsistent with the 2016 guidelines, ceased to exist. This was the intent of the MOD as would be evident from a bare reading of Clauses 3 and 4 of the 2016 guidelines.

27. It was submitted that had the 2011 guidelines still been in vogue and had the 2016 guidelines not in fact done away with the restrictions under the 2011 guidelines, then and in that case, the question of reviewing the 2016 guidelines would not have arisen. Learned Counsel for the appellant has repeatedly submitted that the 2016 guidelines are under review.

28. As regards the submission that the building in question is a potential threat to national security, learned Advocate for DSK submitted that no such case has been pleaded in the writ petition. There is no whisper of any potential threat to national security or how the security of the nation has been evaluated or assessed or threatened on account of the construction of the concerned building.

29. It was then submitted that it is strange that the appellant which is an organ

of the Union of India and the Union of India are appearing through separate sets of lawyers.

30. The Union of India in its affidavit filed before the learned Single Judge did not state that there is any threat to national security by reason of the concerned building. No such point was argued by the Union before the learned Single Judge. The Union of India is estopped from arguing a new case before the appeal Court. In this connection learned Sr. Advocate for DSK relied on the decisions of the Hon'ble Supreme Court in the cases of (a) Banarsi & Ors. v. Ram Phal reported at (2003) 9 SCC 606, (b) Chitra Kumari (Smt.) v. Union of India & Ors. reported at (2001) 3 SCC 208.

31. Learned Sr. Advocate then submitted that there is no quarrel with the proposition that national security is of paramount importance and the issue of national security is a question of policy and not of law. It was submitted that the 2016 guidelines constitute the current policy regulating the construction of buildings in the vicinity of defence establishments. It was submitted that on March 28, 2018, in response to an unstarred question raised in Parliament regarding construction limitations, the MOD responded by stating that the 2016 guidelines are the final amendment on this subject.

32. It was then submitted that the stance taken by the appellant on alleged threat to national security is arbitrary and hence violative of Article 14 of the Constitution. At least 4 high-rise buildings known as Diamond Tower (36 meters high), Siddhartha (42 meters high), Harbour Heights (42 meters high) and Belair (105 meters high) have been permitted to be constructed within 12 to 364 meters from the outer wall of the concerned Ordnance Depot. There is no justification for singling out the present project and raising objection regarding the same.

33. Finally, learned Sr. Advocate submitted that even though the right to property may no longer be a fundamental right, yet, it still remains a constitutional right under Article 300A of the Constitution. If the submissions of the appellant are accepted and sanction of the building plan by KMC is annulled, the same would result in deprivation of DSK's right to property without authority of law. DSK will be deprived of the user of the premises and effectively would be deprived of the Rs. 105 Crore investment made in constructing the building. In this connection reliance was placed on the following decisions:- (a) Bishambhar Dayal Chandra Mohan & Ors. v. State of U.P. & Ors., reported in (1982) 1 SCC 39. (b) State of UP & Ors. v. Manohar, reported in (2005) 2 SCC 126. (c) Chairman, Indore Vikas Pradikaran v. Pure Industrial Coke & Chemicals Ltd. & Ors., reported in (2007) 8 SCC 705. (D) Sarita Gupta v. MCD, reported in 2019 SCC OnLine Del 10123.

34. Learned Advocate for KMC submitted that the relevant building plan was sanctioned keeping in view the 2016 Circular. It would appear from that Circular that the restrictions which had been imposed earlier have been removed and the

restrictions are now limited up to 10 metres from the outer boundary wall of the military establishment in question. The concerned building has been constructed admittedly at a distance of 14 meters from the outer boundary wall of the Ordnance Depot. There was no question of obtaining any NOC from the LMA in view of relaxation of the restriction. KMC sanctioned the building plan strictly in accordance with law and the applicable Rules and Regulations. Learned Advocate referred to Sections 393 and 396 of the KMC Act, 1980 and Rules 3, 4, 7 and 16 of the KMC building Rules, 2009, which pertain to sanction of building plans. It was also submitted that Section 397 of the KMC Act, which authorizes the Commissioner of KMC to cancel a sanctioned plan if it is found that such sanction has been obtained by making misrepresentation or practicing fraud, is not attracted to the facts and circumstances of this case. Learned Advocate submitted that the order impugned in this appeal is well reasoned, and in tune with the settled principles of law, warranting no interference in appeal. The appeal should be dismissed.

