IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3013 OF 2018

1. **Tirandaz Subha Niketan**
   Co-Operative Housing Society Ltd.
   24 and 41, Opp. IIT Market, Powai
   Mumabi – 400 076 Through its
   Chairman, Mrs.Lalitha M. Nair
   Mrs.Sherley Uday Kumar

2. **M/s.Heritage Lifestyles & Developers**
   Office at Heritage House, 4th Floor
   D.K. Sandu Marg, Chembur,
   Mumbai – 400 071

3. **Mr.Girish Gangwani**
   Director Share Holder of Petitioner
   No.2, officer at Heritage House,
   Plot No.29, D.K.Sandu Marg,
   Opp. Saibaba Temple, Chembur
   Mumbai- 400 071 **...Petitioners**

V/s.

1. **Union of India & Ors**
   Through its Ministry of Defence
   Room No.234-South Block
   Ministry of Defence, New Delhi

2. **Chief of Naval Staff**
   having his office at integrated
   Head Quarters, Ministry of Defence
   (Navy), New Delhi -110011

3. **Flag Officer, Commanding in Chief**
   Head Quarters, Western Naval Command

Shahid Bhagat Singh Road,
Mumbai-400 023.

4. State of Maharashtra
Through its Secretary
Urban Development Department
having his office at 1st Floor,
Mantralaya, Mumbai-400 032.

5. Municipal Corporation of Greater Mumbai)
Office at Mahapalika Building,
Mahapalika Marg, Opposite CST,
Mumbai – 400 001.

6. The Municipal Commissioner of MCGM
office at Mahapalika Building,
Mahapalika Marg, Opposite CST,
Mumbai – 400 001

7. Executive Engineer
Building Proposal II,
Municipal Corporation of Greater Mumbai
Raj Legacy Building,
Paper Mill Compound, LBS Marg
Vikhroli, Mumbai – 400 083 **...Respondents**

Dr.Milind Sathe, Sr.Adv. a/w Saket Mone, Bhushan Deshmukh, Vishesh Karla, Subit Chakrabarti, V.N.Tendulkar, Ms.Neha Joshi i/by M/s.Vidhi Partners for Petitioner in WP.No.3013/2018.

Mrs.P.H.Kantharia a/w. Ms.Vandana Mahadik for MCGM. Mr.Anil C.Singh- ASG a/w.Mr.Aditya Thakkar, Parag Vyas for R.Nos.1 to 3 (UOI) in W.P.No.3013/2018.

Mr.Kunal Bhange AGP for the State.

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

RESERVED ON : 15th FEBRUARY 2019

PRONOUNCED ON : 27th FEBRUARY 2019

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

1 The writ jurisdiction of this Court under Article 226 is invoked by the petitioners seeking a writ for quashing and setting aside of the letter dated 14.11.2017 issued by the Executive Engineer of Municipal Corporation of the Greater Mumbai (hereinafter referred to as 'MCGM') directing the petitioners to stop work at the subject property. A writ in the nature of the mandamus is also sought seeking direction to the respondent Nos.5 to 7 i.e. the MCGM and it's Officers to process and sanction all planning permission for construction of the building located at Kanjurmarg without insisting on a 'No Objection Certificate' (for short 'NOC') from the respondent Nos.1 to 3 and in accordance with the Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act') and Development Control Regulations for Greater Mumbai, 1991 (for short 'DCR'). Relief is also sought for calling for the record

and proceedings in respect of the letters issued by the Ministry of Defence, Union of India refusing to grant NOC to the petitioner for construction of the building.

A brief chronology of events for effective adjudication of the issue involved in the Writ Petition would be necessary. The petitioner No.1 is a Society duly registered under the Maharashtra Co-operative Societies Act. The petitioner No.2 is a Developer and a development agreement was entered between the petitioner No.2 and petitioner No.1 in the year 2014 for demolishing the existing building located on CTS No.10/83 of Village-Tirandaz, Powai Estate in Bombay suburban and for construction of new building for rehabilitating the existing members of the petitioner No.1 in the said new building. It is not in dispute that the said property is situated at a distance of approximately 200 metres from the Naval Civil Housing Colony (for short “NCHC”). The petitioners applied for planning permission to MCGM in the year 2015 and the plans came to be sanctioned and the Intimation for Disapproval (for short 'IOD') was issued by MCGM on 08.05.2015. The IOD stipulated several conditions

but the condition of seeking prior approval/NOC of the Naval Establishment was not a part of the stipulation. The Commencement Certificate which came to be granted on 16.11.2016 after compliance of the conditions mentioned in the IOD also did not include any stipulation about prior approval/NOC of the Naval Establishment. Pursuant to the said planning permission received from Corporation from time to time, the petitioner No.2 started construction of the building on the subject property and by September 2016, the construction was completed upto 7th Floor.

The approval was sought for allowing utilization of 400.00 sq.metres and deduction of 400.00 sq. metres as proposed in the utilization for proposed redevelopment and the said proposal was forwarded in consonance with the provision of DCR 1991, prevailing policy and the government notification. It is at this stage the MCGM issued a letter on 14.11.2017 directing the petitioner's Architect to stop construction of the work. The said letter issued by the MCGM was based on letter dated 27.10.2017 which was issued by the Western Naval Command to MCGM, thereby refusing NOC for

construction by the petitioners. The petitioners preferred a representation to the MCGM for grant of such NOC and the Naval Authorities rejected the said request by letter dated 09.03.2018 thereby bringing the construction of the petitioners as a grinding halt.

2. It is with this aforesaid grievance, the petitioners have filed the present Writ Petition. The petitioners assailed the action of the MCGM based on the refusal of grant of NOC by the respondent Naval Authority and the action on part of the MCGM is sought to be challenged on the ground that it is arbitrary, *ultra vires*, without jurisdiction and in contrast to the express provisions of the MRTP Act, 1966. It is alleged that the subject stop work notice issued by MCGM amounts to revocation of planning permission under Section 51 of the MRTP Act, which cannot be done when the construction has substantially progressed. It is also contended that since there was no condition imposed at the time when planning permission was granted, this condition of obtaining a NOC from Naval Establishment cannot be enforced at this stage. It

is also contended that the requirement of obtaining NOC is not prescribed by any law or rule, but it is only sought to be imposed on the basis of the circular issued by the respondent No.1. Another point which is sought to be pressed into service is that the structure of the petitioners is located near a residential colony of Naval Officer and even assuming for the moment that NOC is required, refusal to grant NOC is highly capricious and arbitrary, since the residential colony of the Naval Officer cannot be considered as a Defence Establishment. It is also set out in the petition that there was no justifiable ground for refusal of the NOC since there are several buildings existing between the petitioners' site and the boundary of Naval Establishment which are more in height than that of the petitioners proposed building. The hardship is also pressed into service by stating that the petitioner No.2 is required to pay huge amount of the rent to the members of the petitioner No.1 whose building is sought to be developed and huge financial loss is being incurred on daily basis on account of the arbitrary act of insistence of the NOC from the Naval Authorities.

