



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR
WRIT PETITION NO. 5172 OF 2024**

The Station, HQ Kamptee and anr .. Petitioners

Versus

Nagpur Municipal Corporation and .. Respondents
ors

...

Ms.Mugdha Chandurkar for the petitioners.

Mr.Surendra Mishra, Senior Counsel for the Nagpur Municipal Corporation – respondent no.1

Mr.Deven Chavan, Senior Advocate and Government Pleader for the Collector/District Magistrate - respondent no.2.

Shri Sunil V Manohar, Senior Advocate with Shri Atharv S. Manohar, Advocate for respondent No.3.

CORAM: BHARATI DANGRE &

ABHAY J. MANTRI, JJ.

RESERVED ON : 9th OCTOBER, 2024

PRONOUNCED ON: 11th OCTOBER, 2024

JUDGMENT (Per Bharati Dangre, J):-

1. The present petition is filed by the Station HQ, Kamptee, through its Station Commander, seeking issuance of writ of mandamus or any other appropriate writ, order or direction against the respondents and in specific, the respondent no.3, M/s.Kukreja Infrastructure, to forthwith stop the construction of its building on plot no.2, Kh. No.178/1 Mouza Sitabuldi, bearing Corporation House No.7, City Survey No. 1704, Circle

21, Ward No.39, Commercial Road, Civil Lines, Nagpur, as it is being constructed without a 'No Objection Certificate' (NOC) from the petitioner, since the upcoming construction is situated near to the periphery wall of its Establishment, which is a Defence Establishment.

In addition to the primary relief, direction is also sought to the Nagpur Municipal Corporation, respondent no.1, not to grant any Development/ Building permissions, completion certificate or occupancy certificate to the building of respondent no.3 in respect of the aforesaid construction.

Another prayer in the petition is a direction against the respondents to forthwith vacate/demolish the building or in the alternative, reduce its height to 8 storey, as per the shadow shield clause incorporated in the NOC Guidelines, 2011 along with its amendment dated 17/11/2015, since according to the petitioner, the upcoming structure is detrimental to the Security of Defence Establishment, which is one of the vital defence establishments of Indian Army.

2. Upon the notice being issued in the aforesaid petition on 10/9/2024, on 24/9/2024, Mr.Sunil Manohar, the learned Senior counsel marked his presence on part of respondent no.2 and raised a preliminary objection about maintainability of the petition, by submitting that the construction of the subject building is over long back and on receipt of the occupation certificate on 25/8/2023, the building is already occupied and

also on the ground that the guidelines/circulars on the basis of which the relief is sought by the petitioner, do not apply to the building constructed by the respondent no.3.

We permitted affidavit in reply to be filed by respondent no.3 before the date of our next hearing.

Upon the pleadings being completed as the petitioner also filed rejoinder, we directed listing of the Writ Petition for hearing.

3. We have heard Ms.Mugdha Chandurkar, the learned counsel for the petitioner, Mr.Surendra Mishra, Senior counsel for the Nagpur Municipal Corporation, Mr.Deven Chavan, Senior Advocate and Government Pleader for the Collector/District Magistrate i.e. respondent no.2 and Mr.Sunil Manohar, learned Senior counsel representing respondent no.3.

In the wake of the pleadings being completed, since the respective counsels agreed for hearing of the petition finally, we issue 'Rule' , which is made returnable forthwith.

By consent of the parties, petition is taken up for final hearing.

4. The petitioner, Station H.Q. Kamptee is the head of the area of jurisdiction of Kamptee and Nagpur, and is aggrieved by the act on part of the respondents in carrying out construction of 'Kukreja Infinity' a high rise building of ground plus 28 storey with a height of 108.7 meters, on plot no.2 Kh.

No.178/1 Mouza Sitabuldi, bearing Corporation House No.17, City Survey No. 1704, Circle 21, Ward No.39, Commercial Road, Civil Lines, Nagpur, which according to it, is situated at a distance of 76 meters from its establishment, Auxiliary Force India (AFI) and 482 meters from Sitabuldi Fort location.

The grievance of the petitioner is, the construction being undertaken by the respondent no.3 and the requisite permissions being granted by the Nagpur Municipal Corporation, without seeking No Objection from it, since the necessary clearance is expected from local Military Authorities (LMA), as the upcoming construction is detrimental to the security of its establishment situated at Sitabuldi Fort, an Auxiliary Force India (AFI), and particularly, when the construction is undertaken in the proximity of the defence land.

For establishing this claim, reliance is placed upon various circulars/guidelines issued by Ministry of Defence (MOD) from time to time, restricting the construction activity to be carried out at a distance specified therein, from the location of the defence establishment and we have noted the arguments advanced on behalf of the petitioner, that it is through these guidelines, it has a right to claim that without its no objection, permission for construction ought not to have been granted by the Municipal Corporation.

5. Ms.Chandurkar, representing the petitioner has urged before us that the Defence Establishment located at Sitabuldi

Fort, an Auxiliary Force India (AFI), complex is spread out in an area of approximately 118 acres in Nagpur.

Narrating the history, it is her submission that the battle of Sitabuldi, was fought in 1817, during the Third Anglo War, the Fort being built by the Britishers. On 06.01.1818 British under Maratha ruler entered into a treaty which was subsequently ratified by the Governor General and in terms of Article 7 of treaty, the two hills of Sitabuldi with the Bazars and land adjoining came under the British control which was later handed over to the Indian Army, and was being put to use, as Defence Establishment, though the area around it developed later.

A copy of the defence estate office, Mumbai, Survey Map of 2012 prepared by the Civil Survey Department, along with the copy of the extract of Military Land Register (MLR), of Sitabuldi, an Auxiliary Force India (AFI), is annexed along with the petition.

Ms.Chandurkar would submit that the defence establishment is an establishment, comprising of Military permanent structures and its ancillaries in defined area of defence land marked with its boundary.

According to her, the function of defence establishment is defined by its operational role depending upon the war contingencies which at times is dynamic and unpredictable in nature and hence it is imperative to keep the Establishment

secured and protected at all times from any threat, so that the same can be utilized without any hindrance, when a contingency arises to make it operational. It is also highlighted by her that in today's unconventional war, when the enemy remains discreet, threat is looming all around, it is necessary to secure this area and the use of Sitabuldi and AFI Defence Establishment for storing of ammunition, has a major role to play and therefore, it is necessary to have the structures located at a safe distance from this establishment, as it may pose a threat, as the activity in the establishment may be easily visible.

6. The petitioner has invoked the provisions in the Work of Defence Act, 1903 (hereinafter referred to as 'WODA') which contemplate imposition of restriction on the use and enjoyment of land in the vicinity of defence work or installation by maintaining distance from the same and the restrictions being imposed for safety reasons and security of the "Work of Defence" by enforcing security measures in and around the installation.

The petitioner, in addition to the above Act, has placed reliance upon the guidelines/circulars issued from time to time, while the process of amendment of the Work of Defence Act, 1903, is already set in motion, but since it was consuming time, the gap was attempted to be filled in by issuing instructions, regulating grant of NOC, in the interregnum.

The guidelines on which the petitioner would placed reliance include the guidelines for issue of “No Objection Certificate” for building construction dated 18/5/2011, 18/3/2015, 17/11/2015, 21/10/2016 and 23/12/2022, along with the guideline dated 23/2/2023 issued by the Government of India, Ministry of Defence, which from time to time, has decided the applicable distance from the Establishment of Defence and contemplated No objection to be sought, while constructing any structure/building, dependent upon the distinct situations formulated therein.

We would be referring to the said guidelines a while later, when we come to its applicability to the facts of the case.

At this stage, it is suffice to note that it is based upon these guidelines, the petitioner is insistent upon securing its no objection by placing reliance upon a google map showing the Defence Establishment (Annexure 17) and placing before us certain relevant factors including the height of Kukreja Infinity, the highest residential building around the defence establishment, which according to the petitioner has defied all the rules and regulations of construction being carried out within 500 meters with the permissible limit of 4 storey. It is urged before us that the building is defying shadow and shield clause of NOC guidelines 2011, with the proposed construction of 20 storey, which is more than four times the height of adjacent building which is of 6 – 8 storeyed.

The apprehension expressed by the petitioner is the defiance of shadow-shield clause, would be a beginning of a wrong trend by constructing other high rise buildings, close to the defence establishment within 500 m, which in turn would over shadow the defence establishment and aggravate its security concern.