35. I have given my anxious consideration to the rival contentions of the parties.

36. There cannot possibly be any dispute with the proposition that in case of a conflict between public and private interest, the former will prevail.

National security is of paramount importance and possibly represents the most important public interest. Nothing should be permitted to be done by a citizen which may even remotely tend to compromise or jeopardize the safety and security of the nation. To this extent, all rights of a citizen – be it a fundamental right under the Constitution, other Constitutional Right or any Right under the law of the land - is subservient to the protection of national safety and security. If exercise of any such right by a citizen is likely to adversely affect the security of the nation, the citizen must be restrained from exercising such right.

37. There cannot also be any quarrel with the proposition that the right to property which would include the right to develop a property, although no more a fundamental right, is still a Constitutional Right under Article 300A of the Constitution and has also been recognized as a human right. However, such right must stand abrogated if exercise of such right in any manner tends to endanger the safety and security of the country. If development of a property poses any kind of threat to national security, such development must be stopped.

38. The question is, who decides as to whether or not a particular development project is likely to jeopardize national safety and security? In my view, it is the MOD, in consultation with the 3 Services i.e., the Army, the Air Force and the Naval Force.

39. The Works of Defence Act is a very old legislation of 1903. The world has moved on since then and 120 years have gone by. From the two Circulars of 2011 and 2016 we find that the 1903 Act is in the process of being amended as it was felt that the restrictions imposed in that Act upon use and enjoyment of land in the vicinity of Defence establishments need to be amended to take care

of security concerns of Defence Forces. The 2011 Circular records that the process of amendment of the 1903 Act has been put in motion but may take some time. Therefore, it is necessary to issue instructions in the interim to regulate grant of No Objection Certificate (NOC) for construction of buildings in the vicinity of Defence Establishments. Accordingly, the MOD, in its wisdom, issued the 2011 guidelines for grant of NOC for constructions in close proximity to Defence Establishments. The Circular contained stringent guidelines for grant of NOC. There can be no doubt that the Executive is the proper authority for assessing the national safety and security and ensuring that the same is not compromised in any manner by any action on the part of any citizen of the country. Hence, the MOD was completely justified in issuing the 2011 Circular containing interim guidelines pending finalization of amendment to the Works of Defence Act.

40. However, in view of the strictness of the 2011 guidelines, it appears that the Government received representations from members of the public complaining that their right to property including their right to construct was being unduly restricted or abrogated by the 2011.

41. Accordingly, the Government, in consultation with the Services amended the 2011 Circular by issuing the 2016 Circular. It must be presumed that the Government took such a step keeping in mind the safety and security of the Nation and of the Defence Establishments. The security of the Nation is undoubtedly a matter of Government policy. The Government definitely would not have issued the 2016 guidelines if it thought that the same would tend to compromise the safety and security of the country. Hence, the Government guidelines of 2011 for grant of No Objection Certificate for constructions in the vicinity of defence establishments, stood amended by the 2016 guidelines.

42. Clause (a) of the 2011 guidelines pertained to a situation where local Municipal laws required consultation with the Station Commander before a building plan is approved by the sanctioning authority. This was not relevant in the present case as the West Bengal Municipal Laws do not have any such requirement. Clause (b) of the 2011 Circular contemplates a situation where the local Municipal Laws do not require prior consultation with the LMA for sanctioning a building plan. The guidelines provided that even in such a case if the Station Commander felt that a building being raised within 100 meters, or for a building having more than four storeys, within 500 meters radius of the defence establishment can be a security hazard, it should refer the matter to the next higher authority. If that authority agreed with the Station Commander's view, then the Station Commander could convey his objections/views to the local Municipality or State Government agencies. If the Municipal Authorities or State Government did not pay any heed to such objection, then the matter could be taken up with higher authorities through AHQ / MOD.

43. In other words, the LMA could object to the construction of a building of up to 4 storeys, if the same was being built within 100 meter radius of the

concerned Defence establishment. It could also object to the construction of a building having more than 4 storeys if the same was proposed to be built within 500 meter radius of the Defence establishment. In both cases, if the Station Commander felt that the security of the concerned Defence Establishment would be breached by the proposed construction, he could record his objection to such construction and follow up the matter in the manner provided in the 2011 Circular as I have briefly indicated above.

