Bombay High Court
Union Of India Through The Indian ... vs The State Of Maharashtra And Ors on 29 April, 2016
Bench: Ranjit More

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

WRIT PETITION NO. 452 OF 2012

The Union of India,
through the Indian Army,
HQ, MG&G Area, through the
GOC, MG&G Area,
having his address at

headquarters Maharashtra
Gujarat & Goa Area, Colaba,
Mumbai-400005 Petitioner.

Vs

1. State of Maharashtra
through the Secretary,

Urban Development Department,
Mantralaya, Mumbai.

2. The Mumbai Municipal
Corporation, a body ... through
the Municipal Commissioner,

3. The Mumbai Metropolitan
Regional Development Authority

through its Metropolitan
Commissioner, having his office
at E-Block, MMRDA Building BKC,
Bandra (E), Mumbai-400051.

4. Adarsh Co-operative Housing
Society Ltd, having its address at
CTS No.652, Block VI, Colaba Division,
Capt. Prakash Pethe Marg, Colaba,
Mumbai-400005. Respondents.

Mr. Daraius J. Khambata, Senior Advocate a/w Mr. M.I.Sethna,
Senior Advocate a/w Dhiren Shah, A.M.Sethna, Mr. Phiroz Mehta,
Mr. Anket U Nikam, Ms R. Thakkar i/b Dhiren Shah, Advocates for

Petitioner.

Mr. Shailesh Shah, Senior Advocate a/w Mr. B.H.Mehta, A.G.P for
Respondent no.1-State.

None for Respondent no.2-BMC.

Ms Kiran Bagalia, Advocate for Respondent no.3-MMRDA.

Mr. Navroz Seervai, Senior Advocate, a/w Manish Desai, Saket

Mone, Vishesh Kalra, S. Chakraborti i/b Vidhi Partners, Advocates for Respondent no.4.

CORAM : RANJIT MORE & R.G.KETKAR,JJ.

Reserved on : 02 /12/2015 Pronounced on : ig 29/04/2016.

JUDGMENT : (PER R.G.KETKAR,J.)

1. By an Administrative Order dated 25.8.2015 passed by the Honourable Chief Justice, this Special Bench was reconstituted for hearing of the above petition and other connected matters from the Division Benches available at Original/Appellate Side of this Court. In pursuance thereof, we have heard Mr. Daraius Khambata, learned senior counsel for the petitioner, Mr.Shailesh Shah, learned senior counsel for respondent no.1, Ms. Kiran Bhagalia, learned counsel for respondent no.3 and Mr. Navroz Seervai, learned senior counsel for respondent no.4 at length.

Rule. Learned counsel for the respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final 3 / 98 WP/452/2012 hearing.

2. This Petition under Article 226 of the Constitution of India is instituted by the Union of India through the Indian Army, Head Quarters, Maharashtra Gujarat and Goa Area through the General Officer Commanding (for short, 'GOC'), Maharashtra, Gujarat & Goa Area (MG&G Area) against respondent no.1-State of Maharashtra through the Secretary, Urban Development Department, (UDD), respondent no.2-The Municipal Corporation of Greater Mumbai (for short, 'Corporation') through ig the Municipal Commissioner, respondent no.3- The Mumbai Metropolitan Regional Development Authority (for short, 'MMRDA') through its Metropolitan Commissioner and respondent no.4-Adarsh Co-operative Housing Society Ltd (for short, 'Adarsh Society').

3. By this petition, the petitioner has prayed for writ of mandamus restraining respondents no. 1 to 3 from granting any building/development permissions in the vicinity of and/or within the Colaba Military Station (CMS) without an No Objection Certificate (NOC) from Army Authorities and from granting any development permissions, Completion Certificate or Occupation Certificate to the 4th respondent or in respect of Adarsh Building on the land on which it stands; directing respondents no. 1 to 3 to forthwith demolish the building of the Society and pending 4 / 98 WP/452/2012 demolition, not to permit any occupation thereof. Pending the hearing and final disposal of the petition, the petitioner has prayed for interim relief directing respondents no. 1 to 3 (i) to forthwith cease and desist from granting any development permissions or an Occupation or Completion Certificate in respect of the said building, situate near Plot No.87-C, now allotted CTS No.652 in Backbay Reclamation Block-VI on Captain Prakash Pethe Marg also known as 'Cuffe Parade Road',

Colaba, Mumbai (for short, 'subject plot') or on the land on which it stands, to the 4th respondent society; (ii) to forthwith cease and desist from granting in respect of the said building to the 4 th respondent any sanction, certificate permission or any benefit or status of the authorised building. The relevant and material facts giving rise to filing of the present writ petition, briefly stated, are as under.

4. On 21.9.1999, respondent no.4 society addressed a letter to the Chief Minister of Maharashtra requesting allotment of a particular plot of land (Adarsh plot). It was set out therein that about 15 years back, the Government of Maharashtra proposed widening of Cuffe Parade Road, and joining the same to a 60 meter wide road known as 'Colaba-Uran Road'. However, after this proposal, the Government banned the reclamation of sea and the proposal came to be left on the back burner. In view of the above, it was submitted that there was no need now to widen 5 / 98 WP/452/2012 the Cuffe Parade Road beyond BEST Depot in the Back-way as military area starts from that point. In any case, the proposal was to terminate the said widening at the junction of plot-VI and VII of the Colaba Division. It was further set out therein that "our proposed plot is exactly located at that very junction where military area begins and there is no proposal of any such widening in the military area and, therefore, with little changes in the Development Plan, which is still pending for approval with the Ministry of Urban Development, our project can be cleared and Your Lordship be kind enough to allot the same to us which is free from encroachment and is presently with the Local Army Authorities for construction of houses".

5. On 13.1.2000, respondent no.4-society addressed a letter to Shri Ashok S. Chavan, the then Minister of Revenue and Forests, reiterating the contents of the letter dated 21.9.1999.

On 2.6.2000, the society addressed a letter to the Chief Minister of Maharashtra stating therein that the allotment of 3758 sq.meters of government land forming part of Block VI of Colaba Division will be a kind gesture towards serving and retired offices of Defence Services, more particularly to "our heroes who bravely and successfully participated in Kargil operation". It was further stated therein that possession of this piece of land is 6 / 98 WP/452/2012 already with Army for the last 25-30 years who have already issued their willingness in favour of the society to Collector, Mumbai. Mr Khambata submitted that there are in all 103 members of the society and out of this, only 34 members are from defence and not a single Kargil hero is a member of the society.

6. On 29.3.2000, the Collector, Mumbai addressed a letter to GOC, Headquarters, Maharashtra Gujarat and Goa Area, requesting the latter to confirm that there is no objection to allot land situate near plot no.6, Block-VI to the proposed society of the service personnel by the Government of Maharashtra. This was on the basis of the site inspection carried out on 27.3.2000 where it was revealed that the Military Department has constructed a wall to the said plot and hence the Government land protected from encroachment. The same land is applied by the proposed society. On 30.3.2000, HQ, MG&G Area addressed a letter to the Defence Estate Officer, Mumbai (for short, DEO') to confirm the status of the land situate near plot no.6, Block VI by 1.4.2000, i.e. whether its a State Government or Defence land.

On the same day, DEO Mumbai Circle, gave reply setting out therein that "it is verified from our records that the land in question forms part of Block VI of Colaba Division (Back Bay Reclamation Scheme-VI) which belongs to the Government of 7 / 98 WP/452/2012 Maharashtra and falls outside the Defence Boundary". On 5.4.2000, a letter was addressed by HQ, MG & G Area to Collector, Mumbai informing him that the requested land falls in Block-VI of Colaba Division (Back Bay Reclamation Scheme-VI) which fell outside the Defence Boundary. Necessary action may be taken as deemed fit for the welfare of service personnel/Ex-

servicemen/ their widows. Mr. Khambata submitted that respondent no.4-society in its affidavit in reply has claimed that this is an NOC from the Defence Department from a security point of view. In fact, this letter was not an NOC from a security point of view and DEO would not be appropriate authority in that regard. This letter only pertained to the query of the Collector dated 29.3.2000 in connection with no objection for allotment of the requested land to respondent no.4 society.

7. On 18.1.2003, Revenue and Forests Department of Government of Maharashtra issued Letter of Intent (LOI) subject to conditions stipulated therein. It was noted therein that the land was in possession of the Defence Department. On 16.6.2003, DEO, Mumbai Circle addressed a letter to Shri Pradeep Vyas, IAS, Collector Mumbai setting out therein that "at present the requested plot/Adarsh plot is a garden with many trees under management of Local Military Authority. The GOC, M&G Area Maj. Gen. B.A.Cariappa inaugurated an ecopark here on 8 / 98 WP/452/2012 27.10.1996 on the Infantry Day. The park is surrounded by Military Engineering Service and the same is adjacent and contiguous to Army Unit. How for is it proper to change the purpose of a plot from a park to a residential complex may be reviewed also. As far as the title of the land is concerned, there is some ambiguity in its status. As far as Survey of India Map of Colaba, certain buildings of Engineering Services group of the Army have been shown in the same area. The said issue also needs to be addressed through a proper joint survey of the area.

The State Government has never made any claims over the land even after the inauguration of a park there by the Army in 1996 and a multistoryed high-rise of private individual in that plot would dominate entire area of Army and Navy Area and other sensitive installation like TIFR. Thus, suitability of privately owned high rise may invite security implications in the longer run." In view thereof, a request was made to take note of all the above points before arriving at a decision in this regards. A further request was made for sending information which is desired by higher authorities of Ministry of defence.

8. On 29.9.2004, HQ, Southern Command, Pune addressed a letter to HQ, MG&G Area seeking comments on security implications by 1.10.2004 as regards transfer of a plot of land measuring 2000-2500 sq.meters at Block-VI, Colaba to 9 / 98 WP/452/2012 respondent no.4 society. On 30.9.2004, HQ, MG&G Area asked for comments of HQ, Mumbai Sub Area (Station Cell) on the security concerns raised by Director General Defence Estates (DGDE) today itself. On the same day, ie. 30.9.2004, HQ, Mumbai Sub Area (Station Cell) replied to HQ MG&G Area stating therein that the land in question has a big slum called Ganesh Murti Nagar on one side and on another side Back Bay Bus Depot. Hence there is no security implication for the military cantonment. On the same day, i.e. 30.9.2004, HQ, MG&G Area replied to HQ, Southern Command Pune, stating therein that

there were no security implications as regards transfer of plot of defence land to respondent no.4 society. On 4.10.2004, possession of Adarsh plot was handed over by the Collector, Mumbai to respondent no.4-society. On 22.11.2004, for the first time the Adarsh plot was recorded in the Government of Maharashtra, Land Revenue records.

9. On 11.7.2005, MMRDA addressed a letter to Team One Architects (I) Pvt Ltd, the Architects of respondent no.4 society informing the deficiencies in the proposal. One of them was :

> "v. The plot under reference is very close to the Defence area known as Navy Nagar and the proposed height of the building is 54.9 meters. Hence, the clearance from the Defence Department (Navy Department) be obtained from security point of view and the same is not submitted."
>
> 10 / 98 WP/452/2012
>
> 10. On 13.7.2005, the Architects gave reply to MMRDA and paragraph 5 thereof reads thus:
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> "5. Defence NOC: The plot falls in the block VI of Colaba Division, where Defence Department owns no land. There are already high rise buildings in the vicinity like IDBI towers, World Trade Centre etc in the light of this NOC from Defence Authorities should not be insisted upon. However, the NOC from Defence Department is enclosed as desired by you."
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> 11. Enclosures to this letter are letters dated 30.3.2000 and 5.4.2000. Mr Khambata submitted that the alleged NOC in question was only qua allotment of Adarsh plot and was not from a security point of view. Clearance/NOC from Defence Department as required under letter dated 11.7.2005 has neither been obtained nor being applied by respondent no.4 society.

Letters dated 30.3.2000 and 5.4.2000 alleged by society to be the NOCs qua security, cannot in any event constitute compliance with condition (v) imposed in 2005. The alleged NOC relied on by the society was obtained in 2000, i.e prior to MMRDA's letter dated 11.7.2005 and consequently there could not have been actual or substantial compliance by the society of requirement of obtaining NOC from the Defence Department from a security point of view.

12. On 6.9.2005, MMRDA addressed a letter to the Executive Engineer, Building Proposals, Corporation, and gave permission for construction upto the plinth level only and enclosed along 11 / 98 WP/452/2012 with this Commencement Certificate in duplicate. Condition no.

5 is to the following effect:

"5. NOC from the Army Department shall be obtained before seeking approval above the plinth level."

