
(2013) 12 BOM CK 0097
In the Bombay High Court
Case No : Writ Petition No. 646 of 2013

S.S.V. Developers and Hiral Dinesh Vora	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 23-12-2013

Acts Referred:

Citation : (2014) 1 ABR 667 : (2014) 3 ALLMR 1 : (2014) 2 BomCR 541

Hon'ble Judges : S.C. Dharmadhikari, J;R.Y. Ganoo, J

Bench : Division Bench

Advocate : Milind Sathe, Ms. Sonali Jain instructed by M/s. Khona and Kayser, for the Appellant; Kevic Setalwad, A.S.G., Anish Kulkarni, Som Sinha for respondent No. 4, Mr. Vijay Patil for respondent Nos. 5 and 6, Mr. A.B. Ketkar, AGP for respondent Nos. 7 and 8, Ms. Mamta Sadh, Ms. Ashwini Purav instructed by . Ashwini Purav for respondent Nos. 9 and 10, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—Rule. Respondents waive service. By consent rule is made returnable forthwith. By this petition under Article 226 of the Constitution of India, the petitioners are challenging the communication dated 19th March 2011 issued by the Slum Rehabilitation Authority (SRA for short), requiring the petitioners to obtain No Objection Certificate (NOC for short) from the Naval Authorities, the communication dated 4th November 2010 issued by the State Government to the Municipal Corporation prescribing condition of NOC, a communication dated 29th April 2011 was issued by the Government of Maharashtra to SRA directing issuance of stop work notice to the petitioners and finally stop work notice dated 30th April 2011 issued by the SRA.

2. Since detailed arguments are canvassed and at the stage of interim injunction/relief, we have heard parties on all issues and points canvassed before us.

3. The facts arising out of which these reliefs have been sought are that the petitioner No. 1 is a partnership firm inter alia engaged in the business of real

estate development. The second petitioner is its partner. The Slum Rehabilitation Project on the plot of land bearing C.T.S. No. 208(pt), 209(pt) off Lower Parel, Worli Division, Mumbai is the project which is the subject matter of the petition. This development and slum rehabilitation project is on this plot of land which admeasures 5342.38 sq. mtrs. On this plot, there were 272 slum dwellers. The petitioners state that the plot is not reserved for any public purpose except for widening of road.

4. On 19th October 2004 a letter was addressed by Maharashtra Housing and Area Development Authority MHADA to the Executive Engineer SRA giving the details of the area of the subject plot as well as Annexure II. On 8th December 2004 the Municipal Corporation furnished the development plan remarks in respect of the subject plot to the petitioners Architect stating that the said plot was not reserved for any public purpose. On 23rd December 2004, SRA issued a letter of intent to the petitioners" Architect in respect of C.T.S. Nos. 208(pt) and 209(pt) for rehabilitation of members of Mahakalinagar Rahivashi SRA Sangh. The letter of intent indicated that 122 slum dwellers were to be re-accommodated and 34 PAP tenements were to be generated. On 7th January 2005, a letter was addressed by MHADA to SRA giving their no objection for the redevelopment scheme under D.C. Regulation 33(1) on C.T.S. Nos. 208 (pt) and 209(pt). On 19th March 2005, a letter was addressed by the Government of Maharashtra to slum Rehabilitation Authority granting their NOC for the redevelopment of plots bearing C.T.S. Nos. 208(pt) and 209 (pt). On 10th May 2006, a revised letter of intent was issued by SRA in respect of C.T.S. No. 208(pt) and 209(pt) by changing certain conditions relating to F.S.I.