44. By issuing the 2016 Circular, the Government divided the Defence establishments into two categories. In Part A of the annexure to the 2016 Circular, the Government listed 193 stations and provided that security restrictions in case of those stations will apply up to ten meter from the outer walls of such Defence establishments. Any construction or repairing activity within 10 meter from the outer wall of such a defence establishment would require prior NOC from the LMA. This would necessarily mean that as per the said guidelines, any construction or repairing activity beyond the restricted zone of ten meter from the outer wall of such a Defence establishment would be permissible and would not require NOC from the LMA.

45. However, in respect of 149 Defence establishments listed in part B of the Annexure to the 2016 Circular, more stringent restrictions were maintained. It was provided that security restrictions would apply up to 100 meter from the outer wall of such a Defence establishment. No construction or repairing activity would be permitted within 50 meter from the outer wall of such an establishment. Between 50 meter to 100 meter from the outer wall of such an establishment, there would be a height restriction of 3 meter (one storey). Any construction or repairing activity between 50 to 100 meters from the outer wall of the establishment will require prior NOC from the LMA.

46. From a juxtaposed reading of the two Circulars, it is clear that by issuing the 2016 Circular, the Government limited the restrictions on constructing buildings up to ten meter from the outer wall of a Defence establishment listed in Part A of the Annexure to the 2016 Circular. Admittedly, the Ordnance Depot with which we are concerned in this case, is listed in Part A of the Annexure to the 2016 Circular. Hence, the security restrictions would apply only upto a distance of 10 meter from the outer wall of that Ordnance Depot. The construction objected to by the appellant is admittedly at a distance of 14 meter from the outer wall of the said Defence establishment. Hence, I am in full agreement with the learned Single Judge that the permission granted by KMC for construction of the concerned building having 42 storeys was in no manner contrary to or in violation of the 2011 Circular as amended by the 2016 Circular.

47. An argument was made by learned Advocate for the appellant that the 2016 Circular only dealt with lateral distance from the outer wall of a Defence establishment beyond which a construction can be made. That Circular does not deal with the height of a building that may be constructed. Hence, the restriction regarding height in the 2011 Circular i.e., no building having more than 4 storeys

within 500 meter radius of a Defence establishment, continues to apply and to that extent the Circulars of 2011 and 2016 will have to be read together and harmoniously. I am unable to accept such argument. It is incorrect to say that the 2016 Circular does not deal with height restrictions at all. In so far as the Defence establishments listed in Part B of the Annexure to the 2016 Circular are concerned, it is provided that between 50 meter to 100 meter from the outer wall of such a Defence establishment, there would be a height restriction of 3 meter (one storey). Further, as noted above, no construction or repairing activity is permitted within 50 meter from the outer wall of such an establishment.

48. In other words, while issuing the 2016 circular the government, in its wisdom, in consultation with the respective Chiefs of the three Services, i.e., Army, Air Force and Navy, did away with all restrictions including height restrictions for proposed buildings beyond ten meter from the outer walls of the Defence establishments listed in Part A of the Annexure to the 2016 Circular. This is the understanding of the learned Single Judge and this is how I also read the two Circulars of 2011 and 2016.

49. This is also the understanding of a Division Bench of the Delhi High Court as would appear from the judgment in the case of Union of India v. Government of NCT Delhi (LPA 693 of 2019). In that case also, the Circulars of 2011 and 2016 fell for consideration of the Delhi High Court. It was argued on behalf of the Union of India that the height restrictions stipulated in the 2011 Circular were still in vogue and the 2016 guidelines, were not intended to supersede the 2011 guidelines. It was further submitted, as was submitted in the present case, that the 2011 and 2016 guidelines have to be read together and harmoniously keeping in mind the objective thereof i.e., the safety and security of military establishments in close vicinity of high rise buildings. Referring to an order of the Hon'ble Supreme Court passed on August 28, 2012 in IA 25265/2018, Saraf Infra Projects Ltd. v. The State of West Bengal & Ors., the Delhi High Court at paragraphs 9.3 to 11.0 of the judgment held as follows:-

"9.3 In this respect, suffice it to state that plain reading of guidelines dated 21.10.2016 show that the same unambiguously mention that pursuant to large number of representations received from the elected representatives conveying the difficulties faced by the public in construction of buildings on their own lands, review of the guidelines dated 18.05.2011 was undertaken. And the Government decided to amend the guidelines issued vide guidelines dated 18th May 2011, 18th March 2015 and 17th November 2015. Let us again refer to Clause 2 (a) of the said guidelines dated 21.10.2016 at the cost of repetition which reads as under :

"a) Security restrictions in respect of Defence establishments / installations located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 meters from the outer wall of such Defence establishments / installations to maintain clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone of 10 meters will require prior No Objection

Certificate (NoC) from the Local Military Authority (LMA) / Defence establishments."

