

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.772 OF 2014

Provincial Housings and Property Ltd. ... Petitioner
v/s
Union of India and others ... Respondents

Mr. Chirag Balsara a/w Hamza Talati i/b M/s. Diamondwala & Company for the Petitioner.
Dr. G. R. Sharma a/w Mr. D. P. Singh for Respondent Nos.1 & 2.

CORAM : S.C. DHARMADHIKARI & B.P. COLABAWALLA JJ.

RESERVED ON : 26th August, 2016
PRONOUNCED ON : 8th September, 2016

JUDGMENT [Per B. P. Colabawalla J.] :-

1. Rule. By consent of parties, rule is made returnable forthwith and heard finally.

2. By this Writ Petition, filed under Article 226 of the Constitution of India, the Petitioner has challenged the Notification bearing No.SRO 150 dated 19th June, 1976 (for short, the “said

Notification") issued by the Government of India, Ministry of Defence (Respondent No.1). This Notification is issued in exercise of powers conferred by section 3 read with section 7(c) of the Works of Defence Act, 1903 (for short, the "**said Act**"). By virtue of this Notification, certain restrictions are imposed on the enjoyment of land in the State of Maharashtra and more particularly described in the Schedule thereto. Apart from challenging the said Notification, the Petitioner has also challenged Condition No.55 imposed in the revised Letter of Intent ("**LOI**") dated 30th May, 2009 requiring the Petitioner to obtain the NOC of the Juhu Wireless Station, being a Division of Respondent No.2.

3. Some basic facts need to be narrated to decide the controversy in the present Petition. The Petitioner has been appointed as a Developer to implement the Slum Rehabilitation Scheme over a portion of non-agricultural land admeasuring 12,669 sq.mtrs. together with the structures standing thereon, bearing CTS No.11, Survey No.58B of Village Juhu, J.R. Mhatre Marg, Juhu, Mumbai 400 049 (for short, the "**said property**"). It is an admitted fact that the said property is lying within a distance of 500 yards from the crest of the outer parapet wall of the Juhu

Wireless Station. According to the Petitioner, the said property is owned by the State of Maharashtra and is a censused slum.

4. It is averred in the Petition that in the year 1994, slum dwellers on the said property came together with the intention of redeveloping the said property and formed a proposed society known as Mora Saibaba Co-operative Housing Society Ltd. (Proposed). The said proposed society appointed the Petitioner as the Developer for redevelopment of the said property under the Slum Rehabilitation Scheme and accordingly, entered into a development agreement with the Petitioner on 11th October, 1994. It is the case of the Petitioner that since the said property was a censused slum, the same was capable of being developed under the Slum Rehabilitation Development (“**SRD**”) Scheme as applicable in the year 1995. This Scheme was approved on 16th April, 1996 and the Municipal Corporation of Greater Mumbai also issued a LOI on 11th May, 1996 and sanctioned the said Scheme as per the terms and conditions set out therein.

5. Thereafter, by a Notification dated 27th August 1996 and which was made final with effect from 15th October 1997, the

State of Maharashtra gave an option for conversion of the SRD Scheme to the Slum Rehabilitation Authority ("**SRA**") Scheme. In view thereof, in relation to the said property, the Petitioner made an application for conversion from the SRD Scheme to the SRA Scheme. Accordingly, sanction was granted and a revised LOI dated 6th July, 2006 was issued by the Competent Authority. It is the case of the Petitioner that under clause 40 of the said revised LOI dated 6th July 2006, Respondent No.3 allowed the Petitioner to construct buildings upto a height of 19.20 mtrs.