3. In support of the writ petition we have heard learned senior counsel Dr.Sathe. Dr.Sathe has invited our attention to the provisions of the Works of Defence Act, 1903 which is statute in force empowering imposition of restrictions upon the use and enjoyment of the land in the vicinity of the Works of Defence in order that such land may be kept free from buildings and other obstructions. He submits that the restrictions can be imposed in the manner prescribed in the Works of Defence Act, 1903. The learned senior counsel has invited our attention to the series of Circulars issued by the Ministry of Defence, pending the amendments to the Works of Defence Act, 1903. According to Dr.Sathe the objective of the instructions is to strike a balance between the security concern of the defence forces and the right of public to undertake the construction activities of the land. By inviting our attention to the various circulars, Dr.Sathe would place reliance on the circular issued by the Ministry of Defence on 18.05.2011 issued to the Chiefs of Army staff, Naval staff and Air staff prescribing a requirement of NOC for construction of building within 500 metres with Defence Establishment from the

concerned Defence Establishment, where the Local Municipal Laws do not contain any stipulation. He would also invite our attention to the modified circular issued on 18.03.2015 and also a circular dated 17.11.2015 where the buildings which fall in line or in shadow of a building which are four storeyed or more and which are located within 500 metres of Defence establishment. Dr.Sathe also make a reference to the corresponding circular issued by the Urban Development Department on 04.02.2016 for giving effect to the circulars issued by the Ministry of Defence. The learned senior counsel place reliance on a subsequent circular issued by the Ministry of Defence on 21.10.2016 imposing restrictions in respect of the Defence Establishment located at various stations enlisted in Part A & B of Annexurre and of the inclusion of the requirement of the obtaining NOC from the Local Defence Authority. Dr.Sathe would also rely on a subsequent circular issued by the Urban Development Department for giving effect to the circular dated 21.10.2016 issued by the Ministry of Defence. He would submit that the guidelines issued by the State Government through Urban Development Department

partake the nature of the instructions issued under Section 154 of the MRTP Act and therefore are binding on the Local Planning Authorities. The learned senior counsel would submit that the subject property which is located in Kanjurmarg is not listed as a Defence Establishment in the circular dated 21.10.2016 and according to him, the restrictions which are contained in the earlier circulars are done away by the circular of 21.10.2016 and the restrictions that are imposed in the said circular are only applicable to 193 stations as listed in Part-A of Annexure and 149 stations as listed in Part-B where the restriction apply upto 100 metres from the outer wall of such Defence Establishment/ installations so as to maintain clear line of sight for effective surveillance. The MCGM is bound by the directive contained in the circular dated 07.11.2016 issued by the Urban Development Department by which the State Government has cancelled all the earlier guidelines issued by it and has directed that NOC should be procured strictly inconsonance with the guidelines dated 21.10.2016 issued by the Ministry of Defence. In wake of this circular, Dr.Sathe would submit that the site

where the building of the petitioners is located do not fall within the restricted zone in terms of the circular dated 07.11.2016 and the planning authority was duty bound to act in terms of the said circular issued by the Urban Development Department and the insistence on NOC from Navy by the MCGM is illegal. The learned senior counsel would also advance a submission that the Ministry of Defence has clarified through their letters dated 26.12.2016 and 31.11.2016 that the circular dated 21.10.2016 imposing requirement of NOC is not applicable to the Navy and therefore it was not imperative for the MCGM to seek NOC from the Naval Establishment.

4. Dr.Sathe has placed reliance on the order passed by this Court in case ***Mayfair Housing Society Pvt. Ltd. V/s. MCGM*** in Writ Petition No.369 of 2016 where the Division Bench of this Court clearly held that it was not permissible for the MCGM to impose belated condition after it has granted IOD and it cannot issue a notice for stop work for want of NOC. He submits that the said order was challenged before the Hon'ble Apex Court which resulted into a dismissal, thereby confirming the order passed by the Division Bench.

5. In the backdrop of the factual and legal position, the learned senior counsel makes a submission that the authorities have adopted a pick and choose approach as there are number of other buildings which are situated between the petitioners' site on the boundary of Naval residential colony and he has placed on record the chart of the existing buildings along with their heights. He would make a submission that this attitude of the respondents is violative of Article 14 since it is discriminatory and it also violates his right though not a fundamental right but an important constitutional right in form of Article 300(A) and he cannot be deprived of his property without authority of law and in absence of any compensation being paid to him in lieu of such deprivation.

6. In response to the Writ Petition, the MCGM has filed an affidavit through its Assistant Engineer Shri Jitendra Chaganlal Siddhapura. The affidavit do not dispute that the Municipal Commissioner has approved the concessions involved on 16.02.2015 and the concessions have been considered for proposed building comprising of stilt plus 1st to

11th plus upper floor and accordingly, an IOD was issued on 08.05.2015. It is also admitted that the Completion Certificate (for short 'CC') was also issued on 24.06.2015 upto stilt plus 4th to 6th floor as per IOD and work is carried out for stilt plus 1st to 6th floor. It is also admitted that the Architect of the Corporation has submitted his survey remark on 10.11.2014 where it was endorsed that the plot has not been effected by the clearance Zone/safety Zone of Naval Armament Department, hence NOC was not required from Naval Authority.

The affidavit then proceeds to state that the Union of India through Ministry of Defence has issued guidelines dated 21.10.2016 for issuance of NOC for building construction upto 10 metres to 50/100 metres from the Army unit as per Annexures A and B. It is further stated that the respondent No.3 i.e. the Flag Officer Commander (I/C) I.e. Naval Authorities issued guidelines for building construction in the vicinity of the Naval Establishment on 30.11.2016 under the caption “Guidelines of issue of NOC of building Construction” and in the said guidelines, it is clarified that the

relaxation issued by the Ministry of Defence i.e. Government of India on 20.10.2016 are applicable only for Army Units and not for Naval Units. It is then stated that in terms of the above guidelines, the Building Proposal Department of the Corporation obtained remarks from the Office of the AE (Survey) as to whether the plot under reference is situated within 500 metres from the Naval Establishment at Kanjurmarg. It was then informed by the office of the AE (Survey) that the said plot is within 500 metres from the Naval Establishment. Thereafter, letters were issued by the Corporation requesting the Colony Officer, Commanding in Chief for NOC for proposed redevelopment of the plot under reference belonging to the petitioners but the respondent no.3 refused to grant the desired NOC vide their letters dated 09.12.2016, 09.08.2017 and 27.10.2017 which are impugned in the petition. The affidavit proceeds to state that in these circumstances, no further approval can be granted till the NOC from the Naval Authorities is obtained and in light of this legal impediment, in absence of NOC the stop work notice have been issued.

7. The respondent Nos.1 to 3 has also opposed the petition by placing two affidavits on record. The first affidavit is filed by Rear Admiral Mr.Pradeep Joshi, VSM, working as Chief Staff Officer (Personal and Administration), Headquarters, Western Naval Command. In the said affidavit, preliminary submission is made to the following effect:-

> *"2. I say that as per letter dated 1.4.2016 of the Senior Inspector of Police, Intelligence Branch, the security of the Officers and employees residing in the Naval Civilian Housing Colony is absolutely necessary in view of terrorists activities and in the list of 25 sensitive places in Maharashtra having danger from terrorists organizations like Lashkar-E-Toiba and Jish-E-Mohmed, Military Cantonment of Powai is also targeted and hence recommended the Administration of N.C.H. Colony, Powai, Mumbai to take preventive measures like constructing a compound wall on the Western boundary, install CCTV cameras to ascertain conduct of all the employees and to give Identity Cards to all the employees because, few days to the said letter, a complaint was filed recording kidnap of a 13 years boy residing at N.C.H.C. who would not be identified for want of CCTV cameras. It was recommended to install a siren ad to appoint an officer to liaise with the police authorities, etc. (Exhibit-R1).*

