

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.3217 OF 2018

**Sea Kunal Corporation Pvt. Ltd.**

Office at 155, Mittal Court, "B" Wing  
224, Nariman Point, Mumbai-21

...Petitioner

*Versus*

1. **Municipal Corporation of Greater Mumbai)**  
Office at Mahapalika Marg, Fort,  
Mumbai- 400 001
2. **Executive Engineer**  
Building Proposal Department (City-II)  
Office at E-Ward, Municipal office,  
3<sup>rd</sup> Floor, 10, S.K. Hafizuddin Marg  
Byculla, Mumbai
3. **The Chief Engineer, Building Proposals**  
MCGM, having its office at 5<sup>th</sup> floor,  
Municipal Head Office, Annexe Bldg,  
Mahapalika Marg, Mumbai-400001.
4. **The Dy.Chief Engineer (Building Proposals)**  
City, New Municipal Bldg, Bhagawan  
Walmiki Chowk, Vidyalankar Marg,  
Antop Hill, Mumbai 400037.
5. **The Executive Engineer,**  
**Building Proposals** City-II, New  
Municipal Bldg, Bhagawan Walmiki  
Chowk, Vidyalankar Marg,  
Antop Hill, Mumbai 400037.

*Tilak*

6. **Principal Secretary**  
Urban Development Department,  
Government of Maharashtra,  
Mantralaya, Mumbai 400032.
7. **Colonel, Administrative Commandant**  
**The Station Commander,**  
Head Quarters, Uttar Maharashtra  
and Gujarat Sub Area, Station Cell,  
Colaba, Mumbai 400005.

...Respondents

----

Dr.Milind Sathe, Sr.Adv. Mr.Vineet Naik, Sr. Adv. Mr.A. Hariman, S. Ghosh and Mrs. Deeksha Jani I/by. M/s. Hariani and Co. for the Petitioner.

Mrs.P.H.Kantharia a/w. Ms.Vandana Mahadik for MCGM.

Mr.Anil C.Singh, ASG a/w Mr.Aditya Thakkar, Parag Vyas for Respondent Nos.7 and 8.

Mr.Kunal Bhange AGP for the State.

**CORAM: RANJIT V. MORE &  
SMT. BHARATI H.DANGRE, JJ.**

**RESERVED ON : 15<sup>th</sup> FEBRUARY 2019**

**PRONOUNCED ON : 27<sup>th</sup> FEBRUARY 2019**

**JUDGMENT :- (Per Smt.Bharati H. Dangre, J)**

1 The petitioner, a Private Limited Company incorporated under the provisions of Companies Act, which has undertaken redevelopment under the Development Control

*Tilak*

Regulations of 1991 on a land situated in Colaba, Mumbai has invoked the jurisdiction of this Court, being aggrieved by the impugned stop work notice issued by the Executive Engineer of the Municipal Corporation of Greater Mumbai (MCGM) on the basis of the letter issued by the Administrative Commandant, Station Commander, Headquarters i.e. respondent no.7. The petition raises an issue as to whether the No Objection Certificate (NOC) of defence authorities is required for the completion of construction and occupation of the property being developed by the petitioner. The petition seeks an interim relief to the effect of staying operation of the impugned noticed and refraining the respondent MCGM from acting upon the said impugned notices.

In view of the limited question raised in the petition, we issue Rule and with the consent of the parties, proceed to hear the petition finally.

2 The petitioner has undertaken the redevelopment of category 'A' cessed building situated on land bearing CS No.63 of Colaba Division situated at Shahid Bhagat Singh Road,

*Tilak*

Colaba under Regulation 33(C) of the D.C. Regulation 1991. The respondent no.1 is a Mumbai Municipal Corporation constituted under the Act of 1888 (hereinafter referred to as “MMC Act”) and is a designated planning authority under the provisions of Maharashtra Regional Town Planning Authority, 1966 (for short “MRTP Act, 1966) for the areas under its jurisdiction. The respondent nos.2 to 5 are the Officers of the MCGM and are entrusted the task to grant permissions pertaining to the construction of buildings and completion and occupancy thereof. Respondent no.7 is the Colonel, Administrative Commandant Station Commander Head Quarters Uttar Maharashtra, and Gujarat, whereas respondent no.8 is the Administrative Commandant, Station Commander HeadQuarters, Uttar Maharashtra and Gujarat.

The existing “Rashid Mansion” located on the land bearing CTS 63 of Colaba Division situated at Shahid Bhagat Singh Road, Colaba, admeasuring approximate 2225.49 sq.yards equivalent to 1860.79 sq.m was accorded sanction under Section 36(1)(C) of the Bombay Public Trust Act, 1950 by the Joint Charity Commissioner in 2006. The leasehold

*Tilak*

rights came to be transmitted to the petitioner from Maskati Charitable Properties Trust who was assigned the leasehold rights. The said Rashid Mansion was categorized as “A” category cessed building and was in a dilapidated and dangerous condition. The petitioner proceeded to redevelop the same by constructing a residential building as per the existing development laws and regulations.

3 The petitioner commenced the redevelopment of the property in or about December 2006 and was granted permission for development of the residential building by the planning authorities. The petitioner through its Architect submitted the application in terms of Section 44 of the MRTP Act seeking requisite permission for development/construction of the building in or around 2006. In pursuance thereto, the MCGM issued its intimation of disapproval (IOD) on 22<sup>nd</sup> July 2008 under Section 346 of the MMC Act in favour of the petitioner. The IOD stipulated various conditions including obtaining NOC from various authorities but even it did not contemplate seeking of NOC from defence authorities.

*Tilak*

Pursuant to a commencement certificate issued on 21<sup>st</sup> July 2009, the petitioner commenced construction of a multi storeyed residential tower captioned as “Water Front Tower”. In the mean time, the State Government issued a resolution on 4<sup>th</sup> September 2009 through its Urban Development Department, pursuant thereto Regulation 67 of DCR was modified and a result of which redevelopment of building under DCR 33(6), 33(7), 33(8), 33(9) and 33(10) of Heritage building, sites and precincts was permitted beyond 24 metres subject to the approval of respondent no.2. In view of the removal of height restriction embargo, the petitioner through its Architect submitted amended plans to respondent no.1 and sought permission for development of a building with height upto 158.56 m which was duly approved by respondent no.1 on 15<sup>th</sup> October 2009. Till this stage, there was no stipulation of obtaining any NOC from defence authorities. On 27<sup>th</sup> August 2010, the Commencement Certificate (CC) dated 21<sup>st</sup> July 2009 was endorsed upto plinth i.e. top of service floor in furtherance of the amended plan approved on 15<sup>th</sup> October 2009.