7. The petition contain a specific averment in respect of the other buildings in existence, by pleading as under :-

“6.3 Few buildings which have come up in vicinity after Year 2011 are District Court new building (09 storey constructed after 2011) is 853 Meters from the Sitabuldi Fort boundary and 536 Meters from AFI which poses no restriction as per NOC guidelines 2011 as there is ‘No Restriction’ of height/Number of storey’s after 500 Mtrs from defence boundary. In addition to that building is in shadow of buildings like Bata building (12 storey), NMC building (10 storey) and whole lot of construction between the commercial road and Red Cross road of similar height. So District Court New Building comply with Shadow – Shield clause and No restriction beyond 500 meters clause as per NOC guidelines 2011 hence not a security concern for Army. The other construction after Year 2011 in vicinity is Kingsway Hospital (8 storeys) is within 500 meters and in shadow and shield of existing Raisoni and Parkview Building (8 storeys, constructed prior to 2011) causes no concern as per NOC guidelines 2011 as buildings behind or in line can be of the same height and permitted as per the guidelines considering the texture of existing buildings in the area.

6.4 It is submitted that the Station HQ has forwarded the NOC guidelines 2011 along with the sketch of map of marked area around 100 meters and 500 meters at Nagpur and Kamptee to District Collector vide letter dated 09.02.2016, for ready reference so that the same could be taken into account while giving sanction for construction in residential area close to Defence Establishment and security concerns of Local Military Authority could be maintained. It is also highlighted that all type of constructions irrespective of Public or Private in radius of 100/500 Mtrs come under the purview of NOC guidelines and all are supposed to take clearance from the Local Military Authority as such situation arises.”

8. It is the grievance of the petitioner that the respondent no.1 Nagpur Municipal Corporation has sanctioned the building

plan permit for construction of 'Kukreja Infinity' on 1/2/2018, and it came to be revised on 2/7/2019 and further on 18/5/2021, without informing the Local Military Authority (LMA), overlooking the clauses of NOC guidelines for consultation before approval of the building plan, as per the guidelines of 2011 and 2016. It is also urged that the Nagpur Municipal Corporation incorporated the condition of securing clearance from Fire Department, and thereafter it approved the revised plan and it also sought No Objection from the Airport Authority which was secured on 10/3/2021, but did not bother to seek clearance from the Defence Department, before sanctioning the building plan and this was done in consonance with the UDCPR 2020, but despite a clear contemplation, as regards Defence Establishment, in form of clause 2.2.11, Clause 3.1.11 and 4.20 in the DCPR, the Corporation has failed to ensure compliance.

9. The petition contain the following averment for establishing the cause of action for filing of the Petition, seeking the relief mentioned above :-

"6.7 It is submitted that on 15.09.2022 the officer from the Petitioner's Office submitted a letter to the Petitioner No.1 about implementation of NOC Guidelines, 2011. Subsequent, to that another letter dated 24.09.2022 was issued by the Petitioner to the the Town Planning Department in the office of the Respondent No.1 requesting to forward the copy of existing regulation and provision issued by the State Government regarding construction activity in the area adjoining the defence boundary (Estt.) and distance to be left from the limited (Boundary) of Defence Establishment for any construction activity. Another letter dated 22.10.2022 was again sent to the office of the Town Planning Department in the office of the Respondent No. 1 requesting the same, copy of which was also marked to the Deputy Collector

(Revenue), Nagpur for necessary action. On 29.11.2022, a letter was addressed by the Petitioner to the then Collector and then Commissioner requesting them to implement the Ministry of Defence guidelines pertaining to issue of NOC for building construction dated 18.05.2011 along with reference to the letter which were sent from the office of the Petitioner to the offices of the Respondents. It was specifically requested in the said letter that instructions be issued by the Administrative Authority to its Municipal Bodies so that the guidelines said by the Ministry of Defence dated 18.05.2011 are followed by virtue of which a NOC is to be obtained by the Local Municipal Bodies from Defence Authority/Local Military Authorities for any construction coming up within 100 meters radius of Defence Establishment and upto 500 meters radius for erecting a building more than 4 storeys.

6.8 On 28.12.2022, the Deputy Director from the office of Town Planning Department from the office of Nagpur Municipal Corporation, Nagpur relied to the petitioner that the Nagpur Municipal Corporation, Nagpur is in receipt of the letters from the petitioner about the guidelines of 18.05.2011 about NOC to be issued. It stated in its reply that in UDCPR i.e. Unified Development Control Promotions Regulation for Maharashtra State, 2020 at point 3.1.11 Restriction under Work of Defence Act, 1903, will be supplied is included however, the requirement of NOC about 100 meter/500 meter distance as per guidelines dated 18.05.2011 is not specifically stated. In that said letter, it stated that there are 2 authorities i.e. Nagpur Municipal Corporation, Nagpur and Nagpur Improvement Trust, Nagpur who are responsible for the development in the city. The Town Planning Officer also assured that the petitioner should sent the due maps of the Defence Establishment so that it will be easier to identify the activities around 100 and 500 meters from the said locations.”

10. The above background facts placed before us, deserve an appreciation in the wake of the statutory framework and the guidelines/circulars issued by the Ministry of Defence, to ensure that the security restrictions in respect of defence establishments/installations are properly implemented and to begin with, we must make a reference to the Indian Works of Defence Act, 1903, a statute which provide for imposition of restrictions upon the use and enjoyment of land in the vicinity of works of defence, in order, that such land may be kept free from buildings and other obstructions and for

determination of the amount of compensation on account of the imposition of such restriction.

Part II of the Act, prescribe for the imposition of restrictions and by virtue of Section 3(1), it is competent for the Local Government, whenever it deem necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, so that such land may be kept free from buildings and other obstructions, to make a declaration to that effect under the signature of the Secretary to such Government, and such declaration shall be conclusive proof, that the land has to be kept free from building and other obstructions.

The other important provision in the Act of 1903 in form of Section 7, provide for the restrictions in different contingencies as stipulated by the State Government and clauses (a), (b) and (c), specify such restrictions.

The Scheme in the enactment also contemplate issuance of a public notice, stating the effect of the declaration and the steps to be taken by the Collector for giving effect to the restriction imposed with the procedure to be followed resulting into declaration of an award by the Collector.

11. Pending the amendment in the Defence Act, 1903 the Government of India, Ministry of Defence, issued guidelines to the Chief of Army Staff, Air Staff, Naval Staff, New Delhi, as

regards issuance of 'No Objection Certificate (NOC)' for building constructions.

The need for issuance for those guidelines find place in its inception part by specifying that the issue of NOC, for construction of lands adjacent to different establishments have generated avoidable controversies, particularly in the two known cases of Sukna and Adarsh, and since then, various issues were deliberated upon by the Government in consultation with the services and it was felt that the Work of Defence Act, 1903, which imposes restrictions upon use and enjoyment of land in vicinity of defence establishment, need to be comprehensively amended, so as to take care of security concerns of defence forces.

While the process of amendment has been put into motion which contemplated some time, it was felt necessary to issue instructions in the *interregnum* to regulate grant of NOC, with an object to strike a balance between the security concern of the forces on one hand and the right of public to undertake construction activity on their land.

12. The starting point of these guidelines is the communication/circular dated 18/5/2011 which clearly stipulated two alternative contingencies as below :-

(a) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if

any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders/private parties.

(b) Where the local municipal laws do not so require, yet the Station Commander feels that any construction coming up within 100 meter (for multistorey building of more than four storeys the distance shall be 500 meters) radius of defence establishment can be a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey its objection/views to the local municipality or State Government agencies. In case the municipal authority/State Government do not take cognizance of the said objection, then the matter may be taken up with higher authorities, if need be through AHQ/MoD.

(c) Objection/views/NOC shall not be given by any authority other than Station Commander to the local municipality or State Government agencies and shall not be given directly to private parties/builders under any circumstances.

13. The guidelines of 2011 came to be revised in the wake of the representations received with regards to the restrictions placed, and it was decided to undertake the comprehensive review, so as to address the issues that had arisen from the implementation of the guidelines and hence, the existing guidelines received modification by adding proviso under para 1(b) to the effect that “NOC from LMA/Defence Establishment would not be required in respect of a construction for which permission had been issued by the competent local municipal authority prior to 18/05/2011 (date of circular).

However, this proviso was not to apply to any amendment to the said construction permission with regard to height, if such amendment has been allowed after 18/05/2011.

The other provisions of the circular dated 18/5/2011 however, remain unchanged.

