

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1515 OF 2017
WITH
NOTICE OF MOTION NO.449 OF 2017

Bharat Petroleum Corporation Ltd. }
a Company registered under the }
Indian Companies Act 1913 and }
Government of India Enterprise }
having its registered office at }
Village Mahul, "M" Ward of }
Greater Mumbai, through }
Mr.Shirish Raghunath Chandekar }
Age 42 years, Occu: Senior Manager } Petitioner

Vs

1. Municipal Corporation of Greater }
Mumbai }
Through the Municipal Commissioner }
MCGM, Mahapalika Marg, }
Mumbai 400 001 }
2. Assistant Engineer (Building }
Proposal), Eastern Suburban }
MCGM, Vikhroli (West), }
Mumbai 400 083 }
3. Satwaratna Co-op Housing }
Society Ltd. }
A Co-operative Housing Society }
Registered under The Societies Act }
1960, through its Secretary }
Mrs.Nikita Milind Dhond }
Residing at 602, Mamta Deep Heights }
H P Nagar (West), Mysore Colony, }
Monorail Station, Chembur, }
Mumbai 400 074 }
4. M/s.Kishraj Developers , a registered }
Partnership Firm having its office }
Premises situated on ground floor }

Mitra Tower, Hill Road, Sion
Chunabhatti, Mumbai 400 022

5. State of Maharashtra
Through Principal Secretary
Urban Development Department
Mantralaya, Mumbai 400 021

}
}
}
}
}
}
} Respondents

Mr.Anil C. Singh, Additional Solicitor
General a/w Ms.Geetika Gandhi, Ms.Anjali
Ghuge I/b Kulkarni and Associates for the
Petitioner.

Mr.Anil Y. Sakhare, Senior Advocate a/w
Ms.K.H. Mastakar for Respondent Nos.1
and 2.

Ms.Nayana G. Pardeshi a/w Ms.Sharon
Patole for Respondent No.3.

Mr.Mukesh M. Vashi, Senior Advocate
a./w Ms.Aparna Deokar, Mr.Vivek Vashi
I/b M/S M.P.Vashi and Associates for
Respondent No.4.

Ms.P.H.Kantharia, Government Pleader
a/w Mr.Abhay Patki, Additional
Government Pleader for Respondent No.5.

**CORAM :- S. C. DHARMADHIKARI &
B.P.COLABAWALLA, JJ.**

DATE :- APRIL 25, 2019

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. Rule. Respondents waive service.
2. By consent of all parties, the writ petition is disposed of finally by this order.
3. The petitioner before us is a public limited company

registered under the Indian Companies Act, 1956. It is a Government Company within the meaning of Section 617 of the said Act. It is engaged in the business of refining of crude oil and marketing /retailing of petrol, diesel, Liquefied Petroleum Gas (“LPG”, for short), aviation fuel etc.

4. It operates a refinery at village Mahul, “M” Ward, Greater Mumbai. It produces therein essential petroleum products like petrol, diesel, motor spirits etc. The first respondent is the Municipal Corporation of Greater Mumbai constituted under the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as “the MMC Act”). The second respondent is the official of the first respondent. The third respondent is a co-operative housing society registered under the Maharashtra Co-operative Societies Act, 1960 whereas the fourth respondent is a partnership firm carrying on business from the address mentioned in the cause title as builder and developer. The fifth respondent to the petition is the State of Maharashtra.

5. The petitioner has set out the nature of its activities in paras 3, 4 and 5 of this petition which read as under :-

“The Petitioner operates a Refinery (hereinafter referred to as “the said refinery”) at Village Mahul, in the “M” Ward of Greater Mumbai, producing therein essential petroleum products like petrol, diesel, motor spirits, etc. The said

refinery was commissioned in 1955 by the erstwhile Burmah Shell Refineries Limited and has functioned continuously since then, having expanded its capacity over the years and increased its production to serve the needs of the country. In the year 1976, the said refinery was nationalized and continuing its operation. The said refinery is a valuable national asset, particularly in terms of project cost involved and the essential services/products supplied by it to meet domestic, commercial and most importantly national requirements.

4. The said refinery produces and/or refines petroleum products essentially for use in the city of Mumbai, surrounding areas and Western part of India. The city of Mumbai and large parts of Western India are heavily dependent directly or indirectly on the said petroleum products. The said refinery refines and produces products such as Motor Spirit (MS), High Speed Diesel (HSD), Superior Kerosene Oil (SKO), Aviation Turbine Fuel (ATF), Furnace Oil (FO), Bitumen, Liquefied Petroleum Gas (LPG) and other petroleum products essential for the economic activities of the country and for the daily use of the general public. Apart from the products used in industry, defence requirement and for vehicles, 'LPG' is also supplied from the said refinery, for use in cooking among the households in Mumbai and Western India.

5. In addition to the production of petroleum products as aforesaid, the said refinery has tanks within its complex with a storage capacity of about 1261 thousand metric tonnes (TMT), wherein huge quantities of petroleum products are stored, particularly in view of the government's directive to ensure that at least 45 days national requirement of petroleum products is kept stored at all times for emergency use of the nation. The petroleum products refined, produced, manufactured and stored at the said refinery are obviously highly inflammable and easily combustible, as a result whereof, the need for protection and security of the said refinery and installations within is absolutely vital, to prevent accidents as well as any deliberate subversive activities aimed at the said refinery. The security of the Refinery is also vital from the point of view of "public safety" particularly of nearby vicinity."

6. Thereafter it is stated that the petroleum products are stored in huge iron tanks along the northern and western

boundaries of the said refinery. On the northern side of the said refinery, there are human settlements and the population in that area has grown over the years. From time to time, the petitioner before this Court has taken the precautionary measures and enhanced security protection to the refinery and the installations within. In that regard, in para 6 of the petition, the petitioner states as under :-

“For instance, the Liquefied Petroleum Gas (LPG) (which was previously stored in spheres in an open area on the north side) has been stored for the past several years in underground storage bullets; some LPG-filling carrousel have also been shifted from the said refinery to Uran. Petroleum products and more particularly Motor Spirit, High Speed Kerosene, Diesel & Aviation Turbine Fuel are required to be stored in huge over-ground tanks. These tanks are adjacent to the western boundaries of the said refinery. Several of such petroleum products cannot technically be stored underground, *inter alia*, due to operational reasons, as any leakage would have an extremely disastrous and hazardous environmental impact. There is also a flare chimney within the said refinery, which continuously burns the noxious waste gases released during production, and which are burnt to prevent direct environmental pollution”.

7. The petitioner has further pointed out that industrial units have come up on the northern, southern and eastern sides of the said refinery whereas the western side of the said refinery is largely vacant, except for some small hutments in the south west corner consisting of low one or two storied structures. The western side is being used essentially as salt pans and consists of mangroves. It is also used for laying various pipe lines from the

sea to the shore carrying crude and various other petroleum and hazardous products.

8. The Ministry of Home Affairs, Government of India has confirmed that the refinery of the petitioner is of 'A' category for the purpose of security parameters and measures.

9. The petitioner in para 9 says that for minimising the security risks to the refinery, it is absolutely necessary and essential that no further construction activity should be allowed or permitted in the areas and on the lands adjacent to and around the said refinery. Such further construction would enormously and appreciably add to the security threat to the said refinery, having regard to the increased inflow of persons consequent upon such construction and the level of existing development and habitation in the area. If multi storied buildings are allowed to be constructed, it will expose the refinery to huge security risks as the higher floors would serve as vantage points providing direct visual access into the refinery. It may enable carving out an unobstructed aerial path thereto. It is in these circumstances it is alleged that additional construction in this area would appreciably increase the density of existing population, both fixed and floating. Even the country's Intelligence Agencies have noted the higher risk involved to the petitioner's refinery consequent upon such additional constructions.

