



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF AUGUST 2023

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION No.40510 OF 2017 (LB-BMP)

BETWEEN:

1. JAMBO PLASTICS PVT. LTD.,
HAVING ITS REGISTERED OFFICE AT
NO.11, 1ST CROSS, K.G. EXTN.,
OFF K.G. ROAD
BANGALORE - 560 009
REPRESENTED BY ITS DIRECTOR
MR. KIRAN KUMAR GADIA.

REPRESENTED BY ITS
POWER OF ATTORNEY HOLDER
MERUSHIKHAR INFRA LLP,
REPRESENTED BY ITS
DESIGNATED PARTNER
MR. KISHORE KUMAR.

2. MERUSHIKHAR INFRA LLP
A LIMITED LIABILITY PARTNERSHIP
'SOLUS', 11TH FLOOR,
NO.2, 1ST CROSS, J.C. ROAD,
BANGALORE - 560 027
REPRESENTED BY ITS
DESIGNATED PARTNER
MR. KISHORE KUMAR.

... PETITIONERS

(BY SRI YOVINI RAJESH ROHRA, ADVOCATE)

AND:

1. CHIEF QUALITY ASSURANCE ESTABLISHMENT
(WARSHIP EQUIPMENT)

MINISTRY OF DEFENCE (DGQA)
JALAHALLI CAMP ROAD
YESHWANTHPUR (PO)
BANGALORE - 560 022.

2. THE COMMISSIONER
BRUHAT BENGALURU MAHANAGAR PALIKE,
HUDSON CIRCLE,
BANGALORE - 560 022.
3. JOINT DIRECTOR (TOWN PLANNING-SOUTH)
BRUHAT BENGALURU MAHANAGAR PALIKE
HUDSON CIRCLE
BANGALORE - 560 022.

...RESPONDENTS

(BY SRI UDAY HOLLA, SENIOR ADVOCATE FOR
SRI MANU K., ADVOCATE FOR R2;
SRI M.N. KUMAR, CGC FOR R1;
SMT. SUMANGALA SIMIMATH, ADVOCATE FOR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF CONSTITUTION OF INDIA, PRAYING TO QUASHING THE ENDORSEMENT BEARING NO.BBMP/ADDL.DIR/JD SOUTH/LP 0092/16-17 DATED 03.09.2016 ISSUED BY THE JOINT DIRECTOR (TOWN PLANNING - SOUTH), BBMP, THE THIRD RESPONDENT HEREIN (ANNEXURE-T) AND THE LETTER BEARING NO.CQAE(WE)/WORKS/0720 DATED 15.07.2016 ISSUED BY THE CHIEF QUALITY ASSURANCE ESTABLISHMENT (WARSHIP EQUIPEMENT), MINISTRY OF DEFENCE (DGQA), THE FIRST RESPONDENT HEREIN (ANNEXURE-S) AND ETC.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED ON 14.07.2023 AND COMING ON FOR PRONOUNCEMENT OF ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

S. SUNIL DUTT YADAV. J

This Order has been divided into the following Sections to facilitate analysis:

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The present petition has been filed seeking for issuance of writ of certiorari to quash the endorsement at Annexure-'T' dated 03.09.2016 issued by the Joint Director (Town Planning-South) Bruhat Bengaluru Mahanagara Palike (BBMP) and has also sought for

setting aside of the letter dated 15.07.2016 issued by the Chief Quality Assurance Establishment (respondent No.1) at Annexure-'S'. The petitioner has also sought for issuance of writ of mandamus to direct respondent No.2 to consider the application submitted by the petitioners for issuance of building sanction plan without insisting for No Objection Certificate (NOC) from respondent No.1 in view of the Circular dated 21.10.2016 at Annexure-'V' issued by Ministry of Defence.

BRIEF FACTS:-

2. The petitioner No.1 is stated to be the owner of the land bearing Municipal No.70/1, BBMP, PID No. 2-172-70/1, Ward No.2, Tumkur Road, Bengaluru, morefully described in the Schedule. It is stated that the petitioner No.1 had entered into a Joint Development Agreement dated 08.09.2014 with petitioner No.2 for

the purpose of carrying out development of the residential project.