*Tilak*

4            On 18<sup>th</sup> May 2011, the Ministry of Defence, Government of India, issued an internal communication to the Chief/Army, Naval and Air Staff respectively containing guidelines for raising objection to the construction activities and/or issuance of NOC for completing construction, pending the amendment to the Works of Defence Act, 1903. On 4<sup>th</sup> August 2011, the Chief Engineer, DP, MCGM in his communication addressed to the Director (ES & P) and to the Municipal Commissioner of MCGM categorically admitted that no NOC from defence authorities was necessary in relation to the petitioner's project. In September 2011, the respondent issued stop work notices to the petitioner alleging certain irregularities in the construction of refugee areas and these notices were challenged by filing Writ Petition No.1261 of 2012. This petition was disposed of by consent order in terms of Minutes of Order dated 16<sup>th</sup> August 2012. It was agreed by the petitioner to submit an amended plan seeking reduction in height and in turn, respondent no.1 agreed to scrutinize and approved the plan and to issue further commencement

*Tilak*

certificate expeditiously. No stand was taken before the High Court in this round of litigation seeking any NOC from the defence authorities. The petitioner submitted revised plans seeking reduction of the building height and slashing the height from 158.56 m to 127.53 m to which approval was granted by respondent no.1 on 25<sup>th</sup> March 2013. Further, on 6<sup>th</sup> July 2013, the High Rise Committee also issued its NOC permitting the petitioner to construct a building of 127.53 m height without any stipulation of any NOC from the defence authorities. Another circular was issued on 21<sup>st</sup> February 2015 by the respondent no.6 in exercise of its power under Section 154 of the MRTP Act and the said circular superseded all earlier circulars and issued comprehensive guidelines to all the planning authorities in respect of permitting development in the vicinity of defence establishments. The circular did not contemplate NOC from the local Military authority and contain the following stipulations :-

- (1) No NOC is required to be obtained from the Local Military Authority (LMA) for grant of any permission for development;

and

*Tilak*



- (2) Even if the planning authorities or the private developers had made any applications for NOC to Local Military Authorities and if no response was received from such local military authorities within a period of 30 days, then the development permissions could be further processed without insisting on any NOC.

The petitioner substantially completed the construction of the building upto 112.23 metres though it was sanctioned a height of 127.52 m. The respondents also issued an endorsement granting full commencement certificate in favour of the petitioner in January 2017. The petition proceeds to state that 36 flat purchasers have agreed to acquire the flats in the said building for an aggregate amount of Rs.96,90,00,000/- (Rupees Ninety Six crore Ninety lakhs) and the petitioner Company has spent an approximate sum of Rs.120 crore on the said project, including the cost of acquiring the land, the cost of construction, premiums, charges and fees etc, due towards the said activity. There was no stipulation imposed of obtaining any NOC from the defence authorities or any other restriction of the like nature for the development of the said property as per the DCR or the D.P remarks dated 27<sup>th</sup> October 2006.

*Tilak*

5           Based on the said circular, the petitioner attempts to canvass that the circular was issued in exercise of power under Section 154 of the MRTP Act and the planning authorities are bound by the said circular and no condition contrary to it could be imposed. The petition further proceeds to state that on 19<sup>th</sup> March 2015, the Commencement Certificate was further endorsed upto 100.80 metres (upto 16 floors) in pursuance of the amended approved plan dated 25<sup>th</sup> February 2015. The Ministry of Defence also addressed a communication of 18<sup>th</sup> March 2015 to Chief of all the Three Armed forces relaxing the restriction and amending the earlier guidelines issued by it vide its communication dated 18<sup>th</sup> May 2011 and the condition was relaxed thereby intimating that the restriction contemplated in the circular of 18<sup>th</sup> May 2011 would not apply to any amendment to the construction permission with regard to height, if such amendment has been allowed after 18<sup>th</sup> May 2011. The petitioner also places reliance on the correspondence at the level of the State Government in giving effect to the said circular and makes a reference to the further circular dated 4<sup>th</sup> February 2016 issued by the Principal Secretary, Urban

*Tilak*

Development Department. Even after this circular, the Deputy Chief Engineer (BP) City, by his letter dated 1<sup>st</sup> April 2016 addressed to the President of Improvement Committee, it was stated that in case of 'Water Front Tower' in view of the plans being approved prior to 18<sup>th</sup> May 2011, no fresh NOC was required to be obtained from the Defence Authority. Reliance is also placed on the remarks of the Deputy Law Officer of the MCGM contained in communication dated 12<sup>th</sup> September 2016 where it was opined that circular dated 4<sup>th</sup> February 2016 would not be applicable to petitioner's project as there was no increase in height by the amendment in the plan and rather the height was reduced to 127.53 metres. On 21<sup>st</sup> October 2016, the Ministry of Defence issued new guidelines in respect of 193 stations listed in Part-A of the Annexure-A imposing a restriction upto 10 metres from the outer wall of such establishments and contemplating an NOC from defence authorities within its restricted zone. 149 stations listed in Part-A of the Annexure, restriction upto 100 metres from outer wall came to be imposed with a further restriction that no construction would be permitted within 50 metres and the

*Tilak*

height restriction of 3 metres shall be applicable for a distance of 50 – 100 metres which would require a prior NOC from the defence authorities. Part-A of the Annexure included several defence establishments in the State of Maharashtra, but did not include Mumbai. Resultantly, on 7<sup>th</sup> November 2016, the Urban Development Department of State of Maharashtra issued a circular under Section 154 of the MRTP Act, withdrawing all the guidelines as per prior circulars issued by Ministry of Defence. Pertinently, the defence establishment at Colaba was not listed either in Part-A or Part-B and it is the contention of the petitioner that the said establishment at Colaba is merely an administrative office and is termed by the defence authorities as 'Peace Station'. Thus, according to the petitioner, none of the restrictions would apply to the redevelopment project of the petitioner located at Colaba and it is put forth that even if the circulars issued by the Ministry of defence apply, since the planning authority had granted permission prior to 18<sup>th</sup> May 2011, the restriction contained did not apply to the building of the petitioner. The full Commencement Certificate was accorded in favour of the petitioner on 21<sup>st</sup> January 2017 as per

*Tilak*

the approval plan dated 25<sup>th</sup> February 2015 and this did not include any stipulation of obtaining NOC from defence establishment.