10. It is stated in para 10 that the entire refinery area has been declared as “prohibited area” under the Officials Secrets Act, 1923. It is stated that from past many years, the risk of terrorist, subversive activities, sabotage of vital installations and attacks on national assets have increased manifold in the city of Mumbai and generally all over India. It is also seen that major installations of oil and power plants are likely targets. It is, therefore, said that because of this security threat and nature of refining activities which would pose danger to the safety of the people of the surrounding area, the matter was taken up with the Government of Maharashtra and exhibit 'C' of the petition is relied upon. Thus, from the year 2000, an attempt is made by the petitioner to impress upon the authorities that they must take the necessary safety and preventive measures. Rather the request is to take steps to stop construction activity altogether.

11. A letter was also addressed to the Secretary, Ministry of Environment and Forest, Government of India on 4th December, 2006 impressing upon that Ministry that this refinery is vital and important installation and construction of high rise buildings are justifiably considered as security threats. The Intelligence Bureau, having made an assessment of security measures, recommended strongly that residential complex coming up near

the refinery would pose an utmost hazard. It is in these circumstances that from time to time, the above matters were taken up by the petitioner and it also emphasised the measures taken at its end. On 14th March, 2007, the Ministry of Home Affairs addressed a letter to the Chief Secretary, Government of Maharashtra wherein the concerns expressed by the petitioner are highlighted. Another letter was addressed by the petitioner on 15th May, 2008 to the Department of Urban Development, Government of Maharashtra and to the Chief Engineer of the Municipal Corporation of Greater Mumbai highlighting that there is a construction of multi storied building, namely, “Shanbag Terrace” coming up on land opposite to refinery's main entrance and if construction of such building is allowed, it will jeopardize the safety of the refinery and other vital industrial establishments situate in the area. Exhibit 'J' is copy of the said letter dated 15th May, 2008.

12. The petitioner had been also following up the matter with the Government of India/Central Security Agencies. There are sensitive installations nearby, namely, Bhabha Atomic Research Centre and Hindustan Petroleum Corporation Limited. After the terrorist attack of 26th November, 2008, the Ministry of Petroleum and Natural Gas, Government of India had a meeting

with the Ministry of Civil Aviation and requested that even the air space in Mumbai above the vital installations to be declared as “no flying zone”. That proposal is also under consideration.

13. In para 18 of the petition, reference is made to another construction of “Mamta Deep Height” which is separated from the boundary wall of the petitioner's refinery by a 30 ft. road. A request was made to stop construction of this building.

14. Then what transpired, according to the petitioner, is convening of a high level meeting and the decisions therein. The copy of the minutes of the meeting dated 27th August, 2009 is at Exhibit 'N'.

15. The petitioner also filed Writ Petition No.1982 of 2009, against the construction of thirteen storey building, namely, “Mamta Deep Heights” on the northern side of the said refinery, in this Court. An affidavit was filed by the Deputy Commissioner of Police, Zone VI, Chembur, Mumbai admitting that the building faces vital installations of the petitioner and thirteen storey structure would pose a security threat to the petitioner's installations which are of national importance. He recommended not granting any permission to construct the building.

16. It is clear that the petitioner was opposing the constructions within the vicinity and has also impressed upon the authorities that they should take steps so as to protect and safeguard the refinery.

17. It is then claimed in para 23 that some handouts were distributed by respondent No.4 after which it was learnt that there is a development or rather redevelopment of respondent No.3-society. The redevelopment is through respondent No.4, who, apart from rehabilitating the occupants of the existing structures in situ, would also construct flats for sale in open market. Thus, the attempt of such construction is to provide direct visual access, as it is just 50 meters from the warehouse in the said refinery. Therefore, another high rise building is coming up and that would pose additional security risk. In fact, it increases the existing security risk. The petitioner through its advocate, therefore, addressed a letter to the Municipal Corporation on 26th August, 2015 (Exhibit 'Q') and objected to the said construction. It placed reliance upon the judgment of the Hon'ble Supreme Court of India in the case of *Oswal Agro Mills Ltd. Vs. Hindustan Petroleum Corporation Ltd. and Ors.*¹ The letter was received and it was informed to the petitioner that the same has been forwarded for consideration of the senior officials.

1 (2014) 2 SCC 491

The petitioner also received a reply informing it that Municipal Commissioner has directed the Assistant Commissioner, M West Ward to issue a stop-work notice. Thus, the construction would be stopped was the assurance given by the communication of the Municipal Corporation dated 13th May, 2016 (Exhibit 'S') and it was indeed stopped by issuance of a notice of 5th April, 2016. Thereafter, the petitioner again impressed upon the authorities that measures have to be taken so as to find a permanent solution and in that endeavor, para 27 to 29 have been relied upon.

18. However, the petitioner brings to the notice of this Court the fact that the third and fourth respondents filed a writ petition being Writ Petition No. 1418 of 2016 in this Court. After hearing both sides, this Court on 23rd February, 2017 passed an order. A copy of this order is annexed to the petition at Exhibit 'W'. We reproduce this order for ready reference :-

“The petitioners pray for direction to respondents 1 and 2 to consider and grant application made by the petitioners' architect (Exhibit D), further commencement certificate from 1st floor to 7th floor. Learned Counsel appearing for petitioners submits that the subject site Mahul, Cembur area, which is in close proximity of Bharat Petroleum Refinery, from the subject construction. There are various buildings already constructed and occupied by respective residents. The Corporation had issued IOD and CC till plinth level in respect of subject structure/construction but the Corporation did not entertain petitioners' application for grant of further CC. Learned Counsel submits that the view adopted by Apex Court in the case of *Oswal Agro Mills Ltd. V/s. Hindustan Petroleum Corporation Ltd. {(2014) 2 Supreme Court Cases 491}*

needs to be appreciated in the facts of the present case. The note put up by the Executive Engineer dated 11th March, 2016 shall also be looked into in its proper perspective before taking appropriate decision.

2. Learned Counsel Mr.Singh appearing for 3rd respondent refer to the judgment of the Apex Court in the case of *Oswal Ago Mills Ltd. V/s. Hindustan Petroleum Corporation Ltd. (Supra)* and judgment of this Court in the case of *Hindustan Petroleum Corporation Ltd. v/s. The Municipal Corporation of Greater Mumbai in Writ Petition No.1973/2011* decided on 12th April, 2012. Reliance is placed on affidavit-in-reply filed by respondent no.3 through Mr.Shirish Chandekar, Constituted Attorney, Senior Manager (Employees) Refinery of BPCL. Learned Counsel Mr.Singh submitted that Ministry of Home Affairs confirmed that Refinery of respondent No.3 is categorised as “A” for the purposes of adopting security measures and that category “A” in terms of security parameters is defined as :-

“Industries or installations or facilities, whose products or services are extremely vital to the country's economic and defence potential and whose total loss or severe damage will affect many other industries or services or facilities dependent on them, which are also important from the point of view of economy, defence, and technological progress. Most of such installations are installations such as Atomic Energy, Defence, Space, Power, Ports, Ship Building, Oil and Gas, Dams, Heavy Engineering, etc.”