5. On 11th May 2006, respondent No. 10 was registered as a cooperative housing society. On 17th May 2006 respondent No. 9 was registered as a cooperative housing society. On 29th May 2006, SRA granted intimation of disapproval to the petitioners for construction on C.T.S. Nos. 208(pt) and 209(pt) for composite building. The said intimation of disapproval did not stipulate a condition as regards any No Objection certificate from Naval Authorities or any other authority. On 9th June 2006, a letter was addressed by SRA to the petitioners Architect for amalgamation of the slum rehabilitation scheme of the occupiers who represented respondent Nos. 9 and 10 societies and such approval was granted by the SRA. On 9th June 2006 the commencement certificate was issued by the SRA for construction on C.T.S. No. 208(pt) and 209(pt). On 19th June 2006, the SRA issued intimation of disapproval for building No. 2 in respect of the subject plots bearing C.T.S. Nos. 209=8(pt) and 209(pt). On 8th January 2007, a letter was addressed by Municipal Corporation to the petitioners granting permission for removal/transplanting of trees. On 5th January 2007, commencement certificate was granted by SRA for Sale Building No. 2. On 16th April 2009, SRA addressed a letter to the petitioners Architect sanctioning the amended plans for Building No. 1. On 14th May 2010 an order was passed by the SRA as regards eligibility of certain occupiers.

6. It is then averred that on 1st March 2011, a letter was addressed by the Commanding Officer, INS Trata to the Principal Secretary, Urban Development Department and SRA complaining that the petitioners' buildings under construction were being constructed without NOC from the Naval Authorities and hence, appropriate directions be issued. Annexure I is a copy of this letter.

7. Naturally the petitioners were intimated about the receipt of such letter by the SRA. It was pointed out to the petitioners that the construction of the petitioners' six storeyed building opposite site III was close to site I and V and hence, NOC was necessary. The NOC is required to be obtained because of the circular of the State Government dated 4th November 2010. Annexure J is a copy of this letter from SRA and Annexure K is a copy of the Government circular/direction of the Urban Development Department.

8. It is in these circumstances that the petitioners addressed a letter to the Naval Authority and pointed out that they had approval for rehabilitation building (building meant for rehabilitating all slum dwellers), styled as Buildings A, B, C and D having ground plus six upper floors and sale component building of ground plus ten upper floors. Therefore, a request was made to the Naval Authority to grant NOC. Annexure L is this letter. Thereafter, a letter was addressed by SRA to the petitioners, directing them to stop the work in the light of the communication from Government of Maharashtra dated 29th April 2011 and fax message from Naval Authority dated 6th April 2011. Annexures M, N and O are the said letters/messages.

9. The Commanding Works Officer, thereafter, addressed a letter to the petitioner dated 16th May 2011, informing them that their application for grant of NOC would be processed with the Ministry of Defence only if the further work is stopped. Annexure P is this letter.

10. We are, therefore, taken through the letters of 25th May 2011, 31st May 2011, 13th June 2011 and 16th June 2011 and the letters of July, August and November 2011 to bring home the point that the petitioners were pursuing their request. The request was pursued by the petitioners and, thereafter, their Advocates. However, their Advocate's notice was replied by the Naval Authorities stating that the matter was further examined at the Head Quarters. The petitioners not being satisfied with this response, entered into correspondence through their Advocates in the month of February 2012 (Annexure Y) and they were communicated by the communication dated 12th March 2012 from the Command Works Officer that the NOC has been denied in view of the security guidelines.

11. Thereafter, the matter rested for some time and once again correspondence commenced from July 2012 and what the petitioners are purporting to rely upon is that a communication dated 18th May 2011 from the Director, Government of India, Ministry of Defence to Chief of Army Staff, Air Staff and Naval Staff regarding guidelines for issuance of NOC for buildings under

construction came to their Notice later on. The petitioners submit that the NOC has been rejected in their case relying upon this communication, although, several NOCs were issued to high rise buildings in the vicinity of INS Trata.