13. Mr. Khambata submitted that the society neither applied nor obtained NOC from Army Department. On 12.11.2005, HQ, MG&G Area addressed a letter to the Collector, Mumbai asserting therein that since the high rise building on the Adarsh plot will be overlooking important Army units its location has security implications and requested a list of office bearers and members of the society at the earliest to enable necessary verification by the Army to eliminate the possibility of particular security risk to Army units/installation. HQ, Western Naval Command (HQ WNC) vide several letters dated 27.8.2009, 15.3.2010, 15.4.200, 14.5.010 raised security concerns over the upcoming Adarsh building due to its location in the immediate proximity of strategic defence units and office/residential buildings of defence personnel. HQ,WNC also called upon society and Dy Registrar of societies to provide details of members of the society. On 25.5.2010, respondent no.4 society wrote to HQ WNC stating therein that a complete list of its members would be sent to it once all the names of its members were approved. On 8.6.2010, HQ WNC addressed a letter to the Chief Secretary, Government 12 / 98 WP/452/2012 of Maharashtra raising security concerns in the light of the increased threat perception pursuant to 26.11.2008 attacks. It was stated therein that no occupation certificate, partial or otherwise, should be issued by the State government to society pending security clearance from HQ, WNC. On 25.6.2010, HQ WNC addressed a letter to (i) Chief Secretary, Government of Maharashtra; (ii) Municipal Commissioner, Corporation, (iii) Principal Secretary , UDD, reiterating the contents of letter dated 8.6.2010 and called upon the authorities to provide information about members of society for the purpose of security screening.

It was further stated therein that the State Government should take immediate steps to issue a directive under section 154 of the Maharashtra Regional And Town Planning Act, 1966 (for short, MR&TP Act) mandating that no Occupation Certificate be granted to the society till the requested information was provided by it and vetted by HQ, WNC.

14. In view of letter dated 25.6.2010, the Executive Engineer (Building Proposals), Corporation, addressed a letter dated 19.7.2010 to MMRDA, being the special Planning Authority for Back Bay Reclamation for taking appropriate steps in that regard.

On 29.7.2010, HQ, Mumbai Sub Area (Station Cell) addressed a letter to the Chief Secretary, Maharashtra, raising security concerns about the Adarsh building. A request was made that 13 / 98 WP/452/2012 "no Occupation Certificate, partial or otherwise, be issued by the State Government Authorities to the said society pending a full security audit and screening by the Army and Naval Authorities".

On 4.8.2010, meeting of MLAs of Mumbai regarding slum dwellers of Geeta Nagar under the Chairmanship of Secretary, Housing Department was convened. A decision was taken in that meeting to rehabilitate the slum dwellers of Geeta Nagar situate in Colaba on Defence land in view of the risk to security involved due to the proximity of its location to strategically important defence installations. On 5.8.2010, HQ, MG&G Area addressed a letter to the Chief Secretary, Maharashtra stating therein that:

> ". The under construction building of Adarsh Co-operative housing Society is the most dominating building in Colaba which over looks almost entire Colaba Military

> Station. Occupation of this building by anti national elements can pose serious security threat to Colaba Military Station".

15. On 16.9.2010, MMRDA issued Occupation Certificate to respondent no.4-society. Revocation of Occupation Certificate issued by MMRDA to society was sought. On 30.10.2010, MMRDA revoked the Occupation certificate issued to Society. On 2.11.2010 Bombay Electricity Supply Transport (BEST) and the Corporation disconnected electric and water connections respectively to Adarsh building. On 4.11.2010 directive was 14 / 98 WP/452/2012 issued by UDD, Government of Maharashtra to the Planning Authorities including Corporation and MMRDA mandating that :

> "3. Before sanctioning any development permission in the area of Brihanmumbai Mahanagarpalika, firstly obtain No Objection Certificate from Defence, Army , Navy or Security Body lying in that region or nearby region."

16. On 18.5.2011, Ministry of Defence, Government of India issued guidelines in respect of the security concerns of the defence forces for issuing of NOC for building constructions.

17. In June 2011, Survey Report was carried out and report of Defence installations/structures in close vicinity of and with visibility from Adarsh building showing some structures/installations between 27 meters to 200 meters of Adarsh. Mr. Khambata invited out attention to Survey Report at Exhibit A page 47 and photographs from pages 48 to 57 taken from various floors of Adarsh showing defence installations/structures etc. On 10.6.2011, HQ, MG&G Area addressed a letter to the Municipal Commissioner requesting him to pass suitable orders for demolition of Adarsh building to safeguard the security of CMS. Various factors that made the Adarsh building a security threat were referred therein. This was replied by MMRDA on 30.6.2011 stating therein that the matter of Adarsh being sub-judice, MMRDA could take actions only on 15 / 98 WP/452/2012 receipt of specific directions from this Court or from the Government. On 29.11.2011, HQ, MG&G Area addressed a letter to the Secretary, Environment Department, Government of Maharashtra seeking implementation of the demolition order passed by Ministry of Environment and Forests (MoEF) as the Adarsh building was a threat to the security of CMS. On 2.1.2012, Government of Maharashtra addressed a letter to HQ, MG&G Area requesting it to take up the issue viz implementation of MOEF's demolition order with MOEF directly. In February 2012, present petition is instituted in this Court. On 21.2.2015, Government of Maharashtra issued Circular laying down Guidelines for controlling the construction work around the establishment of Defence Department, inter alia, replacing the Circular dated 4.11.2010 and referring to Ministry of Defence Guidelines for NOC dated 18.5.2011. Planning bodies are directed to forward building Plans of buildings in vicinity of Defence Establishments to the concerned defence establishment.

If no objection within 30 days is issued then NOC shall be deemed to have been issued. On 18.3.2015 first proviso to paragraph 1(b) of the Circular dated 18.5.2011 does not bar any Local Military Authority/Defence Establishment from raising security concerns in respect of any particular building with the Town planning or the Local Authority to prevent its erection or 16 / 98 WP/452/2012 occupation. The proviso only does away with the requirement of an NOC. On 17.11.2015, Ministry of Defence issued Circular adding second proviso to para 1(b) of Circular dated

18.5.2011.

approve such proposal or not. LMA shall give his comments within a period of 30days from the date of receipt of a reference from the State Government/Municipal Corporation. This order will be implemented prospectively."

18. Mr. Khambata submitted that Adarsh building is neither within the 'shadow' nor within the 'shield' of any other existing building/structure between it and CMS. No approval can be given to it under paragraph 1(b) and none has been sought by respondent no.4 society.

19. Mr. R.C.Thakur, the authorized representative of respondent no.4-society, has made affidavit dated 31.7.2014 opposing the petition. It is, inter-alia, contended that the petition suffers from delay and laches and is liable to be dismissed on that count alone. The petitioner has not made out sufficient cause and the gross delay and laches is unexplained. Respondent no.4 has also referred to provisions of the Works of Defence Act, 1903 (for short, 'said Act') and in particular sections 3 and 7.

Reference is also made to two huge slums known as Ganesh Murti Nagar and Geeta Nagar which occupies approximately 17 / 98 WP/452/2012 50,000 persons which are located in close proximity to CMS.

Reliance is placed on photographs Exhibit A Collectively and Exh.

B Collectively. In paragraph 9, it is asserted that Ministry of Defence is a State within the meaning of Article 12 of the Constitution of India and has to act within the four corners of law.

The action of the petitioner to target the building of 4 th respondent alone is not only arbitrary or capricious but is also violative of Article 14 of the Constitution of India. It is further asserted that in the absence of any material placed by the petitioner on record to show that why only respondent no.4's building may pose a security threat and not other buildings, the petition is liable to be dismissed with costs, being thoroughly misplaced. Respondent no.4 also relied upon correspondence from 31.12.1958 to 25.11.2010 in paragraph 10(i) to XLii.

Respondent no.4 contended that one Vice Admiral Sanjeev Bhasin, the then FOC-in-C, WNC vide his letter dated 5.7.2010 decided to form Adarsh-II Project near Oyster and Dolphin and had sought written help from the society. The request was refused by respondent no.4, as a result of fiasco, he created problem in the name of security and wrote several letters to respondent no.1 to force respondent no.4 for screening the society members clearance through Navy. It is further contended that respondent no.4 has obtained all the requisite permissions 18 / 98 WP/452/2012 from the concerned Planning Authorities after allotment of land by the State Government in exercise of powers under section 40 of the Maharashtra Land Revenue Code, 1966 and the Rules framed thereunder. Respondent no.4 has also obtained environment clearance from the concerned authorities. The petitioner has not challenged any of these building permissions and they are valid and subsisting till date, save and except Occupation Certificate which is revoked without following due process of law. Respondent no.4 consists of most of members from Army and Navy and Air

Force and some of them are from civil services. Apart from that, respondent no.4 has obtained NOC from Defence Authorities as is evident from communications dated 29.3.2000, 30.3.2000 and 5.4.2000. Respondent no.3 MMRDA being satisfied with the compliance, granted various permissions in the form of Commence Certificate from time to time to the building of the 4th respondent and the construction carried out by the 4th respondent is strictly in compliance with the permissions granted by the 3rd respondent.

20. Respondent no.4 further contended that it is inconceivable to even think that high ranking officers of Army from 1999 till 2010 being enrolled as members of the society, would compromise on a security concern. Officers referred in paragraph 20(j) had unblemished career and had distinguished 19 / 98 WP/452/2012 services. Even higher formation of Army from Head Quarters Southern Command, Pune and Army Head Quarters/Defence Ministry, New Delhi have been visiting Mumbai frequently, when the construction was in progress for over six years and they were in complete picture of Adarsh society building is being constructed. It is after almost 10 years, that the petitioner has woken up with the issues of security threat and now is trying to rope in its high ranked officers, who have retired from their positions in a distinguished career so as to show that they were hand-in-glove with the society for its construction and did not raise any issue of security concern in lieu of a flat in the society.

21. The petitioner has filed affidavit in rejoinder dated 18.11.2015 of Major General Rajiv Edwards. Along with the affidavit, (a) guidelines issued by the Ministry of Defence dated 18.5.2011, (b) Circular dated 21.2.2015 issued by the first respondent, (c) a Chart giving the details of all buildings mentioned in paragraph 7 of the affidavit-in-reply of respondent no.4 and the factum of the difference between the said buildings vis-a-vis the Adarsh building, qua location from the security point of view, (d) correspondence exchanged by the Defence Authorities as also Naval Authorities with Government of Maharashtra, is enclosed. In the Chart annexed at Exhibit-C to the rejoinder, the petitioner has also given remarks qua each 20 / 98 WP/452/2012 building referred in paragraph 7 of the affidavit-in-reply of the fourth respondent. In paragraph 13 of the rejoinder, it is stated that successive GOCs of the MG & G Area from 1999 to July 2010 have been allocated flats in the Adarsh building and it is for that reason that all the said GOCs did not take any objection to the construction of the said building.

22. In support of this Petition, Mr. Khambata strenuously contended that the nature of threat to the security of nation has undergone a vast change over the last decade with terrorism emerging as a source of major and unconventional danger. The assessment of such threats has heightened and the precautionary measures taken against them have expanded. In 2007 blasts in local train in Mumbai occurred and on 26.11.2008 a terror attack occurred in Mumbai that resulted in death of 164 people, injuring to at least 300 people and damage to property worth crores of rupees. The terrorists entered Mumbai through Machhimarnagar in Mumbai Cuffe Parade road. Safeguarding high value targets, which include the CMS (which includes within its borders the Headquarters Maharashtra, Gujarat an Goa Area), the Headquarters Mumbai Sub-Area and various other installations and buildings within the CMS, has assumed great importance. It is also important not to underestimate the 21 / 98 WP/452/2012 significance of safeguarding the wives and families of serving officers, who reside within the CMS.

23. He submitted that Adarsh building poses a serious threat to the security of the CMS as borne out from the following factors which are not exhaustive:

(i) Adarsh building is the tallest building in the vicinity of the CMS, standing 31 storeys tall, and can facilitate complete observation of military equipment, vehicles and personnel moving into and out of the area.

(ii) Being located on the 'neck', joining Colaba island, one can observe the sea on either side of Colaba island, providing the opportunity for strategically advantageous observation.

(iii) HQ MG&G Area and HQ MSA, which operate as command posts and nerve centres of activity in case of operational necessity, are located in close proximity to the Adarsh building and can be seriously crippled by small arms hand held weapons.

Additionally, the entire top decision making echelons of the Army are situate in HQ MG&G Area, and can be eliminated with sniper rifles wielded from the Adarsh building.

(iv) Important installations are located within 350 meters of the Adarsh building, as is set out in paragraph 7 of the petition and are well within the ranges of various small arm hand held weapons (some of which have a range of over 1000 meters). This 22 / 98 WP/452/2012 is evident from pages 7 to 9, which is reproduced below:

Installations	Distance from Adarsh Building (In Meters)
4. Infantry Officers Mess	61
5. Fuel, Oil and Lubricants Dept	27
7. Sagarika Transit	

9. Tata Institute of Fundamental Research 1148
10. Naval Victualling Yard ig 329
11. Naval Officers Residential

(ii) Sensitive installations that stand in close proximity to, and

can be targeted from, the Adarsh building include the Station Workshop, Storage and Disbursal Depot for POL (petrol, oil and lubricants), Army Supply Depot, Navy Supply Depot and MES Pumping station. He invited our attention to photographs at Exhibit B, pages 47 to 57, and submitted that these photographs make it amply clear that it is possible to inflict damage to these critical and sensitive facilities.

(iii) Enhanced surveillance technologies, which are available to terrorists, could be used from to spy on and transmit live feeds of the activities within the CMS.

(iv) The Naval Officers's Residential Ara is within close range of

the Adarsh building.

(v) It is possible that potential residents of Adarsh society may

invite guests who are foreign nationals.

24. Mr. Khambata submitted that the specific assertions made in paragraphs 3(iii) to (v) are not disputed by the 4 th respondent.