3. It is submitted that in view of the risk of terrorist and subversive activities, sabotage of vital installations and attack on national assets had increased manifold in the city of Mumbai. Major installations of oil and power plants are likely targets of such activities. It was, therefore, submitted that due to sensitivity of the said installation and the consequent security issues arising therefrom, the entire refinery area itself has been declared a “Prohibited Area” under the Officials Secrets Act, 1923. Reliance was placed on the correspondence made in this behalf. Learned Counsel had gone through the affidavit-in-reply, the relevant correspondence made in this behalf to highlight the submission. It was submitted that such permission of constructions in closed proximity of refinery shall not be permitted. In the submissions of the Counsel subject proposed building would pose security threat to the installation.

4. Respondent Corporation filed affidavit-in-reply through Mr.Ramesh Kulkarni, Assistant Engineer (BP) ES. The deponent states that complaint was received on behalf of M/s.Bharat Petroleum Corporation Ltd. In the complaint an apprehension was made that if the developers are permitted to continue with the construction at the site, then it would not only jeopardize the safety of the refinery and other vital installations near by located, but also the safety of the entire residing population would be at stake. Learned Counsel appearing for Corporation refers to relevant notings put up in this connection. It is submitted that the stop work notice was issued on 5th April, 2016 and since then the construction activities are at a standstill.

5. We have perused the record and the judgments cited before us. In the facts of the case, we find that appropriate decision needs to be taken by the Corporation Authority after going through the material placed before it. In the facts of the case, we issue following directions :-

- (a) Petitioners and respondent no.3 are entitled to submit a brief written representation to the Corporation Authority in respect of the subject matter of this petition.
- (b) After receipt of such representation, the Municipal Commissioner/Addl.Municipal Commissioner, as the case may be, shall hear the concerned parties.
- (c) The Municipal Commissioner/Addl. Municipal Commissioner shall pass a brief reasoned order on the issue raised by the parties/the subject issue involved.
- (d) We direct that the Authority of the Corporation shall complete this exercise within eight weeks from today.

6. It is clarified that we have not expressed any opinion on the subject issue.

7. With the aforesaid observations and directions, writ petition stands disposed of.

8. All concerned to act on an authenticated copy of the order.”

19. In terms of the directions issued by this Court, written submissions were filed by the parties. After that, the impugned order dated 16th May, 2017 has been passed. It is that order which is challenged in this writ petition and by prayer clauses (b) and (c), the petitioner prays that this order be quashed and set aside and the authority be commanded to withdraw and rescind any permission or approvals given for this construction.

20. On such a petition being filed in this Court on 28th June, 2017, on being served with the papers and proceedings, one Kishore Advani, partner of respondent No.4 filed an affidavit in reply. In that affidavit in reply, it is firstly contended that this Court has limited jurisdiction to interfere with discretionary orders in exercise of its powers under Article 226 of the Constitution of India. This Court cannot interfere with such orders, once the discretion has been exercised by the planning authority. That authority is aware of the risks involved in permitting constructions near such installations. Therefore, the writ petition be dismissed.

21. Without prejudice to the aforesaid submission, it is submitted that the third respondent-society owns the existing building. That building was ground plus three upper floors. It was situate on Survey No.103, Hissa No.15, CTS Nos.35 and 39 of

Village Mahul, Taluka Kurla, Mumbai Suburban District. That building was in dilapidated condition. That is how the society resolved to appoint the fourth respondent as a developer. He decided to redevelop the property. After this, a development agreement was executed on 19th November, 2014. An irrevocable power of attorney was also executed in favour of the fourth respondent. The fourth respondent, on the basis of this document applied for and obtained a Commencement Certificate/Intimation of Disapproval (IOD) on 25th June, 2015. On 20th July, 2015, the fourth respondent commenced demolition of the existing building. There was a part Commencement Certificate issued on 5th September, 2015. Relying upon this part Commencement Certificate issued by respondent Nos.1 and 2, the fourth respondent completed construction upto plinth level. It handed over set back area admeasuring 362.16 sq.ft. to the Mumbai Municipal Corporation. There is a receipt evidencing possession being taken of this area. There is no monetary compensation which is claimed. Thereafter the fourth respondent applied for further Commencement Certificate. The fourth respondent has projected the hardship caused not only to it, but to the members of the third respondent-society for they have vacated the flats and are receiving monthly compensation in lieu of transit accommodation. Though the Municipal Corporation passed the

impugned order, till 12th September, 2017, the present petitioner did not apply for any interim relief. Now, the full Commencement Certificate has been granted. It is in these circumstances and when the first floor construction was taken up, this Court granted an order of status-quo in this petition on 12th September, 2017.

22. The fourth respondent claims that the Municipal Commissioner has rightly relied upon the construction activities in the vicinity and that fact is not disputed. A large number of buildings have already been constructed. In a nearby slum rehabilitation scheme, 72 buildings of ground plus seven upper floors are constructed. On the very adjacent plot bearing CTS No.118, there is a building of ground plus seven upper floors known as "Tulsi Terrace". That building and other SRA buildings are facing the refinery of the petitioner. It is in these circumstances and when Rs.3.2 crores have already been spent, the present construction activity should not be interfered with is the final request of the fourth respondent in its affidavit filed on 25th September, 2017.

23. There are various annexures to this affidavit proving the construction activities in the vicinity.

24. The first and the second respondent to this petition filed an affidavit and after referring to the facts as set out in the affidavit of the fourth respondent, the Mumbai Municipal Corporation has justified the issuance of full Commencement Certificate for the proposed building comprising of wing 'A' and wing 'B' each consisting of stilt plus first to sixth upper floors. It also says in this affidavit that in the vicinity, many structures, buildings, slums and a mono rail project is existing. The mono rail is passing through the west side of the refinery at a distance of about 10 meters and a mono rail station is located near the petitioner's refinery compound. It is claimed that Mahul Gaathan is in existence since more than 100 years whereas this refinery is commissioned somewhere in 1955. Many structures existing in Mahul Gaathan have reached their maximum life span and now showing signs of distress. Therefore, the properties have to be redeveloped. Thus, the law permits grant of a Commencement Certificate and that is also granted conditionally. It is very clear from the above statements on oath that respondent Nos.1 and 2 stand by the version projected by respondent Nos.3 and 4.

25. Equally, it is said that the Municipal Commissioner was aware of the fact that any civil construction will pose security hazard not only to the installations but to the general public

around it. The affidavit of respondent Nos.1 and 2 refers to a meeting convened in December, 2016 and the necessity of carving out and demarking a buffer zone that should be ideally of 500 meters or more depending upon the sensitive/hazardous activities in the vital installations. Barring this aspect, the affidavits of the respondents are consistent with the findings in the impugned order.

26. In dealing with all these aspects and emphasising the need for taking immediate steps, the petitioner presented an additional affidavit on 11th April, 2019.

27. In that after referring to and reiterating the allegations in the memo of the petition it is claimed that the petitioner complies with specific provisions laid down under 64 different Acts for safety and security of the refinery and the area surrounding the refinery.

28. This aspect was emphasised on account of the proposition canvassed at a brief hearing of this petition on 25th March, 2019. In this affidavit it is stated that the risks are too many. To briefly set out, given the sensitive nature of activities, it would not be safe to reveal the details of the security measures, but it is claimed that the petitioner is equipped with modern

infrastructure and systems to prevent occurrence of accidents and particularly, in the plant itself. However, that is also a possibility which cannot be ruled out.