In the wake of the aforesaid development, the petitioner raises an objection to the letter 2<sup>nd</sup> March 2017 issued by the respondent no.7 without any authority of law directing the stoppage of construction on the said property and it is this communication which torments the petitioner, which was followed by a further stop work notice dated 16<sup>th</sup> March 2017. The petitioner addressed a communication to respondent no.1 on 20<sup>th</sup> April 2017 inviting attention as to why the NOC from the L & A/Defence Establishment was not required, but this did not yield any result and a communication was issued on 22<sup>nd</sup> April 2017 by respondent no.7 which was addressed to the Executive Engineer (BP) City-II, alleging that the Commencement Certificate issued by the respondent no.1 on 25<sup>th</sup> February 2015 and 21<sup>st</sup> January 2017 was in alleged violation of purported circulars dated 18<sup>th</sup> May 2011 and 18<sup>th</sup> March 2015 issued by the Ministry of Defence. The said letter purported to suggest that the property was located at a distance

*Tilak*

of 319.22 metres from the out most periphery of Colaba Military Station (CMS) which is alleged to be within the restricted zone of 500 m and hence, NOC cannot be granted. The petitioner also seeks to challenge the said letter dated 22<sup>nd</sup> April 2017 and is aggrieved by the said action of the respondent authorities, the petitioner has approached this Court seeking a relief which we have already reproduced above.

6 We have heard learned Senior counsel Shri Milind Sathe appearing for the petitioner. Shri Sathe would submit that the only ground on which the MCGM has revoked all its earlier permissions granted in favour of the petitioner is that the respondent no.7 by its communication dated 22<sup>nd</sup> April 2017 has refused to grant NOC for development of the project on the ground that it was located within a distance of 319.22 metres of the Colaba Military Station and it is in violation of the circular dated 18<sup>th</sup> May 2011 and 18<sup>th</sup> March 2015. The learned senior counsel would submit that the impugned stop work notice based on the communication of respondent no.7 is contrary to the provisions of MRTP Act and also the

*Tilak*

Development Control Regulations and the circulars issued by the State Government and in particular, the circular dated 7<sup>th</sup> November 2016 which are binding on the planning authorities by virtue of Section 154 of the MRTP Act and has the force of law. According to Shri Sathe, the imposition of condition mandating NOC from the defence authorities as a condition precedent to the petitioner continuing with its redevelopment work of construction is *ultra vires* the provisions of MRTP Act and the D.C. Regulations. He would submit that insistence on the NOC is contrary to the circular issued by the State Government on 7<sup>th</sup> November 2016 which supersedes all the earlier circulars and as far as State of Maharashtra is concerned, restrictions with respect to construction activity are applicable only in respect of areas set out in Annexure A and this includes the areas like Kalina, Trombay, Ghatkopar, Wadala, Cross Island, Malad and Kandivali in the State of Maharashtra. The defence location situated at Colaba , according to Shri Sathe does not form part of the list of defence establishments to which the Ministry of Defence has imposed any restriction vide the circular dated 21<sup>st</sup> October 2016. Shri

*Tilak*

Sathe would thus submit that when the defence establishment did not itself intend to impose any restriction in this particular area, it is high-handed on the part of the respondent no.7 to refuse to grant NOC. Dr. Sathe would also advance a further submission to the effect that even assuming that the circular issued by the Ministry of Defence continue to apply, perusal of the said circulars would itself disclose that the restrictions imposed vide circulars dated 18<sup>th</sup> May 2011 came to be relaxed by issuance of a further circular dated 18<sup>th</sup> March 2015 granting relaxation in favour of those construction for which permission has been issued by a competent local municipal authority prior to 18<sup>th</sup> May 2011. According to the learned senior counsel, IOD was issued in favour of the petitioner for redevelopment of Rashid Mansion in terms of Regulation 33(6) on 22<sup>nd</sup> July 2008 itself and the Commencement Certificate was issued on 21<sup>st</sup> July 2009 upto plinth level and subsequently further Commencement Certificates were issued from time to time. Dr. Sathe would submit that the MCGM through its competent authority ie. Chief Engineer granted approval permitting height of the proposed building of 158.58 metres vide their

*Tilak*



communication dated 6<sup>th</sup> October 2009 and by 27<sup>th</sup> August 2010, C.C upto 46.04 metres was issued. Dr.Sathe would submit that the petitioner has thereafter reduced the height from 158.56 metres to 127.53 metres and this amendment of reduction in height, was duly approved by the MCGM. He would thus submit that the proviso incorporated in the circular of 18<sup>th</sup> March 2015 issued by the Ministry of Defence is not at all attracted in the case of the petitioner since by amending the plans, the petitioner has sought to reduce the height of 127.53 metres whereas the IOD approved the plans which contemplated a building of 158.58 metres. In these circumstances, learned senior counsel would submit that the stop work notice issued by the MCGM at a belated stage when the building is already constructed in pursuance of the permissions granted by the MCGM from time to time is violative of Article 14, 19 and 300A of the Constitution of India. Further, it is also attempted to canvass before us that the stop impugned notices are issued without affording any opportunity of hearing to the petitioner and is therefore, violative of the principles of natural justice and fair play. The imposition of

*Tilak*

impugned condition has been assailed as being contrary to Section 51 of the MRTP Act which provides that once a development permission is granted, no new additional condition can be imposed nor can such permission be modified or revoked without affording an opportunity of being heard. The practical hardship is also being pressed into service by inviting out attention to the fact that more than 90% of the building is complete and the balance work of only four floors is required to be completed. Reliance is placed on the judgment of this Court in case of Hedavkar Mechanical Works, and others Vs. State of Maharashtra, where the Division Bench of this Court has frowned upon the imposition of additional conditions at a later stage.