12. It is in these circumstances, that the aforementioned communications and letters are impugned in this petition.

13. Mr. Sathe, learned Senior Counsel appearing for petitioners submitted that the construction work has already commenced. The letters of intent and other permissions for development have already been obtained. In these circumstances, directing the petitioners to stop work is totally arbitrary, unreasonable, unfair and violative of the mandate of Article 14 and 19(1)(g) of the Constitution of India. It also violates mandate of Article 21 of the Constitution of India because slum dwellers are awaiting rehabilitation and the project has been stalled completely. Mr. Sathe submits that the security risk/concern is totally vague inasmuch as, there is no statutory sanction or power to issue the impugned guidelines. The guidelines that are issued do not emanate from any statutory authority. Therefore, in the absence of any power to issue such guidelines and particularly requiring obtaining of NOC from Naval Authority, then, all actions of the authorities impugned in this petition and based on these guidelines are unsustainable in law. Alternatively, Mr. Sathe submits that there are no parameters and no guiding principles at all. There is a arbitrary power to stop construction and development activity in a densely and thickly populated residential area. There are several buildings and high rise ones in the vicinity of INS Trata. In these circumstances, Mr. Sathe submits that the circular issued or the guidelines of the Government of India cannot be invoked to insist on the work being stopped. Therefore, this court should quash the communication and letters impugned in the petition on this ground alone. Alternatively and assuming without admitting that the guidelines though issued later on can be invoked and applied, then, in this case the work has commenced already. The permissions were granted prior to the guidelines being brought into effect. Therefore, these guidelines can be applied to only future cases or permissions, namely, prospectively. They should not have been applied to the case of present petitioners at all. Further alternatively he submits that the guidelines and the power conferred therein to withhold the NOC is arbitrary. The grant of NOC ought to be based on some rational, reasonable and fair conditions having nexus with the object sought to be achieved. If the object that is sought to be achieved is to take care of the security risks and concerns, then, there ought to be a definite connection as to what guides the authorities to grant NOC or withhold it. The parameters such as distance, location from strategic and vital installations have to be indicated in precise and clear terms. There cannot be any vague or general description or yardstick or criteria. In the absence of such indication, the power is being misused. These guidelines therefore confer unguided, uncontrolled and untrammelled powers to withhold the NOC. The right to property may not be fundamental but it is constitutional and legal right guaranteed under Article 300A of the Constitution. That ought to be safeguarded by exercising such powers

reasonably and after complying with principles of fairness, equity and justice. In the present case, there are no reasons assigned. There is no hearing given and straight away the impugned communications are addressed. For all these reasons, Mr. Sathe would submit that this petition be allowed and the impugned communications be quashed and set aside.

14. Mr. Sathe, in support of his submissions, places reliance upon the judgment of the Division Bench of this Court reported in 2012 (5) BCR 346 (Lok Housing and Construction Ltd. and Ors. Vs. Municipal Corporation of Gr. Mumbai and Ors.) and submits that the point is squarely covered by this decision.

15. Mr. Kevic Setalwad, learned Additional Solicitor General (ASG) appearing on behalf of the contesting respondents namely respondent Nos. 1 to 4 would submit that the entire petition is misconceived. There is no fundamental right to property. The right to develop a property is also not unconditional and absolute but subject to reasonable restrictions. This right to enjoy and exploit the property as per the wishes and choice of the owner/developer is dependent upon compliances with Municipal rules and regulations, planning laws and other related statutes. It can never be claimed to be so uncontrolled that the planning authorities and the Government cannot interfere with the rights of the property owners in larger public interest. It is in these circumstances, that the challenge must be seen and decided. Ultimately, the concern for security of State and matters of said nature are guided by a definite policy and it is not disputed that a policy decision has been taken. The policy decision cannot be challenged only because in the opinion of the petitioners, there was no necessity for framing a policy. These are matters which are best left to experts in the field of defence of India and security of State. If the Authorities in charge of the same deem it fit and proper not to allow the development and construction of high rise buildings in close vicinity of naval installations, then, the petitioners cannot be heard to say that their fundamental right of equality or to carry on trade or business or occupation of their choice or life and liberty are adversely affected. It is clear that the Development Control Regulations for Gr. Mumbai (D.C. Regulations) 1991 themselves provide for imposition of such conditions in larger public interest. The property or land can be developed only in terms of the permissions and approvals from statutory authorities. The Statutory authority can in larger public interest insist upon procurement of and compliance of some permissions and conditions such as obtaining NOC from the naval authority. Their insistence in the present case cannot be questioned or challenged by the petitioners in this petition. Further, there is nothing arbitrary, unreasonable, unfair and unjust in these matters because the authorities are guided by national security interests and protection of life and property of citizens of this country. In these circumstances, the NOC was always insisted upon earlier as a matter of practice as the security risk certainly is an important and bonafide consideration. The source of power to insist for such NOC from naval authority is to be found in Regulation No. 16(n) of the D.C. Regulations.