3. The petitioner No.2 had filed an application with respondent No.2-BBMP for sanction of residential plan on 19.06.2015. However, the respondent No.2 is stated to have issued an endorsement dated 29.03.2016 at Annexure-'M' directing the petitioner to obtain NOC from the Ministry of Defence in terms of the letter dated 14.01.2016 of the respondent No.1 [Chief Quality Assurance Officer, Ministry of Defence (DGQA), Government of India] and subsequently present the plan for sanction.

4. It is submitted that letter was addressed to the respondent No.2-BBMP to communicate with the respondent No.1 for issuance of NOC as regards the approval of building plan, that on 08.07.2016, letter was addressed to the respondent No.1 seeking for issuance of

NOC. On 15.07.2016, the respondent No.1 has addressed the letter stating that the construction put up by the petitioners is a potential security risk to the first respondent's Establishment and denied issuing of NOC, while relying on the letter dated 04.07.2016, issued by the Ministry of Defence.

5. It is stated that on the basis of number of representations received by the property owners and public regarding the difficulties faced, the Guideline/letter dated 18.05.2011 was revised and a new set of Guidelines dated 21.10.2016 (hereinafter referred to as 'the Guidelines') were issued.

6. After series of correspondences, the respondent No.1 is stated to have addressed a letter to the 'Additional DGQA (Naval),' Director of Quality Assurance (Naval), New Delhi seeking clarification with

regard to the issuance of NOC to the BBMP as regards approval of building plan submitted by the petitioners.

7. Accordingly, the petitioners having learnt that no reply had been sent by Additional DGQA (Naval) either to the first or second respondent clarifying the position with regard to issuance of NOC and accordingly, the present petition has been filed.

8. The statement of objections have been filed by respondent Nos.2 and 3 to the effect that in light of the endorsement at Annexure-'T' dated 03.09.2016, there was no discretion with the BBMP in terms of the letter dated 15.07.2016 of the Ministry of Defence.

9. It is further submitted that in terms of the communication dated 15.07.2016 addressed to the respondent No.2-BBMP, it was observed that the construction being a potential security risk, NOC cannot be given to the Establishment and that such stand was

reiterated by the higher Authority at the Head Quarters BQA(N) and the said issue has been taken up with the Ministry of Defence.

10. It is further submitted that despite the revised Guidelines, the petitioners are required to obtain NOC from respondent No.1.

11. The statement of objections has been filed by respondent No.1 on 05.03.2018 and subsequently additional objections were filed on 04.10.2021. The respondent No.1 has taken the stand that in terms of the Guidelines issued by the Ministry of Defence, NOC is to be obtained from the local Military Authority, while the construction is coming up within 100 Meters and in case of multistorey building of more than four storeys, then in such case, NOC is required where building is within a distance of 500 Meters from the compound wall of the Defence Establishment.

12. It is submitted that the respondent No.1 is a Premier Quality Assurance Establishment under the Department of Defence Production and vital services are provided to the Defence Establishment and the proposed construction of the petitioners in the vicinity is a potential security risk. It is submitted that the Guidelines of 18.05.2011 is to be read alongwith the Guidelines of 17.11.2015.

13. It is further submitted that the endorsement is valid in law. Additional objections have been filed on 04.10.2021 contending that the Guidelines dated 18.05.2011 and 17.11.2015 are issued under the Government of India (Allocation of Business) Rules, 1961 and the said Guidelines amount to an Executive order.

14. It is further contended that there is no necessity to issue notification under Section 3 of the Works of Defence Act, 1903, as the petitioners are

permitted to construct a building subject to restrictions. It is also asserted that other buildings in the vicinity do not violate applicable Guidelines.

ANALYSIS:-

A. WORKS OF DEFENCE ACT, 1903 OCCUPIES THE FIELD:-

15. The application of the petitioner for issue of sanction to the building plan has been kept in abeyance in terms of the endorsement at Annexure-'T' dated 03.09.2016 observing that the Authorities concerned with the Military Establishment, including the Ministry of Defence has refused to give NOC, as the proposed construction was a potential security risk.