8. Reliance is placed on the Works of Defence Act, 1903, and it is then stated that as per policy letter dated 18.05.2011, the distance mentioned is 500 metres from the

defence land which is mandatory requirement in accordance with the policy letters dated 18.05.2011, 18.03.2015 and 17.11.2015. It is then stated that the said policy decisions are upheld in case of ***S.S.V. Developers V/s. Union of India***. It is further stated that another circular issued by the State Government was upheld by the Division Bench of this Court in ***TCI Industries V/s. Union of India***[1]**.**

A further clarification is offered in the said affidavit by stating that the Ministry of Defence vide letter dated 21.10.2016 has relaxed restriction in respect of Defence Establishment located at 193 stations upto 10M and 149 stations upto 50/100M. However, these amendments are applicable to Army Establishment only. It is stated that the recommendations for reviewing the restrictions around the Naval Establishments at Mumbai was submitted to the Ministry of Defence, which had intimated that it will not be desirable to lay down the reduced restriction through Executive instruction by passing the Works of Defence Act, 1903 and Indian Navy has been advised to notify the restrictions as recommended

1 (2012) 5 Bom CR 353

vide NHQ Note/WK/1000/ NOC/WL dated 09.03.2017 under the Works of Defence Act, 1903 and that the procedure for issuance of NOC to be followed as per existing guidelines till promulgation of gazette notification under the Works of Defence Act, 1903.

9. On factual aspects it is stated that Naval Civilian Housing Colony (for short 'NCHC'), (Powai) is situated at Village-Tirandaz on a Defence land. The said land is classified as analogous to A1 Defence land. On 18.05.2011 the Government of India had promulgated an executive order under the delegated powers of legislature which stipulated the requirement to obtain NOC from Naval Authority for all new projects with effect from 18.05.2011 including amendments to the height floor plans of building within 500 metres of defence land. It is stated that the building of the present petitioners namely Tirandaz, Shubh Niketan is situated on plot bearing CTS No.10/83 and 10/84 of Village-Tirandaz, Powai, Mumbai and is situated at about 201 metres from the Defence land and proposes to carry construction of G plus 11 floors. The MCGM

requested the respondent for issuance of NOC for the said proposed construction at Village-Tirandaz and the NOC came to be refused in terms of the circular issued by the Government of India on 18.05.2011, 18.03.2015 and 17.11.2015. As regards the contention that a residential colony of Naval Officers cannot be considered as Defence Establishment and therefore NOC cannot be sought for, the affidavit proceed to state that any Defence land can be utilized for any purpose best benefited to the State and land at Powai is analogous to A1 Defence land. It is also stated that the Defence land in question currently is housing residential accommodation, school, Naval Hospital and MES Officers in the vicinity and the possibility of utilizing the Defence land for any operational requirement in future cannot be ruled out. It is also stated that the Defence land is valuable asset for Indian Navy which can be utilized for furthering national interest and security and considering the present security scenario the authorities on careful consideration have rightfully denied the NOC as per the extant policy.

It is then reiterated that the NOC has been refused

in accordance with the existing policy to issue NOC for construction of the private building adjacent to Defence land. It is also stated that the Naval Authorities have scrutinized all the documents forwarded by MCGM and has also undertaken a physical visit to the site and thereafter concluded that the proposed structure of G plus 12 storey do not qualify to be constructed within 500 metres in accordance with the promulgated policy of the Government of India. It is also clarified that grant of NOC is not a routine affair but aimed at satisfying a procedural requirement taking into consideration the issue of extreme sensitivity of a Defence Unit and no compromise is acceptable to the security of the area. It is also stated that the residential quarters of Defence personnel were subjected to attack in past and this had a major effect on the moral of Armed Forces and in this background the security situation and concerns are relevant. Another additional affidavit is filed by the same Officer on 05.10.2018 and it purports to reiterate its earlier stand. The reliance on the circular of the Urban Development Department issued on 20.04.2016 on which heavy reliance is placed by the petitioner

is sought to be clarified that the circular dated 07.11.2016 issued by Urban Development Department is based on the Ministry of Defence circular dated 21.10.2016 which is not applicable to the Indian Navy and therefore, the circular of 07.11.2016 issued by the Urban Development Department which supersedes all earlier circulars will have no effect and on the contrary earlier circular issued by the Urban Development Department on 20.04.2016 continues to hold the field as far as Indian Navy is concerned and the comments/NOC of the Defence Authority are mandatory. As regards the contention of the petitioner stating that the building in the shadow Zone of the existing building in the vicinity of the NCHC(P) is sought to be explained by stating that the building has been examined by means of an on-site visit by the Local Military Authority (LMA) and the following facts emerge on the site visit :

> *(i) In spite of the fact that two towers (G+22 and G+35) exist in the vicinity of the proposed construction, clear view of defence land (including buildings & other infrastructure) are visible from the seventh floor of the building.*
>
> *(ii) Further, the existing construction on subject plot is on a hill which is approximately 40 metres higher than the defence land and approximately 25*

mtrs higher than the tower of G+22 and G+35 thereby offering near unobstructed view of defence land from 7th Floor and above."

10. One more affidavit is placed on record by Chief Staff Officer of the Western Naval Command and apart from re-iterating its earlier stand this affidavit seeks to explain the comparison sought to be drawn by the petitioner in respect of the seven other constructions for which the NOC has been granted between June 2016 to January 2018. In the affidavit, it is stated that the respondent undertook a detail exercise for the purpose of considering grant of NOC in each case based on its independent factor and it is only after actual physical investigation, which not only involved inspection of building but an investigation of the entire neighborhood, including the line of site, threat perception in the vicinity, nature of Defence Establishment, topography and distance from the Establishment the decision is taken. It is further sought to be explained that it is incorrect to assert that merely one building which is for example of a height of 10 floors has been granted NOC, another building of 10 floors would automatically be

entitled for NOC. It is stated that after investigation the report is placed for consideration before the headquarters Western Naval Command which deliberates from the report and it is necessary again to re-visit the site and it is only thereafter the permission is granted or refused. As far as the petitioners' case is concerned it is set out that property on which the construction is sought to be enhanced by additional four floors is on hill and this would result in an unobstructed view of the Defence land. It is then sought to be stated that the respondent is an expert body to determine the aspect of the National Security and it had exercised its discretion bonafidely and diligently and hence no inference is warranted in its decision.

11. By relying on the detailed affidavits, the learned Assistant Solicitor General Shri.Anil Singh vehemently opposes the petition and submits that the scope of judicial review is limited and he would place reliance on the judgment of this Court in case of ***Union of India V/s. State of Maharashtra*** in respect of the Adarsh Co-operative Housing Society reported in (2016-4-BCR-549). He would place strong reliance on the

observation made by the Division Bench while entertaining a Writ Petition filed by the Union of India seeking a writ of mandamus restraining the State Government and the Planning Authority from granting any building/development permission in the vicinity of the Colaba Military Station (CMS) without a NOC from Army Authorities and from granting any development permission, completion certificates etc., to the Adarsh building on the land on which it stood. Direction was also sought for its demolition and Shri Anil Singh would submit that the said Writ Petition was allowed by the Division Bench of this Court and the issue of the NOC of the Defence Establishment in respect of a structure located near the Defence Establishment has been confirmed and it has been categorically held that it is mandatory duty of the Planning Authority to insist for NOC for Defence Establishment while considering the proposal for building permission. He has also placed reliance on the judgment of the Division Bench in case of ***Akbar Travel India Ltd V/s. Union of India*** to submit that the subjective satisfaction reached by the Defence Authority is a decision of an expert, who had resolved and decided that for

reasons of security and protection of Defence and Naval Establishment NOC should not be granted, then it is not open for the Court to substitute its opinion with the view specifically when the views are neither lacking in *bona fide* nor their actions can be termed as preemptively arbitrary and discriminatory. The learned senior counsel would submit that such policy decision cannot be interfered with and so very little. He also places reliance on the judgment of Division Bench in case of ***SSV Developers V/s. Union of India,***[2]. He would also place reliance on the following judgments to support his submission that the scope of judicial review in the matters of expert decision is limited :-