16. Mr. Setalwad also submitted that there is nothing arbitrary or discriminatory in the insistence on obtaining NOC in this case, because, the instances of Har-Siddhi Apartment and "Godrej" are not on par with the case of the present petitioners. In the matter of Har-Siddhi, the naval authorities and the Union of India have approached this court to stop the development and construction at site. The building constructed by Godrej and stated to be in the vicinity is a construction of 1995 and fairly old and, therefore, no comparison can be drawn from these instances. Apart therefrom, there are no instances and in these circumstances, there is no merit in the contention of the present petitioners.

17. Mr. Setalwad has taken us through the affidavit filed in reply by the respondents. In support of his submissions, Mr. Setalwad relies upon a later decision of a division bench of this court in TCI Industries Limited Vs. The Municipal Corporation of Greater Bombay, Union of India and State of Maharashtra, .

18. There is a rejoinder affidavit filed based on which Mr. Sathe contended that the petitioners' allegations in the petition have not been denied or disputed.

19. For properly appreciating the contentions of the learned Counsel for either side, we have to note that the petitioners do not dispute that they require sanction and approvals so as to undertake project of this magnitude and at several levels. The petitioners do not dispute that their right to develop the property is depending upon the satisfaction of the terms and conditions contained in the letters of sanction, approval in that behalf so also the planning laws. That such terms and conditions can be validly imposed by the planning authority and, therefore, there could be no unconditional permission for development, appears to be a undisputed position. There is no challenge to any other condition, save and except the insistence of the authorities on compliance with a letter dated 4th November 2010 from the State of Maharashtra, which is addressed to the Municipal Commissioner of Brihanmumbai Municipal Corporation. This letter inter alia makes it obligatory for the municipal corporation to insist upon a NOC from defence, army, navy or such security agency within whose precincts the municipal corporation is approving any lay out or sanctioning or approving any plan for development. In terms of the same, the slum rehabilitation authority called upon the petitioners to approach the naval authority and obtain their NOC. We do not find any merit in the contentions of Mr. Sathe that the Government of India, Ministry of Defence letter dated 18th may 2011 containing guidelines for issuance of NOC for building constructions are arbitrary and do not provide for any safeguards. The guidelines have been perused by us carefully and in their entirety. These guidelines have been issued because the authorities found that the Works of Defence Act, 2003 which imposes restrictions upon use and enjoyment of the land in the vicinity of defence establishment needs to be comprehensively amended so as to take care of security concerns of defence forces. The process of amendment has been put in motion and may take some time. Therefore, it was felt necessary to issue

instructions in the meantime to regulate grant of NOC. The objective of these instructions is to strike a balance, between the security concerns of the defence forces and the right of public to undertake construction activities on their land. Therefore, even if the Municipal Laws do not so require, yet, the Station Commander of Navy feels that any construction coming up within 100 meters (for multi-storey buildings of more than four storeys the distance shall be 500 meters) radius of defence establishment can be a security hazard, he should then refer the matter immediately to his next higher authority in the chain of the command. In that event and if 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 the event, these views or the objectives are not taken cognisance of, then, the matter may be taken up with higher authorities. Therefore, we do not find any merit in the argument that these guidelines or instructions confer arbitrary or untrammelled powers to withhold NOC or to refuse it. The criteria evolved is not vague because the distance is notified so also the nature and height of construction. Therefore, going by the distance criteria and depending upon the risk involved, if the NOC is insisted, even if there is no provision in the Municipal laws in that behalf, does not mean that the powers conferred are so absolute and uncontrolled that invariably the NOC will not be granted. In an individual case if these instructions are flouted or applied erroneously or arbitrarily and without satisfaction of the authority concerned, particularly about security matters, then, depending upon other factors, such a refusal or order can be challenged.

20. We need not refer to this aspect in any further details because we are not convinced by Mr. Sathe's argument that the Division Bench judgment of this Court in Lok Holding (supra) lays down that so long as the Statute does not make any provision, then, these guidelines would not have any legal efficacy. We have found that these observations of the Division Bench have been made in a matter where the Division Bench was of the opinion that the order of the Executive Engineer of BMC, challenged in that petition is required to be set aside. That was passed cancelling the IOD and CC., although a letter dated 23rd January 2009 signed by the Administrative Officer Central Ordinance Depot giving no objection to the sanction of building plans was submitted by the petitioners in that petition before this Court. Therefore, finding that there was no justification for cancellation of the IOD and CC that the observations relied upon by Mr. Sathe have been made. Pertinently, the Division Bench does not hold that insistence on such an NOC is beyond the purview of the powers conferred in the planning authority or the State Government. The Division Bench does not hold that the State Government is powerless to issue guidelines or directives in that behalf.