16. The respondent No.2-BBMP while forwarding the request of the petitioner for issuance of NOC from the Chief Quality Assurance Establishment, Ministry of

Defence, has relied on the communication of respondent No.2-BBMP at Annexure-'R' dated 08.07.2016.

17. The respondent No.2-BBMP has relied on communication by Ministry of Defence (DGQA) Chief Quality Assurance Establishment (Warship Equipment), which had communicated that NOC cannot be given by the Office and same stand was reiterated by the Higher Authority, viz., Head Quarters (DQA)(N), which also has held that "construction is a security hazard and in turn had also raised the matter to MoD." It is further observed that the MoD, after perusal of the case has opined that the proposed construction is a potential security risk and construction should be stopped.

18. It is pertinent to note that insistence on NOC from the concerned Authorities of Defence Establishment is on the basis of the Guidelines for issue of 'No Objection Certificate' ('NOC') for building constructions

dated 18.05.2011, 18.03.2015, 17.11.2015 and Guidelines dated 21.10.2016 of the same nomenclature.

19. The entirety of the Guidelines collectively taken, seek to impose restriction regarding grant of sanction for building plans where constructions come up within the vicinity of Defence Establishment which are viewed as a security hazard and the obtaining of NOC from the specified Authority is deemed to be a pre-condition for sanction of building plan.

20. Sri Rajesh Chanderkumar, learned Senior Counsel appearing on behalf of petitioners has contended that the Guidelines referred to above collectively being in the nature of internal communication between the Ministry of Defence and the Chief of Army Staff, Chief of Navy Staff and the Chief of Air Force Staff cannot be interpreted to be an Executive instruction. It is further contended that the form in which such Guidelines exist

will not permit construing it to be a product of exercise of Executive power under The Government of India (Transaction of Business) Rules, 1961 nor under Government of India (Allocation of Business) Rules, 1961.

21. It is further contended that even if the same is in the nature of Executive instruction, it cannot have the effect of violating the right of petitioner No.2 under Article 19(1)(g) of the Constitution of India, which is a developer as also the right of the petitioner No.1 under Article 300A of the Constitution of India.

22. It is also contended that Works of Defence Act 1903, when occupies the field, there cannot be recourse to exercise of executive power in such field.

23. Before dealing with the contention raised by the petitioners, the context in which the Guidelines have been issued requires to be noted and the guidelines

themselves spell out as follows, *"It is felt that Works of Defence Act, 1903 which imposes restrictions upon use and enjoyment of land in vicinity of Defence Establishments, needs to comprehensively amended so as to take care of security concerns of Defence forces. While the process of amendment has been put in motion and may take some time, it was felt necessary to issue instructions in the interim to regulate grant of NOC."*¹

24. It is noticed that the Works of Defence Act, 1903 has been enacted with the object of providing for imposition of restrictions upon use and enjoyment of land in the vicinity of Works of Defence. Section 3 of the said Act provides for declaration regarding imposition of restrictions and Section 7 provides for restriction and is as follows:-

"3. Declaration and notice that restrictions will be imposed.—(1) Whenever it

¹An extract from Guideline dated 18.5.2011 (Annexure - P) and the same is reiterated in subsequent Guidelines.

appears to the Central Government that it is necessary to impose restrictions upon the use and enjoyment of land in the vicinity of any work of defence or of any site intended to be used or to be acquired for any such work, in order that such land may be kept free from buildings and other obstructions, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders.

(2) The said declaration shall be published in the Official Gazette and shall state the district or other territorial division in which the land is situate and the place where a sketch plan of the land, which shall be prepared on a scale not smaller than six inches to the mile and shall distinguish the boundaries referred to in section 7, may be inspected; and the Collector shall cause public notice of the substance of the said declaration to be given at convenient places in the locality.

(3) The said declaration shall be conclusive proof that it is necessary to keep the land free from buildings and other obstructions.