However, respondent no.4, inter alia, contended that:

(i) the issue of security is a "dynamic issue" and that in the modern era of improved surveillance capabilities, security can be provided by denying a particular space physically or otherwise to those who are undesirable;

(ii) the petitioner's perception that 'it is only this building of 4 th respondent which can pose a security threat to the Army installations in the Colaba area, is misconceived for the fact that there are other buildings which are much closer than the building of the 4th respondent.

(iii) However, it is only the building of the 4th respondent of which most of the members are from Army, navy and Air Force as well as some of them are from civil services, pose a security threat to the CMS.

(iv) The Colaba area was surrounded by slums.

(v) Colaba is purely a residential area, where no strategic targets are located and officers of Army, Navy and Air force reside there with their families.

(vi) Most operational locations are located outside Colaba save

a helipad which is surrounded by slums.

(vii) There are three Military Clubs and a Parsi civilian club

which hosts social functions;

(viii) Despite all this only the Adarsh building was being singled out.

He submitted that significantly there is no real dispute that Adarsh building is indeed a security threat.

25. Mr. Khambata submitted that the photographs taken from various storeys of the Adarsh building show that it is the best vantage point from which the CMS and various parts of it can be surveyed and monitored. This itself makes it unique in terms of the security hazard. Although ostensibly respondent no.4 was formed to provide housing to serving and retired personnel, their widows and Kargil heroes, only 34 out of 103 members of the Adarsh Society are from the Defence Services and not a single member is a Kargil War hero. In other words, it is a 'private' housing

society located at the entrance to the CMS. He further submitted that from the material on record, it is evident that respondent no.4 has never obtained NOC/clearance from the Defence Authorities from security point of view. That apart, on 6.9.2005, MMRDA, while giving permission for construction upto the plinth level, specifically imposed condition no.5 on 25 / 98 WP/452/2012 respondent no.4, namely, that NOC from the Army Department shall be obtained before seeking approval above the plinth level.

In the first place, respondent no.4 neither applied nor obtained NOC from the Army Department. Secondly, respondent no. 4 nevertheless misrepresented that it had an NOC from the Defence Department by relying upon communications dated 29.3.2000, 30.3.2000 and 5.4.2000.

26. Mr. Khambata submitted that the Army Authorities have taken into consideration various factors in assessing the security threat posed by Adarsh building and the same have been placed before this Court to satisfy the conscious of this Court that bonafide assessment of the security threat has been made by the petitioner and not to submit the determination of that security threat to judicial review. In support of this submission, he relied upon:

(1) TCI Industries Limited Vs. M.C.G.M, 2012 (5) Bom C.R.

353. In this case, the Division Bench of this Court considered issues that were almost identical to the issues that arise in this petition. The Division bench held that Section 46 of the MR&TP Act cannot be given a restricted meaning and it cannot be said that under Section 46, a Planning Authority cannot consider aspects such as security. Indeed, it was the inherent duty of the Planning Authority to apply its mind before giving development 26 / 98 WP/452/2012 permission and the Planning Authority is required to keep in mind the pros and cons of such development permission.

27. As per Regulation 16 of the Development Control Regulations for Greater Mumbai, 1991 (for short, '1991 DCR'), the Planning Authority may refuse to grant permission for use of land if the proposed development is not in the public interest, a term which has a very wide connotation.

28. Even if no notification is issued under section 3 of the said Act, the Planning Authority could always insist on an NOC from the Defence Department. The Division Bench further held that whether a security threat raised by Defence Authorities is a bogey or a matter of substance is not a question that could be decided in a petition under Article 226 of the Constitution of India and it is not for a court to pronounce upon whether the factor of security raised was justified or not.

29. Mr. Khambata relied upon Intervention Application No.2 of 2014 filed by respondent no.4-society in SLP (Civil) No.10381 of 2012 filed by TCI Industries before the Apex Court. In paragraph 13 of that application, respondent no.4 asserted that the decision by this Hon'ble Court (Apex Court) on the validity of directions/circulars/orders issued by the respondents as also the interpretation of the various provisions of law and the reasons given in the impugned order dated 19.11.2011 will have a direct 27 / 98 WP/452/2012 bearing on the Writ Petition no.452 of 2012 and its outcome.

Therefore, the decision to be rendered by this Hon'ble Court in the instant Special Leave Petition in respect of these issues will have a direct bearing on Writ Petition no.452 of 2012 filed against the applicant herein. As such, the issues/contentions arising in the instant Special Leave Petition are identical to the issues/contentions in Writ Petition No.452 of 2012.

30. Mr. Khambata also relied upon the decision of this Court in Akbar Travel of India (Pvt) Ltd Vs. Union of India and Ors, W.P.(L) No.656 of 2009, (Coram: Swantra Kumar C.J. and S.C.Dharmadhikari, J.) decided on 10.6.2009 and in particular paragraph 31 thereof. He further submitted that a court should only sit in appeal over such determinations only when there are malafides that have been proved against the determining authority. He relied upon decision in the case of Narangs International Hotels Pvt Ltd Vs. Union of India and Ors, 2011 (supp) Bom C.R. 585. He submitted that in the present case, no plea of malafides has been raised, much less established. The existence of the security risk is not disputed by the 4 th respondent. The contention advanced by respondent no.4 is one of the alleged singling out of the Adarsh building.

31. Mr. Khambata submitted that Section 46 of the MR & TP Act lays down that the Planning Authority in considering 28 / 98 WP/452/2012 application for permission shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under the said Act. In the case of S.N.Rao Vs. State of Maharashtra, AIR 1988 SC 712, the Apex Court held that scope of Section 46 of the MR&TP Act was wide and that the planning authorities were at liberty to take into consideration any fact relevant or material for the grant or refusal to grant sanction of any development plan. He relied upon paragraphs 7 and 8 of that decision.

32. Mr. Khambata submitted that in the case of Hindustan Petroleum Corporation Ltd, Mumbai Vs. MCGM, 2012 Vol. 114(3) Bom.L.R 1383, the Division Bench of this Court followed TCI Industries (supra) and held at paras 49 and 50 that it is not only the power but also the duty of planning authorities to consider the security aspect in public interest before granting development permissions as security is a crucial aspect which public bodies, entrusted with the task of regulating development, must take into consideration at all times. The Apex Court in Oswal Agro Mills Ltd Vs. Hindustan Petroleum Corporation Ltd, (2014) 2 SCC 491 affirmed the decision of this Court in Hindustan Petroleum Corporation. In paragraph 27, the majority judgment noted the relevance of the threat to security. Even the dissent judgment of Hon'ble Mr. Justice G.S.Singhvi while 29 / 98 WP/452/2012 remitting the matter to this Court, required this Court to take into consideration the issue of security threat.

33. Mr. Khambata submitted that in TCI Industries (supra), the Division bench of this Court held that it is inherent duty of planning authorities to apply its mind and take into consideration all relevant aspects before granting development permission.

The same decision is followed by another Division Bench of this Court in S.S.V.Developers Vs. Union of India, (2014) 2 Bom.C.R.

541. Mr. Khambata also relied upon Regulation 16(a),(e), (n) of 1991 DCR. Mr. Khambata further submitted that Development Control Rules of 1967 (1967 DCR) apply for the purpose of the CRZ Notification as held by the Apex Court in the case of Suresh Estate V Municipal Corporation of Greater Mumbai (2007)14 SCC 439, the 1991 DCR will otherwise be applicable and this is the stand taken by respondent no.3 -MMRDA, the Planning Authority.

Even assuming for the same of argument without conceding that 1991 DCR are not applicable, under section 46 of the MR&TP Act, the planning authorities are obliged to consider security aspect while considering building proposals. He further submitted that the duty imposed upon the planning authority to take these concerns into consideration while granting building permissions is independent of and not determinant on the raising of such concerns by Defence Authorities as these responsibilities 30 / 98 WP/452/2012 pertain to public interest and the security of the nation. He submitted that there was complete dereliction of the duty by MMRDA while issuing occupation certificate despite the several requests made by the Defence Authorities to it.

34. Mr. Khambata submitted that on 16.6.2003 Shri Saurav Ray, DEO addressed a letter to Collector, Mumbai raising security concerns in allotting the requested land to Adarsh. Even in the note dated 8.3.2004 Director General Defence Estate (for short, 'DGDE') raised security concerns regarding Adarsh building. On 12.11.2005, HQ, MG&G Area addressed a letter to Collector Mumbai to the effect that the high rise building of respondent no.4 will be overlooking important army units, its location as security implications. He submitted that respondent no.4 ensured that each successive GOC of MG&G Area or their family members was made a member of Adarsh society and was allotted a flat. GOCs between 1999 and 13.7.2010 were: (1) Maj.General A. R. Kumar (2) Maj.General V.S.Yadav, (3) Maj.

General T.K.Kaul, (4) Maj. General Tejinder Singh, (5) Maj.General R.K.Hooda. Each of them or their family members were allotted a flat in Adarsh building. Thus, from 1999 till 13.7.2010 all GOCs of MH&G Area became members of Adarsh society. During that period, there was no objection to Adarsh building on the basis of that it was not perceived as a security threat nor there was any 31 / 98 WP/452/2012 objection for transfer of land under occupation or owned by Army to Adarsh society. He submitted that HQ, Western Naval Command, raised security concerns over the upcoming Adarsh building due to its location in the immediate proximity of strategic defence units and /or office residential building/defence personnel vide several letters dated 27.8.2009, 15.3.2010, 15.4.2010 and 14.5.2010. The building of the 4 th respondent is the most dominated building in the area and has an overlooking view of the entire CMS. ig Thus, it is evident that the Defence Authorities have raised security concerns regarding the Adarsh building on numerous occasions and have even sought implementation of demolition orders passed by the MOEF.

35. Mr. Khambata submitted that by imposing condition on 6.9.2005, MMRDA did not consider (1) letters dated 29.3.2000 from Collector, Mumbai to GOC, HQ, MG&G Area (2) 30.3.2000 from HQ, MG&G Area to DEO and (3) 30.3.2000 from DEO to HQ, MG&G Area and (4) 5.4.2000 from HQ, MG&G Area to Collector Mumbai to constitute NOC from Defence Department or Army from security point of view. Alternatively, he submitted that letter dated 11.7.2005 of MMRDA required NOC from security point of view from Navy Department. The alleged NOC propounded by

respondent no.4-society in compliance of that condition are letters from Army and not from Navy. In other 32 / 98 WP/452/2012 words, respondent no.4 has not produced any NOC from Navy Department from security point of view. Even assuming that respondent no.4 had produced a fresh NOC in 2005 from Defence Authorities from a security point of view in compliance with condition imposed by MMRDA, he submitted that the said NOC could not have been propounded as applying to 31 st storeys building as it stands today as in 2005 the Commencement Certificate was issued to Adarsh society only for a 14 storey construction. He further submitted that assessment of threat posed by a proposed building of unknown height in 2000 to a 14 story building in 2005 and 31 story building in 2011 would necessarily be different.

36. Mr. Khambata submitted that respondent no.4 society has contended that the petition suffers from gross delay and laches.

He submitted that even where matters of public interest and national security were not involved, Courts have entertained writ petitions after long period of time. It is settled principles of law that issuance of writs is a matter of court's discretion although delay and laches are factors to be taken into consideration they are not absolute bar to relief. He relied upon the decision of the Apex Court in the case of (1) P.B.Roy Vs. Union of India, AIR 1972 SC 908 and in particular paragraph 8;

33 / 98 WP/452/2012 (2) State of Karnataka Vs. Y. Moideen Kunhi (dead) by LRs and Ors, (2009) 13 SCC 192 and in particular paragraphs 15 to 17;

(3) State of M.P. Vs. Nandlal, AIR 1987 SC 251 and in particular paragraph 24, where the Apex Court observed that even there is delay and the creation of third party rights, the High Court may still exercise its discretion and grant relief to a writ petitioner as ultimately the Court's discretion must be exercised fairly and justly so as to promote justice and not to defeat it.

37. Respondent no.4 also alleged that the assessment made by the petitioner that Adarsh building poses a security threat, is malafide and in support of this proposition, relied upon following decisions:

(1) Narmada Bachao Andolan Vs State of Madhya Pradesh, (2011) 7 SCC 639 and in particular paragraph 17;

(2) Chennai Metropolitan Water Supply and Sewarage Board and Ors Vs. T.T. Murali Babu, (2014)) 4 Supreme Court Cases 108 and in particular paragraph 13;

(3) State of M.P. Vs. Nandlal Jaiswal, (1986) 4 Supreme Court Cases 566 and in particular paragraph 24 thereof.

38. In this behalf, he submitted that respondent no.4 does not dispute that security risk emanates from Adarsh building.

Security generally and more particularly the security risk posed by Adarsh building is a continuing risk and concerns and 34 / 98 WP/452/2012 therefore there is no question of delay in raising such concerns and imposing duty on planning authority. There was change in threat perception after terror attack in Mumbai in 2008. The threat perception was not only heightened but perception of nature and types of threat posed security also changed. When the security of nation and arm forces are at risk, the defence authority is not precluded from raising bonafide national security issues in the future in the interest of public and the security of the nation. Delay is not a factor that can override public interest particularly national security concern.