21. These aspects have been further clarified and in our view the reliance by Mr. Sethalwad on a later Division Bench judgment in the case of TCI Industries (supra) is apposite. There, the controversy was directly dealt with and squarely answered. The Division Bench heard the parties extensively on the point. The

point was whether a individual who occupies the adjoining property to the naval base is required to obtain the NOC from naval authority for development of his property. The arguments of the Counsel for developer and builder were noted by the Division Bench and in reply thereto the Division Bench in paras 13, 14, 15.1, 15.2, 15.3, 16 to 20 has held thus:-

13. The principal question which requires to be decided in this petition is as to whether the Respondent Corporation is justified in insisting for NOC from the Defence Department in connection with the development activity which the petitioner wants to carry out in their premises. In order to consider this aspect, firstly it is necessary to consider the location of the place in question. Both the sides have relied upon various photographs regarding the exact location of the place. It is of course not in dispute and it is an admitted fact that so far as Naval base is concerned, wherein INS Shikra is established, the same is adjacent to the property of the petitioner. There is also a common compound wall between the premises of the Navy and the petitioner. The area beyond the boundary wall belongs to the petitioner where the substantial area is vacant area where some grass and some trees are located. The premises in question are also touching the sea water. So far as Navy premises is concerned, there is also constructed building which according to Mr. Khambata is utilised for keeping armaments and missiles. This is the factual position so far as the premises in question are concerned.

14. It is no doubt true that at some distance there are some high rise buildings. There is also a slum which is on the other side of the premises of the Navy. On the basis of the aforesaid location, learned Counsel Mr. Khambata tried to argue that since there is a common wall between the premises of the petitioner and Navy, that it is all the more necessary that no construction activity may be allowed to be carried out in an area which is just adjacent to the Navy area as anybody can easily climb and jump from one area to another. On the basis of the aforesaid aspect, it is submitted by Mr. Khambata that the risk of danger is on the higher side so far as the area of the Petitioner is concerned as compared to other high rise buildings, whose borders are not touching the border of the premises of the Navy, as some buildings are located at some reasonable distance, though the entire leasehold area originally belonged to Colaba Company Ltd. In order to appreciate the rival contentions, it is necessary to rely upon the statutory provisions contained in various enactments.

15. So far as Municipal Corporation is concerned, the same is a Planning Authority under the provisions of the MRTP Act, 1966. The Planning Authority is required to process the development permission as provided u/s 46 of the MRTP Act. Section 46 provides as under:

46. Provisions of Development plan to be considered before granting permission. The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under this Act.

15.1 Section 51 of the MRTP Act deals with power of revocation and modification of permission to development. Section 154 provides about the control by State Government which reads as under:

154. Control by State Government. (1) Every Regional Board, Planning Authority and Development Authority shall carry out such directions or instructions as may be issued from time to time by the State Government for the efficient administration of this Act.

(2) If in, or his connection with, the exercise of its powers and discharge of its functions by the Regional Board, Planning Authority or Development Authority under this Act, any dispute arises between the Regional Board, Planning Authority, and the State Government, the decision of the State Government on such dispute shall be final.

15.2 So far as the Development Control Regulations for Greater Mumbai, 1991 are concerned, the relevant provisions of Regulation 16 provide as under:

16. No land shall be used as a site for the construction of buildings. (a) if the Commissioner considers that the site is in sanitary or that it is dangerous to construct a building on it or no water supply is likely to be available within a reasonable period of time.

....

(e) If the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the health and safety of the inhabitants of the neighbourhood;

....

(n) If the proposed development is likely to involves damage to or have deleterious impact on or is against urban aesthetics or environment or ecology and/or historical/architectural/aesthetical buildings and precincts or is not in the public interest.