"7. Restrictions.—From and after the publication of the notice mentioned in section 3, sub-section (2), such of the following restrictions as the Central Government may in its discretion declare therein shall attach with reference to such land, namely:—

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

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

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

Provided that, with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe,

road-ballast, manure and agricultural produce may be exempted from the prohibition:

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

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

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

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

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

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

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

by the General Officer Commanding the District and

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

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

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

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

25. The circumstances under which restrictions could be imposed and the nature of restrictions to be imposed upon enjoyment of property rights as regards proposed buildings in vicinity of the Defence Establishments under the Guidelines on one hand and the Works of Defence Act on the other are detailed as per the comparative Table hereinbelow:-

THE WORKS OF DEFENCE ACT, 1903	GUIDELINES FOR ISSUANCE OF NOC FOR BUILDING CONSTRUCTIONS DATED 18.05.2011	GUIDELINES FOR ISSUANCE OF NOC FOR BUILDING CONSTRUCTIONS DATED 18.03.2015	GUIDELINES FOR ISSUANCE OF NOC FOR BUILDING CONSTRUCTIONS DATED 17.11.2015	GUIDELINES FOR ISSUANCE OF NOC FOR BUILDING CONSTRUCTIONS DATED 21.10.2016
<p>Section 7 provides as follows:</p> <p>After publication of the notice as per section 3(2), such of the following restrictions as the Central Government may in its discretion declare therein shall attach with reference to such land, namely-</p> <p>(a) Within an outer boundary which, except so far as is otherwise provided in section 39, sub-section (4), may extend to a distance of two thousand yards from the crest of the outer parapet of the work,—</p> <p>(i) no variation shall be made in the ground-level, and no building, wall, bank or other</p>	<p>While the process of amendment of the Works of Defence Act, 1903 has been put in motion, the following instructions have been issued to regulate grant of NOC.</p> <p>Following guidelines are therefore laid down:</p> <p>(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</p>	<p>These Guidelines detail a comprehensive review of the Guidelines dated 18.05.2011 so as to address issues that had arisen from the implementation of the said Guidelines, which is as follows:-</p> <p>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 a competent local municipal authority prior to 18.05.2011 (date</p>	<p>Amendments to guidelines by adding a second proviso under para 1(b) of Circular of even number dated 18.05.2011 as follows: -</p> <p>Wherever buildings/ structures of four storeys or more already exist within 500 meters of the periphery of any Defence establishment and the construction proposed is in line with or behind i.e., in the shadow or shield of such building/ structure, the State Government/ Municipal Corporation may, after obtaining comments from the LMA and giving due consideration to the same decide whether to approve such proposal or not. LMA shall give his comments within a period of 30 days from the date</p>	<p>The Central Government has amended guidelines issued under Circular dated 18.05.2011 read with Circulars dated 18.03.2015 and 17.11.2015, in consultation with services, in the following manner: -</p> <p>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 10 maintain clear line of sight for effective surveillance. Any construction or repair activity within such restricted zone of 10 meters will require prior</p>