29. The petitioner has also pointed out that apart from the acts of god, terrorist activities or other unanticipated events or in the unlikely event of any incident or accident, for timely evacuation of personnel from within the refinery as well as the surrounding area, it is extremely necessary that no construction activity should be permitted in the vicinity of this vital installation. Thus, the public safety angle has been highlighted in this affidavit.

30. The affidavit encloses several documents concerning the issues of safety of vital installations and the necessity of preventing any development activity within their vicinity.

31. On the above material, we have heard the learned senior advocates.

32. Mr. Anil Singh, learned Additional Solicitor General appearing on behalf of the petitioner would submit that the fourth respondent and the Municipal Corporation's attempt to justify the impugned order overlooks larger issue of public safety. He would submit that there cannot be any compromise nor can the threat or risk perception be diluted in the manner suggested by the

respondents. He would submit that the admitted facts are that the refinery has been constructed and is existing since 1955. This refinery manufactures and refines petroleum products. These are combustible materials and substances. By its very existence, a refinery poses enormous risk and threat to the life and property of those residing or carrying on business in its close vicinity. Mr.Singh submits that apart from the threat to the refinery by subversive and terrorist acts, considering its nature a refinery poses health hazards for those who reside in its vicinity. Eventually all safety measures and precautions are taken, but that would not rule out an untoward incident. On an untoward incident/accident occurring, there is every likelihood of the people residing close by suffering casualties. Apart from that, the congestion in the surrounding areas would make it difficult for emergency vehicles to enter and evacuate not only the personnel engaged by the petitioner but the residents and others carrying on business in the close vicinity.

33. Mr.Singh would submit that the sheet anchor of the arguments of the fourth respondent is the fact that there are already existing construction and development activities. It is urged by Mr.Singh that a slum rehabilitation scheme has been implemented very close by is one of the justifying factors apart

from three other buildings which are already constructed. He points out, with reference to the documents, that insofar as “Tulsi Terrace” is concerned, that building was already constructed in the year 2002 and is of ground plus seven upper floors. Insofar as “Mamta Deep Heights” is concerned, there is a litigation pending and this construction would be subject to the outcome of the same. As far as the “Shanbag Terrace” is concerned, it is an incomplete construction. Rather, the construction activity is virtually abandoned. Mr.Singh would submit that because certain construction activities were not objected earlier is no ground to allow another activity of similar nature to come up within such close vicinity of 50 meters approximately from the compound wall. This is a vital installation and even if the petitioner has sympathies for the occupants of the building, including members of the third respondent-society that by itself does not permit it to compromise with security issues. These risks cannot be diluted or allowed to be diluted by taking such a view of the matter. Mr.Singh, therefore, submits that the impugned order overlooks the issues of larger public interest and public safety. It deserves to be quashed and set aside. It deserves to be quashed and set aside also because the matters of public interest and security are inbuilt in planning statutes like the Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as “the MRTTP

Act”) so also the Development Control Regulations framed thereunder. Mr.Singh also submits that despite other buildings existing at site, in cases where the objections have been raised by the petitioner or similar refineries, this Court and the Hon'ble Supreme Court has not permitted initiation or carrying on of construction activities for these reasons. He would submit that when there is a threat of national dimension, then, all the more we should not sustain the impugned order. He would submit that the threat and vulnerability assessment should be carried out periodically. At no stage, there is any report received that there is no threat perception any longer or now there is no possibility of any attacks or accidents. Once there cannot be any guarantee or certainty in such matters, this Court should not sustain the impugned order.

34. In support of his arguments, Mr.Singh relied upon the following decisions:-

- i) Union of India Vs. State of Maharashtra, reported in (2016) 4 Bom CR 549;
- ii) TCI Industries Ltd. Vs. State of Maharashtra, reported in (2014) 3 Bom CR 210;
- iii) Akbar Travel of India (Pvt) Ltd. Vs. Union of India and Ors. [Writ Petition (L) No.656 of 2009];
- iv) SCOD 18 Networking Pvt. Ltd. Vs. Ministry of Information and Broadcasting, reported in 2015 SCC Online Bom. 6570;

- v) Narangs International Hotels Private Limited Vs Union of India, reported in 2011 SCC Online Bom 727;
- vi) Bycell Telecommunications India Pvt. Ltd. Vs. Union of India, reported in 2011 SCC OnLine Del 5295;
- vii) Hindustan Petroleum Corporation Ltd. Vs. Municipal Corporation of Greater Mumbai, reported in (2012) 5 Bom CR 379;
- viii) Oswal Agro Mills Limited Vs. Hindustan Petroleum Corporation Limited and others, reported in (2014) 2 Supreme Court Cases 491;
- ix) TCI Industries Limited Vs. Municipal Corporation of Greater Bombay, reported in (2012) 5 Bom CR 353;
- x) Tirandaz Subha Niketan Co-Operative Housing Society Ltd. and others Vs. Union of India and others [Writ Petition No.3013 of 2018];
- xi) Sea Kunal Corporation Pvt. Ltd. Vs. Municipal Corporation of Greater Mumbai [Writ Petition No.3217 of 2018]

35. Mr.Sakhare, learned senior advocate appearing for respondent Nos.1 and 2 would submit that merely because a stop-work notice was issued earlier does not mean that the Municipal Commissioner was precluded or prohibited from re-examining the matter and in terms of the directions of this Court. He has examined and scrutinised the materials minutely. He has also taken into consideration the threat perception and issues of safety. While not ignoring them, the Municipal Commissioner has permitted the construction activity with stringent conditions being imposed. Such a discretion, therefore, does not require interference in our writ jurisdiction. It is erroneous to say that the Mumbai Municipal Corporation has allowed the matters of

security and threats to a vital installation to take a back seat. An overall view of the matter has been taken and, therefore, we must sustain the impugned order.

36. The writ petition has been essentially contested by the fourth respondent and Mr.Vashi, learned senior advocate highlighted the facts as set out and narrated in the affidavit in reply of the fourth respondent. He would submit that there is no denial of the same. He would submit that the fourth respondent has taken several steps. There is absolutely no substance in the arguments of the learned Additional Solicitor General and the petitioner cannot selectively oppose construction and development projects in the vicinity. Mr.Vashi would argue that very close by is the free way. The free way is at such a height that any vehicle passing by can be stopped and one can easily witness from that height every single activity in the refinery premises. The free way has never been objected to by the petitioner. That project has been completed to the knowledge of the petitioner. There is also a proposal to widen the road and for that, the land has been surrendered. When the construction of the fourth respondent has progressed, after the plinth commencement certificate has been granted, further to the first floor slab, then, we should not entertain this petition. In fact, this is a second

petition challenging the same project. In the first round, the fourth respondent has approached this Court challenging the stop-work notice which came to be issued at the instance of the present petitioner. Now, the matter has been fully considered by the highest official, namely, the Municipal Commissioner, then all the more, we should not interfere with the impugned order and dismiss this writ petition. Mr. Vashi has brought to our notice the decisions of this Court as also of the Hon'ble Supreme Court which according to him, conclude the matter.

37. For properly appreciating the rival contentions, we must first refer to the order and directions of this Court in the writ petition filed by the fourth respondent. The order of this Court ought to be perused as a whole. The order does not direct issuance of permission and approvals, but a close and minute scrutiny of the material relating to the apprehensions of the petitioner. This Court entrusted a duty to the highest official in the Municipal Corporation in the hope that he would not only seriously consider the concerns expressed by the petitioner, but also the relevant documents placed on record by the society and the developer.