> *"1. Scod 18 Networking Pvt. Ltd. V/s. Ministry of Information and Broadcasting (2015-SCC-Online-BOM-6570)*
> *2. Narangs International Hotels Pvt. Ltd. V/s. Union of India (2011-SCC Online-BOM-727)*
> *3. Bycell Telecommunications India Pvt. Ltd. V/s. Union of India (2011-SCC-Online-Del-5295)."*

12. During the course of the arguments the learned Assistant Solicitor General has also tendered before us a confidential document prepared by Center for Fair Exclusive an

2 (2014) 2 BCR 541

Environment Safety (CFEES), an organization under Defence Research Development Organization (DRDO), Ministry of Defence dated 15.11.2018 and this contains the instructions about the safety of inhabitants around an ammunition depot. We have perused the said communication.

13. With the assistance of the learned senior counsel appearing for the petitioners and the respondents, we have perused the Writ Petition along with its annexures and have also gone through the affidavit along with its annexures in detail. We have also carefully considered the submissions rendered before us in support and in opposition of the relief sought.

The Works of Defence Act, 1903 is an enactment which provides for imposition of restrictions upon the use and enjoyment of land in vicinity of the workers of Defence in order that such land may be kept free from building and other obstructions. It also provide for determination of the amount of compensation to be paid on account of imposition of such restriction. The scheme of the enactment permits imposition

of restriction in Part-II of the enactment and it prescribes that whenever it appears to the Central Government that it is necessary to impose restrictions upon the use and the enjoyment of the land in the vicinity of any work of Defence or of any site intended to be used or to acquire for any such work, in order that such land may be kept free from building and other obstruction, a declaration shall be made to that effect by the Secretary to the Government or some Officer duly authorized to certify its orders. Sub-section 2 of Section 3 makes it imperative to publish the declaration in Official Gazette and to state the District and other territorial Division in which the land is situated and the place where a sketch plan of the land with distinct boundaries is permitted to be kept for inspection. The Collector is appointed as an authority to cause public notice of the substance of the said declaration to be given at convenient places in the locality and the said declaration made under Section 3 of the Act is a conclusive proof that it is necessary to keep the land free from building and other obstruction. The interest and security of the Defence land is the focal point of the said legislation.

14. The Maharashtra Regional Town Planning Act, 1968 is an enactment to make provision for planning the development and use of the land in the region. The planning authority constituted under the enactment is assigned with the said task and is expected to act in aid and in assistance of the development plan. Any development is made subject to permission from the Planning Authority. In considering application for permission, the Planning Authority 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 a notice which is submitted or sanctioned under the Act. The Planning Authority is thus required to examine all the necessary aspects before conferring the development permission and is expected to take into consideration the relevant aspect. It is the inherent duty of the Planning Authority to apply its mind for a co-ordinated development of a Region before conferring the development permission. The Planning Authority will have to therefore bear in mind the restrictions which are sought to be imposed under the Works of Defence Act, 1903 and in order to give effect to the said

enactment, the Planning Authority may insist of obtaining a NOC from the Local Military Authority before granting permission to develop the said land in accordance with the plan submitted. It is permissible for a Planning Authority to make it imperative by including such a condition of NOC in its Development Control Regulations. In a situation where Planning authorities have not included such a stipulation, it would be still open for the Defence Authority to assert the restricted development near its vicinity.

The said Enactment being in force, the Government of India has issued guidelines for issuance of NOC for the building constructions and this action was prompted in light of the celebrated cases, namely, Sukna and Adarsh. The Government of India deemed it expedient to comprehensively amend the Works of Defence Act, 1903 so as to cater to the security concern of the Defence. Pending the said amendments, by way of interim measures, several circulars are issued by the Ministry of Defence to regulate grant of NOC. The object of instructions is set out in one of its circulars, being to strike a balance between the security concern of the forces and right of

public to undertake the construction activities on their land. The circular issued on 18.05.2011 contain the following guidelines.

> *"(a) In places where local municipal laws 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 it 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."*

15. The said guidelines 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. Another circular came to be issued on 21.10.2016 on which the petitioners place heavy reliance to put forth the submission that the restriction imposed by the circular dated 18.05.2011 about 500 metres no longer subsists.

We have carefully perused the circular dated 21.10.2016. It would be appropriate to reproduce the contents of the said circular.

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

decided to amend guidelines issued under Circular dated 18.05.2011 read with Circulars dated 18.03.2015 and 17.11.2015, in consultation with Services, in the following manner.

> *(a) Security restrictions in respect of Defence establishment / installations located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 metres clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone 10 metres will require prior No Objection Certificate (NoC) from the Local Military Authority (LMA) Defence establishments.*
>
> *(b) Security restrictions in respect of Defence establishment / installations located at 149 stations as listed in Part B of Annexure to this circular shall apply upto 100 meter form the outer wall of such Defence establishments / installations to maintain clear line of sight for effective surveillance, any construction or rapier activity shall not be permitted within 50 metres. Further a hight restriction of 03 metres (One Storey) shall be applicable for the distance from 50 metres to 100 metres. Any construction or repair activity within such restricted zone between 50 to 100 metres will require prior No Objection Certificate (NoC) from the Local Military Authority (LMA) / Defence establishments.*

16. Based on the said stipulation, the learned counsel for the petitioner has advanced a submission to the effect that this circular do away with the restrictions earlier imposed by

the circular dated 18.05.2011 and its amended form. The restrictions which are sought to be imposed by the circular dated 21.10.2016 are 10 metres in case of 193 stations listed in Part-A of the Annexure and 149 stations listed in Part-B. The submission of Dr.Sathe is that the area of Kanjurmarg do not find place in any of the annexure and therefore there is no restriction at all which continues to govern the buildings falling outside Part-A and Part-B of annexure. He submits that preface of the said Government Resolution is self-explanatory and the intention of the Government of India was to relax the restriction in light of the difficulties that were been faced by the public in constructing the buildings of their own land and pending finalization of the amendments in the Works of Defence Act, 1903. The submission of the petitioners is therefore that no restriction apply at all from 21.10.2016 in respect of building other than those falling in Part-A and Part-B of the annexures.