<p>construction above the ground shall be maintained, erected, added to or altered otherwise than with the written approval of the 2 [General Officer Commanding the District], and on such conditions, as he may prescribe;</p> <p>(ii) no wood, earth, stone, brick, gravel, sand or other material shall be stacked, stored or otherwise accumulated:</p> <p>Provided that, with the written approval of the 3 [General Officer Commanding the District] and on such conditions as he may prescribe, road-ballast, manure and agricultural produce may be exempted from the prohibition:</p> <p>Provided also that any person having control of the land as owner, lessee or occupier shall be bound forthwith to remove such road-ballast, manure or agricultural produce, without compensation, on the requisition of the Commanding Officer;</p> <p>(iii) no surveying operation shall be conducted otherwise than by or under the personal supervision of a public servant duly authorized in this behalf, in the case of land under the control of military authority, by the Commanding Officer and, in other cases, by the Collector</p>	<p>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.</p> <p>(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.</p> <p>(c) Objection/ views/ NOC shall not be given by any authority other than Station</p>	<p>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.</p> <p>The other provisions of the circular dated 18.05.2011 will remain unchanged.</p>	<p>of receipt of a reference from the state government/ Municipal Corporation. This order will be implemented prospectively.</p> <p>In respect of proposals for construction between the boundary of the Defence establishments and the existing structure as indicated above and within 500 meters of the Defence establishments, the guidelines as indicated above and within 500 meters of the Defence establishments, the guidelines contained in circular dated 18.05.2011 with regard to NOC from the LMA shall continue to apply. Other provisions of the circular dated 18.05.2011 and 18.03.2015 will also remain unchanged.</p>	<p>No Objection Certificate (NoC) from the Local Military Authority (LMA) / Defence establishments.</p> <p>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 sight 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.</p> <p>3. It is further provided that where local municipal laws require consultation or approval or NoC from the LMA / Station Commander before a building plan is approved, compliance to such statutory requirements shall continue to be applicable.</p> <p>4. The procedure for issuance of NOC shall be the same as contained in</p>
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<p>with the concurrence of the Commanding Officer; and</p> <p>(iv) where any building, wall, bank or other construction above the ground has been permitted under clause (i) of this subsection to be maintained, erected, added to or altered, repairs shall not, without the written approval of the [General Officer Commanding the District], be made with materials different in kind from those employed in the original building, wall, bank or other construction</p> <p>(b) Within a second boundary which may extend to a distance of one thousand yards from the crest of the outer parapet of the work, the restrictions enumerated in clause (a) shall apply with the following additional limitations, namely:—</p> <p>(i) 4 [no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall bank or other construction shall be erected:]</p> <p>Provided that, with the written approval of the</p>	<p>Commander to the local municipality or State Government agencies and shall not be given directly to private parties/builders under any circumstances.</p> <p>(d) NOC once issued will not be withdrawn without the approval of the Service Hqrs.</p> <p>2. These instructions will not apply where constructions are regulated by the provisions of the existing acts/notification viz., Cantonments Act, 2006, Air Craft Act, MoCA, 1934, Gazette Notification SO 84(E) dated 14.01.2011 (as revised from time to time), Works of Defence Act, 1903, etc. In such cases provisions of the concerned Act/Notification will continue to prevail.</p>			<p>Circular dated 18.05.2011.</p>
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<p>1 [General Officer Commanding the District] and on such conditions as he may prescribe, huts, fences or other constructions of wood or other materials, easily destroyed or removed, may be maintained, erected, added to or altered:</p> <p>Provided also, that any person having control of the land as owner, lessee or occupier shall be bound forthwith to destroy or remove such huts, fences or other constructions, without compensation, upon an order in writing signed by the 2 [General Officer Commanding the District]; and</p> <p>(ii) live hedges, rows or clumps or trees or orchards shall not be maintained, planted, added to or altered otherwise than with the written approval of the 1 [General Officer Commanding the District] and on such conditions as he may prescribe.</p> <p>(c) Within a third boundary which may extend to a distance of five hundred yards from the crest of the outero parapet of the work, the restrictions enumerated in clauses (a) and (b) shall apply with the following additional limitation, namely:—</p> <p>no building or other construction on the surface, and no excavation, building or</p>				
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<p>other construction below the surface, shall be maintained or erected :</p> <p>Provided that, with the written approval of the Commanding Officer and on such conditions as he may prescribe, 3 [a building or other construction on the surface may be maintained and] open railings and dry brush-wood fences may be exempted from this prohibition.</p>				
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26. The question of resorting to exercise of Executive power where a statute passed in exercise of legislative power is in operation, does not arise. The Apex Court has observed in **State of Sikkim v. Dorjee Tshering Bhutia**² as follows:

"15. The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State which is contrary to any statutory provisions, is without jurisdiction and is a nullity...."

² (1991) 4 SCC 243

27. Accordingly, when the legislative scheme contained in the Act provides for a methodology for imposition of restriction regarding proposed constructions in the vicinity of a Defence Establishment, there cannot be resort to exercise of Executive power for imposing of such restrictions.

28. As it is clear that Guidelines have been issued during the interregnum when steps are afoot to amend the Works of Defence Act, recourse to Guidelines during such period is impermissible. When power is required to be exercised under the statute in a particular manner, there cannot be recourse to achieve the same consequence in a different manner by recourse to exercise of Executive power.