15.3 Section 3 of the Works of Defence Act, 1903 provides as under:

3. Declaration and notice that restrictions will be imposed. (1) 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 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 authorised to certify its orders.

(2) The said declaration shall be published in the Official Gazette and shall state the district or other territorial division in which the land is situate and the place where a sketch plan of the land, which shall be prepared on a scale not smaller than six inches to the mile and shall distinguish the boundaries referred to in

Sec. 7 may be inspected, and the Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality.

(3) The said declaration shall be conclusive proof that it is necessary to keep the land free from building and other obstructions.

15.4 So far as helicopter is concerned, it is also considered as an aircraft under the Aircraft Act, 1934. The Act also prescribes certain provisions in connection with security of the Airport and aircraft. Section 9A of the Aircraft Act, 1934 empowers the Central Government to prohibit or regulate construction of buildings, planting of trees, etc.

16. Relying on the aforesaid provisions, it is submitted by Mr. Kapadia that unless there is a notification u/s 3 of the Defence Act, the security aspect cannot be considered by the Planning Authority and it is argued by him that even under the Aircraft Act, the Central Government can prohibit or regulate construction and that aspect has also not been done in the present case. We have considered the aforesaid provisions of the MRTTP Act and D.C. Regulations as well as Section 3 of the Defence Act as well as the Aircraft Act.

17. So far as Section 46 of the MRTTP Act is concerned, in our view, it is not possible for us to give such a restricted meaning as canvassed by the learned counsel for the petitioner. u/s 46 of the MRTTP Act, the Planning Authority is required to examine the aspect about granting development permission in an appropriate manner and by considering the relevant aspects. While granting development permission, one of the things which the Planning Authority is required to consider is to the provisions of the draft or final plan sanctioned under the Act meaning thereby that if any provision in respect of anything in the draft or final plan published by means of notice or same is sanctioned under the Act, the Planning Authority cannot ignore the same and it has to be taken into consideration. It is impossible for us to accept the say of Mr. Kapadia that the Planning Authority cannot consider any other thing except giving due regard to the provisions of the draft or final plan as mentioned in Section 46 of the MRTTP Act. In our view, Section 46 of the MRTTP Act cannot be given such a restricted meaning and it cannot be said that u/s 46, the Planning Authority cannot consider any other aspect such as security etc. It is not possible for us to accept the submission of Mr. Kapadia that Section 46 of the MRTTP Act is to be read in such a restrictive manner.

18. It is required to be noted that it is in fact the inherent duty of the planning authority to apply its mind before giving development permission and the planning authority is required to keep in mind the pros and cons of such development permission. For example, if there is a fire brigade station or refinery or any sensitive object is located at the place nearby the area for which development permission is sought, the planning authority cannot shut its eyes and is blindly give sanction only on the basis that, except what is provided in Section 46, they are not required to call for any other information. On the

contrary, it is the duty of the planning authority to call for such information otherwise they will be failing in their duty and they are not required to sanction blindly by shutting their eyes to the relevant aspect of the matter. In view of the same, it is not possible for us to accept the submission of Mr. Kapadia that except what is provided under the MRTTP Act and the D.C. Regulations, the planning authority is not empowered to call for any other information and to straightaway grant permission and is not required to call for any other information except the one provided u/s 46 of the MRTTP Act or under the D.C. Regulations.

19. In view of what is stated above, no fault can be found with the Corporation in insisting for NOC from the Defence Department. Even as per the D.C. Regulation 16(n), the Planning Authority may refuse to grant permission of using the land if the proposed development is likely to involve damage or to have a deleterious impact on or is against the aesthetics or environment or ecology and/or historical/architectural/aesthetical building and precincts or is not in the public interest. In our view, public interest cannot be read in line of what is mentioned under Regulation 16 regarding environment as public interest have wide connotation and if any particular development activity is found to be not in public interest, in a given case, the development authority can refuse such permission. The public interest, therefore, is to be read independently to the earlier part of the said Regulation i.e. ecology, architectural aspects etc. Reading the provisions of Section 46 of the MRTTP Act, it cannot be said that the insistence of the planning authority of NOC of a particular department which, according to the Planning Authority is in public interest, such insistence cannot be said to be de hors the provisions of the Act and the Regulations.