We do not agree with the said submission of the learned senior counsel as reading of the circulars conjointly do not lead us to this conclusion. On 18.05.2011, the restriction

was imposed for those buildings which were coming up within a distance of the 100 metres and 500 metres where the Local Municipal Laws did not require consultation that the station Commander before the building plan is approved, but yet the station Commander was of the opinion that such a construction within 100/500 metres within radius of Defence Establishment can be security hazard. What is sought to be done by the circular of 21.10.2016 is granting relaxation of the restrictions by categorizing it into Part-A and Part-B of the Annexure. Undisputedly, this decision was taken in the backdrop of the large number of representations received from elected representative so as to relax the guidelines issued in 2011 which posed serious difficulties. Considering this representation, 193 stations which are listed in Part-A of Annexure, the restrictions would apply upto 10 metres and only in respect of such construction, an NOC is sought. In respect of 149 Stations listed in Part-B, the restrictions are made applicable upto 100 metres from the outer wall of Defence Establishment/installation. Any construction or repair activity is not permitted in the 50 metres in these 149 stations

and height restriction of 3 metres is applicable to 50 metres to 100 metres. Apart from these two categories which find place in Part-A and Part-B of Annexure, we cannot construe that no restrictions at all are applicable. Perusal of Annexure-A and Annexure-B would disclose that it is not the entire list of the Defence Establishment but they include only the Defence Establishment belonging to Army. Even all the Army Establishment are not covered in the said list and the Annexures would disclose that they do not cover the actual sensitive area of Army or its cantonment but refers to certain Command areas where the restrictions have been imposed. In any contingency, we cannot go into the question of placing the particular establishment in a particular category as that is not within our province. However, one important aspect which needs consideration is Paragraph-B of the circular dated 18.05.2011. This confers a power under the Station Commander to impose a restriction that even Municipal Laws do not impose such a restriction and such restriction can be imposed if he is of the opinion that any such construction coming up within 100/500 metres radius of Defence

Establishment and is a security hazard. Thus, what is important is the satisfaction of the Station Commander that a particular structure coming up in its vicinity can be a security hazard.

17. Reliance placed by Dr.Sathe on the circular issued by the Urban Development Department is also misconceived. In order to give effect to the directions issued by the Ministry of Defence, the Urban Development Department has issued the circulars from time to time. On 4th February 2016, it issued a circular with an intention to implement uniform policy throughout the State since the planning authorities are bound to give effect to the directives of the Ministry of Defence. On the basis of the circular issued by the Ministry of Defence on 18th May 2011 and its modified circular on 18th March 2015, the State of Maharashtra directed compliances of both the circulars by all the planning authorities. Directives were further issued to the effect that all the structures with four storeys or more situated within the radius of 500 m from the defence establishment and those which are not falling in line

or in the shadow of the existing structures, the NOC should be obtained from the competent defence authorities and respective authorities were expected to communicate their decision within a period of 30 days. The said instructions were required to be modified in light of the subsequent issuance of circular by the Ministry of Defence on 21st October 2016. Accordingly, on 7th November 2016, Urban Development Department issued a circular by which it cancelled all its earlier circulars and it gave effect to the guidelines of Ministry of Defence dated 21st October 2016 and continued the restrictions only to the structures mentioned in Annexure-A which covered structures/constructions in Kalina, Trombay, Ghatkopar, Wadala, Cross Island, Malad, Kandivali in Mumbai city. It imposed the restriction of 10 metres in respect of the said structure. Shri Sathe has placed heavy reliance on the said circular. However, in our considered view, the said circular is inconsequential as far as the naval establishment is concerned and this is apparent from the clarification issued by the Director of Ministry of Defence – D (Navy Coord) on a query being raised by the Integrated Head Quarters of Ministry

of Defence (Navy). The Rear Admiral of the Integrated HeadQuarters of Ministry of Defence (Navy) (for short "IHMD") with reference to the Ministry of Defence letter dated 21st October 2016 issued the clarifications on 17th November 2016 to the following effect :

> "MOD vide letter dated 21 October 2016 has relaxed restrictions in respect of Defence Establishments located at 193 stations upto 10M and 149 Stations upto 50/100M as per Annexure to the MOD letter. <u>These amendments are applicable to Army Establishments.</u>
>
> However, it is possible that the amended MOD letter may be misconstrued by the State Govts/Local Agencies/Builders and Developers as applicable to Naval Units/Establishments also, even if they are protected by statutory provisions under WODA 1903.
>
> In view of the above, it is recommended that the respective State Government Department/Local Municipal and other agencies may be intimated on application of above MOD Letter to notified army establishments <u>only</u> and reiterate the need to approach Naval LMA as Hitherto for NOC for constructions in vicinity of naval establishments as governed by existing rules".

Further, the Ministry of Defence of 28th April 2017 also issued a following clarification

> "The recommendations made by the NHQ for reducing the restrictions around Naval establishments at Mumbai vide their ID note under reference have been

> considered in this Ministry. It has been decided that it will not be desirable to lay down the reduced restrictions through executive instructions bypassing the Works of Defence Act (WoDA), 1903. NHQ is advised to notify the restrictions as recommended by them vide their ID Note under reference under the WoDA, 1903".

18 In the aforesaid circumstances, when the Ministry of Defence has made it clear that the Naval Head Quarter should notify the restriction as recommended by them vide their ID Note dated 9th March 2017 under the Works of Defence Act, 1903, the restrictions imposed in the circular dated 21st October 2016 are not applicable to the Navy. Therefore, the clarification issued by the State Government by the circular dated 7th November 2016 through the Urban Development Department, in any case, do not apply to Naval establishment. Perusal of Annexure A and B of the circular dated 21st October 2016 also contains list of Army Establishments and hence, it cannot be said that the circular of 21st October 2016 which relaxes the condition imposed vide earlier circular dated 18th May 2011 is applicable to Naval establishment. Hence, reliance on the circular of the Urban

Development Department of the State cannot be of any succour to the petitioners and we are not inclined to accept the submissions of Dr.Sathe that the restrictions imposed vide its circular dated 18th May 2011 ceased to exist.

19 Since we have rejected the submission of the learned counsel for the petitioner, what continues to govern the field is the guidelines dated 18th May 2011 issued by the Ministry of Defence. The Development Control Regulations for the Mumbai Municipal Corporation do not contemplate condition of obtaining NOC. The case is however, covered by latter stipulation contained in the guidelines where the Station Commander is of the opinion that the construction falls within the restricted zone and is a security hazard. As far as MCGM is concerned, the municipal laws do not require consultation with the Station Commander. As a result, the petitioners proceeded with the construction activity in the existing framework of the Mumbai Municipal Corporation Act. The petitioner no.1 entered into a development agreement with petitioner no.2 for redevelopment of its building which undisputedly is located at

a distance of 200 metres from the residential complex of the naval authority. The survey report was issued by the MCGM for the planning of the redevelopment of the subject property on 10th November 2014. The said report does not contain any stipulation about obtaining an NOC or any restriction on development of the said property. Clause No.20 of the said survey remark answers the query "whether the plot is effected by clearance zone, safety zone – hence, NOC from Naval Armaments Department is necessary", is answered in negative. As regards point no.21, whether NOC is required since the plot falls in aerodrome zone, the remark is in the positive. The petitioners have complied with the said survey report. On 8th May 2015, the intimation of disapproval (IOD) is issued by the MCGM for the proposed redevelopment of existing building on plot bearing CTS No.10/83 and 10/84 of village, Tirandaz, Mumbai. The condition stipulated in the IOD includes the procurement of a commencement certificate under Section 45 of the MRTP Act and several other stipulations. The IOD issued under Section 346 of the Mumbai Municipal Corporation Act read with Section 45 of the MRTP Act, assures

compliance of the local municipal laws and terms and conditions set out by the planning authority. On 16th November 2016, the commencement certificate is granted to the petitioners for construction upto plinth level and full commencement certificate is granted on 24th June 2016. The municipal authorities all the while did not solicit any NOC from the naval authorities. However, on 4th February 2016, when the Urban Development Department issues a circular implementing the guidelines issued by the Government of India imposing a restriction on construction of more than 4 floors within 500 sq.m from defence establishment, the condition of obtaining NOC is insisted upon. In September 2016, the petitioners have completed the construction upto 7th floor and the agreement of transfer/ utilization of Transferable Development Rights (TDR) is entered into with Mumbai Metropolitan Regional Development Authority (MMRDA). In pursuant thereto, MMRDA addressed a communication to the Executive Engineer of MCGM regarding debiting of the Development Right Certificate which was granted to the petitioners for the purpose of loading TDR.