7 In response to the said petition, the respondent no.7 has filed an affidavit in reply through one Amit Kumar holding the rank of Major with Indian Army currently working as 'Quarter Master' Garisson Battalion and residing in Colaba Military Station. The affidavit proceeds to reiterate the ground on which the NOC has been refused. The refusal has been

*Tilak*

justified on the ground that on inspection of various defence establishments, it was revealed that the range of the building within 300 – 400 metres was within the effective range of modern weapons and the proposed construction would pose a security concern/threat due to its domination by operations and possibility of fire of the defence establishment in the vicinity. It is then stated that on the recommendation of the Board of Officers, the NOC has been refused in the interest of safety and security of defence establishment and the nation. Reliance is placed on the circular dated 18<sup>th</sup> May 2011 issued by the Ministry of Defence and it is submitted that it is applicable to all defence establishments in the country which contemplated a clearance from defence authorities for construction of multi storeyed buildings which fall within radius of 500 metres from defence establishment. It is then proceeded to state that this circular was further amended by circular dated 18<sup>th</sup> March 2015 read with circular dated 17<sup>th</sup> November 2015 and the further circular dated 21<sup>st</sup> October 2016 issued by the Government of India, Ministry of Defence. The circular dated 18<sup>th</sup> March 2011 is sought to be clarified by stating that the terminology used in

*Tilak*

the said circular is “radius of defence establishment” and that the circular dated 17<sup>th</sup> November 2015 expressly refers to the 500 meters being calculated from the periphery of the defence establishment. It is then clarified that the intention and express language of the circulars is to cover constructions which fall within 500 metres of defence establishment and not just constructions which are within 500 metres from the center of the defence establishment. As regards the contention that the Colaba Military Station is not enlisted in the circular of 21<sup>st</sup> October 2016 and no security clearance would be required for its construction is stated to be a misreading of the said circular. The affidavit proceeds to state that the circular dated 21<sup>st</sup> October 2016 merely identifies certain Military establishments where a lower limit is prescribed. However, the circular envisages for a lesser or lower limit of distance from the defence establishment only in respect of establishments mentioned therein. For all other establishments not mentioned therein, the earlier circulars would continue to operate and apply. Reliance is also placed on the further clarification letter dated 5<sup>th</sup> January 2018 issued by the Army HeadQuarters which

*Tilak*

is placed on record at Annexure-E. It is also asserted that Colaba Military Station may be a Peace Station but the higher echelons of the Army authorities would be actively and exceedingly involved in war time activities at the highest level have their offices in the Colaba Military Station and the presence of families of certain officer also heightens the need to maintain high security. CMS is projected as the defence establishment and it is further asserted that it is essential that the safety and security of the said establishment is maintained.

8 As far as the permission granted by the planning authorities is concerned, it is stated that the permission for construction which was in force as on 18<sup>th</sup> May 2011 was height of 46.07 metres or in the alternative, height of 68.10 metres whereas the proposition is now to construct a structure elevated to the height of 127.86 metres and this would amount to clear amendment in the height to the construction permission after 18<sup>th</sup> May 2011 and for that purpose, NOC of defence is necessary. The allegation by the petitioner that other buildings are permitted to be constructed or CMS is also denied and it is

*Tilak*

stated that no two NOCs would be comparable as alleged and that each plot and each proposed construction has to be considered on its own merits qua the implication of the national security.

9 In support of the stand of the respondent, the learned Assistant Solicitor General Shri Anil Singh puts a fierce stand before this Court and advances submission to the effect that the safety and security is an issue which is better left to the defence authorities and this Court would not sit in appeal over such determinations unless the satisfaction reached by the authorities is vitiated by malafides that have been proved against the determining authority. He would submit that the planning authorities in terms of Section 46 of the MRTP Act shall have due regard to the provisions of any draft or final plan or proposal published by means of notice submitted or sanctioned under the Act and they are expected to take into consideration the relevant facts or material for grant or refusal to grant sanction to any development plan and this would extend to the issue of security aspect in public interest. Shri

*Tilak*

Singh would place heavy reliance on the judgment of the Division Bench of this Court in case of *TCI Industries Ltd Vs. State of Maharashtra*<sup>1</sup> wherein the Division Bench of this Court has held that it is the inherent duty of planning authority to apply its mind and take into consideration all the relevant aspects before granting any development permission. He would also place heavy reliance on the judgment of this Court in case of *Union of India Vs. State of Maharashtra*<sup>2</sup> where the Division Bench has categorically concluded that when the national interest is pitted against private interest, naturally, national interest must be protected and the technical objections of delay and laches will not come in the way of the Court in exercising its extra ordinary jurisdiction under Article 226 which is undoubtedly equitable jurisdiction. He would further submit that the Division Bench had issued directions imposing prohibition on the State of Maharashtra as well as the MCGM and the MMRDA for granting any building/development permission in the vicinity of and/or within the Colaba Military Station without any NOC or the army

---

1 (2014) 3 BCR 210

2 (2016) 4 BCR 549

authorities. Shri Singh would thus submit that the insistence of NOC by the defence is on account of public interest element involved and is in the larger interest and this must yield to an individual's commercial interest, the former being supreme. He would thus pray for dismissal of the Writ Petition.