39. Respondent no.4 has also contended that there is inaction on the part of the defence authorities against other constructions that allegedly posed security concerns to CMS. He submitted that other high-rise buildings, referred to by Adarsh society only offered limited view of CMS. The other high-rise buildings are not in as close proximity to the CMS as Adarsh building is. The height and proximity of Adarsh building provides an incomparable overview of the CMS. He has invited our attention to affidavit in rejoinder filed by the petitioner and annexure 'C' to indicate differences between Adarsh building and other buildings.

Merely because other constructions have been permitted cannot justify permitting one more construction and further dereliction of duty by the planning authority. As far as slums of Ganesh 35 / 98 WP/452/2012 Murti Nagar and Geeta Nagar are concerned, the defence authorities in conjunction with the State Government, have continued to make attempts to relocate and/or rehabilitate the slum dwellers located in the vicinity of CMS. He also invited our attention to affidavit dated 1.4.2011 made by Vice Admiral Bhasin in Writ Petition No.2407 of 2010 wherein he denied the allegations made against him by respondent no.4 and asserted that the documents relied upon by respondent no.4 are false and fabricated documents. Respondent no.4 has not refuted these assertions.

40. Mr. Khambata relied upon decision of the Apex Court in the case of Ratnagiri Gas and Power Pvt Ltd Vs RDS Projects Ltd, (2013) 1 SCC 524 to contend that the law casts a heavy burden on the person alleging malafides to prove the same on the basis of facts that are either admitted or satisfactorily established and/or logical inferences deducible therefrom. He further contended that reliance placed by respondent no.4 on the decision of the Apex Court in the case of All India State Bank Officers Federation Vs. Union of India, (1997) 9 SCC 151 to contend that such allegations against individuals should not be taken into consideration by the Court when those individuals have not been made parties to the proceedings before it. He submitted that the petitioner has only placed material facts 36 / 98 WP/452/2012 pertaining to persons who occupied the position of GOC of HQ MG&G Area from 1999 to 2010 and these GOCs became members of the Adarsh society.

41. Mr. Khambata also invited our attention to the Guidelines issued on 18.5.2011 read with Circulars dated 18.3.2015 and 17.11.2015 and submitted that these circulars are merely administrative guidelines as to how applications for NOC made to Defence establishments are to be dealt with. These circulars do not bar any Defence establishment from raising security concerns in respect of any particular building with the town planning or local authorities to prevent erection or occupation. It is only the requirement of NOC that is done away with. In any case, these circulars do

not and cannot in law limit the powers of the authorities concerned with the security of the nation to object to the planning authorities or to file proceedings before this Court. In any event, power of this Court under Article 226 is not curtailed by these circulars.

42. Mr. Khambata submitted that respondent no.4 has relied upon the said Act and in particular Sections 3 and 7 thereof as also relied upon the following decisions:

(1) Lok Holding & Construction Ltd Vs. Municipal Corporation of Greater Mumbai, 2012(5) Bom.C.R. 346;

(2) Anurag Agarwal Vs. State of Assam, Manu/GH/0257/2012,

learned Single Judge of Gauhati High Court;

(3) Union of India Vs. State of Karnataka, Writ Petition No.14387 of 2013, decided on 24.2.2014 by learned Single Judge of Karnataka High Court.

He submitted that the said argument was dealt with and specifically negatived by the Division Benches of this Court, firstly, in TCI Industries (supra) and secondly in S.S.V.Devleopers (supra). Both these decisions have categorically held that the decision of Lok Holding and Construction Ltd (supra) does not lay down any law. Even otherwise, the said Act entitles the Central Government to acquire land in the vicinity of Defence Establishment. It does not concern the duties of planning authorities to take security into account as a relevant factor while permitting development. The provisions of the said Act and Section 46 of the MR&TP Act operate in entirely different fields.

One does not exclude or override the other.

43. Mr. Khambata submitted that respondent no.4 contended that NOC is obtained from Defence Authority and on account of inaction on the part of Army Authorities, promissory estoppel operates against them. Respondent no.4 has relied upon a decision of the Apex Court in the case of Motilal Padampat Sugar Mills Vs. State of Uttar Pradesh, (1979) 2 SCC 409. He submitted that the principle of promissory estoppel applies to those cases 38 / 98 WP/452/2012 where there is a clear and categorical promise which is intended to be binding and acted upon and is in fact acted on. NOC propounded by respondent no.4 cannot be said to be a promise at all, much less a clear and categorical one.

44. He further submitted that in paragraph 24 in Motilal Padampat Sugar Mills case the Apex Court observed that the doctrine of promissory estoppel is an equitable doctrine.

Respondent no.4 had never obtained an NOC/clearance from the Defence Authority from a security point of view but nevertheless misrepresented that it had an NOC from the Army and obtained benefits and proceeded to construct its building. Assuming for the sake of argument that the doctrine of promissory estoppel is applicable, great prejudice would be caused to the public interest in allowing the Adarsh building to stand as the security of the nation would be adversely affected and public interest would be prejudiced.

45. Mr.Khambata further submitted that respondent no.4 contended that CMS is a 'peace station' and not an active war station. He submitted that the highest echelons of the Army Authorities who would be actively and exceedingly involved in war-time activities at the highest level, have their offices in the CMS (including the GOC, who is the head of MG&G Area, whose office window directly faces the Adarsh building) and the 39 / 98 WP/452/2012 presence of the families of serving officers also heightens the need to maintain high security. Lastly, he submitted that respondent no.4 has contended that the petitioner has not challenged various building permissions granted by MMRDA. He submitted that respondent no.3-Planning Authority had imposed condition of obtaining NOC from Defence Establishment and rather misrepresenting MMRDA that respondent no.4 had obtained NOC, it has carried out construction. In other words, respondent no.4 has willfully violated the conditions imposed by the Planning Authority. The Planning Authority is vested with Powers to demolish structures under sections 52 and 53 of MR&TP Act. In support of this proposition, he relied upon a decision of the Apex Court in the case of M.I. Builders Private Ltd Vs. Radhey Shyam Sahu, AIR 1999 SC 2468. For all these reasons, he submitted that petition deserves to be allowed and the reliefs prayed for deserve to be granted.

46. Ms. Kiran Bhagalia appearing on behalf of respondent no.3 MMRDA submitted that the MMRDA being Planning Authority had granted all building permissions in accordance with 1991 DCR as also directives issued by the State Government from time to time. She submitted that between 2003 and 2010 Defence Establishment did not raise any security concern. In other words, there was total in action on the part of Defence Establishment in 40 / 98 WP/452/2012 so far as the security threats are concerned. It is not a duty of the Planning Authority to consider safety aspect. She submitted that by not objecting to the construction of the building, by conduct, Defence Establishment has impliedly given NOC. In fact, if at all the petitioner has genuine concern over the security establishment, it should have raised objections at the threshold when the query was made for allotment of Adarsh plot to the 4 th respondent. She further submitted that communication dated 30.3.2000 addressed by DEO confirming ig that Adarsh plot fell outside defence boundary as also communication dated 5.4.2000 from HQ MG&G Area to Collector constitute NOC. She further submitted that no malafides are attributed to officers of MMRDA or to MMRDA. She further submitted that at the highest there is mistake on the part of MMRDA in construing communications dated 30.3.2000 and 5.4.2000 as NOC. The petition also suffers from cross delay and laches. She invited our attention to paragraph 19 of the petition to contend that the assertions made therein also constitute NOC of Defence Establishment. She made it clear that MMRDA is not opposing any prayers in the petition and is also not supporting respondent no.4. She further submitted that as far as the proposal to reduce width of Capt.

Prakash Pethe Marg (Cuffe Parade Road) was not initiated by MMRDA under section 37 of MR&TP Act. The proposal was 41 / 98 WP/452/2012 initiated by the State Government under section 37(1A). She further submitted that officials of the MMRDA are not beneficiaries and nobody is member of respondent no.4. She further submitted that condition no.5 in the permission to construct upto plinth level dated 6.9.2004, is not necessarily from security point of view but NOC is required as the land was in possession of defence. Condition no.5 does not talk from security point of view. She submitted that judgments relied by the petitioner do not mandate that the Planning Authority must insist NOC of defence from security point of view. She submitted that for the first time in June 2011 the petitioner addressed a letter and till that time the petitioner did nothing. She further submitted that the Circular dated 18.5.2011 is prospective. She submitted that appropriate orders may be passed.

47. On the other hand, Mr. Seervai submitted that the petition is filed seeking demolition of the building constructed by respondent no.4-society. The petitioner has portrayed the building as posing a security threat to the Defence Establishment. However, the record shows that from 2003 to 2011 the only objection raised by the petitioner was as regards the personnel who would become the members of the society.

Admittedly and undisputedly, from 2003 to 2011 the petitioner only wanted to verify the antecedents and credentials of the 42 / 98 WP/452/2012 members of the society. In fact, it never raised the slightest objection to the construction of the building which was taking place in front of their very eyes. The petitioner never raised any objection to the construction of the said building because in fact it had none. Though the petitioner is seeking writ of mandamus under Article 226 directing demolition of the building, it has not challenged the valid and subsisting permissions which have been granted by the third respondent, the Planning Authority pursuant to which respondent no.4 has constructed a building. It is thus clear that the actions of the petitioner are clearly arbitrary, malafide and without any basis much less any justification. The actions of the petitioner are also violating Article 14 for targeting only the building of the 4th respondent in an area which is completely developed with high-rise buildings and also occupied by slums which are in close proximity to the Defence Establishment. The petitioner has not given any justification, much less any explanation, as to how the only building of the 4 th respondent poses a security threat to the Defence Establishment.

48. Mr. Seervai submitted that on 29.3.2000, Collector Mumbai addressed a letter to GOC, HQ, MG&G Area requesting him to confirm that there is no objection to allot land to respondent no.4 by Government of Maharashtra. This was obviously in connection with carrying out construction. On 30.3.2000 Mr. B.S.Rao, 43 / 98 WP/452/2012 addressed a letter to DEO, Mumbai enclosing copy of letter of Collector dated 29.3.2000 and requested the DEO to confirm the status of the land by 1.4.2000. On 30.3.2000 DEO Mr. Guruswamy who is not a member of the 4 th respondent addressed a letter to HQ MG&G Area stating that the land in question which was applied for by the 4 th respondent forms part of Block-VI of Colaba Division (Back Bay Reclamation Scheme-VI) which belongs to Government of Maharashtra and the same falls outside the defence boundary. ig On 31.3.2000, HQ Munbai Sub Area (Station Cell) addressed a letter to HQ MG&G Area stating therein that as per records available, the Army land does not fall in Block-VI of Colaba Division. It is further

stated that the army land in Colaba forms part of Block-VII and Block-VIII and Colaba promontory.

49. On 5.4.2000, HQ M&G Area addressed a letter to Collector Mumbai stating therein that "the land falls in Block -VI of Colaba Division, (Back Bay Reclamation scheme-VI) which falls outside the defence boundary. Necessary action at your end may be taken as deemed fit for the welfare of service personnel/Ex-

servicemen/their widows". Thus, on a plain reading of letter dated 5.4.2000 which is addressed by HQ M&G Area, is a NOC issued by Defence Establishment for construction of the building on the land to be allotted by the Government of Maharashtra to 44 / 98 WP/452/2012 the 4th respondent. None of the personnel who wrote the aforesaid letters either in the HQ, M&G Area or the Defence Estate, are members of the 4th respondent and have given their inputs based on record which were available with the office of the petitioner.

50. Mr. Seervai submitted that the communication dated 5.4.2000 written by HQ M&G area has been treated as NOC not only by the Corporation, MMRDA, Collector, Registrar of Societies, besides the State of Maharashtra but even more significantly the petitioner and office of DGDE also treated it as NOC while preparing note dated 8.3.2004 based on the reference of Chief Vigilance Officer dated 26.2.2004. In sub paragraph 1(d), DGDE note dated 8.3.2004 referred the security implications by the building of the 4th respondent. Based on sub-paragraph 2(d) of DGDE note, the HQ, Southern Command, Pune on 29.9.2004 wrote letter to HQ MG&G Area, Colaba Mumbai, seeking comments of the security implications. The said comments were to be given by 1.10.2004.

51. On 30.9.2004 HQ MG&G Area wrote a letter to HQ Mumbai Sub Area (Station cell) requesting it to forward comments on the security implications in terms of paragraph 2(d) of DGDE Note.

On the same day, i.e. 30.9.2004 HQ Mumbai Sub Area (Station Cell) informed HQ MG&G Area that the Adarsh plot has a big slum 45 / 98 WP/452/2012 called Ganesh Murti Nagar on one side and on another side Back Bay BEST Bus Depot. Hence, there is no security implications for the Military Cantonment. On the same day, HQ MG&G Area based on the inputs given by HQ Mumbai Sub Area (Station Cell) informed HQ Southern Command (Q/L) that the plot in question is located in the slum colony called Ganesh Murti Nagar on one side and a BEST Depot called Back Bay Depot on the other side along with Capt Prakash Pethe Road and therefore there are no security implications. The said letters were written based on the factual position as well as based on record which categorically stated that there would be no security implications to Defence Establishment if the building is constructed by the 4 th respondent on the land to be allotted by the Government of Maharashtra.