20. Section 3 of the Works of Defence Act, 1903 provides for issuance of declaration and notice. As per the said provision, if the Central Government is of the opinion to impose restriction upon use and enjoyment of land in the vicinity, said land is to be kept free from buildings and other obstructions, a declaration can be issued. It is, however, required to be noted that in the instant case, the premises which are in possession of the petitioner are concerned, there is some construction which has already taken place since long, which is of course not high rise building and the Respondent has not tried to insist upon demolition of the same, the question for their NOC arose when petitioner wanted to develop the property by constructing high rise building. u/s 3 of the said Act, even the Central Government can acquire the property for national interest. In the instant case, the defence has not thought it fit to issue such a declaration but has tried to assert its right under the provisions of the MRTTP Act and the Development Control Regulations by which they have not agreed to give NOC in view of the security reasons. It, therefore, cannot be said that simply because no declaration u/s 3 of the Act is issued, the defence was not entitled to insist for their NOC. It is not possible for us to agree with Mr. Kapadia that unless notification u/s 3 of the Act is issued, the Respondents have no right whatsoever to object for the development carried and/or for refusing to grant NOC. So far as Section 3 of the

Act is concerned, it has no relevancy so far as insistence of the planning authority regarding no objection from the Defence Department is concerned. In a given case, even if there is no notification u/s 3 of the Defence Act, the planning authority can always insist for NOC from the Defence Department, if the property is located just adjacent to the premises of the petitioner. So far as Section 3 of the Defence Act is concerned, the planning authority nowhere figures in the picture and the petition has been filed against the planning authority against their insistence of NOC from the Defence Department. While considering the said aspect, it is not necessary to place any reliance on the provisions of Section 3 of the Act as in future if the Defence is of the opinion that if any declaration is issued for acquiring the property, it can always proceed on that basis. In that eventuality, the planning authority nowhere figures in the picture. Today the dispute of the petitioner is against the planning authority as according to the petitioner, the planning authority has no right whatsoever to insist for NOC from the Defence Department. While considering the said aspect, it is not necessary that unless there is declaration u/s 3 of the Act, the planning authority cannot insist for any NOC or might even refuse to grant NOC on the ground of public interest. It is not possible for us therefore to accept the argument of Mr. Kapadia that unless there is a declaration u/s 3 of the aforesaid Act, it is not open for the Navy to raise the point of security which, according to him, is nothing but a bogey and concocted version of the Navy.

22. In para 31 of this decision, the Division Bench judgment Court on which Mr. Sathe places reliance has been noted and it is held that the quoted decision does not lay down any principle in law, but makes the observations relied upon by Mr. Sathe in the passing. The relevant observations regarding the same as contained in para 31 are as under:-

31. Reference is also made to the decision of the Division Bench of this Court in the case of Lok Holding and Construction Limited Vs. Municipal Corporation of Gr. Bombay and others, which is an unreported decision dated 10th August 2011.....

....In the aforesaid case no law has been laid down by the Division Bench in its unreported judgment. In any case, on going through the aforesaid judgment, we are of the opinion that no law has been laid down by this Court nor provisions of section 46 of the MRTP Act nor D.C. Regulation 16 were under consideration of the Division Bench. It, therefore, cannot be said that any law has been laid down by the Division Bench while making certain passing observations in the judgment. In the instant case, it is required to be noted that u/s 154 of the MRTP Act, the State Government is authorised to issue directions to the planning authority. The said provisions have already been quoted above.

In such circumstances, it would be contrary to judicial discipline to rely upon earlier division bench judgment in Lok Holding (supra). The decision in TCI is directly on the issue. It answers the same relying upon the decisions of the Supreme Court, construes the D.C. Regulations, 1991 and a prior decision of this Court. When we agree with the view and reasoning all the more it will be

improper to ignore it.

23. In our view, therefore, not only the paragraphs reproduced above but the further paragraphs of the decision in TCI case (supra) would demonstrate and denote that the point raised before us is completely covered against the petitioners in the present case. In view of this Division Bench judgment, additionally, we find that there is no merit in the argument of Mr. Sathe that TCI Industries judgment (supra) must be seen in the backdrop of its facts and is distinguishable because it is delivered in a case where the property was immediately adjacent or adjoining to the defence establishment.