14. Once again on 17/11/2015, the circular of 18/05/2011 received a further amendment, by adding a second proviso under para 1(b), to the following effect.

“Wherever buildings/structures of four storeys or more already exist within 500 metres of the periphery of any Defence establishment and the construction proposed is in line with or behind i.e. in the shadow or shield of such building/structure, the State Government/Municipal Corporation may, after obtaining comments from the LMA and giving due consideration to the same, decide whether to approve such proposals or not. LMA shall give his comments within a period of 30 days from the date of receipt of a reference from the State Government/Municipal Corporation. This order will be implemented prospectively.”

15. Further, on 21/10/2016, in view of large number of representations received from elected representatives seeking review of the guidelines issued in 2011, as difficulties were faced by the public in constructing buildings on their own land and while the amendment to the work of Defence Act, 1903 was pending finalization, a decision was taken to amend the guidelines dated 18/5/2011 to be read with the circular dated 18/3/2015 and 17/11/2015 by imposing the following restrictions:-

“(a) Security restrictions in respect of Defence establishments/ installations located at 193 stations as listed in Part A of Annexure to this circular shall apply upto 10 meters from the outer wall of such Defence establishments/installations to maintain clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone of 10 meters will require prior No Objection Certificate (NoC) from the Local Military Authority (LMA)/Defence establishments.

(b) Security restrictions in respect of Defence establishments/ installations located at 149 stations as listed in Part B of Annexure to this circular shall apply upto 100 meters from the outer wall of such Defence establishments/installations to maintain clear line of sights for effective surveillance. Any construction or repair activity shall not be permitted within 50 meters. Further, a height restriction of 03 meters

(one Storey) shall be applicable for the distance from 50 meters to 100 meters. Any construction or repair activity within such restricted zone between 50 to 100 meters will require prior No Objection Certificate (NoC) from the Local Military Authority (LMA)/Defence establishments.

A perusal of Part A (Annexure) which include the name of the Defence Establishments, to be covered thereunder, would reveal that at item No.10 under the “Southern Command”, ‘Kamptee (Main, Sitabuldi, Fort), Nagpur,’ in State of Maharashtra is included.

16. On 20/2/2020, the OSD, D (Lands) Ministry of Defence, intimated that the guidelines dated 21/10/2016 are under review in the Ministry, in consultation with services and Coast Guard and the outcome of the same shall be intimated in due course.

Apparently, the implementation of the guidelines dated 21/10/2016 was not specifically stayed.

Another development which took place on 6/10/2020 was in form of a communication from Brig, Brigadier Land for QMG and with respect to the implementation of NOC guidelines, the following declaration was issued:-

“(a) Only NOC guidelines dated 18 May 2011 (amended vide MoD ID Nos. 11026/2/2011/D(Lands) dated 18 March 2015 and 17 November 2015) be implemented across all defence establishment pan India.

(b) NOC Guidelines dated 21 October 2016 have not been accepted by Army as these have been issued by MoC without taking security concerns of Army into account.

(c) Cases for grant/dental of NOC be processed only based on NOC guidelines dated 18 May 2011 (duly amended)”

17. On 23/12/2022, another guideline/circular was issued by the Government of India, Ministry of Defence and this was issued in supersession of the earlier guidelines and contemplated fresh guideline for issue of NOC for construction in vicinity of Defence establishment, in the following manner:-

“(i) In places where local municipal laws require consultation with the Station Commander before a building plan is approved, the Station Commander may convey its views after seeking approval from next higher authority not below the rank of Brigadier or equivalent within four months of receipt of such requests or within the specified period, if any, required by law. Objection/views/NOC will be conveyed only to State Government agencies or to Municipal authorities, and under no circumstances shall be conveyed to builders/private parties.

(ii) Where the local municipal laws do not require, yet the Station Commander feels that any construction coming up within 50 meter radius of defence establishment which are listed at Annexure, is a security hazard, it should refer the matter immediately to its next higher authority in the chain of its command. In case the next higher authority is also so convinced, then the Station Commander may convey its objection/views to the local municipality or State Government agencies. In case the Municipal Authority/State Government do not take cognizance of the said objection, then the matter may be taken up with the higher authorities, if need be through AHQ/MoD. Provided that :-

(a) For all other defence establishment not listed at Annexure A, the said prescribed distance shall be 100 meter (for multistoreyed building of more than four storey, the distance shall be 500 meter) from the periphery.

(b) In such defence establishments not listed at Annexure A, wherever buildings/structure of four storeys or more already exist within 500 metres of the periphery of any Defence establishment and the construction proposed is in the line with or behind i.e. in the shadow or shield of such building/ structure, the State Government/Municipal Corporation may after obtaining commends from the LMA and giving due consideration to the same decide whether to approve such proposals or not. LMA shall give its commends within a period of 30 days from the date of receipt of a reference from the State Government/Municipal Corporation.

The annexure appended to the said circular extended it to Kamptee, but excluded area of Sitabuldi Fort.

18. The next communication in line was issued on 23/2/2023, informing that as per the decision taken, the MoD letter dated 23/12/2022 under reference, shall be kept in abeyance until further orders.

This was followed by issuance of guidelines on 21/3/2023, containing a direction, that NOC Guidelines 2022, shall be held in abeyance until further orders and IHQ of MoD (Army) on NOC guideline will be reverted to status as on 22/12/2022 i.e. NOC Guidelines dated 18/5/2011 (guideline dated 18/3/2015 and 17/11/2015) will be implemented around defence establishment and when NOC is required to be granted/denied or objections (if any, are to be raised) in consonance with the guidelines, once again clauses (a) and (b) of the guideline dated 18/5/2011 were re-introduced, as was prescribed earlier.

This circular once again reiterated/highlighted the aim of NOC guidelines, being to strike a balance between the security concern of defence establishment and right of civilians to construct on their property.

What is most pertinent are the following clauses therein :-

(a) Subjective & Flexible : It can be seen that the Guidelines are quite subjective, and accord adequate flexibility and auth to the Station Commander, who should pragmatically assess specific security concerns of the defence establishment and accord/deny NOCs.

(b) Restricted Zones and NOT 'No Construction Zones' : Dists specified are restricted dists within which a Station Commander is required to pragmatically assess the security concerns and grant/deny NOC. These dists should not be treated as 'No construction Zones', which would render the entire process of applying for NOC and analysis by Station Commander infructuous.

(c) If Ongoing Construction in Restricted Zone is NOT perceived as a Security Threat. In case, views of Station Commander are NOT required as per the bye-laws, and construction is NOT seen, as a security threat by a Station Commander, then a Station Commander is neither required to raise an objection, nor issue any NOC, and the indl. Should be allowed to construct on his property without any reference.”

19. In the wake of the aforesaid guidelines, being revised and relooked from time to time, the question which fall for consideration before us, is which guideline prevailed, when the respondent no.3 undertook the construction of the subject building and the respondent no.1 Corporation granted the necessary permissions.

Admittedly, the construction of Kukreja building commenced in the year 2018 when the NOC Guidelines 2016 were in force, but under review, as per the communication dated 20/2/2020, but not which were neither stayed nor made inoperative.

We must also note the distinct phases in construction of the subject building.

The respondent no.3 applied for permission of the development work on the la11 ptnd, with its description as Plot No.2, Kh. No.178/1 Mouza Sitabuldi, within the jurisdiction of Planning Authority i.e. Nagpur Municipal Corporation, under Section 44 of the Maharashtra Regional and Town Planning Authority, 1966 and by building permit dated 1/2/2018, it was permitted to carry out the development work. However, on its request to revise the sanction, revised sanction was accorded

first time by permit on 2/7/2019 and for the second time, on 18/5/2021.

As per the building permit dated 18/5/2021, respondent no.3 was accorded sanction by the Planning Authority to carry out the development (basement + ground floor + recreational floor + 28 floors) construction with the height of 108.70 meters. The respondent no.3 before securing the building permit also submitted the necessary NOC from the Airport Authority of India as well as from the Fire Department.

20. All the while, when the respondent no.3 had approached the Corporation and the Corporation granted necessary permits for undertaking the construction activity/ development work, the petitioner did not raise any objection and the first objection raised by the petitioner about securing its No Objection in respect of the subject building is dated 21/3/2023, when with reference to the Government of India, Ministry of Defence letter dated 18/5/2011, Colonel Amitabh Hoskhote, ADM, commandant for STN CDR, communicated to the Nagpur Municipal Corporation as below :-

“(2) Construction of High Rise Building which is being done by Kukreja Builders, in front of Band line, Defence Enclave, Civil lines Nagpur is within 100 mtr from def boundary and also is close vicinity of Vidhan Bhawan & RBI. The high rise building gives direct line of sight to Military installations, which is a grave security risk. Kukreja High Rise building has not obtained NOC from LMA till date. This construction of multi-storeyed high rise building has violated the NOC Guidelines 2011 issued by GoI. MoD letter referred at Para 1 above.