10 With the assistance of the learned senior counsel for the respective parties, we have perused the writ petition along with its annexures and also the affidavit in reply filed by respondent nos.7 and 8. There can be no doubt that safety and security of the nation as perceived by the defence establishment has a primacy over the individual interest, howsoever, loudable it may be. The proposition laid down by the Division Bench of this Court to which one of us (Justice Ranjit V. More) was a party in case of *Union of India Vs. State of Maharashtra*, popularly referred to as 'Adarsh case' cannot be questioned at all and is a *sacrosanct*. The Division Bench was dealing with a Writ Petition filed by the Union of India through the Indian Army Head Quarters, Maharashtra, Gujarat and Goa area through the general commanding Officer against the State of

*Tilak*



Maharashtra as well as the planning authorities i.e. MCGM and MMRDA seeking a writ in the nature of mandamus restraining the respondents from granting any building/development permissions in the vicinity of and/or within the Colaba Military Station (CMS) without a No Objection Certificate (NOC) from the Army authorities and from granting any development permission or completion certificate or occupation certificate to the respondent no.4 in respect of Adarsh building on the land on which it stood. A direction was also sought to demolish the building of the society and to restrain any occupation thereof during the pendency of the writ petition. On a minute consideration of the facts involved and on consideration of a similar argument advanced on behalf of learned senior counsel for the petitioner, where a strong reliance was placed on a survey report carried in June 2011 on defence installation/structures in the close vicinity of and with visibility of Adarsh Building showing some structures/installations between 27 m to 200 m of Adarsh building. It was concluded that the Adarsh building was a security threat to CMS. The Division Bench had referred to the threat to the security of a nation, in its advanced

*Tilak*

form resulting in expansion of the mode and manner in which the precautionary measures are adopted. The said judgment had referred to several buildings located within the vicinity of CMS and the argument advanced that Colaba was purely a residential area where no strategic targets are located did not find favour with the Division Bench. The Division Bench relying on the judgment of *TCI Industries Ltd* (supra) has categorically held that the NOC from defence establishment is necessary and in fact, it is the mandatory duty of the planning authority to insist for NOC of defence establishment while considering proposal for building permissions. It also held that the provisions of the Defence Works Act, 1903 are not the sole repository for prohibiting construction activity near defence establishment and even section 47 of the MRTP and DCR 16 can be invoked. As regards the issue as to whether the building constructed by respondent no.4 poses a threat to the defence establishment, the question was answered in the positive and the direction was issued to respondent nos.1 to 3 to forthwith demolish the building of Adarsh Co-operative Housing Society Limited and even Ministry of Defence was directed to hold an

*Tilak*

in-depth inquiry for finding out the lapses or reasons on the part of its officers for not instituting the writ petition at the earliest opportunity.

11 In this background, it would be necessary for us to refer to the Works of Defence Act, 1903 which provides for imposition of restriction upon the use and enjoyment of land in the vicinity of works of defence in order that such land may be kept free from buildings and other obstructions. The said Act enacted in the year 1903 is still in force and contains provisions for imposition of restrictions. The manner in which the restrictions can be imposed are set out in the said enactment and the said provisions can be invoked 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 works of defence or of any site intended to be used or to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, then the declaration shall be made to that effect under the signature of the Secretary to such Government or some officers duly

*Tilak*

authorized to certify. The said declaration once it is published in the official gazette, is a starting point for imposition of such restriction as specified in Section 7 of the said enactment. The said enactment contemplates a detail procedure for declaration of an award by the Collector and award of compensation for any damage caused or to be caused and for any restrictions that are imposed under Section 7. The said enactment, however, was not sufficient to tackle with the situation in light of the recent controversies like in the case which we have referred to i.e. Adarsh Society and the Ministry of Defence deemed it expedient to review the said enactment and contemplates its reconsideration with the defence service pending a comprehensive amendment to tackle the security concerns of the defence forces, by way of interim arrangement, the Government of India, Ministry of Defence issued interim directions in form of circulars/guidelines.

The object of the instruction as set out in one of the circulars issued by the Government of India itself being to strike a balance between the security concerned of the forces and right of public to undertake the construction activities on their

*Tilak*

land. The circular issued on 18.05.2011 included the following guidelines.

*“(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 metres) radius of defense 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 Services Hqrs.”*

12           The said circular was addressed to the Chief of the three forces, namely Army, Air Force and Navy. The circular came to be modified from time to time and the restrictions came to be relaxed in peculiar situation like where a permission was issued prior to 18.05.2011 by the Competent Planning Authority or where a building falls in line or in the shadow of another building which is within 500 metres of the Defence Establishment. The said circular came to be modified by Circular dated 18<sup>th</sup> March 2015 and the restrictions imposed vide Circular 18<sup>th</sup> May 2011 were sought to be relaxed by adding a proviso under para 1(b) to the effect that the construction for which permission has been issued by the local municipal authority prior to 18<sup>th</sup> May 2011 were not required to obtain the NOC from the local military authority/defence establishment. This, however, was not to be made applicable to any amendment to the said construction permission with regard to the height, if the amendment was allowed after 18<sup>th</sup> May 2011. This circular came to be again modified by the Ministry of Defence on 17<sup>th</sup> November 2015 and relaxation was also granted in respect of buildings/structures of four storeys or

*Tilak*

more which were existing within 500 meters of the periphery of any defence establishment and the construction proposed is in line with or behind i.e. in the shadow or shield of such building/ structure, the State Government/the Municipal Corporation, after obtaining comments from the LMA and giving due consideration to the same was to decide whether to approve such proposals or not.

It is further pertinent to note that the Urban Development Department also issued circular to give effect to the guidelines issued to the Ministry of Defence and they were issued on 4<sup>th</sup> February 2016. The guidelines issued by the Ministry of Defence were further amended on 21<sup>st</sup> October 2016 and the said guidelines imposed the security restrictions in respect of defence establishments/installations located at 193 stations listed in Part A of Annexure to apply upto 10 metres from the outer wall. In respect of 149 stations listed in Part-B of Annexure, the restrictions were made applicable upto 100 metres from the outer wall of such defence establishment/installations to maintain clear line of sight for effective surveillance. The Urban Development Department also acted

*Tilak*

in furtherance of the guidelines of the Ministry of Defence and issued a circular on 7<sup>th</sup> November 2016, thereby superseding the earlier circulars issued by it and providing restrictions in terms of Annexure A of the guidelines issued by the Ministry of Defence on 21<sup>st</sup> October 2016 and thereby restricting it to a few defence stations in Mumbai covering Kalina, Trombay, Ghatkopar, Wadala, Cross Island, Malad, Kandivali.