In pursuance of the guidelines issued by the Urban Development Department on 7th July 2016, based on the guidelines issued by the Government of India, on 21st October 2016, the MCGM prepared an office note prescribing guidelines to be complied by the municipal officers for granting NOC for construction around defence establishment. On 15th February 2017, the petitioner through its Architect forwarded an application to the Executive Engineer of MCGM for amendment plans of the building and proposed a construction of stilt + 9 floors by utilization of additional FSDI and the slum TDR. It is at this stage, the MCGM intervenes and responds to the letter from the Flag Officer Commanding in Chief, informing that the petitioners are located within 500 metres from the Naval boundary at Kanjur Marg. The Executive Engineer informs the Flag Officer Commanding-in-Chief that the plot under reference is situated within 500 metres from the Naval boundary and the location plan of the plot is certified by AE (Survey) and the documents submitted by the licence surveyor also came to be forwarded. In response, for the first time on 9th August 2017, the Flag Officer

informs to the Executive Engineer that the proposal has been scrutinized by the Head Quarters and NOC cannot be issued for the redevelopment of ground + 11 floor storey building. It is pertinent to note that this letter do not disclose any reasons. The petitioners represent the authorities for reconsideration and on 27th October 2017, refusal to grant NOC is re-iterated, this time with reasons. The reasons cited are to the following effect.

> (a) The full C.C. for the said construction was issued by MCGM on 24 June 16, based on which the construction has commenced, whereas, the case for NOC was received in this HQ from your office only in April 17.
>
> (b) As per existing guidelines of MoD on the subject of accord/denial of NOC, there are no provisions to accord NOC on an "ex-post facto" basis after commencement of construction. Further, the purpose of according NOC loses relevance once construction has already commenced.
>
> (c) The report forwarded by the developer stating that the building is in the shadow zone of the existing buildings in vicinity of NCHC (P) has also been examined by means of an on-site visit by the Local Military Authority. Following has emerged out of the site visit and is hereby intimated.
>
> With the said reasons, request for NOC is turned

down. As a sequel, the MCGM on 14th November 2017 directed the petitioners not to proceed with any construction work at site on the basis of the refusal of NOC by the Western Naval Command. On a request for reconsideration, once again, on 9th March 2018, the respondent no.3 again maintains its earlier stand in refusing to grant the NOC.

20 Perusal of the aforesaid correspondence discloses that MCGM as a planning authority had proceeded to grant permission to the petitioners to carry out the redevelopment of the plot which is situated near the residential colony of the Navy, but in the backdrop of the circulars issued by the Urban Development Department, it referred the matter to the respondent no.3 seeking its NOC and it came to be rejected on three occasions by the impugned communications. By this time, petitioners had already constructed 8 floors. The refusal is firstly on the ground that MCGM has not asked for prior NOC and issued a full commencement certificate before obtaining such NOC and there is no provision for granting ex-post facto NOC for commencement of construction. The other

ground dealing with the contention that the building is in shadow zone of the existing building is also turned down by the respondent no.3 in its communication dated 27th October 2017 on the ground that though there are two towers (G + 22) and (G + 35) in the vicinity, clear view of the defence land (including building and other infrastructure) are visible from 7th floor of the building and one more reason namely, that the existing construction of the subject plot is on a hill which is approximately 14 metres higher than the defence land and approximately 25 metres higher than the tower of G + 22 and G + 35, thereby offering unobstructed view of defence land from 7th floor and above.

21 Dealing with the said satisfaction reached by the authority that the said proposed structure of the petitioners would pose a danger to the Naval residential Head Quarters, the question that falls for consideration is the scope of our judicial review in reviewing the said decision. It is no doubt true that the defence establishments are entitled to put forth the security facet and that would be looked upon as in the

larger public interest as the security of the nation should be accorded supremacy and the individual interest, specifically commercial interest, must yield to it. The reliance placed by Shri Anil Singh on the judgments cited above to that effect and the propositions laid down in the said judgment cannot be doubted and we are of the considered opinion that the said principle is a cardinal principle which should govern the conflict of interest situation. However, the basis on which the privilege is claimed cannot be said to be completely obscure or falling outside the purview of judicial review when it is specifically alleged that the decision taken is arbitrary and not based on germane consideration. This argument of Dr. Sathe has to be tested in the backdrop of his two contentions i.e. that the Naval Establishment in question for which the protection is sought by imposing a restriction on the constructions coming within its vicinity, is a residential colony of naval authorities and it would not strictly fall within the meaning of defence establishment and the second contention to the effect that there are other structures which are more in height than the structure of the petitioner and the refusal to grant NOC to the

petitioners on a specific ground that from 7th floor of the said building, the premises of the establishment are clearly visible, requires a consideration. Shri Singh has attempted to canvass before us that though the Naval establishment is a residential colony, the Senior Inspector of Police, Intelligence Branch has communicated a threat perception and for the said purpose, he had placed reliance on the communication dated 1st April 2016 addressed by the Senior P.I, Parksite Police Station, Mumbai to the Manager, NCH Colony, Kanjur Marg, Mumbai. The said communication is placed on record along with the affidavit filed by the respondent nos.1 to 3. We have perused the said communication. The said communication makes a reference to an intelligence input dated 17th March 2016 which had declared a list of 25 sensitive places in Maharashtra facing threat perception from terrorist organizations which includes Military Cantonment, Powai. In furtherance of the said inputs, it was directed that the preventive measures should be undertaken like constructing a compound wall on the western boundary, installation of CCTV cameras, providing Identity card to all the employees etc. Reference is also made to a

kidnapping incident of a 13 year old child. It is also further suggested that a Nodal Officer should be appointed to be in touch with the local police and security personnel should be deputed near the water tank and the cabin supplying electricity. It is on the basis of this letter the threat is perceived.

Perusal of the said letter discloses that it makes a reference to some security issues and it also suggests the modes in which the issues can be tackled with. No other reason is cited as a threat perception to the residential colony of naval residents. It is stated in the affidavit and Shri Singh has vehemently argued that there are certain installations in the said establishment which he cannot disclose. However, in one of the affidavit, the respondents themselves have admitted that apart from the residence, one school and hospital is located in the said premises and there is no indication that certain sensitive operations are carried out in such a crowded locality. In the affidavit, it is also suggested that there is a possibility of utilizing the defence land for any operational requirement in future and this is expressed only as a

possibility. We have no doubt in our mind about the sensitive operation which the defences are required to carry out and its justification to keep their establishment at a distance away from the development of the nearby area. However, merely on the premise that the present residential premises of the navy personnel can be used in future for some operations, cannot offer a justification for imposing restrictions. The reason put forth in form of threat perception is also based on report from local police and it can only be termed as a bald assertion, particularly when there are other buildings surrounding the NCHC, and those are not projected as threat to the security.