(3). In view of the above, you are requested to pass necessary instructions to Kukreja Builders that no construction activity is undertaken at their end. The same is in violation of the laid down

norms and instructions as regards Defence Land. A notice dated 21 Mar 2023 is forwarded herewith for your further necessary action. You are requested to ensure that no construction activity to be done Kukreja Builders.”

21. This request is again reiterated on 3/4/2023 as well as 10/5/2023, when the Corporation was directed to intimate about the action taken on the subject by ensuring that no construction activity is done by Kukreja Builders.

Repeated communications with the same intent are forwarded to the respondent no.1 on 9/6/2023, 20/6/2023, which received response from the Corporation.

On 30/5/2023, with specific reference to the letter of the Station HQ, Kamptee on 21/3/2023 as well as the letter submitted by M/s.Kukreja Infrastructure on 28/4/2023 responding to the letter of the petitioner, the Municipal Commissioner of the Corporation, expressly informed the Station Commander, Kamptee, (Nagpur), that on receipt of the communication from the Col., Off Adm Comd for Station Commander, and the letter stated as below:-

“As per the clarification submitted by M/s.Kukreja Infrastructure the building at CTS No.170, Kh No.43-44/2, NMC House No.2230, Mouza Sitabuldi has been sanctioned by Nagpur Municipal Corporation vide building permit No. 225/P.P/Sitabuldi/TP/NMC/2724 dated 18/05/2021. The said building is 108.70 m. high (B + G + Recreational Floor + 28).

The above sanction was given based on the land use shown in the Sanctioned Development Plan 2001 for Nagpur City and other technical parameters like side margin, height, etc. were sanctioned as per DCPR-2001 for Nagpur City. The said land falls under the Residential zone as per Sanctioned Development Plan-2001 for Nagpur City. The adjoining land is also shown in Residential zone in the Sanctioned Development Plan-2001 for Nagpur City. It is not earmarked as Defense zone or restricted zone.

As per the clarification submitted by the M/s.Kukreja Infrastructure and the report dated 6/5/2021 the commencement and the completion work of B + G + Recreational Flor + 22 floors has been done as per Section 6.2 of DCPR-2001 of Nagpur City. The said residential project has also been registered under RERA Act. The registration number on the RERA is P50500015438 (copy enclosed). It is to be noted that most of the flats are sold after registration under the RERA Act hence third party interest have been created. The Airport Authority of India gave NOC to the project for 108.72 m height vide letter No. AAI/N.P/NOC/2021/MAR/25, dated 10/03/2021 which is valid upto 9/3/2029 (copy enclosed). The developer also submitted NOC from Fire Department vide letter No. FES/1009/CFO, dated 06/05/2021.

M/s.Kukreja Infrastructure clarified that at this stage it is not possible to disturb the structure. They are ready to implement suggestions if any, regarding safety. The developer also stated that their project is fully equipped with complete security systems and is under CCTV surveillance. Also, the building is completely safe from outside interference”.

The Municipal Commissioner also clarified that M/s. Kukreja Infrastructure is ready to implement suggestions, if any, regarding safety and had also informed that their project is fully equipped with complete security systems and is under CCTV surveillance.

The Municipal Commissioner also expressed its opinion, in the following words :-

“Now, at this stage, considering the above facts and the project being ready for occupation, it is not possible to make any structural changes in this building as well as not possible to refuse the project if the developer applied for an occupancy certificate. However, it is possible to implement safety measures or remedies if any, for avoiding security risk”.

Along with the communication, copy of sanction building plans were also annexed with a request to inspect the site and suggest a developer to provide safety measures.

22. On general consideration, since the petitioner had insisted for implementation of MoD Guidelines of 2011 with a request

to the Corporation to forward the copy of the existing regulations and provisions issued by the State Government regarding construction activity in the area adjoining the defence boundary (Establishment) and the distance to be left from the limit (boundary) of defence establishment for any construction activity and for promulgation of notification/orders for implementation of the MoD guidelines, the Commissioner requested the Station Commander to share the plan showing the location of their land parcels in Nagpur Municipal Corporation limit, so that on adopting due procedure under the Maharashtra Regional and Town Planning Act, 1966, the modification could be effected in the development plan, or their establishments can be incorporated in the current development plan to avoid such a situation in future.

23. Through another communication dated 27/7/2023 addressed by the Deputy Director, Town Planning, Municipal Corporation, Nagpur, to the Station Officer for Station Commander, Station HQ, Kamptee, it was clarified that, as the project of Kukreja Infrastructure was ready for occupation and most of the flats are sold for registration under RERA Act and third party interest have been created, it is not possible to make any structural changes in the building and refuse the occupancy certificate, if the developer apply for any occupancy certificate. However, it is possible to implement safety measures or remedies, if any, for avoiding security risk.

Along with the said communication, the RERA NOC, Fire NOC and AAA compliance was also forwarded.

One more was addressed to the petitioner by the Deputy Director, Town Planning, on 25/07/2023, offered a clarification with reference to the guidelines of 2011 issued by the MoD for height restriction in the vicinity of Local Military Authority (LMA)/Defence Establishment and the subsequent amendment thereto.

The communication stated as below :-

“In his guidelines Government of India, Ministry of Defense attached list of 193 stations as Part-A of Annexure and list of 149 stations as Part-B of annexure.

List enclosed as part-A of Annexure is for restrictions for any construction or repair activity within such restricted zone of 10 meters will require prior No Objection Certificate (NOC) from the Local Military Authority(LMA)/Defense establishment. In this list, only one station is included from Nagpur District on Sr. No. 10 as Kamptee (Main, Sitabuldi Fort). Whereas security restrictions in respect of Defense Establishments/installations located at 149 stations as listed in Part-B of annexure shall apply up to 100 meters from the outer wall of such Defense Establishments/installations to maintain clear line of sight for effective surveillance. Any construction/repairs activity within such restricted zone between 50 to 100 meters will require prior No Objection Certificate (NOC) from the LMA/Defense Establishments in the list enclosed as Part-B of Annexure, no station is included from Nagpur District.

NMC approved the building plan of M/s. Kukreja Infrastructure situated at Mouza Sitabuldi Plot No.02, CTS No.170, Kh. No.43-44/2, NMC House No. 2330, Nagpur vide building permit No.225/BP/Sitabuldi/TP/NMC/83 on dated 01/02/2018 and same plan is revised twice vide building No. 203/BP/ Sitabuldi/ TP/NMC/2724, dated 18/05/2021. As the said building plan is sanctioned with the reference to amendment No. F.11026/2/2011/D(lands) dated 26/10/2016 as the said land is not included in the restriction list published vide Amendment No. F.11026/2/2011/D(Lands) dated 26/10/2016. In this situation, the developer was not bind for obtaining NOC from LMA/Defense establishments.

Municipal Corporation already communicates with reference letter no. 7, 3 & 9 to the station commander for issuing of No Objection Certificate from your department. As the project being

ready for occupation and it is submitted that most of the flats are sold after registration under RERA Act and third party interest have been created, it is not possible to make any structural changes in this building as well as not possible to refuse the Occupancy Certificate for this project if the developer apply for any Occupancy Certificate with all relevant documents this department is binding to issue Occupancy certificate within 30 days as per Maharashtra State Government Resolution No. MCO-2015/Sr.No. 189/UD-14, dated 23/5/2015 under Maharashtra Right to Service Act.

Considering the above mentioned facts and situations the letter is forwarding to you for issuance of No Objection Certificate for this project as the developer completed his construction work and the project is ready for occupation kind request to issue NOC for the project within 15 days.”

24. On 11/8/2023, the petitioner with reference to its earlier communication, reiterated that NOC cannot be given to the high rise building constructed by M/s. Kukreja Infrastructure, as the construction is just 76 meters from the boundary of Defence Establishment and gives direct line of sight to military installations, which is a grave security hazard and Nagpur Municipal corporation was asked to request the builder to stop the construction as the activities were going on without permission.