38. Pertinently, this Court referred to the arguments of Mr. Anil Singh. It also took into consideration an affidavit in reply filed by

Mr. Shirish Chandekar, Constituted Authority and Senior Manager (Employees) of the refinery of the petitioner. In that affidavit, reference has been to the categorisation of the installation and once it is categorised as category 'A', it is brought on par with such vital installations like the Bhabha Atomic Research Centre and others dealing with Defence, Space, Power, Ports, Ship Building, Oil and Gas, Dams and Heavy Engineering. These activities are very sensitive. They are not only vital and crucial for the national economy and over all development of the nation and making it self sufficient, but given the advancement in science and technology when new methods are employed and the potential of the refinery is maximised, there is every likelihood of any untoward incident or an accident occurring at the site. The deployment of manpower and machines having increased over the years and decades particularly, to meet the demand in the competitive market, the security concerns are that much multiplied. Wherever constructions are carried out in the close vicinity of such vital installations, the concerns of the parties like the petitioner have to be seriously noted and considered.

39. In that light, we must also refer to a representation, copy of which is at Exhibit 'X' page 117 of the paper-book, forwarded by the present petitioner.

40. In that representation, the petitioner dealt with several aspects of the matter, *inter alia*, the refinery products. In addition to petroleum products, the refinery has tanks within its complex with a storage capacity of about 1261 thousand metric tons, wherein, huge quantities of petroleum products are stored, particularly in compliance of the Government's directive to ensure that atleast 45 days petroleum production at national level is maintained. The storage is also to meet all emergency requirements. The petroleum products refined, produced, manufactured and stored at the said refinery are highly inflammable and combustible, as a result whereof, the protection and security of the said refinery and installations within it is absolutely important. That is to prevent accidents as well as to avert subversive activities aimed at damaging the said refinery. The petroleum products are stored in huge iron tanks along the northern and western boundaries of the said refinery. On the northern side, there are human settlements and the population in that area has grown over the years. From time to time, the petitioner has taken various measures and enhanced the security and protection to the refinery and the installations within. It has set out the nature of the measures taken briefly, but emphasised that except for some small hutments in the south west corner, the western side of the refinery is lying vacant. There are industrial

units which have come up on the northern, southern and eastern side of the refinery. It is then claimed that the Ministry of Home Affairs confirmed the categorisation and from time to time impressed upon the State Government to take measures to safeguard and protect these installations. The materials referred to in the memo of this petition are highlighted in this representation. The correspondence, particularly in relation to “Mamta Deep Heights” is also referred and it is claimed that even though a writ petition is pending in this Court, it cannot be said that any construction activity has been consented to by the petitioner expressly or that it has acted in such a manner so as to waive its right to object to the construction activities, within the close vicinity of the refinery. That construction activity has been allowed or despite objections is continuing at site does not mean that a new development within close vicinity and at a distance of 50 meters cannot be objected to.

41. We would now refer to the impugned order in order to find out as to whether it addresses these concerns. When the petitioner points out that the proposed construction of multi storied building is approximately at a distance of 30 meters from the refinery, namely, the compound wall of the refinery and would be a security threat, as also highlighted the fire incident at Indian

Oil Depot at Jaipur, then, all the more we expected the Municipal Commissioner to seriously note these matters and concerns.

42. While these materials were before the Municipal Commissioner, what we have found from a reading of the impugned order is that the Commissioner says that he has gone through the representation of the petitioner. He also considered the materials placed by the petitioners, namely, respondent Nos.3 and 4 before this Court in earlier writ petition. The third respondent-society said that their building was constructed sometime in the year 1972-1973. It was ground plus three upper floors. It is in deteriorated condition. The developer has obtained the consent of the society and after applying for IOD so also being permitted to commence the construction, has demolished the existing building on 22nd July, 2015. The argument of the petitioner in Writ Petition No.1418 of 2016, the third respondent before us, is that in the vicinity of the refinery, there are more than 72 buildings developed in a slum rehabilitation scheme. In the adjoining land, there is a building "Tulsi Terrace" of ground plus seven upper floors already existing. There are many structures, buildings and slums and equally a mono rail project. There is whole Gaothan and only one construction is being opposed.

43. After referring to the detailed representation of both sides, the Commissioner concluded that the refinery is inhabited by many plots in the vicinity which has increased in sizable population over the last four decades. He is highly impressed by the fact that within the vicinity, the construction activities have been allowed. There are other buildings constructed and if the petitioner faces one more existing construction activity within 50 meters of the compound wall, then, that does not enhance the risk or threat appears to be the understanding of the Municipal Commissioner.

44. The construction activity permitted by the MCGM has been highlighted by the Commissioner and he says in the impugned order that the reliance by the petitioner on the case of *Oswal Agro Mills Ltd. Vs Hindustan Petroleum Corporation Limited* (supra) is of no assistance for the simple reason that the present case is of redevelopment of the property which is already in existence. Thus, the new construction is to accommodate its occupants, that would not fall foul of the planning law. Even in matters of safety and security, there is absolutely nothing in law which would enable him to interfere with the construction activity. All the more, when there is no Buffer Zone notification or any such direction from the higher authorities. Para 7 of the impugned

order at running page 145 reads as under:-

“The Respondent No.3 I.e. BPCL has stated that it is a vital installation coming under EA F class where Civil Constructions, building etc. will pose security hazard to its installations and to General public around it. BPCL has represented that in the recent meeting held on December 2016, under the chairmanship of Special Secretary (Internal Security), Minister of Home Affairs, it is mentioned that it is essential to make provision/legislation in the form of act or gazette/notification, creating a Buffer Zone (of 500 mt. or more depending on the sensitive/hazardous nature of the vital installation) around the vital installations where constructions/occupation of land will be prohibited due to security reasons. However, no such directives, gazette notification/sanction for any Buffer Zone is so far received from U.D.Department.”

45. It is in these circumstances, he passed the following order:-

“After going through the above facts, I pass the following order:-

Order

The permission granted for redevelopment to M/s Satwaratna C.H.S. Ltd. on C.T.S. No.35 & 39 is as per D.C.Rules & Regulations 1991 and the same shall be continued. Petitioner No.1 & 2 shall submit a registered undertaking stating that the flats will be sold to prospective buyers only after his/her due police verification is made. Also, a clause mentioning police verification of further prospective buyers/tenants shall be made included in the sale deed/agreement. They shall provide round the clock registered security to the building and avoid harm from miscreants.

As regards Respondent No.3 i.e. BPCL's concern towards the safety & security of the vital installations/refineries, it is suggested that BPCL can acquire the surrounding land and may apply to Government for suitable modification in the Development Plan for a Buffer zone for a certain distance, as deem fit and proper.”

(AJAY MEHTA)
Municipal Commissioner
Municipal Corporation of greater Mumbai”

46. After perusal of the order of the Municipal Commissioner, it is evident that he has totally downplayed and virtually ignored the security concerns expressed by the petitioner. We are surprised that these concerns are treated only as a version of the petitioner. We are sorry to say that this is not a correct approach in matters of this nature.