6. It is the case of the Petitioner that thereafter there was an increase in entitlement of the permanent alternate accommodation to be allotted to the slum dwellers (from 225 sq.ft to 269 sq.ft.) and accordingly, a revised LOI was issued to the Petitioner on 30th May, 2009 by Respondent No.3. In this revised LOI, Respondent No.3 imposed Condition No.55 requiring the Petitioner to obtain the consent / specific remark from Respondent No.2. Condition No.55 reads as under :-

"55. That as per the policy decision of Municipal Commissioner u/no.MCP/1355 dtd. 2/01/2009 as the plot under reference falls within the influence zone of military signal transmission station at Juhu. The specific remarks in this respect must be obtained from concerned Defence Authority before asking C.C. / endorsement of C.C. as per the amended plan."

7. It is the Petitioner's contention that the Respondents had in the past expressly permitted construction upto a height of 19.20 mtrs. within 500 yards of the Juhu Wireless Station without any requirement of any NOC from Respondent No.2. It was therefore the Petitioner's contention that driving the Petitioner to get the NOC from Respondent No.2 for construction upto a height 19.20 mtrs. is illegal and bad-in-law. It is in these circumstances that this Condition No.55 has been impugned in this Writ Petition. Despite this, and prior to Condition No.55 being inserted in the revised LOI dated 30th May, 2009, the Petitioner, by their letter dated 4th July, 2005 approached Respondent No.2 with a representation to relax the height restriction imposed by Notification dated 19th June, 1976 and allow the Petitioner to construct buildings upto a height of 48 mtrs. It is the case of the Petitioner that even the Civil Aviation Authority had granted permission for construction of buildings upto a height of 48 mtrs. Thereafter, certain information was sought for by Respondent No.2 from the Petitioner, which according to the Petitioner, was supplied to Respondent No.2.

8. Be that as it may, the Petitioner commenced construction on the said property after getting due approvals for carrying out construction upto a height of 19.20 mtrs. as per the sanctioned plan. However, on 5th September 2009, Respondent No.2 brought to the attention of Respondent No.4 (Municipal Corporation of Greater Mumbai) the said Notification dated 19th June, 1976 and directed it to stop work of construction which was being carried out by the Petitioner on the said property and also requested Respondent No.4 to issue necessary instructions to ensure that all construction activities on the said property were stopped.

9. Since the Petitioner was not getting any response from Respondent No.2 with reference to relaxation of the height for construction of buildings upto 48 mtrs., the Petitioner, by their various letters to Respondent No.2 (Exhs. T-1 to T-8 to the Petition), requested that pending such consideration, NOC be granted for construction of buildings upto 19.20 mtrs. as per the sanctioned plan. Thereafter, Respondent No.2 addressed a letter dated 3rd June, 2013 to the Petitioner and requested the Petitioner to approach the Local Military Authority through Head Quarters, Mumbai. It is the case of the Petitioner that pursuant to the

aforesaid letter, the Petitioner met Col. P.K. Singh when the Petitioner was informed that no construction could be allowed and the NOC sought for, could not be granted.

10. Thereafter, further representations were made by the Petitioner to Respondent No.3 for waiver of the impugned Condition No.55 as set out in the revised LOI dated 30th May, 2009 without any success. It is in these circumstances that the Petitioner has been constrained to approach this Court under Article 226 of the Constitution of India impugning the said Notification dated 19th June, 1976 as well as Condition No.55 set out in the revised LOI dated 30th May, 2009.

11. In this backdrop, Mr Balsara, learned counsel appearing on behalf of the Petitioner, submitted that the actions of the Respondents in restraining the Petitioner from carrying out construction on the said property is wholly illegal and without the authority of law. In this regard, he placed reliance on the Notification dated 19th June, 1976 to contend that the Notification itself contemplated that buildings on the said property could be constructed upto a height of 15.24 mtrs. (now increased to 19.20 mtrs.) without requiring any NOC from Respondent No.2.

According to Mr Balsara, this being the case, Condition No.55 as set out in the revised LOI dated 30th May, 2009 was wholly illegal and liable to be struck down by us. He submitted that this was also the interpretation that was put on the said Notification by the authorities themselves considering the fact that in the past, Respondent Nos.3 and 4 had allowed redevelopment in the vicinity of the Juhu Wireless Station without insisting on any NOC from Respondent No.2. In this regard, Mr Balsara brought to our attention the averments in paragraphs 43 to 45 of the Petition.