In its communication dated 19/8/2023, the Station HQ, Kamptee, alleged that the construction being undertaken by respondent no.3, is illegal and level accusation against M/s.Kukreja Infrastructure, by alleging that being a reputed builder, it is fully aware of the geography of the place including nearby Defence Establishment and its sensitivity but has omitted to obtain NOC from Military Authorities, inspite of being informed of the position directly/indirectly many times by the Station HQ, Kamptee and therefore, the responsibility of

continuing the illegal construction in the vicinity of defence establishment, shall completely fall on the developer.

25. The situation further aggravated when on 10/7/2023, Station HQ, Kamptee, addressed a communication to the Inspector of Police, Sitabuldi, Nagpur, complaining about the NOC violation by Kukreja High rise building and a request was made to lodge an FIR and assist the Head Quarter by sending the representative for stopping the construction.

Ultimately, on 8/6/2023, the respondent no.3 received a notice from Stn. H.Q Kamptee, advising him not to carry out any construction activity and warning that if it continue to do so, the action shall be presumed to be illegal.

On subsequent dates i.e. 10/7/2023, 14/10/2023, 19/10/2023, 23/2/2024 and 28/2/2024, the petitioner demanded the copy of the DPCR 2001 from the Corporation as it contemplated NOC from Defence Authority.

26. On appreciating the sequence of above events, we cannot but ignore that when the construction of the subject building by respondent no.3 proceeded ahead, it faced an allegation from the petitioner that the construction was illegal, as there was no compliance of the guidelines of MOD, we must therefore, deal with this contention of the petitioner.

Pending the amendment to the Defence Work Act, 1903, the Ministry of Defence had issued guidelines with an object of

ensuring safety of the Defence Establishments/ Installations and necessarily, to cater to its security concern. However, a reading of these guidelines right from the one issued on 18/5/2011 to the latest guidelines in form of instructions were intended to be operational in the interregnum, when the Defence Act, 1903 was in the process of being amended.

The instructions are to be followed by the Army, Air Force as well as Naval staff, when any construction activity is likely to have an impact upon their establishments/installations and it is their duty to take care of security concerns of defence forces and the instructions have to be read in that spirit.

27. The guidelines of 18/5/2011 contemplated two contingencies; in the first scenario, where the municipal law require consultation with the Station Commander before a building is approved, then it was open for the Station Commander to convey its views after following the procedure at the Department level within the stipulated period of receipt of such request. The said stipulation was hedged with a condition that the objection/view/NOC will be conveyed to the State Government Agency or municipal authorities and not to the builder/private parties.

In the second contingency, when the local municipal laws did not require the consultation with the Station Commander before a building plan is approved, but still the Station Commander was of the opinion that any construction coming

up within 100 meter and 500 meters, if the building is more than four storeys, and it would pose a security hazard, then he shall refer the matter to the higher authority and if the authority is convinced, then the Station Commander would convey his objection/view to the local municipality or State agency, but even if the cognizance is not taken, then the matter may be taken up with higher authorities through AHQ/MoD.

The reading of the aforesaid two contingencies stipulated in the guidelines thus contemplate giving of NOC where the local municipal law require such a NOC to be given, but if it do not so require, but the Station Commander is of the opinion that a construction will create a security hazard, then, the issue will be taken up with higher ups, if necessary through AHQ/MoD.

28. The case of the respondent no.3 would fall within clause (b) of the guidelines dated 18/5/2011, if the construction had to commence on 18/5/2011, as the local municipal laws did not contemplate such a consultation.

The guidelines came to be amended on 18/3/2015 and 17/11/2015, as by the former, a proviso was introduced under Part-1(b) that the NOC would not be required if the permission for construction has been issued by competent local municipal authority prior to 18/5/2011, but with a caveat that the said provision shall not apply to any amendment to the construction permission with regard to height, if such amendment was made after 18/5/2011.

On 17/11/2015, a second proviso was added in respect of the buildings/structures of four storeys or more already existing within 500 meters of periphery of defence establishment and the construction proposed is in line with or behind i.e. in the shadow or shield of such building/structure and in such case, the State Government may obtain comments from LMA and decide whether approval has to be granted to such proposal or not.

Admittedly, this contemplated its implementation prospectively i.e. 17/11/2015 onwards.

On 21/10/2016, in the wake of the representation received from elected representatives, as the existing guidelines of 2011 were posing difficulties in constructing the buildings by the public on their own land, the existing guidelines were amended and the security restrictions in respect of defence establishments/installations were divided in two compartments; Part-A and Part B of Annexure, and as far as Part-A was concerned, the security restrictions were made applicable upto 10 meters, from the outer wall of such establishments, to maintain clear line of sight for effective surveillance, and therefore, any construction or repair activity within such restricted zone of 10 meter, required a no objection certificate (NOC) from the Local Military Authority/Defence Establishment.

Admittedly, Kamptee (Main, Sitabuldi, Fort) in Nagpur was covered in Part-A of the Annexure, but the NOC was

required only if the construction/repair activity was within 10 meters.

29. This guideline continue to remain in force till 6/10/2020, when it was declared that these guidelines have not been accepted by Army and therefore, shall not apply to establishments of army.

It is a different issue as to whether it is open for the Integrated HQ of MoD (Army) to adopt such a stand, but in any case, we need not enter into this controversy.

30. On 23/12/2022, the Ministry of Defence issued fresh guidelines which superseded the guidelines of 18/05/2011, along with its amendments dated 18/03/2015 and 17/11/2015, as well as the NOC guidelines issued by the letter dated 21/10/2016.

Now, the fresh guidelines for issuance of NOC for construction in the vicinity of defence establishment once again postulated two contingencies; the first being when the municipal laws require consultation with the station commander and the second, when it did not so require, but yet the station commander felt that any construction coming up within 50 meters radius of defence establishment, which is listed at annexure-A is a security hazard, then he is expected to refer the matter to the higher-up and convey his views/objection to the Local Municipality or the State

Government Agency, but if no cognizance is taken, then the matter shall be taken up before the high authorities.

The Annexure-A, included the establishment at Kamptee, but excluded Sitabuldi Fort, and as per the new circular, the prescribed distance for other defence establishment was 100 meters but for multi-storeyed building i.e. more than 4 storied, it was prescribed as 500 meters from the periphery.

Admittedly, these guidelines came into effect from the date of its issuance, but was kept in abeyance until on 21/03/2023, when a decision was taken to revert back to the status as on 23/12/2022 i.e. when the NOC guidelines dated 18/05/2011, along with its amendment were applied around the defence establishment.

31. The whole journey of these guidelines is akin to a time capsule, which travel from 18/05/2011 to 21/03/2023, encapsulating the intervening events, of the issuance of guidelines of 2016, the guideline of 23/12/2022, superseding the existing guidelines but ultimately on 21/03/2023, the position was reverted back to the guidelines of 18/05/2011.

Assuming that if the guidelines do apply, if we accept the contention of the petitioner, it would amount to making the respondent no.3 ride in the time capsule indicated above, with no certainty as to its applicability as the construction of the subject building commenced in the year 2018, when at the relevant time, the 2016 guidelines were in operation but the

security restrictions were applicable to the defence establishment/installations located at 193 stations, being applicable to Kamptee including Sitabuldi area, but the NOC was contemplated only for a construction activity within restricted zone of 10 meters from the outer wall of the defence establishment/installations. Admittedly, the construction of the petitioner did not fall within its ambit but now in 2023, the position is reverted back to 2011.

When the new guidelines of 23/12/2022, in supersession of the earlier guidelines were issued, the structure 'Kukreja Heights' was already complete after receiving two subsequent approvals from Fire Department as well as Airport Authority of India, and the revised sanctions were received from Corporation on 2/07/2019 and 18/05/2021.

32. It is a specific stand adopted by the Corporation when it responded to the communication from the petitioner, that the commencement and the completion work of the B+G+ recreational floor+22 floors has been done as per clause no.6.7 of DCPR, 2001 of Nagpur City. The initial permission was granted by corporation for construction of the building on 1/02/2018, and it received revision on 2/07/2019 and 18/05/2021, and ultimately the occupation certificate was also issued on 25/08/2023.

Mr. Manohar, the learned Senior Counsel appearing for respondent no.3 took a preliminary objection about

maintainability of the petition, by contending that on the date when the petition is taken up for hearing, all the reliefs prayed therein have been rendered infructuous, as even the OC is received from the Corporation, for 'Kukreja Heights'.