9.3.1 It is evident that no height restriction was imposed qua buildings coming up near defence establishments specified in Annexure A. Whereas, restriction of height was imposed with respect to construction coming up in the vicinity of certain installations/defence establishments specified in Annexure-B. Restriction of height was prescribed with respect to certain buildings (in Annexure B) and not with respect to others (in Annexure A). Thus, there is hardly any force in the argument of Ld. counsel for the appellant that restriction as to height as per 2011 guidelines has to be read even in respect of buildings falling in Clause 2(a) of 2016 circular. Rather, from the reading of Clause 2 (a), it is evident that the Government in its wisdom and after considering various representations and taking into account the security concerns, etc., did not contemplate any prior NOC from LMA/DE with respect to any construction/repair activity beyond 10 meters of DE/installations located at 193 stations as listed in Part A of Annexure to the said circular. As already noted that the DE, the Ordnance Depot, Shakur Basti (as involved in the present case) is listed at Serial No. 144 in Part A of the Annexure to the 2016 Circular. Thus, the construction activity beyond 10 meters of the said defence establishment is permissible, without any height restriction.

10.0 Ld. counsel for respondent no. 4 also referred to order dated 28.11.2018 of Hon'ble Supreme Court in Civil Appeal No. 4746/2017, titled as Saraf Infra Projects Ltd. vs. The State of West Bengal & Ors., relevant portion of which is reads as under :

"The present I.A. is filed in view of certain recent Guidelines that have been issued by the Central Government, in particular, Guidelines dated 21.10.2016, in which it is stated that so long as the construction is beyond 10 meters of the outer wall of a military compound, there would be no objection by the military authorities to such construction coming up in accordance with law.

Ld. counsel for the petitioner has shown us a recent circular issued by the Kolkata Municipal Corporation dated 02.01.2017 in which it has been directed by all concerned to follow the guidelines dated 21.10.2016 issued by the Central Government.

In this view of the matter and in view of the fact that the appellant alleges that their construction is beyond 10 meters of the outer wall of the military compound concerned, we allow this I.A. and direct the Respondent No.3 to issue an Occupation certificate, as prayed for, in accordance with law."

10.1 In its counter affidavit dated 07.12.2019 to the present appeal, in para 4 of Preliminary Objections, the respondent no. 4 has stated that in the above case 11 storeyed building of Hotel Radisson Blue was constructed at a distance of more than 10 meters from the boundary wall of military establishment.

10.2 As per the above judgment, considering that the construction was beyond

10 meters of the defence establishment, though stated to be 11 storeyed tall, the Occupation Certificate was directed to be issued by the Apex Court.

11.0 Ld. counsel for the respondent no. 4 also submitted that even otherwise, the Ordnance Depot, Shakur Basti is located in thickly populated area of Delhi; and there are number of multi-storeyed buildings already existing in its front side, namely Bhagwan Mahavir Hospital (Government) with Staff Residence, which is of 35 meters height; Keshav Mahavidyalaya in front of Ordnance Depot, Office of Deputy Commissioner of Police, a Petrol Pump, Vardhman Shopping Complex, Telephone Exchange, Magistic Mall, etc. No objection was ever raised by the appellant at the time of construction of these buildings. Ld. counsel further argued that even 10 storeyed hotel has already come up adjacent to the wall of the Ordnance Depot, with respect to which even Completion Certificate has been issued by the DDA. These facts are not disputed. Ld. counsel for the respondent no. 4 argued that in view of these facts, apprehension expressed by the appellant regarding security threat is absolutely unfounded."

50. Learned Advocate for the appellant argued that in the case before the Delhi High Court, it was submitted that the Government had decided to close down the concerned defence establishment and that is a distinguishing feature. I cannot agree. The observations and findings of the Delhi High Court are independent of the fact that the Defence establishment involved in that case was going to be shut down. I am in respectful agreement with the view of the Delhi High Court in the aforesaid case, as regards the effect of the 2016 guidelines.