47. For one, the concern is founded on two critical aspects. First is safety. Now, natural calamities come uninvited. On such occasions, it is the normal and ordinary expectation of the general public and those caught in and are victims of calamities, that rescue operations are commenced forthwith. The response, therefore, ought to be almost immediate. The teams and squads in-charge of emergent relief and rescue measures ought to reach the site within minutes and not hours. If the construction and development in the vicinity of the refinery is not regulated, restricted and controlled, then, a natural calamity can never be tackled properly if not averted altogether. When bureaus in charge of climate and weather can now foresee a cyclone, heavy to very heavy rainfall causing floods, mudslides, landslides etc. then, adequate safety measures have to be taken by making suitable advance arrangements. Huge amount of machinery and manpower has to be deployed even before the calamity strikes

and it must be totally geared up, prepared so as to minimise the loss to life and property. A refinery is not comparable with any other establishment. Its existence meets and satisfies the Nation's fuel requirement. Given its prominence, a refinery has to be protected and safeguarded in a manner excelling every other building. It has to be equipped from within and must receive total outside support so as to meet a natural and man-made calamity and disaster. A refinery catching fire means enormous loss to the public exchequer. The operations in such establishment go on round the clock (24x7). They would be at a standstill if a major fire, explosion, accident etc. occurs. The Commissioner appears to be wholly oblivious to all this. It never strikes him that it is the Municipal Corporation which stopped the construction when above concerns were expressed, then, how can the Municipal Corporation be justified in taking a U-turn now ought to have entered his mind. Far from it, even though there was nothing on record to arrive at a conclusion that all concerns of the petitioner are no longer subsisting, the Municipal Corporation has in the impugned order gone back and allowed resumption of construction. This is wholly inexplicable and the approach is wholly perfunctory.

48. Secondly, the security of the refinery is of paramount consideration. That must prevail over a commercial or private business enterprise. The refinery under continued threat of the nature highlighted above means risk to human life, threat to the economy and loss of reputation of the State as a whole. The world at large will ridicule us if a prime refinery in Mumbai is destroyed by terrorists and subversive activities of a handful. One can only imagine the magnitude of the financial and economic loss in the event such activities stall or obstruct production of petroleum products.

49. The decision making should not be influenced by any other except the above yardsticks and parameters. The above is not the manner in which these matters have to be decided. In the first instance, this Court itself would have gone into the concerns expressed by the petitioner and equally considered the versions of respondent Nos.3 and 4. However, it gave an opportunity to the Municipal Corporation to have a second look particularly because it had earlier issued the stop-work notice. There is not a word as to why a stop-work notice was issued in the year 2016 despite all permissions and approvals in place. If the Municipal Corporation found substance in the complaint of the petitioner and its genuine concerns leading to the issuance of stop-work notice, then, we do

not understand the turn around. This turn around is virtually fatal. If such high level officials and particularly, drawn from Indian Administrative Service and working as Municipal Commissioners take a pedantic view in a matter of national importance and concerning public safety, then, we are compelled to hold that their approach overlooks the very object and purpose of a planning legislation.

50. The MRTP Act is an Act enacted by the State Legislature. That Act is to make provision for planning the development and use of land in Regions established for that purpose and for the constitution of Regional Planning Board therefor, to make better provisions for the preparation of development plans with a view to ensuring that town planning schemes are made in a proper manner and their execution is made effective. It is also an Act to provide for creation of new towns by means of Development Authorities and to make provisions for compulsory acquisition of land required for public purposes in respect of the plans and for the purpose connected with the matters aforesaid. Thus, the aim is, there should not be uncontrolled, unregulated and unrestricted construction and development activities leading to chaos. The sole purpose for which a planning law is enacted is to ensure a planned development. Several provisions of this Act and when it

is divided into Chapters as many as IX in number are to fulfill this primary object and purpose, then, one cannot overlook this aspect altogether. The planning legislation and particularly, the provisions like Section 22 thereof take care of the concerns expressed by the petitioner before us.

51. By Chapter III titled as “Development Plan”, Section 21 enables such a plan to be put in place. Such a plan has the contents enumerated in Section 22. The proposals for allocation, the proposals for designation of land for public purpose, the proposals for designation of sites, service industries, industrial estate and any other development, reservation of land for community facilities and services, preservation, conservation and development of areas of natural scenery and landscape, proposals for flood control and prevention of river pollution and also to secure the use of land in the manner provided by and under this Act are the contents broadly indicated. It is common ground that development permissions are granted in accordance with the provisions, particularly carved out from Section 43 onwards. There is a declaration of the development area and after it follows Chapter IV titled as “Control of Development and Use of Land included in Development Plans”. Section 43 places restrictions on the development of land and permission is required to carry out

any development. Such permission is to be in writing. The permission is not necessary for carrying out the work for maintenance, improvement or other alteration of any building, being works which affect only the interior of the building or which do not materially affect the external affairs thereof, except in case of heritage building and carrying out of any works in compliance with any order or direction made by any authority under any law for the time being in force and carrying out of works by any authority in exercise of its powers under any law for the time being in force. Clause (iv) of Section 43 deals with the work of Central or State Government or any local authority. That inter alia includes highway etc. The application for permission for development is contemplated by Section 44 and it is evident therefrom that a previous permission has to be obtained. When the application for permission to develop is under consideration, there should be due regard to the provisions of draft or final plan or proposal submitted or sanctioned under the Act. It is, therefore, further evident that the development cannot be disorderly and undisciplined.

52. The Development Control Regulations for Greater Mumbai are traceable to Section 22 Clause (m) and we have no doubt in our mind that read with the contents of the development plan and

the MRTP Act, matters of public safety and public interest are in-built in the scheme of this legislation. Even a subordinate legislation like DCR has taken note of matters of public interest and public safety. There is no provision in the law which enables haphazard construction or control-free development. That some areas are congested does not mean that even though they are in the vicinity of a installation of great importance, that they should be permitted to be redeveloped. That only attracts more members of public in a thickly populated city like Mumbai and increases the number of people residing in the same. If such congested areas are nearer to or in close vicinity of a oil refinery or other installations of vital importance for the nation, then all the more, it is the duty of the planning authority to avoid granting permissions for development and redevelopment of properties in already crowded places particularly very near or in proximity with airports, refineries etc. We have witnessed several legal proceedings instituted by the residents of this city, who are not inclined to go and occupy tenements, particularly in Mahul, Mumbai. When Mahul was chosen by the Municipal Corporation as a locality for resettling and rehabilitating project affected persons, there was a hue and cry and serious resistance. That led to litigations in this Court and this Court issued directions to resettle and rehabilitate the project affected persons in some

other locality.

53. Thus, Mahul was not the area permitted by this Court for rehabilitation and the objections of the residents were upheld. There is reason for the same and that is the existence of refinery of the petitioner and such other installations in very close vicinity of this Gaathan or other residential areas in Mahul. That the factories, industries and installations dealing with inflammable and obnoxious substances and products by themselves present a threat to the life of the people residing in buildings within their proximity. If the people residing there are likely to face serious health issues on account of emission of gases and toxic substances, leakages and accidents in these installations, then all the more, the stand of the Municipal Corporation, when it agreed to resettle and rehabilitate the project affected persons to a locality other than Mahul and the present departure therefrom cannot be reconciled. We have witnessed a totally opposite approach in this matter. The Municipal Commissioner is aware of the fact that there is a risk in residing within close vicinity of such installations going by the nature of the activities in such installations. They are hazardous to health and in the case of a mishap would result in death or loss of limbs. If instances of leakages and accidents occur frequently and poisonous gases are

released day in and day out from such installations, then, it would not be possible to save human lives or to retrieve persons caught in such accidents. Some of them may be employees of the refinery. They have to be rescued and brought out. For that, a huge emergency plan has to be drawn up and implemented. The areas have to be evacuated so that emergency vehicles can reach such installations in record time. If these vehicles do not reach and the necessary manpower is not able to access the sites of such installations expeditiously and quickly, then, precious human lives would be lost. Therefore, there is not only a threat perception of the nature presented by Mr.Singh, but existence of vital installations like a refinery by itself enhances the possibility of danger and harm to the people. The nature of the activities in refineries and like installations cannot be wished away, ignored or brushed aside so lightly and casually as has been done in the present case. Nobody can assure or guarantee that despite strict security and safety measures, no accidents will occur in future. None can guarantee that there will be no explosion or no leakage. When there are number of hazardous industries in Mumbai Suburban, Thane and Palghar Districts, and the accidents in such industries have resulted in loss of precious human lives and destruction of property, then all the more, we are unable to sustain the approach of the Municipal Corporation and the