13 The facts involved in the present case revolve around the two circulars i.e. 18<sup>th</sup> May 2011 and its modified form issued on 18<sup>th</sup> March 2015. Perusal of the circular dated 18<sup>th</sup> May 2011 disclose that the Government of India, in order to strike a balance between the security concern of the forces and the right of public to undertake the construction activities on their land, imposed a restriction in form of obtaining the views of the station commander. In places where municipal laws require consultation with the Station commander before a building plan is approved, it contemplate the Station commander to convey his views within the stipulated period to the State Government Agencies or to the municipal authorities.

*Tilak*



Where the local municipal laws did not require so, but the Station Commander feel any construction coming up within 100 metres for multi storeyed buildings, more than four storeyed to be of 500 metres, falling within the radius of defence and the establishment pose a security hazard, the views to be communicated to the local municipality/the State Government agencies. The said circular, however, was modified by circular issued on 18<sup>th</sup> March 2015 which reads thus :

*“The Chief of Army Staff  
The Chief of Air Staff  
The Chief of Naval Staff*

*Subject : Guidelines for issue of ‘No  
Objection(NOC)for  
building constructions’.*

*I am directed to refer to circular of even number dated 18.05.2011 vide which guideline for issue of ‘No Objection Certificate (NOC) for building constructions’ were issued. Following the issue of the guidelines representations and references have been received with regard to restrictions placed by these guidelines on building construction in the vicinity of Defence Establishments. It was therefore decided to undertake a comprehensive review of the guidelines so as to address issues that had arisen from the implementation of the guidelines.*

*2 The recommendations arising from the review undertaken have been duly considered by the Ministry and*

Tilak

*it has been decided to modify the aforementioned Circular dated 18.05.2011 by adding a proviso under para 1(b) to the effect that NOC from LMA/Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent local municipal authority prior to 18.05.2011 (date of circular). However, this proviso shall not apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 18.05.2011”*

*3 The other provision of the circular dated 18.05.2011 will remain unchanged.*

*(Surya Prakash)  
Director (L & C)*

*Copy to :*

- (i) DG, DGDE, New Delhi*
- (ii) CC(R & D), DRDO, New Delhi*
- (iii) Coast Guard HQ*
- (iv) Ordinance Factory Board  
(Through D(Fy-II))*
- (v) CGDA*
- (vi) DGQA”*

The said circular thus contemplated the relaxation of the stipulation of obtaining NOC from LMA/defence establishment where a permission has been issued by the competent local municipal authority prior to 18<sup>th</sup> May 2011. The petitioner's case is that he is covered by the said stipulation and that the further proviso contained in the circular of 18<sup>th</sup> March 2015 is not attracted.

Tilak

14 On examination of the dates of events involved in the petition, it is apparent that the petitioner acquired the leasehold rights from a charitable trust of a land measuring 1860.79 sq.m along with its structures standing thereon in the name of Rashid Mansion on 30<sup>th</sup> October 2006. The intimation of disapproval was issued in favour of petitioner for redevelopment of the said premises on 22<sup>nd</sup> July 2008. The IOD issued stipulated certain conditions to be complied with before the commencement of work stage wise, including the construction at plinth level and construction of the super structure. The said IOD included several stipulations to obtain NOC from various authorities but did not contain a stipulation of seeking NOC from the defence authorities. The IOD issued under Section 346 of the Mumbai Municipal Corporation Act is reflective that the Commissioner did not disapprove of the building or work of which the notice was given by the petitioner and on compliance with the condition and reasons for its disapproval, and the prescribed terms, the building or work is deemed to have been approved by the Commissioner. The commencement certificate was also issued in favour of the

*Tilak*

petitioner on 21<sup>st</sup> May 2009 under the caption “Proposed Redevelopment under the provision of D.C. Regulation 33(c) to the existing building on the plot bearing CS 63 of Colaba Division and the building permission under Section 346 of the BMC Act 1888. The certificate issued for commencement was initially valid upto 20<sup>th</sup> July 2010 and was granted for plinth level i.e. upto first podium top slab as per approved plan dated 22<sup>nd</sup> July 2009 and contemplated a height of 46.04 metres level as per approved pan dated 15<sup>th</sup> October 2009. This was extended from time to time and it was extended upto 16 floors as per amended approved plan dated 25<sup>th</sup> February 2015 and lastly, for entire building as per approved plan dated 25<sup>th</sup> February 2015. The certificate was liable to be revoked by the Municipal Commissioner if :-

- (a) *The development work in respect of which permission is granted under this Certificate is not carried out or the use thereof is not in accordance with the sanction plans*
- (b) *Any of the conditions subject to which the same is granted or any of the restrictions imposed by the Municipal Commissioner for Greater Mumbai is contravened or not complied with”*
- (c) *The Municipal Commissioner for Greater Mumbai is satisfied that the same is obtained by the applicant through fraud or misrepresenting and the applicant and every person deriving title through or*

Tilak

*under him in such an event shall be deemed to have carried out the development work in contravention of Sec 43 & 45 of the Maharashtra Regional and Town Planning Act, 1966.”*

15 On 15<sup>th</sup> October 2009, the amended plan submitted by the petitioner came to be approved for the proposed redevelopment under the D.C. Regulation 33(6) and the said approval was subject to the following conditions :-

*That all the conditions of IOD under even No. dated 22.7.2008 shall be complied with.*

*That the revised structural design / calculations / details / drawings shall be submitted before extending C.C.*

*That the C.C shall be got endorsed as per the amended plan.*

*That the work shall be carried out strictly as per approved plan.*

*That the final Structural stability certificate shall be submitted before asking for B.C.C.*

*That the NOC from Inspector of Lifts shall be submitted.*

*That the NOC from Ch.E(M&E) for A.H.U shall be submitted.*

*That the revised NOC from E.E. (T&C) for parking layout shall be submitted.*

*That the N.O.C from High Rise Committee above 70M shall be submitted.”*

This approval did not include a stipulation of obtaining any NOC from defence. On 6<sup>th</sup> October 2009, the MCGM approved the further draft plans submitted by the petitioner with the following recitation :

Tilak

“In this case, the plans for the above referred proposal were approved and I.O.D was issued on 22.7.2008. Further, the C.C. upto plinth was issued on 21.7.2009.