This prompted Mrs. Chandurkar, the counsel appearing for the petitioner to seek amendment in the prayer clause of the petition by raising a challenge to the issuance of the Occupation Certificate, as prayer clause (a), prayer clause (b) were rendered infructuous as the activity of respondent no.3 has crossed the phase of construction, and it had received the development permission, building completion certificate and even the Occupation Certificate.

We have therefore permitted the amendment to be carried out, raising a challenge to issuance of Occupation Certificate to 'Kukreja Infinity'.

33. Along with the petition, a judgment delivered by the Division Bench of this Court at the Principal seat in case of *Union of India through Ministry of Defence, Southern Command Composite Signal Regiment vs. State of Maharashtra (WP No. 3145 of 2021)* dated 23/10/2023, is placed on record.

The petition filed by Union of India through Ministry of Defence sought quashing and setting aside of the commencement certificate issued by the respondent no.2 in favour of respondent no.3, in respect of construction activities on a plot situated at Lohegaon, Pune, which was alleged to be

in close proximity of the Unit of Southern Command Composite Signal Regiment 'SCCSR'. The stand adopted by Union of India in relation to the construction of a building "Ganga Trueno" without prior NOC of SCCSR was based on the very same set of guidelines, including the guideline dated 18/05/2011, issued for grant of NOC by Ministry of Defence, Government of India, which was subsequently amended and also the guidelines issued in the year 2022 and 2023.

A similar argument was advanced by the learned Additional Solicitor General that the security threat perception of the LMA, like Commander of SCCSR is what matters ultimately in such cases and since the ongoing construction violated the mandate of circular dated 18/05/2011, as modified by later circulars, the permissions awarded by the Planning Authority were in violation of the security restrictions imposed by the said circulars. A further submission was also made that certain amendments to the Defence Act are under consideration, which are to be introduced through legislation, but the executive instructions issued by the aforesaid circulars would bind upon all the authorities.

34. In this background, the Division Bench had an opportunity to delve into the circular/guidelines including paragraph no.1(b) of the circular dated 18/05/2011, where it observed thus:-

"21. As regards requirement of paragraph 1(b) of the circular dated 18th May 2011, we find that it does not say that any NOC should be

obtained by the land owner making construction or any application for grant of NOC should be made by such a person. It only says that if the Station Commander is of the opinion that any construction coming up within 100 mtrs. or 500 mtrs. (for multi-storey building of more than four storey) within radius of Defence Establishment is a security hazard, the Station Commander may seek opinion of the higher authority in the chain of command and if higher authority is convinced that the construction is objectionable, it may through the Station Commander, convey its objection or views to the LMA or the State Government, expecting some action to be taken by the Municipal Authority or the State Government. It further says that if no cognizance of the objection is taken, the matter may be taken up with the higher authorities. It does not say about the consequence of not accepting the objection of the LMA regarding such construction activity by the Municipal Authority or the State Government. Here again there is no requirement of prior NOC being obtained by the land owner making construction in the vicinity of the Defence Establishment.

22 It, therefore, follows that the guidelines stated in para 1(b) of the circular dated 18th May 2011 by themselves do not impose any direct restriction upon undertaking construction of any building within the distances of 100 mtrs. or 500 mtrs. from the Defence boundary, as the case may be, and they only give authority to the Commanding Officers, in the facts and circumstances of each case, to take an objection or to take an appropriate decision. They also do not give any clear guidance as to what course of action in law may be taken by the Defence Authorities when objection is taken and not accepted by the State Government or LMA. There is no clarity in these guidelines, if or not the Defence Authorities would get any right to stop the construction work and also seek its demolition. Even if it is assumed, for the sake of argument, that once an objection to the construction being made in the vicinity of Defence Establishment goes unheard by the State Government or the Municipal Authority, the LMA would get a right to stop the construction and even seek its demolition; still it would have some restrictive operation in view of the circular dated 18th March 2015. Let us, therefore, consider the circular dated 18th March 2015, relevant paragraph of which is extracted as here-in-below :-

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

35. Apart from this, in reference to the circular dated 23/12/2022, the pertinent observation of the Division Bench

squarely applies to the facts before us and we deem it appropriate to reproduce the same.

“27 There is yet another circular dated 23rd December 2022, which has been issued in supersession of the guidelines issued vide circulars dated 18th May 2011, 18th March 2015, 17th November 2015 and 21st October 2016, regarding grant of NOC from the LMA. This circular contains some modified guidelines, but we need not take their cognizance for the reason that paragraph 2(iii) thereof clearly states that NOC from LMA / Defence Establishment would not be required in respect of a construction for which permission was issued by the competent authority prior to 18th May 2011, though it also clarifies that NOC would be required, if there is a proposal for amendment of the construction permission with regard to height. In the present case, it is an established fact, as seen from the reply of the Competent Authority, i.e. respondent no.2, that there is no amendment sought to the construction permission with regard to height by respondent no.3 prior to 23rd December 2022. Therefore, the circular dated 23rd December 2022, which has been issued in supersession of the aforesaid circulars and which does not provide for any retrospective operation, will have no application to the facts of the present case.

28. Thus, we find that even going by the own contentions of the petitioner, the construction of the building “Ganga Trueno” is not, in any manner, affected by the circular dated 18th May 2011 or the later circulars issued by the Government of India and Government of Maharashtra and, therefore, we are of the opinion that there is no merit in this petition.”

36. One more perspective from which the controversy involved in the case was examined by the Division Bench was the nature of the circular/the guidelines and the argument that they are not issued in the name of the ‘President’ as Article 77(1) of the Constitution mandate that all executive actions of the Government of India shall be expressed to be taken in the name of ‘President’ was not adhere to. While deliberating upon this argument, the following conclusion was reached:-

“31. Having regard to the aforesaid observations of the Apex Court, which have been followed by the learned Single Judge in the case of Jambo Plastics Pvt. Ltd. (Supra), we have no hesitation to hold that all the aforesaid circulars, which have been relied upon by the petitioner, not having been issued in the name of the President, as mandated by Article 77(1) of the Constitution of India, have not culminated into an order affecting right of the petitioner to enjoy his property as per his free will,

subject to limitations of law. These circulars, which have been relied upon by the petitioner, would not, therefore, confer any right upon the petitioner to seek any prohibition upon ongoing construction and even demolition of the construction of the building already made.”

37. As a result, finding no merit in the petition, the same came to be dismissed.

We are informed that the SLP preferred by the Union of India against the said judgment is dismissed on 27/09/2024.

38. In order to test the bonafides of the petitioner, we have carefully perused the sequence of events and we must take note of the most strange fact being that as far as the construction of the subject building is concerned, the objection is raised at a belated stage and it was too late in the day to do so as the subject building was already complete and by relying upon circular dated 21/03/2023, the petitioner is desirous of making the circular of 2011 applicable to the construction of the building, with a retrospective effect.

With reference to the guidelines of 21/03/2023, an attempt is made to apply the requirement therein to a building which has commenced its construction in February, 2018 and with all the revised permissions being granted by the Corporation, Occupation Certificate has been granted on 25/08/2023.

39. It is the assumption of the petitioner that since the UDCPR, 2020 issued by the Government of Maharashtra

through Urban Development Department, published vide notification dated 2/12/2020, was made applicable from 1/12/2020, from that date the NOC from it is mandatory. Reliance is placed upon the provisions in Chapter 2, which contemplate development permission and commencement certificate to be obtained as per the UDCPR.

Three clauses in the UDCPR are pressed before us to establish the need of NOC from the petitioner and they are the following clauses:-

“2.2.11 Clearance from other Departments

In case of development / construction of buildings requiring clearance from the authorities like Civil Aviation Authority, Railways, Directorate of Industries, Maharashtra Pollution Control Board, District Magistrate, Inspectorate of Boilers and Smoke Nuisance, Defence Department, Maharashtra Coastal Zone Management Authority, Archaeological Department etc., the relevant no objection certificates from these authorities, whichever applicable, shall also accompany the application, where such information is not received by the authority as mentioned in Regulation No. 3.1.13.

In case of building identified in Regulation No. 1.3 (93) (xiv), the building scheme shall also be cleared by the Fire Officer of the authority or in absence of such officer, by Director of Maharashtra Fire Services or an officer authorised by him.

3.1.11 Restriction under the Works of Defence Act, 1903

The restrictions imposed under the Work of Defense Act, 1903 shall be applicable and no development in contravention with the notification shall be permissible.