12. Mr Balsara further submitted that the Notification dated 19th June 1976, with the passage of time and advancement of science and technology, has been rendered redundant and otiose. Traditional telecommunication devices had been replaced with latest sophisticated devices. Hence, the height of nearby buildings would not in any manner adversely affect the working of the Juhu Wireless Station, was the submission. According to Mr Balsara, this Notification did not serve any purpose any further and it illegally interfered with the rights of a person around the area to develop their property and better their living conditions. The slum dwellers would be forced to live in slums on the said property though others have developed their properties, was the submission

of Mr Balsara. Hence, the said Notification, by the efflux of time, had become otiose, arbitrary and unjust, violating Articles 14, 21 and 300A of the Constitution of India. Mr Balsara submitted that a law may be valid when it was enacted, but due to passage of time it could be rendered unconstitutional. He submitted that in the facts of the present case, though the said Notification may have been valid when issued in 1976, but due to scientific advancement and development in the area, the Notification had rendered itself arbitrary and unjust and was liable to be struck down. He submitted that the restriction of height could not be justified any further and hence the said Notification be quashed and set aside.

13. To further this argument, Mr. Balsara also contended that there was no security threat to the said wireless station. He submitted that the grounds within which the said wireless station is located, is also given on contract basis for conducting parties and marriages etc. The public in general has free access with no specific restrictions imposed for ingress and egress into and out of the said grounds, during such functions. He submitted that this would clearly indicate that the said Wireless Station is not being used for the purpose for which it was set up and in these circumstances also the said Notification, by the efflux of time, has been rendered

redundant and otiose and ought to be struck down by this Court. For all the aforesaid reasons, he submitted that the Petitioner was entitled to the reliefs as prayed for in the Writ Petition.

14. On the other hand, Mr Sharma, learned counsel appearing on behalf of Respondent Nos.1 and 2, contended that the reliefs sought for in the present Writ Petition were in gross violation of the law and more particularly, the Works of Defence Act, 1903 as well as the said Notification issued thereunder. In this regard, he brought to our attention certain provisions of the said Act and more particularly, the definition of the expressions "land" and "maintain" more particularly set out in the said Act. He thereafter also brought to our attention the provisions of section 7 which stipulate certain restrictions imposed on the development of land covered under the said Act.

15. With regard to the submission of the Petitioner that due to the efflux of time and advancement of science and technology, the Notification dated 19th June, 1976 has been rendered redundant and otiose, Mr. Sharma submitted that this contention was absolutely without any merit. He submitted that the Petitioner does not have any knowledge of the functioning of the Wireless

Station and the effects of the height of adjoining buildings thereon. He submitted that this Wireless Station at Juhu was of strategic importance and played a vital role in communication to defence forces. He therefore submitted that such irresponsible submissions were wholly misplaced and ought to be ignored. The advancement in technology does not wipe out the said Notification and admittedly it is not rescinded, was the submission of Mr Sharma.

16. Mr Sharma further submitted that as provided in section 7(c) of the said Act, the restrictions set out therein were applicable with reference to the Wireless Station at Juhu and the same had been duly notified vide SRO 150 dated 19th June, 1976. He submitted that the responsibility of implementation of the said Notification was that of the State Government agencies including the Collector of Mumbai / MCGM / Revenue Department etc. He submitted that even though in the past these authorities / agencies had glossed over the said Notification, the same cannot be cited as a rule for continuing this wrong practice and this wrong practice / illegality cannot be allowed to be perpetuated. He submitted that this is a serious security issue and merely because in the past some illegality has gone unnoticed, the same cannot be allowed to continue in the future. He submitted that with respect to issuance

of NOCs in the past for construction of buildings within the restricted zone of 500 yards, the same was deliberated till the highest level and the competent authority thereafter, having considered all the aspects, had already initiated a court of inquiry to investigate the circumstances under which those NOCs were issued and also for finding out who were the delinquents responsible for the lapse.