22 The submission of the learned counsel for the petitioner is that the said subjective satisfaction cannot completely oust the scope of the judicial review whereas the learned senior counsel Shri.Singh has argued that the decision is outside the purview of judicial review. Hence, we would deal with the said bone of contention between the parties. Learned senior counsel Shri Singh has argued that the decision to refuse NOC is that of an expert body and hence the

interference by this Court should be minimal. It is trite position of law that when a discretion is conferred on a Government to form an opinion as to a particular fact, it has every right to arrive at such a decision. However, there is nothing like absolute or unfettered discretion and the higher Courts of the country are duty bound to exercise its extra ordinary jurisdiction and interfere to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the Court to examine whether the reasons for formation of opinion have rational connection or relevance bearing to the formation of such opinion and are not extraneous for the purposes of the statute. The power of judicial review vested in the Constitutional Court is one of the basic features of our constitution and an intrinsic part of Constitutionalism and in exercise of its power, the administrative decisions taken by an administrative body or judicial or quasi judicial authority can always be subjected to judicial review. No decision of the Government or its functionary is immune from judicial review and if it is found that the impugned action is *ultra vires*, the Constitution or

otherwise arbitrary or discriminatory, it would be ample justification to interfere in such a decision. The purpose of judicial review is to check whether the choice or decision is made lawfully and not to check whether the choice is 'sound'.

In ***Council of Civil Service Unions vs. Minister of State for Civil Service***[3]; the House of Lords highlighted the grounds and the basis of judicial review under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting *ultra vires*, errors of law and/or fact, erroneous decision, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, etc. The ground of irrationality takes into account Wednesbury principle of unreasonableness, which

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31984 (3) All ER 935

covers the major heads of review and the Court can interfere with a decision if it is so absurd that no reasonable decision maker would in law arrive at such a decision. Lord Diplock fashioned the principle of unreasonableness and used the term 'irrationality' in the following words :

> *"By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury's unreasonableness". It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."*

23 The Hon'ble Apex Court in case of ***All India India Railway Recruitment Board and Anr. Vs. K. Shyam Kumar & ors***[4] applies the Wednesbury and proportionality test and makes observations to the following effect :

> *Wednesbury and Proportionality - Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to `assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance between individual rights and public interest. Suffice to say that there has been an overlapping of all these*

4 (2010) 6 SCC 614

> *tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.*
>
> *Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.*

It is settled position that power of judicial review is not directed against the decision but it is confined to the decision making process. It is not an appeal from a decision but a review of the manner in which a decision is made. The Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. The Court would confine itself to the question of legality and would exercise its power when the authority has reached an unreasonable decision or abused its power.

24 In ***State of Punjab Vs. Bandeep Singh & ors***, the Hon'ble Apex Court observed thus :-

> *4 There can be no gainsaying that every decision of an administrative or executive nature must be a composite and self sustaining one, in that it should contain all the reasons which prevailed on the official taking the decision to arrive at his conclusion. It is beyond cavil that any Authority cannot be permitted to travel beyond the stand adopted and expressed by it in the impugned action. If precedent is required for this proposition it can be found in the celebrated decision titled Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi [1978] 2 SCR 272, of which the following paragraph deserves extraction:*
>
> > *"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji [1952] 1 SCR 135: Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of Explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.*
>
> *Orders are not like old wine becoming better as they grow older".*
>
> *The same principle was upheld more recently in Ram Kishun Vs. State of U.P. (2012) 11 SCC 511. However, we must hasten to clarify that the Government does not have a carte blanche to take any decision it chooses to; it cannot take a capricious, arbitrary or prejudiced decision. Its decision must be informed and impregnated with reasons.*

> *This has already been discussed threadbare in several decisions of this Court, including in Sterling Computers Ltd Vs. M & N Publications (1993) 1 SCC 445, Tata Cellular Vs. Union of India (1994) 6 SCC 651, Air India Ltd Vs.Cochin International Airport Ltd (2000) 2 SCC 617, B.S.N. Joshi & Sons Ltd Vs. Nair Coal Services Ltd. (2006) 11 SCC 548, Jagdish Mandal vs. State of Orissa (2007) 14 SCC 517.*

25 Applying the aforesaid principles, we have examined the decisions to refuse the NOC on the part of the respondent no.3 and acting on the same, the decision by the MCGM directing the petitioner to stop the work, we can very well infer that the decision is highly arbitrary. The authority conferred with the said discretion is expected to apply the test of Wednesbury reasonableness and would be required to justify its decision based on the relevant consideration which it has taken into account. The restriction is imposed in the wake of the existing Naval Housing Colony which finds its location in a densely populated city like Mumbai which is outgrowing. The Naval Housing Establishment is situated in the heart of Powai. It is not a sensitive naval station and we could have very well understood the restriction so imposed by the respondent no.3 if it was so.

26 Another ground which prompts us to exercise our power of judicial review is the existence of similar structures in the vicinity. Shri Sathe has placed on record a list of the constructions in respect of which the NOC has been granted in the recent times i.e. from 2017. Perusal of the map which has been tendered before us do reveal that there are buildings approximately having the height same as that of the petitioners' building and which has been granted the NOC by the Naval Officers. The approximate height of the building of the petitioners is 42 metres whereas permission has been granted to a structure located at a distance of 130 metres which is a ground + 35 storeyed Hotel. In any contingency, when we have already recorded that the NCHC which is already surrounded by numerous residential buildings and some of them located within the restricted area, and since it do not house any sensitive Navy operation according to the own showing of the respondents in their affidavit, the mere possibility that some sensitive operations may be carried out in future, cannot exclude the power of judicial review by us on the mere premise that we cannot sit in Appeal over the said

decision. Once it is noted that the approach of the respondents is arbitrary and irrational, we cannot be precluded from intervening the impugned decision in exercise of the power of judicial review.

27 Learned counsel for the petitioner has placed on record seven NOCs granted by the Rear Admiral Chief Staff Officer (P & A) for Flag Officer Commanding-in-Chief for the year 2017 and 2018. Perusal of the NOC issued by the Western Naval Command discloses that the NOC is granted in respect of the constructions located near the Ghatkopar Navy Depot as well as Worli INS strata. The NOCs place on record contain a peculiar stipulation :

> *"It may be noted that the proposed residential building on plot bearing CTS No.596, 596/1 to 6, 597, 597/1 to 7, 598, 598/1 to 3, 599A, 599A/1 to A/81, 601, 602, 602/1 to 9, 603, 604, 605, 605/1 to 17, 606, 606/1 to 83, 607/1 to 31, 607A and 607D of Village Kanjur at LBS Marg Kanjur Mumbai for which No Objection Certificate is issued, will be undertaken at your own risk, subject to the condition that the Department/Indian Navy/ Ministry of Defence/Government of India is totally indemnified against any claim, whatsoever, under all circumstances".*

Shri Sathe submits that these NOCs are granted within the precincts of Navy Depot and Worli INS strata which are operational naval stations whereas the present location of navy is merely a civilian housing colony. We have taken note of the said NOCs placed on record.

28 Reliance placed by Shri Anil Singh on the judgment of the Division Bench in the case of ***TCI Industries Limited Vs. Municipal Corporation of Greater Mumbai***,[5] and in case of ***SSV Developers Vs. Union of India***,[6] are clearly distinguishable. The focal point of both these judgments is the location where the construction was sought to be undertaken. The Division Bench in case of ***TCI Industries Limited*** (supra) has observed 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*

5 2012 5 BCR 353

6 2014 2 BCR 541

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".

Thus, the judgment proceeds on the peculiar facts involved and the construction of the petitioners to which an NOC was refused, was adjacent to the Naval base wherein INS Shikara was established. The argument advanced on behalf of the Union was in the backdrop that the said naval station was utilized for keeping armaments and missiles. In the backdrop of these facts, the Division Bench has arrived at a conclusion to the following effect :

"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 under Section 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 under Section 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".