Thus, on a plain reading of letter dated 5.4.2000, as also correspondence subsequently ensued between HQ Southern Command, Pune and HQ MG&G Area, it is crystal clear that the building of the 4th respondent does not pose any security threat and that it was issued a valid NOC on 5.4.2000 by the Defence Establishment.

52. Mr. Seervai submitted that on 11.7.2005, MMRDA addressed a letter to Architects of the 4th respondent. Clause (5) thereof required respondent no.4 to obtain clearance from the Defence

Department (Navy Department) from security point of 46 / 98 WP/452/2012 view as the proposed height of the building is 54.9 meters. On 13.7.2005, respondent no.4's Architects gave reply stating therein that the plot falls in Block VI of Colaba Division where Defence Department owns no land. There are already high-rise buildings in vicinity like IDBI towers, World Trade Centre, etc. In the light of this, NOC from Defence Authority should not be insisted upon. However, NOC from Defence Department is enclosed as desired. On 6.9.2005 MMRDA gave permission for construction upto plinth level. One of the conditions therein was to obtain NOC from Army Department before seeking approval upto plinth level. Along with that, Commence Certificate was also enclosed. Mr Seervai submitted that the petitioner has inadvertently or otherwise lost sight of significance of the letter dated 20.11.2006 addressed by Architects of the 4 th respondent to the Chief Town and Country Planning MMRDA. In paragraph 5 of that letter, it is specifically stated that condition of obtaining NOC from Army Department has been complied with vide letter dated 13.7.2005, i.e. NOC dated 5.4.2000. He submitted that respondent no.3 was satisfied with the compliance made by the 4th respondent and did not insist upon a further NOC from the Defence Department. In view thereof, respondent no.3 did not insert that condition in any of the further permissions granted by it to the 4th respondent. It is thus clear that the authorities more 47 / 98 WP/452/2012 particularly MMRDA as well as defence Department having been satisfied with the NOC did not raise any such issue from the years 2003 to 2011. Even the Occupation Certificate dated 16.9.2010 was issued by respondent no.3. It is, therefore evident that respondent no.3 having applied its mind to the matter exercised its discretion, the same cannot be faulted by the petitioner as having been wrongly exercised. At no point of time Defence Establishment raised any objection as regards letter dated 5.4.2000 having been construed as NOC in favour of the 4th respondent nor did Defence Department ever raise any objection to the construction of the building which was going on almost six years in front of their eyes.

53. Mr. Seervai submitted that before starting construction, respondent no.4 had issued public notice in Daily Newspaper on 19.10.2005 thereby informing public at large that it had been granted building permission by the planning Authority and it proposes to start construction in compliance with the same, the petitioner did not raise any objection to the aforesaid notice. He, therefore, submitted that it is not open to the petitioner now to contend that letter dated 5.4.2000 is not an NOC or that the said letter is NOC for the purpose of allotment of land and not for construction of a multi storeyed building or that NOC of 5.4.2000 cannot be construed to be NOC from security angle. The said 48 / 98 WP/452/2012 contention is dis-engineers, dishonest and absurd. The petitioner very well knew that the plot was being allotted to the 4 th respondent for specific purpose of construction of a multi-

storyed building. NOC was, therefore, obviously given from the security angle. Respondent no.4 having obtained a valid and subsisting NOC as well as other building permissions from respondent no.3 and Corporation has constructed building on the said land by investing huge sum of monies and has altered its position to its detriment. The members of the 4 th respondent had invested their life savings in getting the flats and it is not open to the petitioner to contend or even suggest after 7-8 years that the letter dated 5.4.2000 is not an NOC or that it is not a valid NOC.

54. Mr. Seervai has taken us through correspondence during the period from 2003 to 2011. All this correspondence centers around membership of the society as also about their credentials and antecedents. He submitted that perusal of this correspondence clearly shows that the petitioner or even HQ, WNC, was seeking details of members including their antecedents and credentials so that occupants of the building do not pose any security threat to Defence Establishment. The only perception of the security threat of the petitioner as well as HQ, WNC was that the foreign national or some antisocial elements 49 / 98 WP/452/2012 should not occupy the building so as to pose security threat to Defence Establishment. He further submitted that respondent no.4 did not withhold any information either from the petitioner or HQ, WNC.

55. Mr. Seervai submitted that the petitioner has relied upon the letter dated 16.6.2003, addressed by Mr. Saurav Ray, the then DEO, to suggest that security concern was raised in 2003, ie prior to allotment of land in favour of the 4 th respondent. On the other hand, the petitioner has submitted that DEO has nothing to do with actual security implications of Defence Establishment.

The issue of security does not come within the purview of the office of Defence Estate. He relied upon the Acquisition, Custody and Relinquishment Rules 1944. He submitted that the management of defence land in CMS is with Local Military Authority and not the DEO. As per Rule 4, request for acquisition of land for Army purposes is to be initiated at the request of said Local Military Authority. As per Rule 7, the request for acquisition of land for defence purposes after initiation by LMA the proposal is to be sent through Army Headquarters through proper channel before initiating any acquisition proceedings. Only after receipt of approval from Defence Ministry, local DEO is to be requested to initiate proceedings for acquisition of land required by Defence.

None of these steps have been initiated by LMAs for

acquisition/transfer of land for Block-VI of Colaba Division and, therefore, DEO has no role to play in writing letters raising an issue of the alleged security threat.

56. He submitted that the said DEO was in fact reprimanded by his immediate superior, i.e. Principal Director, Defence Estate, in his letter dated 5.8.2003 addressed to DGDE, copy whereof was sent to Mr. Saurav Ray wherein he was directed not to take immediate and unilateral action without consulting the higher authorities of sensitive issue of this nature. The initiation of Mr. Saurav Ray to write such letter is clear from the letter dated 6.8.2003 addressed by Brigadier Pravinder Singh to Addl. Director General (Quarter Master General Branch), wherein in paragraphs 6 and 7 he has categorically stated that Mr Saurav Ray applied for membership of respondent no.4 and the same having been refused, he raised issues which were not within his jurisdiction. The said letter also states that DEO, who has not been able to obtain membership of the 4 th respondent, had

resorted to mischievous methods of planting anonymous letter raising issues which were not within his jurisdiction. The same fact is also reiterated in the letter dated 25.5.2004 addressed by HQ, Southern Command, to the Addl. Director General (Quarter Master General Branch). Thus, it is apparent that Mr Saurav Ray has personal agenda and an axe to grind against respondent 51 / 98 WP/452/2012 no.4.

57. Mr. Seervai submitted that suddenly on 10.6.2011 the petitioner, for the first time, wrote letter to Metropolitan Commissioner of MMRDA seeking demolition of the building on the ground that the building itself constituted a security threat.

This was replied by the MMRDA stating that the matter is sub-

judice in this Court and respondent no.3 shall take action on receipt of specific directions either from the High Court or the Government. The petitioner thereafter wrote a letter dated 29.11.2011 to Environmental Department, Government of Maharashtra, seeking demolition of the building of the 4 th respondent. The Environment Department, in turn, addressed a letter dated 2.1.2012 to the petitioner to directly approach MOEF for appropriate orders of demolition.

58. Mr. Seervai submitted that the petition suffers from gross delay and laches and the delay is justified on the ground that the petitioner bonafide believed that it would not have to file a separate proceedings to challenge the construction of building on the ground of it being security threat in view of the order dated 14.1.2011 passed by MOEF ordering demolition of building. The petitioner has further justified filing of the petition belatedly on the ground that as the matter challenging the order of demolition of MOEF did not progress, the petitioner thought it fit to file 52 / 98 WP/452/2012 present petition without any further delay. The said plea ought to be disbelieved and discountenanced by this Court. If the petitioner was serious about national security, there was no question of waiting for the building to be demolished under the MOEF order dated 14.1.2011. The petitioner has belatedly targeted a stand alone building in an area which is completely developed after the building was constructed, completed and was granted Occupation Certificate.

59. He further submitted that while exercising powers under Article 226 of the Constitution of India, the Court is required to weigh the explanation offered for the delay and laches and consider if the explanation offered is credible or believable. Such consideration would include:

(i) Whether the delay and laches has caused irreparable harm and prejudice to other side;

(ii) The extent of delay;

(iii) The credibility and plausibility of the explanation given for the delay.

In support of this proposition, he relied upon following decisions:

(i) Chennai Metropolitan Water Supply and Sewarage Board (supra) and in particular paragraphs 13 to 17;

(ii) State of M.P. (supra) and in particular paragraphs 19

to 25.

(iii) Narmada Bachao Andolan case (supra) and in particular paragraphs 17 to 20.

60. Mr.Seervai submitted that in order to justify gross delay and laches in filing the petition, the petitioner has levelled allegations of malafides against five GOCs, namely (i) Maj.General A.R.Kumar, (ii) Maj General V.S.Yadav, (iii) Maj.General T.K.Kaul,

(iv) Maj.General Tejinder Singh and (v) Maj. General R.K.Hooda without making them parties to the present petition.

ig These officers have been deprived of an opportunity to defend themselves and answer the allegations of malafides levelled against them. This is legally impermissible. They are high ranking Army Officers with a highly decorated service career who have given their lives to the nation. The petitioner has made loose allegations of malafides and has insinuated these officers who have compromised national security for securing a flat in the building of the 4th respondent. The petitioner has indirectly portrayed their actions as if they are traitors. To add insult to injury, these allegations are bare and bald allegations, unsubstantiated with any particulars, details or materials, let alone a jot or iota of documentary evidence.

61. He submitted that respondent no.4 has dealt with these allegations in paragraph 20(j) and still the petition is not 54 / 98 WP/452/2012 amended so as to implead these five officers as party respondents. He submitted that mere assertions or a vague or bald statement is not sufficient. It must be demonstrated either by admitted or proved facts and circumstances obtainable in a given case. The burden of proving malafides is on the person making the allegations and the burden is very heavy. The allegations of malafides are often more easily made than made out and the very seriousness of such allegations demand proof of a high degree of credibility. ig He submitted that a judicial pronouncement declaring an action to be malafides is a serious indictment of the person concerned that can lead to adverse civil consequences against him. The Courts have, therefore, to be slow in drawing conclusions when it comes to holding allegations of malafides to be proved and only in cases where based on the material placed before the court or facts that are admitted leading to inevitable inferences supporting the charge of malafides that the Court should record a finding in the process ensuring that while it does so, it also hears the person who is likely to be affected by such a finding. In support of this submission, he relied upon following decisions:

1. Ratnagiri Gas and Power Pvt Ltd case (supra) and in particular paragraphs 25 to 29;

2. All India State Bank Officers Federation case (supra) and in 55 / 98 WP/452/2012 particular paragraphs 20 to 22 and 31 to 40.

62. Mr. Seervai submitted that as opposed to the Army having a Peace Station in Colaba Defence Establishment, the Navy in fact, operates a War Station which is also located in Colaba Defence Establishment. Till the year 2009, the Navy did not write a single letter raising an issue of security threat posed by the 4th respondent as the case of Navy is far away from the building of respondent no.4 to pose a security threat. Except Vice Admiral Madanjit Singh, none other high ranking officer of Navy in Colaba Defence Establishment are member of the 4th respondent. Navy has not chosen to file the petition.

63. Mr. Seervai submitted that in the present case, admittedly Colaba has not been declared/modified as Works of Defennce nor any procedure as envisaged under the said Act has been undertaken by the petitioner. In the absence of such procedure under the said Act, action of the petitioner at such belated stage is an arbitrary and unreasonable exercise of powers and should not be countenanced. He relied upon Sections 3 and 7 of the said Act as also following decisions.

(i) Lok Holding & Construction Ltd (supra) and in particular paragraphs 4 and 5;

(2) Anurag Agarwal (supra) and in particular paragraphs 82 to 85;

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(3) Union of India Vs. State of Karnataka, Writ Petition

No.14387 of 2013 decided on 24.2.2014 by learned Single Judge of Karnataka High Court and in particular paragraphs 15 to 17.

64. Mr. Seervai submitted that apart from the building of the 4th respondent, there are several high-rise buildings, namely, Daulat Shireen, Buena Vista, Connaught Barracks, Usha Sadan, Shangrila and Windmere and many others which are totally overlooking into the MG & G Area and Army and Navy area in Colaba. Durgamata Towers, a 32 storey (approximately 112 meters) building constructed in the year 2006 totally occupied by the civilians is dominating the Army and navy military stations.