51. The Kerala High Court also has taken the same view in a judgment and order dated February 8, 2018, passed in W.P.(C) no. 9798 of 2013.

52. On behalf of the respondent no. 5 it was also argued that the present appellant/Writ petitioner does not have the locus standi or the authority to maintain the present proceedings. The Circulars of 2011 and 2016 both lay down the procedure for the Station Commander to proceed in the event he has objection to any construction being raised in the vicinity of a Defence establishment. In the present case, the Station Commander has not followed such procedure and has purported to file the writ petition. He should have reported the matter to higher authorities and the writ petition could have been filed only by the Union of India through the Ministry of Defence.

Although there may be some substance in the aforesaid submission, I need not go into the same since on merits I am of the considered view that the writ petition was rightly dismissed by the learned Single Judge and this appeal is accordingly liable to be dismissed.

53. Learned Counsel for the respondent no. 5 also argued that Union of India which was added as a party respondent in the writ petition by the learned Single Judge by order dated October 1, 2021, did not urge the point of national security before the learned Single Judge. Referring to the affidavit filed by the Union of India before the learned Single Judge, learned Counsel submitted that there is

not a whisper in the said affidavit about threat to national security by reason of the construction in question. Hence, Union of India ought not to be permitted to urge that point before the appeal Court. In this connection learned Counsel relied on two Supreme Court's decision in the cases of *Banarsi & Ors. v. Ram Phal* (supra), *Chitra Kumari (Smt.) v. Union of India & Ors.* (supra).

Again, there is no need for me to go into the aforesaid issue since in my view, on merits, the appellant/writ petitioner has no case.

54. As regards the submission of the respondent no. 5 that at least 4 high rise buildings have been permitted to be constructed within 500 meters from the outer wall of the Ordnance Depot in question, the same surely goes some distance to support the case of the respondents as regards the interpretation of the 2016 Circular. However, I need not dwell on such issue as on an independent interpretation of the 2016 Circular in the back drop of the 2011 Circular, I have found the appellant's case to be devoid on merits.

55. The other decisions cited by learned Counsel for the appellant are all on the point that the safety and security of the nation and the defence establishments of the Country are of utmost importance. The Army is an expert in the field of national security which is a matter of policy and not an issue of law. The policy laid down by the Defence Ministry in the interest of national security is not justiciable.

56. There can be no dispute with the aforesaid propositions and hence to avoid prolixity, I refrain from dealing with the said decisions relied upon by the appellant.

57. I completely agree with the appellant's contention that nothing can be more important than national safety and security. It is the duty of every citizen of the country to ensure that under no circumstances national security is compromised to any extent. No interest of an individual citizen or even of a group of citizens can override national interest. Any right of a citizen, whatever may be the source of such right, must stand abridged or negated if national interest so requires.

58. However, in the present case, I find that the prevailing policy of the Government as regards guidelines for issuance of NOC or permission for construction of buildings in the vicinity of the Defence establishments, is contained in the 2016 Circular issued by the MOD in consultation with the heads of the three wings of the Military. The Government of India through its MOD has in its wisdom thought it fit and proper, by issuing the 2016 guidelines, to relax the restrictions regarding construction of buildings in the proximity of Defence establishments as were contained in the 2011 Circular. The Government is no doubt the best judge of what will or will not be a threat to National Security or the safety and security of Defence establishments. The Court is not in a position to adjudicate the prudence behind issuance of the 2016 guidelines nor the Court has been called upon to do so in the present proceedings. If the MOD, which is the appropriate authority, is of the opinion that the 2016 guidelines need

amendment for better protection of the safety and security of the Defence establishments of the nation as a whole, the same should definitely be done. However, as the concerned Government Policy stands at the moment, reflected in the 2016 Circular, I find no merit in the objection raised by the appellant to the construction of the building in question. KMC has not erred in any manner to accord sanction for the said construction. Such permission is in no manner in breach of the 2016 Circular.

59. In view of the aforesaid, I find no reason to interfere with the judgment and order assailed in this appeal. The appeal is accordingly dismissed.

There will be no order as to costs. Interim order stands vacated.

60. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities

I agree.