17. Placing reliance on the provisions of the said Act as well as the Notification dated 19th June, 1976, Mr Sharma submitted that these provisions make it abundantly clear that any construction work being carried out in the restricted zone of 500 yards from the said Wireless Station would be illegal and it was incumbent on Respondent Nos.1 and 2 to ensure that the said Notification was not flouted and/or violated. He submitted that in the present case, admittedly the construction of the Petitioner was within the restricted zone of 500 yards and hence no NOC could be granted for any construction.

18. Mr Sharma lastly contended that it is factually incorrect that the grounds on which the said Wireless Station is located is also given on contract basis for conducting parties and

marriages etc. He stated that the area of the Wireless Station is bounded by a concrete boundary and no functions and/or marriages are held in the said premises. For all the aforesaid reasons, he submitted that there is no merit in this Writ Petition and the same ought to be dismissed with costs.

19. We have heard the learned counsel at length and perused the papers and proceedings in the Writ Petition as well as the annexures thereto. Before we deal with the rival contentions, it would be apposite to refer to certain provisions of the Works of Defence Act, 1903 and the purpose for which it was enacted. As the preamble of the Act would reveal, the said Act was brought into force to provide for imposing certain restrictions upon the use and enjoyment of land in the vicinity of works of defence so that such land may be kept free from buildings and other obstructions and for incidental matters thereto. This Act was brought into force on 20th March, 1903 and there have been several amendments to the said Act thereafter. As it stands, it extends to the whole of India. In the definitions clause, the expression "land" has been defined under section 2(a) to include benefits that arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. The expression "maintain" has also been defined in

section 2(h) which reads as under:-

"2. Definitions.—In this Act, unless there is something repugnant in the subject or context,—

(h) "maintain", with its grammatical variations and cognate expressions, does not, when used in relation to a house or other construction, include the doing of any act necessary for keeping such house or construction, until the making of the award referred to in Section 12 or until the exercise, prior to the making of the award, of the powers of demolition conferred, in case of emergency, by Section 6, sub-sections (1) and (3) in the state in which it was at the time of the publication of the notice referred to in Section 3, sub-section (2):"

20. Section 3 of the said Act provides for a declaration and notice that restrictions will be imposed. It stipulates that whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders. Thereafter, section 7 and which is germane for our purpose, lays down certain restrictions. Section 7 reads thus:-

"7. Restrictions.—From and after the publication of the notice mentioned in Section 3, sub-section (2), such of the following

restrictions as the Central Government may in its discretion declare therein shall attach with reference to such land, namely:—

(a) Within an outer boundary which, except so far as is otherwise provided in Section 39, sub-section (4), may extend to a distance of two thousand yards from the crest of the outer parapet of the work,—

(i) no variation shall be made in the ground-level, and no building, wall, bank or other construction above the ground shall be maintained, erected, added to or altered otherwise than with the written approval of the General Officer Commanding the District, and on such conditions as he may prescribe;

(ii) no wood, earth, stone, brick, gravel, sand or other material shall be stacked, stored or otherwise accumulated :

Provided that, with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, road-ballast, manure and agricultural produce may be exempted from the prohibition:

Provided also that any person having control of the land as owner, lessee or occupier shall be bound forthwith to remove such road-ballast, manure or agricultural produce, without compensation, on the requisition of the Commanding Officer;

(iii) no surveying operation shall be conducted otherwise than by or under the personal supervision of a public servant duly authorised in this behalf, in the case of land under the control of military authority, by the Commanding Officer and, in other cases, by the Collector with the concurrence of the Commanding Officer; and

(iv) where any building, wall, bank or other construction above the ground has been permitted under clause (i) of this sub-section to be maintained, erected, added to or altered, repairs shall not, without the written approval of the ⁴ [General Officer Commanding the District], be made with materials different in kind from those employed in the original building, wall, bank or other construction.