The petitioner has never objected in respect of the said buildings except the building of the 4th respondent. The Navy's Western Fleet is located adjacent to the gateway of India and is dominated by Taj Mahal Hotel where foreigners come and stay as also various other buildings, located in that area, directly viewing the Western Fleet of the Navy. Similarly, Bombay Stock Exchange and Reserve Bank of India buildings overlook the entire Naval areas. Two high rise buildings known as Oyster and Dolphin owned by Pilot Bunder CHS Ltd (located within Colaba Military Station), which are allotted to retired service officers and civilians, are occupied by civilians including foreigners for which the approach road and water supply has been provided by the 57 / 98 WP/452/2012 Army staff and which pertinently does not pose any concern of security threat whereas only the building of the 4 th respondent which is actually located outside the defence boundary is purportedly posing a security threat to the petitioner's area in Colaba. Apart from that, two slums known as Ganesh Murti Nagar and Geeta Nagar where approximately 50000 persons are residing are located in close proximity to CMS. No action whatsoever is taken against them by the petitioner. He has invited our attention to Chart which is part of Sur-rejoinder at page 582 which is to the following effect :-

Building	Distance
1. Usha Sadan	30-40 mtrs from the gate of Mumbai Sub- area.
2. Bakhtavar	30-40 mtrs from the gate of Mumbai Sub-area.
3. Cannaught Mansion	10-20 mtrs from the gate of Mumbai Sub- area.
4. VeenaTower	50-60 mtrs from the gate of Mumbai Sub-area.
5.Sneh Sadan	40-50 mtrs from the gate of Mumbai Sub area.
6.Daulat Shireen	Shares the common boundary wall with Mumbai Sub Area.
7.Beauna Vista	Shares the common boundary wall with Mumbai

	Sub Area.
8.Shangrila	30-40 mtrs from the gate of Mumbai Sub- area.
9.Wind Mere	Shares a common boundary wall with Station Work Shopand HQ Mumbai Sub Area.
10.Oyster and Dolphin	Within Colaba Defence Station.
11.World Trade Centre	100-150 mtrs from the gate of Station Work Shop.
12.DSK Durgamata	150-160 mtrs from the gate of Mumbai Sub area
13.IDBI Tower	100-150 mtrs from Naval ships and residence of

FOC-in-C (Flat officer Commanding-in-Chief), 58 / 98 WP/452/2012 Western Naval Command.

14.BSE 100-150 mtrs from Western Naval Fleet.

Thus, the action of the petitioner in instituting petition only against the building of the 4 th respondent is both arbitrary and discriminatory which is violative of Article 14 of the Constitution of India.

65. He submitted that though the building of the 4 th respondent is alleged to be a security threat, the said building is vacant and unguarded for the past 5 years. ig No efforts are made by the petitioner or the Navy to secure the building from the security point of view. Apart from this, the plot next to that of 4 th respondent is now reserved by the Mumbai Metro for construction of a Metro Station where the public will embark and get inside and have an easy access to the Colaba Defence Establishment area. However, to the best of the information and belief of the 4th respondent, no objection has been raised as regards the security threat posed by the said Metro Station by the petitioner.

66. Mr. Seervai submitted that the Circulars/Guidelines are issued by the State Government as well as Ministry of Defence on 4.11.2010, 18.5.2011, 21.2.2015, 18.3.2015 and 17.11.2015. All these Circulars have been issued after the completion of the construction of the building and none of them apply to the 59 / 98 WP/452/2012 building as those Circulars/Guidelines will apply prospectively.

67. Mr. Seervai also distinguished the decisions relied by the petitioner in (1) TCI Industries Limited, (2) SSV Developers and (3) Oswal Agro Mills. He submits that these judgments will have to be considered in the light of the facts obtaining in those cases.

A little difference in the facts or additional facts makes a significant difference to the precendiary value. In support of this proposition, he relied upon the following decisions.

(1)Union of India Vs. Dhanwanti Devi, (1996) 6 SCC 44 and in particular paragraphs 9 and 10 thereof.

(2)State of M.P. Vs. Narmada Bachao Andolan (supra) and in particular paragraphs 64 thereof.

He submitted that the decisions in TCI Industries Limited, SSV Developers and Oswal Agro Mills do not constitute binding precedent since the facts and circumstances of those cases are entirely different in material aspect from those in the present case.

68. He submitted that both in TCI Industries Limited and SSV Developers, the Navy which operates a war station in Mumbai, namely the Western Naval Command, had at the very outset and from the very beginning raised objections to the proposed construction by the concerned developers adjacent to/in the immediate vicinity of INS Shikra at Colaba (active war station for 60 / 98 WP/452/2012 operation of Helicopters 365 days) and INS Trata at Worli. The Navy was alert and acted with all promptitude and seriousness to prevent any constructions once it genuinely perceived a security threat that would be caused by the proposed construction.

Similar was the case in Oswal Agro Mills where HPCL also persistently objected from the inception on grounds of security.

69. In TCI Industries Limited (supra) and SSV Developers (supra), the Navy insisted with the Corporation to ensure that the developer sought from the Navy a NOC. The Navy refused to grant an NOC on security grounds. In both these cases the developers challenged the refusal to give NOC. In fact, in the present case, the Defence Establishment had issued NOC on 5.4.2000 which was acted upon by the Planning Authority who in turn granted permissions to the 4th respondent and the 4th respondent constructed and completed a 31 storey building to the knowledge of the Army and without any objection or dissent from the Army. The Army and Navy never objected to the construction of the building over a period of 5 years since they never perceived it as a security threat. There was no protest and no complaint made either with the planning authority, the State Government or the 4th respondent. Between 2003 and 2011 the only aspect of security that was concerned to the Navy and the Army was as to the genuineness of the credentials and 61 / 98 WP/452/2012 antecedents of members of the 4 th respondent and the flats should not be permitted to be let out to foreign nationals.He further submitted that whereas in Writ Petition No.369 of 2011, the petitioner contended that 1967 DCR are applicable, in the present case they are relying upon 1991 DCR.

70. Without prejudice to the above submissions, Mr. Seervai submitted that this Court in TCI Industries Limited and SSV Developers has erroneously interpreted the powers of the Planning Authority under DCR 16(a), (e) (n).

ig These Judgments also erroneously interpreted the provisions of the said Act when holding that invocation of the provisions of that Act was not the only method by which security could be ensured in and around works of defence. These judgments erroneously distinguished the binding decision of the Division Bench of this Court in Lok Holding and Construction Ltd (supra) on the ground that the

said decision did not lay down any law.

71. Mr. Seervai submitted that the petitioner by its act and representation is estopped from seeking demolition of building on the ground that it constitutes a security threat or to even contend that it constitutes a security threat. The record before this Court unmistakably shows that the petitioner, fully conscious and aware of ongoing construction over a period of five years, led respondent no.4 to believe that it has no objection on 62 / 98 WP/452/2012 security grounds or otherwise to the construction of a 31 multi-

storey building, both by its conduct or its representation.

Respondent no.4 and their members altered their position by investing crores of rupees as well as by taking loans from financial institutions. The situation has become irreversible due to the conduct of the petitioner. He, therefore, submitted that the petition being thoroughly misconceived is liable to dismissed.

CONSIDERATION

72. We have recorded the above submissions in great details, lest, we are accused of not correctly depicting the submissions as they were canvassed before us. We have carefully considered the rival submissions advanced by the learned counsel appearing for the parties. We have also carefully perused the material on record. In our opinion, following questions fall for our determination.

(i) Whether, in the facts and circumstances of the case, NOC of Defence Establishment is necessary?

(ii) Whether communication dated 5.4.2000 addressed by HQ, MG&G Area to Collector Mumbai at Exhibit 'T' page 334, constitutes NOC of Defence Establishment?

(iii) Whether it is mandatory duty of respondent no.3-

MMRDA being the Planning Authority to impose condition of obtaining NOC from Defence Establishment?

(iv) Whether Respondent no.3-MMRDA could have waived

condition (v) in communication dated 11.7.2005 and condition no.5 in communication dated 6.9.2005 granting permission to carry out construction upto plinth level only and in fact waived those conditions?

(v) Whether the petitioner is to necessarily invoke the provisions of the Works of Defence Act,1903 or whether they can invoke provisions of MR&TP Act, and 1991 DCR?

(vi) Whether the building constructed by respondent no.4 poses a security threat to Defence Establishment?

(vii) Whether the Petition is liable to be dismissed on the ground of gross delay and laches?

73. The discussion on questions no.(i) and (iii) will be overlapping and, therefore, these questions are answered together Re: Questions No.(i) and (iii) In the facts and circumstances of the case,

(i) Whether NOC of Defence Establishment is necessary?

(iii) Whether it is mandatory duty of respondent no.3- MMRDA being the Planning Authority to impose condition of obtaining NOC from Defence Establishment?

In order to consider these questions, it is necessary to deal with the correspondence exchanged between the parties in that 64 / 98 WP/452/2012 regard.

74. On 29.3.2000, Collector, Mumbai addressed a letter to GOC, HQ, MG&G Area Colaba setting out therein that the Chief Promoter of the society requested to the Government for allotment of land situate near plot no.6, Block-VI for residents of staff members of Defence Service Personnel. On 27.3.2000, at the time of site inspection it was revealed that the Military Department had constructed a wall to the above plot and hence the government land is protected from encroachment. The same land is applied by the society. A request was, therefore, made to confirm that there is no objection to allot the land to the proposed society of service personnel by the Government of Maharashtra.

(emphasis supplied)

75. On 30.3.2000, HQ, MG&G Area addressed a letter to DEO Mumbai enclosing therewith communication dated 29.3.2000 addressed by Collector, Mumbai by GOC, HQ MG&G Area and requested DEO to confirm the status of the said land, i.e.whether the State Government or Defence land by 1.4.2000. (i.e. hardly in 2 days) (emphasis supplied)

76. On the same day, i.e. on 30.3.2000, Mr. M.G.Guruswamy, DEO, Mumbai Circle addressed a letter to HQ, MG&G Area 65 / 98 WP/452/2012 referring the letter dated 30.3.2000 and it was stated that "it is verified from our records that the land in question forms part of Block-VI of Colaba Division (Back Bay Reclamation Scheme-VI) which belongs to the Government of Maharashtra and falls outside defence boundary.

(emphasis supplied)

77. Again on the same day, i.e. on 30.3.2000, HQ Mumbai Sub Area (Station Cell) addressed a letter to HQ, M&G Area setting out therein that "as per records available with this office, the Army land does not fall in Block-VI of Colaba Division. The DEO vide their letter no.BEO/STATS/100-A-XIV/130 dated 7.11.1997 has intimated that a piece of State Government land is in occupation of Army in the form of garden at Block-VI (copy Att.).

It is also submitted that Army land in Colaba forms part of Block-

VI, Block VIII and Colaba promontory.

78. On 5.4.2000, HQ, M&G Area informed Collector, Mumbai that the land falls in Block VI of Colaba Division (Back Bay Reclamation Scheme-VI) which falls outside the Defence Boundary. Necessary action at your end maybe taken as deemed fit for the welfare of service personnel/Ex-

servicemen/their widows."

(emphasis supplied)

79. Mr.Khambata relied upon Section 46 of MR&TP Act as also 66 / 98 WP/452/2012 regulations 16(a), (e) and (n) and also decisions in (1) TCI Industries Limited (supra), (2) Hindustan Petroleum Corporation Ltd (supra), (3) SSV Developers (supra) and (4) Oswal Agro Mills (supra). He submitted that respondent no.4 society has admitted that decision of this Court in TCI Industries Limited (supra) squarely applies to the present case. He relied upon the assertions made by respondent no.4 in Intervention Application No.2 of 2014 filed by it in SLP (Civil) No.10381 of 2012. In the case of Hindustan Petroleum Corporation Ltd (supra), the Division Bench of this Court has held in paragraphs 48, 55 and 56 thus:

"48. .. We are of the opinion that it is not only the power but also duty of the Municipal Commissioner to consider the security aspect in public interest before granting permission to develop any land.

55. In our view security as well as health aspects are crucial and are of equal concern and are of fundamental necessity that the Planning Authorities, the Government and the Public bodies, who are entrusted with the task of deciding on the location of residential areas, must be alive to these very read and basic necessities at all times. We are of the view that the court cannot permit any compromise or leniency on these issues by public body or even individuals. ... "

56. In our view, the security and health aspect in respect of public at large is a part of planning which the authorities ought to have considered as a mandatory duty before sanctioning any plan or permitting development."

(emphasis supplied)

80. In TCI Industries Limited the Division Bench also dealt with 67 / 98 WP/452/2012 Section 46 of the MR&TP Act and observed in paragraphs 15, 17,18 and 19 thus:

"15. .. .. In our view, Section 46 of the MRTP Act cannot be given such a restricted meaning and it cannot be said that under section 46, the Planning authority cannot consider any other aspect such as security, etc .. .. "

"17. So far as Section 46 of the MRTP Act is concerned, in our view, it is not possible for us to give such a restricted meaning as canvassed by the learned counsel for the petitioner. Under Section 46 of the MRTP Act, the Planning Authority is required to examine the aspect about granting development permission in an appropriate manner and by considering the relevant aspects. While granting development permission, one of the things which the Planning Authority is required to consider is to the provisions of the draft or final plan sanctioned under the Act meaning thereby that if any provision in respect of anything in the draft or final plan published by means of notice or same is sanctioned under the Act, the Planning Authority cannot ignore the same and it has to be taken into consideration. It is impossible for us to accept the say of Mr. Kapadia that the Planning Authority cannot consider any other thing except giving due regard to the provisions of the draft or final plan as mentioned in Section 46 of the MRTP Act. In our view, Section 46 of the MRTP Act cannot be given such a restricted meaning and it cannot be said that under Section 46, the Planning Authority cannot consider any other aspect such as security etc. It is not possible for us to accept the submission of Mr. Kapadia that Section 46 of the MRTP Act is to be read in such a restrictive manner."