As per the earlier approved plan, the proposed building under reference comprises of stilt + podium + 14<sup>th</sup> (part) upper floors + AHU on 14<sup>th</sup> (part) + 15<sup>th</sup> (part) floor with the total height of 58.20 m.

Now Architect has submitted the amended plans for the proposed building. As per the amended plan, proposed building under reference comprises of basement + greater height of stilt + 9 level podium + girder level + greater height of stilt + service floor + 29 upper floor including 4 refuge floors. Architect has explained that he has reduced the floor plate of the proposed building”.

16 The said approval provided for the following stipulations :-

(1) Not to insist heritage NOC for height more than 24.0 m as per Government Notification u/No.TPB/4308/1829/CR-209/2009/UD-22 dated 4.9.2009.

*As per D.P remarks as at Pg.C-13 to C-15 and survey remarks as at Pg C-11, the property under reference comes under the Cuffe Parade Precinct. Architect has already submitted the NOC from MHCC for height upto 60.5 M vide Pg.C-137 to C-163.*

*Now Architect has submitted the amended plans for approval with the total height of 158.38 M and requested to approve the same as per the Government Notification u/No.TPB 4309/1829/CR-209/2009/UD-11 dated 4<sup>th</sup> September 2009.*

Tilak

*As per the Notification, "in case of redevelopment under D.C.Regn 33(6), 33(7), 33(8), 33(9) and 33(10) of heritage building/sites from Grade III and precincts. Special permission from the Municipal Commissioner of M.C.G.M may be obtained if height of the building exceeds 24.0 M (excluding height of stilt on ground floor).*

*In view of above, Ch.Eng (D.P.)/Dir. (E.S.&P)/M.C.'s approval is requested to allow height of the proposed building of 158.58 M as explained above."*

It also contained the other specifications about parking, open spaces, service floor, refugee floors, Architectural features, open spaces, balconies etc. The said proposal is approved by the Technical Officers of the Corporation including the Assistant Engineers, Deputy Chief Engineers, Chief Engineers and is also approved by the Municipal Commissioner himself. It is thus clear that on 6<sup>th</sup> October 2009, approval was granted by the MCGM allowing height of proposed building of 158.58 metres comprising of stilt + podium + 14<sup>th</sup> floor (part) upper floor + AHU on 14<sup>th</sup> (part) + 15<sup>th</sup> (part) floor with total height of 58.20 metres. The amended plan which was proposed, referred to basement + greater height of stilt + 9 level podium + girder level + greater height of stilt + service floor + 29 upper floors

Tilak

including 4 refuge floors. The said proposal has been approved for a proposed height of 158.58 metres. The revised plans were approved on 15<sup>th</sup> October 2009 with a stipulation of obtaining NOC from High Rise Committee above 70 metres. The Commencement Certificate was issued from time to time and the petitioner proceeded with the construction in accordance with the said commencement certificate which was amended from time to time.

The guidelines were issued by the Ministry of Defence on 18<sup>th</sup> May 2011 and NOC is sought from the defence authorities by relying on the said circular where the construction is coming up within a radius of 500 metres (for multi storeyed building of more than 4 storeyed) where the establishment poses a security hazard. Perusal of series of circulars disclose that this circular came to be modified by a subsequent circular on 18<sup>th</sup> March 2015 and the conditions contained in circular of 18<sup>th</sup> May 2011 are not to be made applicable to those permissions prior to 18<sup>th</sup> May 2011. The said circular uses the terminology “Permissions” and this would contemplate the permissions which are necessary from the

*Tilak*



planning authority under the local planning laws. The construction of the petitioner is governed by the Mumbai Municipal Corporation Act, 1888 and it would thus contemplate the permission by the said planning authority under the said enactment. The said enactment stipulates framing of building regulations under Chapter 12 and contemplate a notice to be given to the Commissioner of an intention to erect the building under Section 337 and the Commissioner may require the plans and offer documents to be furnished. The commencement of work is contemplated under Section 345 and Section 346 contains a stipulation of an IOD when a building or work which is disapproved by the Commissioner may be proceeded with subject to the stipulations contained in the IOD and section 347 provides as to when the work may be commenced. The petitioner complied with the provisions of the said enactment before the commencement certificate was issued and has placed on record the steps taken by him with the approval of the planning authorities. All the steps do indicate that the construction of the petitioner commenced prior to 18<sup>th</sup> May 2011. The circular of 18<sup>th</sup> March 2015 relaxes the restriction

*Tilak*

sought to be imposed by circular dated 18<sup>th</sup> May 2011 issued by the Ministry of Defence if the permissions are granted by the competent authority prior to 18<sup>th</sup> May 2011. The MMC enlists the provision for permission to be sought and the manner in which it is granted. The planning authority through series of communications gave a positive indication to the petitioner to proceed with the construction in terms of the DCR and the petitioner complied with the stipulations contained in the IOD and all those conditions imposed while granting the commencement certificate. The approval letter dated 25<sup>th</sup> March 2013 approved the revised plans and permitted the reduction of height of the building to 127.53 m in place of its original height of 158.56 m. Even the High Rise Committee issued NOC to the petitioner permitting construction of a building upto height of 157.53 m.

17 A circular which came to be issued by the Urban Development Department on 21<sup>st</sup> February 2015 in exercise of powers under Section 154 of the MRTP Act expressly contain a stipulation to the following effect :-

*Tilak*

- (1) *No NOC is required to be obtained from the Local Military Authority (LMA) for grant of any permission for development and*
- (2) *Even if the planning authorities or the private developers had any application for NOC to Local Military Authorities and if no response was received from such local military authorities within a period of 30 days, then the development permissions could be further processed without insisting on any NOC.*

18           The circular issued by the State Government under Section 154 of the MRTTP are the directions issued to the planning authority and it is binding on the planning authority. The petitioner cannot be said to be at fault when he proceeded to act in terms of the said directions/guidelines and the planning authority permitted the construction in accordance with those guidelines. The Commencement Certificate was granted to the petitioner as permissible by the local laws and in terms of the plans submitted by the petitioner. No developmental work has been carried out by the petitioner in absence of the permission granted by the planning authority. The Ministry of defence itself stipulated that if the permissions are granted by the competent authority prior to 18<sup>th</sup> May 2011, then, that may not be construed as a restriction as the one

*Tilak*

contemplated in its circular dated 18<sup>th</sup> May 2011. Though an exception was made in a case where there was increase in the height of the proposed building after the issuance of the said circular, the petitioner in fact did not seek any approval for increase in height but has rather reduced the height and therefore, the impediment by the proviso contained in the circular dated 18<sup>th</sup> March 2015 will not be attracted in case of the petitioner. The planning authority has also construed it in the same manner and it expressed in its letter dated 12<sup>th</sup> September 2016 that there is no requirement of obtaining a defence NOC for construction of the said property since there is no increase in the height by the amendment to the construction permissions but what was sought to be done was only the reduction in the height of the proposed building.