Whether the area affected by the notification under Works of Defense Act- 1903, is earmarked in Development Plan / Regional Plan or not, it shall be permissible to treat the area under such restrictive zone as marginal distance at the time of construction of any building proposed on contiguous unaffected area.

Provided that, it shall be permissible to utilise the FSI and also the receiving potential of the land under this zone, as otherwise permissible, on the remaining contiguous unaffected land of the same land owner.

4.20 DEFENCE ZONE

i) The developments as may be required by the Ministry of Defence or its Authorities shall only be permissible on the lands owned and possessed by the Ministry of Defence or its Authorities.

ii) Restrictive Zone –

No development in contravention with the notification shall be permissible in the area affected by the notification under Works of Defence Act- 1903, whether earmarked as such on Development Plan/Regional Plan or not or development shall be permissible with the No Objection Certificate from the concerned Defence Authority.

Provided that, it shall be permissible to treat the area under such restrictive zone as marginal distance at the time of construction of any building proposed on contiguous unaffected area.

Provided further that, it shall be permissible to utilise the FSI and also the receiving potential of the land under this zone, on the remaining contiguous unaffected land of the same land owner.”

40. Mr. Manohar, has canvassed before us that clause 2.2.11 is applicable in a situation, where the development/construction of the building require clearance from Statutory Authority like Civil Aviation Authority, Railways, Defence Department etc, and in such case, the relevant ‘No objection’ shall be obtained and accompanied along with the application.

We find substance in his argument, that this clause do not contemplate a ‘No Objection Certificate’, but if by way of any statute or a provision of mandatory nature, such an NOC is required, then while submitting the building plan, for its sanction to the Planning Authority, for seeking development permission/building permission/ commencement certificate, etc., the application shall be accompanied with such a ‘No Objection Certificate’ from the concerned department.

It is worth to note that permission from the Pollution Control Board, permission from the Civil Aviation Authority, Railways, Director of Industries, are the permissions which are

required by the statute, but as far as Defence department is concerned, the Works of Defence Act, 1903, which is a statute enacted for imposing restrictions upon the use and enjoyment of land in the vicinity of Works of Defence so that the land can be kept free from buildings and other obstructions, contemplate a declaration of the restriction in the manner prescribed and in absence of the procedure being undertaken under the said statute, imposing the restriction upon the use and enjoyment of land in the vicinity of Works of Defence or any site intended to be used or acquired for any such work, definitely by issuance of circular/guidelines/ instructions by whatsoever name, they are called, it shall not have a statutory effect. In absence of any restriction being found to be imposed under the Works of Defence Act, 1903, to the construction carried out by respondent no.3, the condition of NOC is not even stipulated according to us, in Unified Development Control and Promotion Regulations for State of Maharashtra.

As far as clause 3.1.11, which relate to the restriction under the Works of Defence Act, it clearly stipulate the applicability of the restrictions, where the area affected by the notification under the Works of Defence Act, 1903 is earmarked in the development plan/regional plan or not, but it shall be permissible to treat the area under the restrictive zone but for that purpose, it is necessary to have a notification to that effect published in the Official Gazette of the district or territorial division in which the land is situated and it shall be the

conclusive proof, to have the land kept free from buildings and other constructions.

We do not find any such declaration under Section 3(1) being published in the Official Gazette, restricting the use of land in the vicinity of the petitioner.

Further as far as clause no.4.20, on which Mrs. Chandurkar has placed reliance which pertain to the development work to be carried out in defence zone, once again contemplate issuance of a notification under the Works of Defence Act 1903, which is conspicuously absent in the case pleaded before us by the petitioner.

41. The construction by the respondent no.3 commenced in the year 2018 and at that time 2016 guidelines were prevailing. Though Mrs. Chandurkar has attempted to canvass that on 20/02/2020, the 2016 guidelines were suspended, we do not find any such indication, as on 20/02/2020, the OSD, D(Lands) with reference to a Contempt Petition in the High Court of Bombay, at Aurangabad Bench has made a reference that the guidelines of 21/10/2016, are under review in the Ministry in consultation with services and Coast Guard.

It is on 6/10/2020, a clarification is issued addressed to all Commander HQ (Q/Land) by the Quarter Master General Branch, but NOC guidelines dated 21/10/2016 shall not be applicable and all concerned shall proceed on the NOC guidelines of 18/05/2011.

When we specifically queried with Ms. Chandurkar, as to which guidelines were holding the field when respondent no.3 sought permission for construction from the respondent no.1, she would invite our attention to clause no.4.7 of the petition, which contain a reference to the letter dated 20/02/2020.

It is worth to note that till 1/12//2020, the DCPR was not made applicable and therefore, there was no requirement/contemplation under the Municipal Laws to have consultation with the Station Commander, before the building plan was prepared and, therefore, if the Station Commander was of the opinion that the upcoming construction was likely to be a security hazard, it was open for him to take up the issue before the next higher authority and convey the views to local Municipality or State Government, since there was no mandatory requirement of consulting the Station Commander.

As we have already concluded on perusal of the relevant clauses in the UDCPR for Maharashtra, which has come into force from 1/12/2020, that the said regulation by itself do not make it imperative for the Planning Authority/Corporation to secure 'No objection' of the petitioner, before it grant the building permission/ commencement certificate or completion certificate.

42. In the wake of the conjoint reading of the Defence of Works Act, 1903 and the circular/guidelines issued by the Government of India, Ministry of Defence for issuance of 'No

Objection Certificate' (NOC) for building construction, as regards the construction of the building by the respondent no.3, no provision in the Act or the circular of MOD contemplated an NOC from the LMA.

The argument advanced on behalf of the Petitioner about the same, falling in the shadow or shield of such building/structure, as contemplated in the guidelines dated 17/11/2015 is also a submission not worth consideration, as the amendment contemplated in the circular/guideline of 18/05/2011, by adding a second proviso in paragraph 1(b) was necessarily applicable to the buildings/structures of 4 storied or more already existing within 500 meters of periphery of any defence establishment and the construction proposed is in lying with or behind i.e. in the shadow or shield of such building or structure, but it is not the situation prevailing her.

In any case, since we have already deduced a conclusion that the guidelines prevailing on the date when the proposal was moved by the respondent no.3 for seeking building sanction as well as the revised sanction, the guideline of 21/10/2016, in form of security restrictions in respect of defence establishment/installations was applicable only upto 10 meters from the outer wall of defence establishment/installations so as to maintain clear line of sight for effective surveillance, an NOC was contemplated from the local Military Authority only for such constructions.

The petitioner itself remained unresponsive in making the restrictions operational till 21/03/2023 and coincidentally, it is the same date when the clarification was received from MOD as regards reverting the NOC guidelines to 18/05/2011 and we cannot but note that the petitioner woke from slumber after the entire high rise building was constructed and when the building was ready for issuance of Occupation Certificate, the petitioner formed an opinion that the construction of the building was in violation of the NOC guidelines 2011, and insisted the Corporation to stop the construction activity, without any statutory backing.

43. We find the approach of the petitioner completely unreasonable, as on completion of entire building and on issuance of Occupation Certificate, it now pray before us that the building of respondent no.3, should be vacated/demolished or its height be reduced to 8 storied as per the Shadow Shield clause in the guidelines of 2011, as amended by 17/11/2015, which as we have noted above, is not at all applicable to the structure, 'Kukreja Heights'.

We find the Corporation to have acted fairly in having adopted a clear stand, negating the insistence on issuance of NOC at the level of the petitioner and communicating the factual developments, when the construction of the High Rise commenced and concluded and the restriction sought to be made applicable to the construction being unsustainable.

44. One important aspect, which has caught our attention is the decision of the Board of Officers to ascertain the security concern on behalf of LMA, due to construction of Kukreja High Rise building. The Board assembled to ascertain the exact distance of the building from the defence establishment at AFI complex and Sitabuldi Fort, to assess the security implications in the wake of the NOC guidelines 2011 and its amendments.