24. Mr. Sathe would urge that the distance in the present case is not such as would be affecting the naval establishment. Once, we are of the view that it is the experts who have resolved and decided that for reasons of security and protection of defence and naval establishment NOC should not be granted, then, it is not for us to substitute our opinion with their views. We do not find that the views are lacking in bonafides nor their actions can be termed as patently arbitrary and discriminatory. Their actions are keeping in mind the security of the defence installation. That has to be placed in forefront. We are completely in agreement with Mr. Setalwad that such policy decisions cannot be interfered with by us and so very lightly. In fact, even prior to the guidelines being brought into force, the concern on account of indiscriminate construction activity within the vicinity of defence establishment was raised. Way back in the year 2006, the issue of unauthorised construction in the vicinity of defence establishment without obtaining NOC from Navy was raised by the Western Naval Command. Further, the Government of Maharashtra had written to the Flag Officer, Commanding in Chief, Western Naval Command that a meeting would be convened by the Urban Development Department to decide the issue and answer the concern of the defence establishment. It is, thereafter, that the matter was taken up at all levels. Even in the year 2004 in one of the matters NOC was refused by the Executive Engineer, (B.P.) of the Municipal Corporation Gr. Mumbai relying upon the opinion of the Commodore, Command Works Officer for Flag Officer Commanding in Chief, HQ, Western Naval Command. As far as the petitioners are concerned, they were throughout aware that the naval authorities' NOC would be needed and they cannot claim that the construction can go on unmindful of their concern or disregarding their view and opinion. It is futile to urge that the construction permission having been given earlier and the guidelines being issued subsequently, the LOI, IOD and CC are being virtually withdrawn by such an exercise of insistence on NOC. That is not the position because neither of the permissions have been refused or withdrawn but all that the petitioners are informed is that the construction cannot proceed without no objection certificate from Indian Navy. Once the Division Bench has put the matter on the pedestal of risk to the defence installations, vital for national security, then, we are not in a position to hold that any rights of the petitioner in development and construction are affected at this stage. In fact at page 193 of the paperbook there is a specific request from the commanding officer INS Trata

to the Flag Officer Commanding HQ, expressing deep concern and voicing an apprehension with regard to the petitioner's construction. In these circumstances, it is not as if the location of naval establishment was either unknown or that the petitioners were taken by surprise. The annexures to the affidavit of Rear Admiral Mathur have been rightly relied upon by Mr. Setalwad.

25. In these circumstances, we do not find that the orders/communications impugned by the petitioners are in any way vitiated. We are satisfied from the explanation given in the affidavit that there is no discrimination and it is not that the petitioners project has been singled out for any different treatment.

26. As a result of the above discussion, we do not find that the issuance of circular of UDD or Government of India is in any way vitiated. We are also not in agreement with learned Senior Counsel for petitioners that because the works at site has commenced the guidelines will have no application to the petitioners' construction or that it can proceed without the NOC from Navy. We are also not in agreement with Mr. Sathe that any arbitrary or untrammelled powers are conferred on the authorities while considering the cases for grant of NOC. As held by the Division Bench in the TCI case (*supra*), no rights in the property much less any constitutional right in that behalf is adversely affected. The communications and particularly those impugned in this petition are, therefore, not vitiated by any error of law apparent on the face of record or perversity requiring interference in our writ jurisdiction. The petition is devoid of any merits and the same is dismissed. No costs. Rule is discharged.

27. At this stage, Mr. Shah appearing for respondent Nos. 9 and 10 urged that he represents the slum dwellers and whose structures have been demolished for constructing the rehabilitation building and as their permanent alternate accommodation. If the petition is dismissed, then, these slum dwellers who are languishing in transit accommodation or making their own arrangement for residence will be prejudicially affected and no permanent alternate accommodation will be made available to them. We are of the opinion that the petition is by the developer and against an act of the Municipal Corporation and State Authorities in insisting on obtaining NOC from the naval authorities. The challenge to that insistence having failed, it is for the slum dwellers and the developers to take appropriate steps and in accordance with law in the event there is any cause of action for the slum dwellers against the slum dwellers and the authorities. That cause of action and the grievance based thereon will not be affected by our order passed today on this petition.