19 In the backdrop of the aforesaid facts, the petitioner's case would fall within the relaxation conferred by Ministry of defence itself in its circular dated 18<sup>th</sup> march 2015. We are therefore, not required to examine the issue as to whether the building of the petitioner ought to have been

*Tilak*

considered as a security hazard and we are also not required to consider the other submissions advanced by Shri Sathe that there are other buildings which are granted No objection in spite of they being closely located within a radius of 500 m. Once we hold that the petitioner falls within the relaxation conferred by circular dated 18<sup>th</sup> March 2015, it is not necessary for us to examine the other issues as to the threat perception being located in the vicinity of Colaba Military Station. The said relaxation granted by circular dated 18<sup>th</sup> March 2015 is not in any way disturbed or curtailed by any circular issued by the Ministry of Defence and it continues to govern the field.

20 The learned Asstt. Solicitor General argued before us that in the matter of such nature, the discretion exercised by the defence authority need not be easily tinkered with since security of the State is of utmost importance. He has placed reliance on the Division Bench judgments of this Court in case of *TCI Industries Vs. Union of India*<sup>3</sup> and *SSV Developers Vs. Union of India*<sup>4</sup> to buttress his submission where it is held that

---

3 (2012) 5 Bom CR 353

4 (2014) 2 Bom CR 541

the said decision taken by the defence authorities should not be interfered so lightly. We have no iota of doubt in our mind about the said principle and we are in agreement with the learned ASG who advances the said proposition. However, when the Ministry of Defence itself has granted relaxation from the restrictions imposed by its earlier circulars where building permission by the competent authority are already conferred prior to 18<sup>th</sup> May 2011, we fail to understand as to how it is permissible for the respondent no.5 to deviate from the said circular issued on 18<sup>th</sup> March 2015 which modified the guidelines issued on 18<sup>th</sup> May 2011. The petitioner has commenced the construction only on issuance of appropriate permissions prior to the said cut-off date I.e. 18<sup>th</sup> May 2011 and the Planning authority has issued the commencement certificate and also approved the plans. It do not lie in the mouth of the defence authorities to submit that this do not amount to the permissions. The permission granted by the Municipal Authorities is construed by them in accordance with the statute and the Executive Engineer (Building Proposal) City invites the attention of the Administrative Commandant that the plans

*Tilak*

were approved and the IOD was issued in favour of the petitioner on 22<sup>nd</sup> July 2008 for the construction of stilt + podium + 14 upper (part) floors+ AHU on 14<sup>th</sup> (part) and 15<sup>th</sup> floor. On 9<sup>th</sup> October 2009, the MCGM had approved the proposal of the petitioner for the following structure :

- (i) Basement + stilt + 9 parking floors + Girder floor + upper stilt + service floor + 29 floor (including & refuge floors + 2 floors for AC Plant rooms)
- (ii) Height of Building : 158.56 m.

What is thus important is what the planning authority perceived as "Permission" and just because the respondent no7 and 8 that it is not a permission, we are not ready to accept the said submission. In such circumstances, we need not deal with the submission of Shri Singh to the effect that we should bear in mind the restraint when we are examining the decision of an expert body. The Ministry of defence had itself issued the guidelines and respondent no.s7 and 8 are under a duty to abide by them and it is not open for the individual officer to construe the said guidelines which are unambiguous and

*Tilak*

convey a clear intention of the Ministry of Defence. Therefore, we are not inclined to go into the other aspects of the matter since the case of the petitioner clearly falls within the circular of 18<sup>th</sup> March 2015 and the proviso is not attracted in the said case since the planning authority has already granted permission of construction upto the height of 158.56 metres and subsequent to coming into effect of the circular of 18<sup>th</sup> May 2011, the petitioner has reduced the height of the proposed building to 127.53 metres. Therefore, the petitioner do not fall within the proviso and it covered by the first proviso inserted to clause 1(b) of the guidelines dated 18<sup>th</sup> may 2011.

Since we have already noted that the petitioner is entitled for relaxation in terms of the policy of the Ministry of Defence and we have arrived at a conclusion that the refusal to grant NOC is arbitrary and discriminatory, we are within our jurisdiction to exercise our writ jurisdiction and hence, we pass the following order :

- (i) Writ Petition is allowed.
- (ii) The impugned two work notice dated 16<sup>th</sup> March 2017 issued by the Executive Engineer, Building Proposal City –

*Tilak*



II, Mumbai and the order dated 25<sup>th</sup> January 2018 passed by the Commissioner, MCGM is quashed and set aside.

(iii) The impugned letter dated 22<sup>nd</sup> April 2017 issued by the Administrative Commandant, Station Commander i.e. respondent no.7 is also quashed and set aside.

(iv) We declare that the petitioner is not required to obtain the No objection certificate from the respondent no.7 in light of the guidelines dated 18<sup>th</sup> March 2015 issued by the Ministry of Defence.

No order as to costs.

**(SMT. BHARATI H. DANGRE, J.)**

**(RANJIT V. MORE J.)**

At this stage Mr.Anil Singh, learned Assistant Solicitor General prays that this order be stayed for the period of 4 weeks. In light of the discussion made in the order we are not inclined to grant the request. The same is accordingly rejected.

**(SMT.BHARATI H. DANGRE, J.)**

**(RANJIT MORE, J.)**

*Tilak*