18. It is required to be noted that it is in fact the inherent duty of the planning authority to apply its mind before giving development permission and the planning authority is required to keep in mind the pros and cons of such development permission. For example, if there is a fire brigade station or refinery or any sensitive object is located at the place nearby the area for which development permission is sought, the planning authority cannot shut its eyes and is blindly give sanction only on the basis that, except what is provided in Section 46, they are not required to call for any other information. On the contrary, it is the 68 / 98 WP/452/2012 duty of the planning authority to call for such information otherwise they will be failing in their duty and they are not required to sanction blindly by shutting their eyes to the relevant aspect of the matter. In view of the same, it is not possible for us to accept the submission of Mr. Kapadia that except what is provided under the MRTP Act and the D.C. Regulations, the planning authority is not empowered to call for any other information and to straightaway grant permission and is not required to call for any other information except the one provided under Section 46 of the MRTP Act or under the D.C. Regulations."

19. ... . Reading the provisions of Section 46 of the MRTP Act, it cannot be said that the insistence of the planning authority of NOC of a particular department which, according to the Planning Authority is in public interest, such insistence cannot be said to be de hors the provisions of the Act and the Regulations."

81. The decision of TCI Industries Limited (supra) was followed by the Division Bench of this Court in SSV Developers (supra) and in particular paragraph 22 thereof. In paragraph 23, the Division Bench extracted paragraph 31 of TCI Industries case wherein the Division Bench in TCI Industries referred to a decision of the Division Bench of this Court in the case of Lok Holding and Construction Ltd and thereafter observed thus:

"In such circumstances, it would be contrary to judicial discipline to rely upon earlier Division Bench judgment in Lok Holding (supra). The decision in TCI is directly on the issue. It answers the same relying upon the decisions of the Supreme court, construes the D.C. Regulations, 1991 and a prior decision of this Court. When we agree with the view and reasoning all the more it will be improper to ignore it."

We will deal with decision of Lok Holding and Construction Ltd a little later.

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82. In paragraph 22 of Oswal Agro Mills Ltd (supra), the Apex Court referred DCR 16. DCR 16 (a), (e) , (n) read thus:

> "16. Requirements of Sites No land shall be used as a site for the construction of buildings-
>
> (a) if the Commissioner considers that the site is in-sanitary or that it is dangerous to construct a building on it or no water supply is likely to be available within a reasonable period of time;
>
> (b)...(d)
>
> (e) if the use of the said site is for a purpose which in the Commissioner's opinion may be a source of danger to the health and safety of the inhabitants of the neighbourhood;
>
> (f)...(m)
>
> (n) if the proposed development is likely to involve damage to or have deleterious impact on or is against urban aesthetics or environment or ecology and/or on historical/architectural/aesthetical buildings and precincts or is not in the public interest."
>
> 83. Mr. Seervai distinguished the decisions. He submitted that a little difference in the facts or additional facts makes a significant difference to the precendiary value of the decision.

He relied upon (1) Dhanvantari Devi case (supra) and in particular paragraphs 9 and 12 and (2) Narmada Bachao Andolan case (supra) and in particular paragraph 64 thereof. He submitted that in the case of TCI Industries Limited (supra) and 70 / 98 WP/452/2012 SSV Developers,(supra) the Navy was alert and at the very outset had raised objection to the proposed construction by the concerned developers. Similar was the case in Oswal Agro Mills Ltd (supra) where HPCl persistently objected the proposed construction from inception on the ground of security. In the cases of TCI Industries Limited and SSV Developers, the corporation refused to grant NOC on security grounds which were challenged by the petitioner. He submitted that in the present case, NOC is issued by Defence Establishment on 5.4.2000 and in any case, the condition imposed in Commencement Certificate dated 6.9.2005 was complied by respondent no.4 and, therefore, respondent no.3 did not incorporate the said condition in subsequent permissions. In the present case after obtaining all development permissions from the Planning Authorities, respondent no.4 has put up construction whereas in the case of TCI Industries Ltd, SSV Developers and Oswal Agro Mill, the construction was not substantially progressed.

Section 46 of the MR&TP Act reads thus:

"46. Provisions of Development plan to be considered before granting permission- The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan [or proposals] [published by means of notice] [submitted] or sanctioned under this Act."

71 / 98 WP/452/2012 Perusal of Section 46 extracted herein above shows that while considering the application for permission, the Planning Authority has to have due regard to the provisions of any draft or final plan or proposal published by means of notice submitted or sanctioned under the Act. Scope of Section 46 was considered by the Apex Court in the case of S.N.Rao (supra). In paragraph 8, it was observed thus:

"8. There can be no doubt that if there be any other material or relevant fact, Section 46 does not stand in the way of such material or fact being considered by the Municipal Corporation for the grant or refusal to grant sanction of any development plan. In the unreported decision of the High Court, the relevant fact that was taken into consideration was the draft revised development plan, even though the plan was not published. In the instant case, however, at the time the Municipal Commissioner rejected the plan submitted by the respondent No. 5, there was no draft revised development plan in existence. It was in contemplation. If there had been such a plan, the Municipal Commissioner would be entitled to rely upon the same in rejecting the plan submitted by the respondent No. 5. But, as there was no such draft revised plan as has been stated before this Court even by the Counsel for the Municipal Corporation, the Municipal Commissioner was not justified in merely relying upon a proposal for the preparation of a draft revised plan. An order rejecting a development plan submitted by the owner of the land should be supported by some concrete material. In the absence of any such material, it will be improper to reject the plan on the ground that there is a proposal for revision of the draft plan or that such a revision is under contemplation. We are, therefore, of the view that the ground for rejecting the plan submitted by the respondent No. 5 was not tenable and the appellant authority was justified in allowing the appeal."

84. Thus, the Apex Court has categorically held that if there is 72 / 98 WP/452/2012 any other material or relevant fact, Section 46 does not stand in the way of such material or fact being considered by the Municipal corporation for grant or refusal to grant sanction of any development. We have already extracted paragraphs 17 and 18 of TCI Industries Judgment. The said decision was quoted with approval in SSV Developers (supra) as also in paragraph 49 of HPCL Ltd (supra). The decision of this Court in HPCL is confirmed by the Apex Court in Oswal Agro Mill Limited (supra).

85 In view of the aforesaid pronouncement, we are firmly of the view that NOC of Defence Establishment is necessary and in fact it is mandatory duty of the planning Authority to insist for NOC of Defence Establishment while considering proposal for building permissions. Questions no.(i) and (iii) are answered accordingly.

Re: Questions No.(ii) Wether communication dated 5.4.2000 addressed by HQ, MG&G Area to Collector Mumbai at Exhibit 'T' page 334, constitutes NOC of Defence Establishment?

86. We have already extracted in detail the relevant correspondence. Perusal of the correspondence clearly shows that the correspondence was exchanged with a view to ascertaining ownership of the subject land, namely whether it belongs to the State Government or Defence Establishment as 73 / 98 WP/452/2012 also for allotment of land. In fact, from that point of view, correspondence for no objection for allotment of the land to respondent no.4 was made. The letters dated 30.3.2000 at page 332 and 5.4.2000 at page 334 clearly show that DEO and HQ, MG&G Area confirmed that the subject land belongs to the Government of Maharashtra and fell outside the Defence Boundary. NOC was not sought for by Collector Mumbai from the security point of view. The reading of correspondence extracted herein above clearly shows that the NOC was sought from Defence Establishment for allotment of land and not from security point of view and therefore it does not constitute NOC of Defence Establishment from security point of view. That apart, on 21.6.2005, Team One Architects of respondent no.4 submitted proposal to respondent no.3 for construction of building and enclosed documents 1 to 18 enumerated therein. Perusal of this letter shows that respondent no.4 did not enclose NOC from Defence Establishment. After examining the proposal, on 11.7.2005 respondent no.3 MMRDA communicated deficiencies in the proposal submitted by respondent no.4. By clause (v), it was informed to the Architects of respondent no.4 that plot under reference is very close to the defence area known as Navy Nagar and the proposed height of the building is 54.9 meters. Hence clearance from Defence Department (Navy Department) be 74 / 98 WP/452/2012 obtained from security point of view and the same is not submitted.

87. On 13.7.2005, respondent no.4 replied the said letter. It was submitted that the plot falls in Block VI of Colaba Division where Defence Department owns no land. There are already high-rise buildings in the vicinity like IDBI towers, World Trade Center etc. In the light of this, NOC from Defence Authority should not be insisted upon. However, the NOC from Defence Authority is enclosed as desired by MMRDA.

88. It is not in dispute that along with this letter, Architects of respondent no.4 enclosed communication dated 5.4.2000. We have already held that said communication does not constitute NOC of Defence Establishment. In fact, on 6.9.2005 while granting permission for construction

upto plinth level specifically imposed condition no.5 calling upon Architects of respondent no.4 to obtain NOC from Army Department before seeking approval above the plinth level.

89. It is, therefore, material to note that in the first place, respondent no.3-MMRDA was not satisfied with the response dated 13.7.2005 given by the Architects of respondent no.4 to the effect that the NOC from Defence Establishment need not be insisted upon and the case of respondent no.4 that communication dated 5.4.2000 NOC from Defence Department 75 / 98 WP/452/2012 was not accepted by respondent no.3-MMRDA. Secondlym it is material to note that at no point of time respondent no.4 made grievance about imposition of that condition by MMRDA in Commencement Certificate dated 6.9.2005 on the ground that respondent no.4 had already obtained NOC from Defence Establishment on 5.4.2000 and, therefore the said condition may be deleted.

90. Mr. Seervai relied upon the letter dated 20.11.2006 addressed by Architects of respondent no.4 and in particular clause (v) thereof wherein it is stated that NOC from Army Department (Defence) has been complied with vide letter dated 13.7.2005. Respondent no.3 treated communication dated 5.4.2000 as NOC from Defence Establishment. Communication dated 16.12.2006 of the corporation records that Architects of the 4th respondent has complied with most of the conditions except no.1 NOC from E.E.T.C. for parking purpose and about debris management plan. In other words, the Corporation also treated the communication dated 5.4.2000 constituting NOC of Defence. We find no merit in this submission. In the light of this discussion, question no.(ii) is answered to the effect that the communication dated 5.4.2000 does not constitute NOC.

Re: Questions No.(iv)

Whether Respondent no.3-MMRDA could have waived

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condition (v) in communication dated 11.7.2005 and condition no.5 in communication dated 6.9.2005 granting permission to carry out construction upto plinth level only and in fact waived those conditions?

91. We have also perused files tendered by Ms Bhagalia dealing with the condition imposed by MMRDA for obtaining NOC from the Defence Establishment for finding out whether respondent no.3 has in fact waived the said condition.

92. In the first place, in the light of the decisions of this Court in TCI Industries Limited, SSV Developers, HPCL as also the decision of the Apex Court in Oswal Agro Mills, we have held that it is the mandatory duty of the Planning Authority to insist upon NOC from the Defence Establishment. In other words, MMRDA could not have waived that condition. In fact, as noted earlier, on

11.7.2005 and 6.9.2005 MMRDA specifically imposed that condition. What is relevant to note is that while granting permission on 6.9.2005 to carry out construction upto plinth level, respondent no.3 specifically called upon the Architects of respondent no.4 to obtain NOC from Defence Establishment before seeking approval above plinth level. In other words, on the basis of permission dated 6.9.2005, respondent no.4 was permitted to carry out construction only upto plinth level.

Respondent no.4 was thereafter expected to obtain NOC from Defence Establishment and thereafter only proceed with

construction above the plaint level. Perusal of the original files does not indicate that respondent no.3 MMRDA has factually waived that condition. This, in law, respondent no.3 could not have waived that condition and on facts also did not waive the said condition. Question no. (iv) is answered accordingly.

Re: Questions No.(v) Whether the petitioner is to necessarily invoke the provisions of the Works of Defence Act,1903 or whether they can invoke provisions of MR&TP Act, and 1991 DCR?

93. This aspect was also considered by the Division Bench of this Court in TCI Industries Limited (supra). In paragraph 20, it was observed thus:

"20. Section 3 of the Works of Defence Act, 1903 provides for issuance of declaration and notice. As per the said provision, if the Central Government is of the opinion to impose restriction upon use and enjoyment of land in the vicinity, said land is to be kept free from buildings and other obstructions, a declaration can be issued. It is, however, required to be noted that in the instant case, the premises which are in possession of the petitioner are concerned, there is some construction which has already taken place since long, which is of course not high rise building and the Respondent has not tried to insist upon demolition of the same, the question for their NOC arose when petitioner wanted to develop the property by constructing high rise building. Under Section 3 of the said Act, even the Central Government can acquire the property for national interest. In the instant case, the defence has not thought it fit to issue such a declaration but has tried to assert its right under the provisions of the MRTP Act and the Development Control Regulations by which they have not agreed to give NOC in view of the security reasons. It, therefore, cannot be said that simply because no declaration under Section 3 of the Act is issued, the defence was not entitled to insist for their 78 / 98 WP/452/2012 NOC. It is not possible for us to agree with Mr. Kapadia that unless notification under Section 3 of the Act is issued, the Respondents have no right whatsoever to object for the development carried and/or for refusing to grant NOC. So far as Section 3 of the Act is concerned, it has no relevancy so far as insistence of the planning authority regarding no objection

from the Defence Department is concerned. In a given case, even if there is no notification under Section 3 of the Defence Act, the planning authority can always insist for NOC from the Defence Department, if the property is located just adjacent to the premises of the petitioner. So far as Section 3 of the Defence Act is concerned, the planning authority nowhere figures in the picture and the petition has been filed against the planning authority against their insistence of NOC from the Defence Department. While considering the said aspect, it is not necessary to place any reliance on the provisions of Section 3 of the Act as in future if the Defence is of the opinion that if any declaration is issued for acquiring the property, it can always proceed on that basis. In that eventuality, the planning authority nowhere figures in the picture. Today the dispute of the petitioner is against the planning authority as according to the petitioner, the planning authority has no right whatsoever to insist for NOC from the Defence Department. While considering the said aspect, it is not necessary that unless there is declaration under Section 3 of the Act, the planning authority cannot insist for any NOC or might even refuse to grant NOC on the ground of public interest. It is not possible for us therefore to accept the argument of Mr. Kapadia that unless there is a declaration under Section 3 of the aforesaid Act, it is not open for the Navy to raise the point of security which, according to him, is nothing but a bogey and concocted version of the Navy."