Municipal Commissioner. For instance, every factory manufacturing hazardous goods and products has witnessed at least one fire and explosion, it comes uninformed and unpredicted and at odd hours. Thereafter, we have seen a rush to the site and emergency vehicles have to be brought from all over so as to commence the rescue operations. There is a salvage operation also to be carried out. All this requires areas within the vicinity of such industries to be kept open from human occupation. If human beings reside very freely in these localities, then, they may also be victims. The construction activity cannot be controlled, but if not checked at the right moment, increases the harm and danger assuming that such checks do not necessarily guarantee and ensure safety of the occupants. The occupants face a continued risk to their life and to their property. That is not minimised by passage of time. Rather, by passage of time, it increases. The population expansion and its pressure is bound to result in more serious accidents or incidents of the nature described above. Pertinently, in the impugned order, the Municipal Commissioner does not conclude that the concerns of the petitioner are imaginary and not real. There is a reason for stressing on safety, security issues repeatedly. The petitioner has not been held guilty of exaggerating them. To then not take cognizance of such issues and matters by holding that there is no

law setting a regime like creation of a buffer zone is to neglect and gloss over the same. There is no prohibition in law to be wise enough and to do everything possible to avoid a disaster and catastrophe.

54. We have not seen any attention paid by the Municipal Commissioner to the above aspects. Equally, we have not seen in the impugned order, the Commissioner taking into consideration the apprehensions expressed by the petitioner. The petitioner points out as to how the vital installations are targets of terrorists and the activities of this nature are carried out throughout the world. Such installations are regular targets. To paralyse the economy and to block the regular supply of petroleum products that regularly the refineries are attacked. Merely because after 26th November, 2008, no terrorist attack or bomb blast has taken place in the city of Mumbai does not mean that there will be no recurrence of the same in future. In fact, because of the high alert and strict vigil that such attacks are averted. Moreover, sustained efforts in improving the standards of safety and security would not necessarily guarantee that in future, there will be no attacks mounted on all vital installations in the city of Mumbai. In fact, the recent developments denote that on several occasions and particularly when there are such incidents in the

neighbouring countries, an alert is sounded, cautioning all concerned, by the Intelligence Agencies in India. They alert everybody, including parties like the petitioner and request them to take additional protective and safety measures. They place the installations like the petitioner in high risk zone. Additional forces are deployed and we see their presence round the clock. In fact, the concerns expressed by the petitioner have not been addressed by the authorities. We cannot be unmindful of the fact that despite high level meetings convened, no comprehensive policy measures are taken. It is left to the petitioner to upgrade its safety measures. It is left to the petitioner to then deploy additional security officials. It is only left to the petitioner then to strengthen its boundaries and compound walls. However, this is an individual endeavor. A comprehensive action plan has to be put in place. That is not only by the planning authority and Ministry, but equally by the Central Government and Central Industrial Security Forces and agencies like the same. They have to sit together and draw up a contingency and security plan. We, hope and trust that it would be done expeditiously.

55. Further, we do not understand how in the absence of a demarcation of the buffer zone, the permission as sought by respondent No.4 deserves to be granted. The permission already

granted could not have been objected in absence of the buffer zone appears to be the view of the Municipal Commissioner. He categorically observes that it is essential to make provision or legislation in the form of an Act or a Gazette Notification, creating a buffer zone of about 500 meters or more, depending upon the sensitive and hazardous nature of the vital installations. Thus, such a zone around the vital installation, where construction will be prohibited due to security reasons, is presently not in place according to him. No directive or notification in law for buffer zone means one should necessarily grant or sustain the development appears to be his view. We cannot uphold it as the Municipal Commissioner ought to be aware that it is not necessary to prescribe such a zone and if that is not prescribed, the concerns of public safety and larger public interest have to be ignored or brushed aside. They cannot be kept aside. Rather, they should be present to the mind of a authority like the Municipal Commissioner and he must not allow any further construction to take place.

56. The whole edifice is built on several constructions and buildings within the vicinity existing for years together. We cannot appreciate as to how mere construction or building activity continuing in the vicinity would permit one more building

to be raised and particularly, within 50 meters from the compound wall of the refinery. If more than one buildings have already come up or more than one buildings are already existing and those are existing for decades together does not mean that additional building or new development should be permitted. There is no such law nor there is any regulation, nor there is any blanket authority of this nature. There is no vested much less fundamental right in a developer and a builder or owner of the immovable property or land of the nature proclaimed before us. However, a legal right, depending upon the terms carved out in several laws and rules and regulations, does exist. Thus, the right to property has ceased to be a fundamental right, it is nevertheless a constitutional right, but that is also not unconditional or absolute in nature. The right to construct or develop is subject to planning and equally municipal laws. It is subject to stringent conditions that development activities are permitted. Therefore, we do not see how the construction activity of the fourth respondent can be permitted merely because there are existing buildings in the vicinity. We do not think that the presence of high rise building in the vicinity for decades together would automatically allow one more to be constructed. The argument is that at a close distance and vicinity of this refinery is the free way. That free way has an elevation of such a nature that

standing on that free way would give a unobstructed view of the activities in the refinery. However, the free way has never been objected by the petitioner. If that is how the matter is to be perceived, then, flying over the refinery would have also to be prohibited. This perception is so naive and if accepted, every high rise building which presents an unobstructed and unrestricted view of the refinery must necessarily be permitted. The faint attempt is to show that if aircrafts can fly over high rise buildings and they can be constructed giving a free view of the activities, but till date no attack on the refinery from air, ground and roof tops have taken place does not mean that there will be none in near future and that by itself is no ground to allow one additional high rise construction to come up. In fact, it would be quite apposite to conclude that miscreants would still attempt to mount an attack by this technology, including using Drones. However, that has not succeeded because of the alertness of the security staff deployed at the vital installations. They painstakingly safeguard and protect the refinery. Their continuous vigil has averted many a mishaps and attacks. It is necessary therefore to strengthen their hands by not permitting a further construction activity in such close vicinity. It is better to be wise now than repent later on. In fact, the essence of planning is to visualise beforehand the danger to national security. If one

has an opportunity to avoid a risk and threat to the security and safety of the installation like that of the petitioner, then, that is a very relevant factor and has to be present to our mind. We must avoid future threats and if that is the endeavor of the petitioner, then, we do not see how its apprehension, as highlighted and projected before the Municipal Commissioner and before us, can be said to be without any basis.