(b) Within a second boundary which may extend to a distance of one thousand yards from the crest of the outer parapet of the work, the restrictions enumerated in clause (a) shall apply with the following additional limitations, namely :—

(i) no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall, bank or other construction shall be erected:

Provided that, with the written approval of the ⁶General Officer Commanding the District] and on such conditions as he may prescribe, huts, fences or other constructions of wood or other materials, easily destroyed or removed, may be maintained, erected, added to or altered :

Provided, also, that any person having control of the land as owner, lessee or occupier shall be bound forthwith to destroy or remove such huts, fences or other constructions, without compensation, upon an order in writing signed by the General Officer Commanding the District; and

(ii) live hedges, rows or clumps of trees or orchards shall not be maintained, planted, added to or altered otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe.

(c) Within a third boundary which may extend to a distance of five hundred yards from the crest of the outer parapet of the work, the restrictions enumerated in clauses (a) and (b) shall apply with the following additional limitation, namely :—

no building or other construction on the surface, and no excavation, building or other construction below the surface, shall be maintained or erected :

Provided that, with the written approval of the Commanding Officer and on such conditions as he may prescribe, a building or other construction on the surface may be maintained and open railings and dry brush-wood fences may be exempted from this prohibition."

(emphasis supplied)

21. As can be seen from the said provisions, after the publication of the notice as mentioned in section 3(2), such of the following restrictions as the Central Government may in its discretion declare therein shall attach with reference to such land as more particularly described in section 7. To put it in a nutshell, when the land is within a distance of 2000 yards from the crest of the outer parapet wall of the Wireless Station, then the restrictions set out in section 7(a) would apply. Similarly, when such land is at a distance of 1,000 yards from the crest of the outer parapet wall of the Wireless Station, in addition to the restrictions mentioned in section 7(a), additional restrictions as set out in section 7(b) would apply. Thirdly, when such land is at a distance of 500 yards from the crest of the outer parapet wall of the Wireless Station, in addition to the restrictions enumerated in sections 7(a) and 7(b), an additional limitation would apply viz. that no building or other construction on the surface or any excavation, building or other construction below the surface shall be maintained or erected. The proviso to section 7(c) stipulates that with the written approval of the Commanding Officer and on such conditions as he may prescribe, a building or other construction on the surface may be

maintained and open railings and dry brush-wood fences may be exempted from this prohibition.

22. In the facts of the present case, it is an admitted fact that the said property on which construction is sought to be carried out by the Petitioner, falls within a distance of 500 yards from the Juhu Wireless Station as contemplated under section 7(c) of the said Act. This being the factual position, once a Notification has been issued under section 7(c), no building or other construction on the surface and no excavation, building or other construction below the surface shall be maintained or erected. In the facts of the present case, the impugned Notification dated 19th June, 1976 clearly stipulates that in exercise of the powers conferred by section 3 of the said Act, the Central Government declares that it is necessary to impose restrictions specified in clause (c) of section 7 of the Act upon the use and enjoyment of the land, more particularly described in the Schedule thereto, being the land in the vicinity of the Juhu Wireless Station and in order to ensure that such land may be kept free from buildings and other constructions. In these facts, we are clearly of the opinion that Condition No.55 as imposed by Respondent No.3 in the revised LOI dated 30th May, 2009 was perfectly justified and does not suffer from any illegality.