In the backdrop of the said observations, the contention advanced on behalf of the petitioners relying on Article 300-A of the Constitution of India came to be rejected and the Division Bench held that the said right needs to be read as subservient to the larger public interest. Further, in case of ***SSV Developers*** (supra), the Division Bench was dealing with a proposed construction which was located again in the vicinity of INS strata. The Division Bench has therefore heavily relied upon the observations made by the earlier Division Bench in case of TCI Industries Limited. After

referring to the said observations, the Division Bench has accepted the view expressed earlier that it is the experts who have resolved and decided that for reasons of security and protection of defence and naval establishment, NOC should be granted and then it is not for us to substantiate our opinion with their views. The observations made by the Division Bench would reveal that it observed so since it concluded that there is nothing to record that the views are lacking bonafide or that the action can be terms as patently arbitrary and discriminatory but the actions are keeping in mind the security of the 'defence installation' and that has to be placed in forefront. Both these judgments will have to be read in the backdrop of the naval location which the Courts were dealing with and then the observations will have to be construed accordingly. The decision of the Flag Officer Commanding Head Quarters in both these judgments was not interfered as the NOC was sought in respect of the construction which was located near INS strata. However, in contrast to the facts involved in the two writ petitions, we are dealing with a contingency where the NOC has been refused for a

construction located near Navy Civilian Housing Colony. It is not the case of the respondents that it contains any defence installation. The report that has been placed before us by the learned Assistant Solicitor General also pertains to the implementation of safety distances around the ammunition depots and in fact, the said guidelines itself puts a restriction on inhabiting any buildings nearby such depots and needless to say that it would cover even the housing meant for navy personnel. We do not find that on the basis of the Confidential Reports that has been placed before us that the present location of Navy is an ammunition depot or a sensitive zone as indicated in the said report.

29 For the aforesaid reasons, the two judgments are clearly distinguishable on the facts and the observations made to the effect cannot be relied upon. On the contrary, we are guided by the observations of the Division Bench in case of SSV Developers where the Court has observed that it has refused to interfere since there was no element of discrimination or arbitrariness and it was not the case that the petitioners'

construction was only singled out. However, in the present case in hand, we have before us a scenario where the NOC is refused on the ground that the buildings are located in the vicinity of NCHC when there are number of buildings situated at a distance lesser than that of the petitioner and this includes the structure in form of Chedi Hotel which is the structure of G + 40 with an approximate height of 120 metres and the approximate distance of 0.34 metres from the Naval Civilian Housing Colony. There is also another structure at a distance of 230 metres which is less than the distance of the petitioners in form of 'Sun Heights' which is the G + 25 storeyed building. Another building in the close proximity of the NCHC is Gundecha Heights which is G + 19 storeyed building approximate height of 55 metres. The respondents have offered an explanation about two buildings which are G + 12 and G + 20 which are situated in the close vicinity but no explanation is offered in respect of other existing buildings which are listed below :-

Sr.No.	NAME OF THE BUILDING	Distance from NCHC	Approximate Height

1	Gundecha Heights / G + 19	30 metres	55 metres
2	Lodha Avenue Garden/G + 35	230 metres	105 metres
3	Damji Shamji Business Gallery G +12	30 metres	50 metres
4	Chedi Hotel / G + 40	34 metres	120 metres
5	Sun Heights / G + 25	230 metres	75 metres
6	Vishrant Building / G + 8	240 metres	30 metres
7	Nilgiri Building / G + 17	300 metres	55 metres
8	Tirandaz Shubh Niketan / G + 11	286 metres	

30 We have carefully perused the Google Map produced before us by the petitioner and we could clearly observe that the said area belonging to the Navy is surrounded by numerous buildings located within the restricted zone. Merely saying that from 7th floor of the proposed building of the petitioner, the naval station is clearly visible; is an unreasonable observation since even something is visible, it is only a housing colony. We could very well understand if it was some sensitive area as was in the case of the two judgments cited before us i.e. ***SSV Developers*** (supra) and the decision in the case of ***TCI Industries Limited*** (supra). The said judgment emphasizes on the location of the said property. In the said judgments, the Court was dealing with a situation where the objected structure was pitted against a naval base wherein INS

Shikra is established. The proposed structure was situated next to the compound wall between the premises of the Navy and the petitioner therein. The Division Bench in the backdrop of the factual situation and in light of the submission advanced by the learned Advocate General was in the backdrop that the naval based was actively used and important armaments as well as missiles were located and there was also a radar at the said place and therefore a serious apprehension of security aspect was raised. It was also pointed out to the Court that the naval base of the Navy was fully operational and many helicopters of the navy are landing at the said place and recently the American President Barrack Obama also landed at the very same place. INS Shikra is an Indian Naval air station located at Colaba in Mumbai and it is a Heli Port and Full fledged Air station providing support and maintenance facilities to the integral flights of the fleet and aviation requirements of the Western Naval Command. Its primary role is to provide the administrative, technical and logistic support for all squadrons and flights based in Mumbai. In addition, it undertakes coastal patrol, air surveillance in the area. The

Division Bench dealing with the said situation had therefore, turned down the arguments advanced that the security and protection of the defence is merely a bogey and observed that since the said views expressed were not lacking any bonafides, nor the actions could be termed as 'patently arbitrary' and discriminatory, and rather the actions were found on the security of the defence installation, the conclusion was arrived that such a policy decision cannot be interfered so very lightly. However, the situation in the present case is completely distinct and the attempt on behalf of the learned Assistant Solicitor General to rely on the observations of the Division Bench in advancing the submission that the power of judicial review should not be exercised and it may be left to the defence authorities who are the experts in the said field cannot be made applicable to the facts in the present case. Further, perusal of the guidelines issued by the Ministry of Defence pertaining to the restrictions to be imposed itself disclose that the security restriction are in respect of defence establishment/ installation and the restrictions were imposed so as to maintain clear lines of site for effective surveillance. The Ministry of

Defene thus contemplate some defence establishments or installations where surveillance is necessary. This surely don ot convey the intention to cover civil housing societies belonging to these establishments.

31 In such circumstances, for the reasons recorded above, we are inclined to exercise our power of judicial review and conclude that the decision taken by the respondent no.3 cannot be sustained since the proposed structure of the petitioner is located near the Naval Housing Colony and the restrictions which are sought to be imposed under the guise of the circular issued by the Ministry of Defence on the ground of security, cannot be sustained. Further, the action of the respondents is also discriminatory insofar as it has permitted structures within the restricted zone whereas there is denial of the No Objection to the petitioner.

Resultantly, we quash and set aside the impugned letters dated 9th August 2017, 27th October 2017 and 9th March 2018 issued by the Ministry of Defence, Union of India refusing

to grant NOC in favour of the petitioners. In view of the quashment of the said letters, we also quash and set aside the letter dated 14th November 2017 issued by the Executive Engineer of MCGM, directing the petitioner to stop work at the subject property.

We issue writ of mandamus to the respondent no.1 to 3 to issue a No Objection Certificate for construction of the subject property to the petitioners and further direct the MCGM to permit the petitioners to continue with the construction of the building in accordance with the permissions accorded by it.

Rule is made absolute in the aforesaid terms.

No order as to costs.

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

At this stage Mr.Anil Singh, learned Assistant Solicitor General seeks stay of the said judgment for a period of four weeks. The said prayer is vehemently opposed by the

learned counsel for the petitioners. Since we have already recorded a finding that the refusal of NOC by the respondent nos.1 to 3 was not based on germane reasons and there are other constructions which are already standing in the vicinity of the NCHC, we are not inclined to accept the request of the learned Senior counsel. The prayer for stay is therefore, rejected.

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