57. This Court has been repeatedly taking a view that the planning authorities should not casually and mechanically grant development permissions in close vicinity of such vital installations. That is how the judgments relied upon by Mr. Anil Singh would read. In fact, his reliance on the judgment of this Court, particularly, in the case of *Oswal Agro Mills Limited* (supra) is apposite. When the matter was carried to the Hon'ble Supreme Court of India and the three Judge Bench considered it, there was a difference of opinion. One Hon'ble Judge of the Supreme Court found no basis in the objections raised by Hindustan Petroleum Corporation Limited whereas the majority found that their concerns and particularly, with regard to health, safety and security are extremely relevant factors. The majority has upheld the view taken by this Court. While upholding the view of this Court, it has been observed by the majority that the

objections lodged were required to be considered by the Municipal Authorities, but they did not consider them. Rather, they refused to consider them on a total erroneous reading of Development Control Regulations (DCRs), as can be seen from their letter dated 28th October, 2010. When human habitation is permitted in proximity hazardous plants, there is an immediate, as well as long-term, danger of exposure to health hazards. The Planning Authority cannot ignore this aspect. The public interest cannot be sacrificed at the altar of commercial interests. The submissions of the Municipal Corporation and the appellant are clearly contrary to the regulations. These observations in paras 25 to 28 of the judgment of the Hon'ble Supreme Court ought to serve as a reminder to the Municipal Authorities. However, we find that the Municipal Corporation of Greater Mumbai has not learnt any lesson despite the authoritative pronouncement of the Hon'ble Supreme Court. The Hon'ble Supreme Court of India held further that if there is a security threat and possible danger to the health of the occupants of the buildings already constructed and to that of the prospective occupants of the buildings which would be coming up, then, that is a very crucial aspect and requires serious consideration. The Hon'ble Supreme Court emphasised that the security threat is clearly placed on record so also a possible danger to the health of the occupants of the buildings

already constructed and to be constructed as well.

58. We have applied this very test to the facts and circumstances of the present case. When we apply it and decided the matter on the touchstone of the same, naturally, we cannot uphold the arguments of Mr.Vashi.

59. Mr.Vashi would submit that the judgment in *Oswal Agro Mills Limited* (supra) is not apposite nor is the principle of any application of the facts in this case. Mr.Vashi relied upon another judgment of Division Bench in the case of *Bharat Petroleum Corporation Limited and Anr. Vs. State of Maharashtra and Ors.*, reported in [(2009) 5 AIR Bom R 694].

60. A very close look at the facts of that case would reveal that the subject matter of the petition was land in village Mahul Taluka Kurla. It is at the distance of 80 meters from the boundaries of the land on which the refinery of the Bharat Petroleum Corporation Limited was situated. This land was originally owned by Mafatlal Fine Spinning and Manufacturing Company Ltd. It was partly in special industrial zone and partly in residential zone. That was as per the development plan of M-Ward sanctioned in the year 1967. A portion of the said land was reserved for public amenities, such as garden and development

plan road. In the year 1984 when the draft development plan was published, the land was proposed to be marked as “No Development Zone”. The land was also affected by the Urban Land Ceiling Act and declared surplus. During the process of consideration of objections and suggestions of the public, the land owner and the petitioner before this Court made a representation for deletion of the designation of the land as “No Development Zone”. The request was to place it in residential zone because the petitioner before this Court and the land owners had entered into a Memorandum of Understanding for development of the land for construction of staff quarters for the employees of the petitioners. At the request of the petitioners and the owners, therefore, certain portion of the land was included in the residential zone so as to enable the construction of staff quarters. There were conditions imposed. The exemptions were granted accordingly. Thereafter, a development as noticed by the Division Bench, took place and the correspondence. Thus, the correspondence with the State Government had to be responded, but the petitioner-Bharat Petroleum Corporation Limited did not respond and the developer responded. This Court found that the petitioner-Bharat Petroleum Corporation Limited was not interested in pursuing the matter. The letter to that effect was not addressed by the petitioner-Bharat Petroleum Corporation Limited, but the

developer. From the record, it appears that there was a communication from the Intelligence Bureau. That communication to Bharat Petroleum Corporation Limited revealed that construction activities started by respondent No.8, after the exemption order being modified, presented some security threats. After that communication, there was further correspondence and it appears that the petitioner and the Municipal Corporation continued the same. There were meetings and in them, some decisions were taken. After the developments to that effect have been noted, what the petitioners were aggrieved by is that the order issued by the State Government making modifications to the exemption notification issued under Section 20 of the Urban Land Ceiling Act and the Conveyance which was executed so as to allow rehabilitation of slum dwellers and foot-path dwellers on the land belonging to the industry, came to be questioned. It is in that context and in that factual background, the Division Bench made the observations relied upon by Mr.Vashi. The Division Bench held that assuming that there is a security threat to the refinery of the petitioners because of the designation of land in the final development plan for rehabilitation of slum and foot-path dwellers, that designation can be cancelled or annulled only in accordance with established law and merely because there is an apprehension of security threat,

the established law cannot be ignored. Thus, no relief can be granted to Bharat Petroleum Corporation Limited in absence of legal provisions which would enable a security threat to displace the designation in the final development plan. The designation in the final development plan designating a land for the purpose of rehabilitation of slum dwellers and foot-path dwellers cannot be cancelled only on such apprehension and absent a clear legal provision is the ratio of this judgment.

61. We are not faced with any such situation. We have, on the contrary, a situation where the stop-work notice was initially issued and the construction activity by respondent No.4 was stopped. Aggrieved and dissatisfied with that stop-work notice, a writ petition was filed in this Court and on that writ petition, after hearing both sides, the above reproduced order came to be passed. Pertinently, respondent Nos.3 and 4 to the present petition are the petitioners in that writ petition. They accepted the orders and directions of this Court to the effect that the Municipal Commissioner must revisit the whole matter and take a fresh decision. Once they accepted that decision and went back to the Municipal Commissioner and an order favourable to them was passed, which is now challenged, then, we do not see how the above judgment of the Division Bench can assist them.

62. The judgment in the case of *Muni Suvrat-Swami Jain S.M.P. Sangh Vs. Arun Nathuram Gaikwad and others* [(2006) 8 *Supreme Court Cases* 590] is reiterating the salutary principle that when the power conferred in statutory authority is discretionary in nature, no writ or command from the Court be issued to frustrate or to defeat that exercise of power. Thus, the discretion cannot be directed to be exercised in a particular manner. That should always be present to the mind of a Court while issuing a prerogative writ or writ of mandamus. Thus, there cannot be a command or writ to demolish the construction, even if it is found to be unauthorised and illegal so long as there is discretion vesting in the authority in-charge of proceeding against it and that authority can take a call whether to demolish it or otherwise. This judgment also has no application to the facts and circumstances of the present case simply because we have found that the discretionary power exercised in this case is vitiated by non application of mind. It is vitiated by total non application of mind to very relevant and critical aspects particularly of security, public interest and public safety. Once these serious concerns voiced before us are totally ignored by the Municipal Commissioner, then, we have to hold that the discretionary exercise is vitiated by non application of mind for it allows the construction ignoring the larger public interest and matters of

public safety. This is the reason assigned by us not to sustain and uphold the discretionary exercise. Once such is the case, the prerogative writ must be issued to demolish such exercise of discretion and to uphold the rule of law.

63. Once we precisely do that, then, the judgment in *Muni Suvrat-Swami Jain S.M.P. Sangh* (supra) has no application to the matter at hand.

64. As a result of above discussion, this writ petition succeeds. The impugned order is quashed and set aside. Rule is made absolute accordingly. There will be no order as to costs.

65. In view of the disposal of the writ petition, the Notice of Motion does not survive and stands disposed of as such.

(B.P.COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)