After having the assessment of the entire situation including the presence other buildings in the surrounding area as well as on having the detail study of the alignment visible from the building along with exact distances, the google images and the physical analysis of the site and surrounding areas in respect to the security concerned, the Board recorded its finding on 19/03/2023, when the building was already standing and the findings record thus:-

“8. Findings of the Board

- (i) *Kukreja High Rise Building is overlooking the defence establishment at (Band Line) at AFI complex and Sitabuldi Fort and surrounding area. It is the highest building in the area within the 100 mtrs from the AFI Complex and within 500 mtr from Sitabuldi Fort.*
- (ii) *The dist of Kukreja High Rise Building from the defence bdy is 76 mtr.*
- (iii) *The bldg has approx 28 Floors and height of more than 100 mtrs. It is the most dominating building in the vicinity of defence est AFI Complex.*
- (iv) *Bldg is constr within the restricted zone of 100 mtr as per NOC guidelines.*
- (v) *It has 28 storeys which is in contravention to the authorized limit of 04 storeys from 100 to 500 mtr that too with LMA clearance.*
- (vi) *Bldg has 28 storeys whereas the other bldgs which are existing in the area are of generally 06 to, 08 storeys which is gross violation of NOC guidelines 2011.”*

45. Under the caption of 'Threat Analysis', the Board reported that the High Rise building give direct observation and line of sight for fire to the defence establishment at a distance of 76 meters from AFI complex and 486 meters from Sitabuldi Fort area and it provides a good line of sight for communication and any cyber activities.

In conclusion, the Board recommended that Kukreja High Rise building of 28 storeys and more than 100 meter in height is grave security concern for the defence establishment and the construction of Kukreja High Rise building is not recommended. The said report is placed on record along with the affidavit filed by the petitioner responding to the preliminary objection raised by the respondent. It is however worth to note that the entire exercise is carried out by the Board after the building was complete, awaiting the Occupancy Certificate from the Corporation, and the Corporation had made its stand clear to the petitioner through its communications.

46. On reading of the circulars/guidelines, which are instructive in nature, we can safely infer that it do not contemplate grant of 'No Objection Certificate', but where the Station Commander record an objective satisfaction, that there is a security hazard, he shall raise an objection to the higher ups in the chain of command. What is most significant is such objection will have to be raised within the timelines and not as in the present case after the entire construction of the building is complete. In the present case, the objection which has been

raised is on completion of the civil work of the building and that too without referring the matter to the higher authorities as mandated by the circular.

As far as the security hazard is concerned, except in the meeting of the Board, we do not find any material to apprehend security hazard as it is too far fetched, and even if the security hazard is to be looked into, it shall be assessed with an objective satisfaction being recorded by the higher office and not by the petitioner.

The circulars/guidelines definitely cannot supersede the statutory law in form of Works of Defence Act, 1903, which is in force. The petitioner, according to us, under the garb of the guidelines has assumed to itself the power to grant a 'No Objection Certificate' for construction, and has raised objections with the Planning Authority, which has turned it down with a clear understanding that a 'No Objection Certificate' from the petitioner is not contemplated, either under the prevailing DCR or the new DCPR which has come into force from 2020.

It was open for the petitioner to file objection before the Planning Authority, and the matter could have rested there as even going by the guidelines of 18/05/2011, the Station Commander can only convey his objection/views to the local Municipality or the State Government Agency and even if they do not take the cognizance, then the matter was expected to be taken up with the higher authorities, if needed through AHQ/MOD.

Instead of resorting to the said procedure available, assuming that the guidelines of 18/05/2011 is applicable, we do not find that any case is made out by the petitioner for any interference in the permissions that are granted by the Municipal Corporation in favour of the respondent no.3, and ultimately the Occupation Certificate, granted on 25/08/2023.

47. Mrs. Chandurkar, has drawn our attention to a decision of this Court in case of Dolby Builders Pvt Ltd vs. MCGM (WP 2724 of 2021) dated 27/09/2023, where the circular dated 18/05/2011, 18/03/2017, 17/11/2015 and 23/12/2022, came to be quashed and set aside, when the issue before the Court was somehow similar, as the petitioner who was desirous to reconstruct/re-erect a building of ground + 2 storeys on the subject property was unable to do so, for insistence of the MCGM to obtain 'No Objection Certificate' from the Commodore, Chief Staff Flag of a said Commanding Chief, Western Naval Command, Mumbai and the Commander, INS Trata before granting development permissions as per rules and the respondent no.3 to 5 having refused such NOC.

48. Dealing with the insistence on the NOC from the respondent nos.3 to 5, which was based upon the circular issued by the Ministry of Defence, the stand of Union of India i.e. respondent no.6, being that the restrictions are imposed in the interest of safety and security of the Nation and is a matter of larger public interest, was taken into consideration by the Division Bench.

Worth it to note that the petition also raised challenge to the circulars issued by the Ministry of Defence being ultra vires of the Act of 1903 and this included circular dated 21/10/2016, which however was clarified to be applicable only to the Military Establishment and not to the Naval Establishment.

The Division Bench in threadbare considered the circular/guidelines dated 18/05/2011, as amended by the circular dated 18/03/2015, and 17/11/2015, and the circular dated 23/12/2022.

Validity of this circular was tested against the Works of Defence Act, 1903, the Central Legislation enacted for providing imposition of restrictions upon the use and enjoyment of the land in the vicinity of Work of Defence and the detailed scheme of the legislation. As against this, the circulars were noted to be executive instructions, and applying the same without any declaration issued by following the procedure prescribed under Section 3 of the Act of 1903 and restricting the use and enjoyment of land in the vicinity of INS Trata, it was held that the impugned circulars are inconsistent with the provisions of the Act of 1903.

49. The Division Bench also reiterated the settled law that when a Central or State Legislation occupies the field, and since as far as the field of imposing restrictions upon use and enjoyment of land/property situated in the vicinity of Defence Establishment, such restrictions cannot be imposed by a mere executive fiat. The Division Bench further observed thus:

“38. The sum and substance of the above referred discussion is that now it is well settled law that when a Central or State legislation occupies the field; in the present case, the field is of placing restrictions upon use and enjoyment of land or property situated in the vicinity of Defence Establishments, including Naval Establishments, such restrictions cannot be imposed by a mere executive fiat and if at all they are to be imposed, they must be imposed by following the procedure prescribed under the legislation occupying the field; in the present case the Act 1903, and that deprivation of right to property or curtailment of the right to property, as envisaged under Article 300A of the Constitution of India, can be done only under the authority of law and the word “law”, in the context of Article 300A, must mean an Act of Parliament or a State legislature, or a rule or a statutory order, having the force of law, which, in other words, is a State-made law or a Positive Law as per the theory of Legal Positivism propounded by Scholars Jeremy Bentham and John Austin.”

In the wake of the aforesaid observation, it was held that the MCGM could not insist upon the petitioners to obtain the NOC before processing their applications for reconstruction and re-erection of the building holding that the impugned circulars were violative of principles of rule of law, the same were quashed and set aside.

This decision was taken to the Apex Court and the order passed on 22/01/2024, is placed before us.

The Apex Court while dealing with the challenge, observed thus:-

“Having regard to the submissions made at the Bar, we find that the directions issued by the High Court vis-a-vis the relief sought for by the respondent-writ petitioners before the High Court insofar as the issuance of the ‘No Objection Certificate’ and other directions are concerned shall be complied with by the appellants within a period of one month from today. On such compliance being made it is recorded that the respondent writ petitioners before the High Court shall not press their plea with regard to the vires of the aforesaid circulars and the same shall stand withdrawn.

Needless to observe that this submission made on behalf of the respondent-writ petitioners before the High Court is with regard to the compliance to be made by the appellants vis-a-vis only respondent-the writ petitioners before the High Court.

It is further needless to observe that if any other party has assailed the vires of the said Circulars before the High Court or this Court, the said parties are at liberty to advance all arguments on the vires of the said circulars in accordance with law.”

50. Since we are not confronted with the issue of validity of the circulars, as none of the parties has raised challenge to the same, we need not further deliberate upon the effect of the order of the Apex Court, upon the decision of the Division Bench while disposing the Special Leave Petition filed against. However in the peculiar facts and circumstances of this case, since we have concluded that the petitioners have failed to make out any case based on the executive fiat and when we have found its applicability to the case of the petitioners to be doubtful, we are not inclined to show indulgence and particularly, when now the petition is restricted only to the relief of calling in question the grant of occupancy certificate and further the relief sought in prayer (c) i.e. issuance of direction to the respondent to forthwith vacate/demolish the construction, structure of the building or reduce its height to 8 storey as per the Shadow Shield Clause in terms of the guidelines of 2011 as amended from 17/11/2015, on the ground that the building continue to pose a security threat to the defence establishment, as we are not persuaded to accept the said contention, particularly when we are informed that the building is already occupied.

For the reasons recorded above, finding no merit and substance in the petition, the same stand dismissed.

Easy on costs.

(ABHAY J. MANTRI, J)

(BHARATI DANGRE, J.)