23. Faced with this situation, Mr Balsara submitted that the proviso to the said Notification stipulates that the said restrictions shall not apply to such permanent constructions beyond the permissible height of 15.24 mtrs. which have already been completed at the commencement of the said Notification. He laid great emphasis on the words "*beyond the permissible height of 15.24 mtrs.*" to contend that the Notification itself contemplated that upto a height of 15.24 mtrs. (which according to the Petitioner is now increased to 19.20 mtrs.) was not barred under the said Notification and hence there was no question of obtaining any NOC from Respondent Nos.1 and/or 2. We are afraid we are unable to accept this submission. Firstly, the proviso clearly applies to construction which has already been completed at the commencement of the said Notification. We do not read this proviso to mean that the same would also apply to constructions that are now going to commence after this Notification. Secondly, section 7(c) clearly stipulates that when any property is within a distance of 500 yards from the Wireless Station, then no building or other construction on the surface and no excavation above or below the surface can be erected. This is a complete prohibition, and unlike section 7(a) and 7(b), this restriction cannot be relaxed with the

approval of the General Officer commanding the Division. If we were to read the Notification as sought to be contended by Mr Balsara, the same would clearly be in violation of the clear language of section 7(c) of the said Act. We therefore have no hesitation in rejecting this argument.

24. Mr Balsara then contended that in the past several buildings have come up within 500 yards of the Wireless Station and which are having a height of 19.20 mtrs. or more. In this regard, he brought to our attention the list of buildings annexed at Exh.EE (Page 220 of the paper-book). He therefore submitted that at least upto a height of 19.20 mtrs., the Petitioner be allowed to put up construction on the said property. This argument is stated only to be rejected. Firstly there are no details given as to when these buildings/bungalows (described in Exh.EE of the paper-book) were constructed. Secondly, even assuming that they were constructed after the said Notification, merely because some buildings were allowed to be constructed in breach of the provisions of law, the same cannot give any right to the Petitioner to contend that they too can commit this illegality and perpetuate it further by putting up construction in contravention of the said Notification read with section 7(c) of the Act. We cannot under Article 226 of the

Constitution of India issue any direction permitting the Petitioner to commit any illegality and that may or may not have been done in the past by some other parties. We therefore find that this argument is wholly without merit.

25. On this issue, Mr Balsara lastly contended that in the past, Respondent Nos.1 and/or 2 had issued several NOCs for construction within 500 yards of the Wireless Station to other parties. In this regard, he brought to our attention Exh. "C" (pages 53 to 66 of the paper book). We find this argument also to be without any substance. Firstly, there is nothing on record to indicate that the NOCs issued with reference to the properties listed in Exhibit "C" are within 500 yards of the Juhu Wireless Station. Secondly, even assuming that they, or some of them, do fall within 500 yards of the Wireless Station, merely because some NOCs have been given in the past, and which to our mind, at least prima facie, would be contrary to the statutory provisions, cannot give a right to the Petitioner to insist upon a NOC for its construction. In fact, it is specifically mentioned in the affidavit in reply filed on behalf of the Respondent Nos.1 and 2, that to inquire how these NOCs were issued, the Competent Authority has already initiated a court of inquiry to investigate into the matter. We therefore find that this

VRD

21 of 23

argument does not carry the case of the Petitioner any further.

26. Mr Balsara's contention that the impugned Notification is bad-in-law as the same, by efflux of time, had become redundant and otiose, is also without any substance. In this regard, as correctly submitted by Mr Sharma, it is not for the Petitioner to decide whether the Juhu Wireless Station is required by Respondent Nos.1 and/or 2 for the purpose of providing communication to defence forces. As correctly submitted by Mr Sharma, the Petitioner does not have the expertise or knowledge of the functioning of the Wireless Station and the effects thereon in view of the height of the adjoining buildings. At paragraph 6 of the affidavit in reply, it is categorically averred that the Wireless Station at Juhu is of strategic importance and plays a vital role in providing communication to defence forces. Looking to all these facts, we unhesitatingly reject the argument of Mr Balsara that the Notification dated 19th June, 1976 has been rendered redundant and/or otiose by efflux of time and therefore ought to be struck down by this Court. Apart from making this bald assertion, nothing else has been brought on record by the Petitioner to substantiate this contention.

27. For all the reasons set out earlier in this judgement, we find no merit in this Writ Petition. Rule is accordingly discharged and the Writ Petition dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI J.)