B. AUTHORITIES RELIED UPON BY THE RESPONDENTS

29. The Respondents have relied on the following judgments to substantiate their contentions, which are distinguished as follows:-

The decisions of Bombay High Court in **Union of India v. State of Maharashtra and Others**³, **S.S.V. Developers and Hiral Dinesh Vora v. Union of India and Others**⁴ and **Hindustan Petroleum Corporation Ltd., v. The Municipal Corporation of Greater Mumbai**⁵, rested heavily on the interpretation of Section 26 of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act), while observing that the said provision takes within its fold the power to consider other relevant material and accordingly upheld the insistence of NOC from the Defence Establishment.

³ 2016 (4) Bom CR 549

⁴ 2014 (2) Bom CR 541

⁵ 2012 (5) Bom CR 379

However, in the present case, no case is made out regarding existence of statutory provision under the Municipal law providing for obtaining of NOC.

In the case of **Sea Kunal Corporation Pvt. Ltd. v. Municipal Corporation of Greater Mumbai and Others**⁶, the High Court of Bombay merely noticed the relaxation in the restriction as regards building permission granted prior to 18.05.2011.

Further, the contention that the Guideline was without statutory backing and hence could not infringe upon the right under Article 300A or under Article 19 of the Constitution of India and such infringement could be only by a statutory law was neither contended nor discussed.

⁶ 2019 (2) ABR 766 : 2020 (1) ALLMR 616

C. EXECUTIVE POWER CANNOT HAVE THE EFFECT OF ABRIDGING RIGHTS UNDER ARTICLE 300A AND 19(1)(g) OF THE CONSTITUTION OF INDIA

30. Insofar as the petitioner No.2 - Developer is concerned, the right to carry on occupation, trade or business including of developing property would be a right falling within Article 19(1)(g) of the Constitution of India and restriction to be imposed upon such right under Article 19(1)(g) would be only by a law under Article 19(6) which is by a legislative law and cannot be by an Executive action.

31. Article 13(2) of the Constitution of India stipulates that State shall not make any law which abridges right under Part-III which would include a right under Article 19. The Constitution Bench of Apex Court in **State of Madhya Pradesh and Another v. Thakur Bharat Singh** (*Bench of 5 Judges*)⁷ has considered the

⁷ AIR 1967 SC 1170

validity of an order made in exercise of power under Section 3 of the Madhya Pradesh Public Security Act, 1959, whereby restriction was placed on the movement of a citizen. As the order under Section 3 was an Executive order, it was contended that Article 19 restricts the power of the State to abridge rights by way of Executive instruction without legislative backing. The Apex Court while refusing to permit such Executive action to curtail rights abridging fundamental rights has observed as follows:-

"6... Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued.

7. We are therefore of the view that the order made by the State in exercise of the authority conferred by Section 3(1)(b) of the

Madhya Pradesh Public Security Act 25 of 1959 was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Article 352 no immunity from the process of the Court could be claimed under Article 358, of the Constitution, since the order was not supported by any valid legislation."

32. In the facts of the case referred to above, the reference to rights refers to the fundamental rights under Article 19(1)(d) of the Constitution of India. Accordingly, an extension of the same logic would lead to the conclusion that the fundamental right under Article 19(1)(g) of the petitioner No.2 cannot be abridged by Executive action and must be only by legislative action.

33. The same legal position is reiterated by the Apex Court in **Union of India v. Naveen Jindal**⁸, where a flag code contained in an Executive instruction of the Central Government sought to impose restrictions on the fundamental right of 19(1)(a) and was struck down on

⁸ (2004) 2 SCC 510

the ground that the restriction on the right under 19(1)(a) could be only by a legislative law under Article 19(2) and law as contemplated would not include Executive instructions. The relevant observations made by the Apex Court are as follows:-

"28. Before we proceed further, it is necessary to deal with the question, whether Flag Code is "law"? Flag Code concededly contains the executive instructions of the Central Government. It is stated that the Ministry of Home Affairs, which is competent to issue the instructions contained in the Flag Code and all matters relating thereto are one of the items of business allocated to the said Ministry by the President under the Government of India (Allocation of Business) Rules, 1961 framed in terms of Article 77 of the Constitution of India. The question, however, is as to whether the said executive instruction is "law" within the meaning of Article 13 of the Constitution of India. Article 13(3)(a) of the Constitution of India reads thus:

"13. (3)(a) 'law' includes any ordinance, order, bye-law, rule, regulation, notification, custom or

usage having in the territory of India the force of law;"

29. A bare perusal of the said provision would clearly go to show that executive instructions would not fall within the aforementioned category. Such executive instructions may have the force of law for some other purposes; as for example those instructions which are issued as a supplement to the legislative power in terms of clause (1) of Article 77 of the Constitution of India. The necessity as regards determination of the said question has arisen as Parliament has not chosen to enact a statute which would confer at least a statutory right upon a citizen of India to fly the National Flag. An executive instruction issued by the appellant herein can any time be replaced by another set of executive instructions and thus deprive Indian citizens from flying National Flag. Furthermore, such a question will also arise in the event if it be held that right to fly the National Flag is a fundamental or a natural right within the meaning of Article 19 of the Constitution of India; as for the purpose of regulating the exercise of right of freedom guaranteed under Articles 19(1)(a) to (e) and (g) a law must be made."

(emphasis supplied)

34. Insofar as restriction being imposed on the right to construct within the vicinity of a Defence Establishment including restrictions to construct buildings upto a certain height which may amount to infringement of the right under Article 300-A of the Constitution of India, the Apex Court speaking through a Constitutional Bench (5 Judges) in **K.T. Plantation Private Limited and Another v. State of Karnataka**⁹ has observed as follows:-

"168. Article 300-A proclaims that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat, without any specific legal authority or without the support of law made by a competent legislature. The expression "property" in Article 300-A confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognised by law."

⁹ (2011) 9 SCC 1

Accordingly, the right of the owner of the property, i.e. petitioner No.1 to obtain sanction of building plan which is a concomitant right of property cannot be abridged by an Executive fiat as in the nature of Guideline in the present case. Accordingly, the Guidelines would be illegal insofar as they infringe upon the right of the petitioner No.1 to enjoy his property.

D. WHETHER THE GUIDELINES COULD BE CONSTRUED TO BE AN EXERCISE OF POWER CONFERRED UNDER THE TRANSACTION OF BUSINESS RULES AND ALLOCATION OF BUSINESS RULES?

35. A perusal of the Guidelines dated 18.05.2011, 17.11.2015 and 21.10.2016 would indicate that the said Guidelines are not issued in the name of the President.

36. Though it has been argued by learned Additional Solicitor General appearing for the respondent through Video Conference that the Guidelines have been passed in exercise of power conferred under the

Government of India (Transaction of Business) Rules, 1961 as well as Government Of India (Allocation of Business) Rules, 1961, the same cannot be accepted, as both the Rules having been framed under Article 77(3) of the Constitution of India are required to be in the name of the President. In the present case, none of the Guidelines are in the name of the President. Article 77(1) stipulates that all Executive action of Government of India shall be expressed to be taken in the name of the President and accordingly, Rules made by the President under Article 77(3) are also required to conform with the condition that exercise of Executive power must be in the name of the President.

37. The observations of the Apex Court in **State of Uttaranchal and Another v. Sunil Kumar Vaish and Others**¹⁰ has observed as follows:-

¹⁰ (2011) 8 SCC 670

"24. ... The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77(2) or Article 166(2)..."

38. Though the petitioner has not challenged the validity of the Guidelines, however, in light of finding recorded that Executive Guidelines have no place when field is occupied by Legislation, the Guidelines cannot be relied upon by the Union Government to impose restriction as long as the Works of Defence Act, 1903 is in operation and is not amended.

39. Accordingly, the endorsement issued by relying on such Guidelines are not backed by any legal foundation and accordingly, Annexure-'T' dated 03.09.2016 and Annexure-'S' dated 15.07.2016 are set aside and the respondent-BBMP to proceed with consideration of grant of sanction plan from the stage at

which it was kept in abeyance in accordance with the applicable laws and Rules without insisting for adherence to the Guidelines and complete the process as per law, within a period of three months.

Accordingly, the petition is ***disposed off.***

**Sd/-
JUDGE**

VGR