94. In paragraph 31, the Division Bench referred to the decision of this Court in the case of Lok Holding and Construction Limited (supra) and observed thus;

"31. Reference is also made to the decision of the Division Bench of this Court in the case of Lok Holding and Construction Limited vs. Municipal Corporation of Gr. Bombay and others, which is an unreported decision dated 79 / 98 WP/452/2012 10th August, 2011. In the aforesaid case, the Division Bench has held that if notification under Section 3 is not issued, the Corporation should not have relied upon the NOC from the Defence establishment. So far as the facts of the said case are concerned, it is required to be noted that IOD and OC were already issued in favour of the petitioner of that petition for construction of building and the same were granted by the Corporation after the petitioner therein produced a letter dated 23rd January, 2009 signed by the Administrative Officer, Central Ordnance Depot giving no objection to the sanction of the building plan submitted by the petitioner. Subsequently it was pointed out that the said letter was forged letter and the permission which was granted was withdrawn. The action was challenged before this Court. The Division Bench in its judgment has noted the fact that earlier a notification in relation to the defence establishment was actually issued by the Collector but it was subsequently cancelled. Observing the said aspect, the Division Bench came to the conclusion that no notification, therefore, was in existence which was earlier issued. The Division Bench, therefor,e held that refusal of development permission on the basis of the instructions given by the State Government to to grant development permission without NOC from the defence is not just and proper especially when statutory enactment is occupying the field i.e. Works of Defence Act, the Government may not have the power to issue such instructions in respect of the defence establishment wherein there was no notification as contemplated by the provisions of the said Act. The Division Bench gave certain directions after taking an overall view of the matter. In the aforesaid case, no law has been laid down by the Division Bench in its unreported judgment. In any case, on going through the aforesaid judgment, we are of the opinion that no law has been laid down by this Court nor provisions of Section 46 of the MRTP Act nor D.C. Regulation 16 were under consideration of the Division Bench. It, therefore, cannot be said that any law has

been laid down by the Division Bench while making certain passing observations in the judgment."

95. Now, we will deal with the decision of Lok Holding and Construction Ltd (supra) to which one of us (R.G.Ketkar, J.) was a 80 / 98 WP/452/2012 party. Mr. Seervai submitted that the Division Bench in TCI Industries Limited wrongly held that no law has been laid down by the Division Bench in that case. We do not agree with this submission for more than one reason. In the case of Lok Holding and Construction Ltd (supra), IOD and Commencement Certificate were cancelled by the Corporation, principally, on two grounds, namely, firstly, access to the plot of the petitioner was not available and secondly, objection was raised by the Defence Authority for raising construction on the plot on ig security grounds. As far as the first ground is concerned, the petitioner relied upon the decree passed by Competent Court in their favour granting access to the petitioner's plot where construction was proposed to be made. As far as the second ground is concerned, in paragraph 4, the Division Bench observed thus:

"In our opinion, as there is a statutory enactment occupying the field, viz. The Works of Defence Act, 1903, the government may not have the power to issue such instructions in respect of defence establishment in relation to which there is no Notification as contemplated by the provisions of the said Act."

(emphasis supplied.

Perusal of the extracted portion shows that this Court did not record positive finding that in the absence of Notification under the said Act, the Government has no power to issue instructions contained in letter dated 4.11.2010. It was observed that 81 / 98 WP/452/2012 "Government may not have power to issue such instructions in respect of Defence Establishment in relation to which there is no Notification as contemplated by the provisions of the said Act."

Secondly, provisions of Section 46 and DCR 16 were also not brought to the notice of this Court. We, therefore, respectfully agree that the observations made in paragraph 31 by the Division Bench in TCI Industries Ltd that the said decision does not lay down any law as also the provisions of Section 46 of the MR&TP Act and DCR 16 were not brought to the notice of the Division Bench in that case.

96. In the light of the aforesaid decisions, we are clearly of the opinion that the provisions of the Defence of Works Act are not sole repository for prohibiting construction activities near Defence Establishment and the petitioner can certainly invoke Section 46 and DCR 16. Question no.(v) is answered accordingly.

Re: Questions No.(vi) Whether the building constructed by respondent no.4 poses a security threat to Defence Establishment?

97. We have carefully gone through assertions in paragraphs 3(iii), (iv),(v),(a) to (h) as also the photographs annexed at Exhibit-B Collectively (Pages 48 to 57 of Writ Petition).

98. In the case of TCI Industries Ltd, the Division Bench of this Court observed in paragraph 37 as under :

82 / 98 WP/452/2012 "37. Considering the case law cited by both the sides, we are of the opinion that whether the security point raised by Navy is merely a bogey or is a matter of substance is not a question which we can decide in a petition under Article 226 of the Constitution of India and this aspect should be squarely left to the defence authority. It is not for this court to pronounce the aforesaid aspect as it is completely in the realm of the defence department. It is also not for this Court to pronounce upon the decision of the Navy that the point of defence raised by them is justified or not... .."

99. In the case of Akbar Travel of India (Pvt) Ltd (supra), the Division Bench has observed in paragraph 31 thus :

"31. We cannot transgress the limits of writ jurisdiction by sitting in judgment over the actions of Intelligence Agencies. These agencies manned by experts, who are in the best are position to judge the security interests. Ultimately, sensitive and vital installations have to be safeguarded and protected from entry of persons who are considered to be undesirable and a security risk.

Precisely, such are the inputs in the reports which have been received and if the Bureau has acted upon the same, then, we cannot sit in judgment over their decision. The writ Court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the inputs do not endanger the security of the Airport nor public interest demand that the ground handling operations of the petitioner be prohibited. These are matters which are better left to the authorities in charge of security of the vital installations as they are in-charge of laying down standards and norms for protecting and safeguarding them. They act in public interest and when no malafides are alleged, their actions ought not be interfered. "

In the case of Narangs International Hotels Pvt Ltd (supra), the Division Bench of this Court observed in paragraph 11 thus:-

"11. Having considered the rival contentions, we are of the opinion that this is a case where this court cannot interfere with the impugned order which rejects the security clearance on the basis of the report of the Intelligence Bureau. We 83 / 98 WP/452/2012 have perused the report of the Intelligence Bureau. We have no reason to disbelieve it. We cannot sit in appeal over the said report. This case involves the security of India and more particularly the security of the Airports. Intelligence Bureau is an expert body. The petitioners have not alleged any malafides. It is impossible to say that any extraneous reasons have persuaded the Intelligence Bureau to submit the report or that respondent 1's action is malafide."

100. Perusal of the photographs at Exhibit-B Collectively clearly shows that the building of the 4th respondent is located on the 'neck' joining Colaba Island and is the tallest building in the vicinity of CMS. The photographs taken from various storeys of Adarsha building show that it is the best vantage point from which CMS and various parts of it can be surveyed and monitored. From this

building, complete observation of military equipments, vehicles and personnel moving into and out of the area can be facilitated.

101. Important installations are located within 350 meters of the Adarsh building and are well within the ranges of various small arm hand held weapons. Sensitive installations that stand in close proximity and can be targeted to Adarsh building including Storage and Disbursal Depot for petrol, oil and lubricants, Army supply depot, Navy Supply Depot and MES Pumping station.

Enhanced surveillance technologies which are available to terrorists could be used from the spy on and transmit live feeds of the activities within the CMS. HQ MG&G Area and HQ MSA , 84 / 98 WP/452/2012 which operate as command posts and nerve centres of activity in case of operational necessity, are located in close proximity to the Adarsh building. They can be seriously crippled by small arms hand held weapons. The entire top decision making echelons of the Army are situate in HQ MG&G Area, and can be eliminated with sniper rifles wielded from the Adarsh building.

102. We find that this is a bonafide perception of the Army Authorities. As against this, respondent no.4 contended that the construction of the building was taking place in front of eyes of officers of the petitioner. They never raised any objection to the construction of the building. In fact, public notice was issued in daily newspaper on 19.10.2005 thereby informing public at large that it can be granted building permission by the Planning Authority and it proposes to start construction in compliance with the same. The petitioner did not raise any objection to the aforesaid notice. The record shows that from 2003 to 2011 the only objection raised by the petitioner was as regards the personnel who would become members of the society. The petitioner only wanted to verify the antecedents and credentials of the members of the society. He submitted that Army is having a peace station in Colaba Defence Establishment. There are several high-rise buildings, namely, Daulat Shireen, Buena Vista, Connaught Barracks, Usha Sadan, Shangrila and Windmere and 85 / 98 WP/452/2012 many others which are totally overlooking into the MG&G Area and Army and Navy area in Colaba. Durgamata Towers, a 32 storey (approximately 112 meters) building constructed in the year 2006 totally occupied by civilians and is dominating the Army and Navy Military stations. The Navy's Western Fleet is located adjacent to the Gateway of India and is dominated by Taj Mahal Hotel which is visited by foreigners. Similarly, Bombay Stock Exchange and Reserve Bank of India buildings overlook the entire Naval areas. Two high rise buildings known as Oyster and Dolphin owned are located within CMS.

103. In our opinion, respondent no.4-Society has not seriously disputed that Adarsh building poses a security threat. What is contended is that other high rise buildings are located in the proximity of CMS and they also similarly pose security threat to CMS. However, the petitioner has not made complaint against those buildings. The petitioner has only singled out the building of the 4th respondent. From the data placed on record by the petitioner, we are satisfied that having regard to location of the building of the 4th respondent, it poses security threat to CMS.

The arguments advanced by the 4 th respondent are peripheral and do not touch the heart of the matter, namely that the building of the 4th respondent society poses the security threat.

104. As held by the Division Bench of this Court in TCI Industries 86 / 98 WP/452/2012 (supra) and Akbar Travel of India (Pvt) Ltd (supra) as also Nagangs International Hotels Pvt Ltd (supra) whether the security point raised by the petitioner is merely a bogey or a matter of substance is not a question which the Court can decide in a petition under Article 226 of the Constitution of India. This aspect should be squarely left to the Defence Authority. It is not for this Court to pronounce the aforesaid aspect as it is completely in the realm of the Defence Department. Ultimately, sensitive and vital installations have to be safeguarded and protected from entry of persons who are considered to be undesirable and a security risk. The writ court does not possess any expertise in such cases. The Court cannot indulge in guess work and hold that the security concern expressed by the petitioner is not bonafide. In the present case, security of CMS is involved and we are not prepared to accept that for any extraneous reason the present petition is instituted.

105. It has come on record and is not disputed that Oyster and Dolphin buildings came up in late 1960. Both buildings are 12 storeyed high rise buildings. Earlier these buildings were occupied by military personnel and today they are occupied by civilians. The fact that the nature of threat to the security of nation has undergone a vast change over the last decade with terrorism emerging as a source of major and unconventional 87 / 98 WP/452/2012 danger need not be over emphasized. The assessment of such threats has heightened and the precautionary measures taken against them are expanded. In 2007 blast in local train in Mumbai occurred. On 26.11.2008 a terror attack occurred in Mumbai. Times have changed. People have changed. Technology has advanced. New techniques are employed. Increase of terrorism is accepted international phenomenon. Respondent no.4 has also not seriously disputed the specific assertions made in paragraphs 3(iii) to (v). The photographs at Exhibit collectively produced on record substantiates the perception expressed by the petitioner. Having regard to location of the Adarsh building, we are satisfied that the building constructed by respondent no.4 poses a security threat to the Defence Establishment. Point no. (vi) is answered accordingly.

Re: Question No.(vii) Whether the Petition is liable to be dismissed on the ground of gross delay and laches?

106. Mr.Khambata submitted that even where matters of public interest and national security are not involved, the Courts have entertained writ petitions after long periods of time. It is settled principles of law that issuance of writs is a matter court's discretion, although delay and laches are factors to be taken into consideration and they are not absolute bars to relief. He relied 88 / 98 WP/452/2012 upon decisions in (1) P.B.Roy (supra), (2) State of Karnataka (supra) and State of M.P. (supra).

107. On the other hand, Mr. Seervai submitted that the petitioner has belatedly targeted a stand alone building in an area which is completely developed after the building was constructed, completed and was granted Occupation Certificate.

He further submitted that while exercising powers under Article 226 of the Constitution of India, the Court is required to weigh the explanation offered for the delay and laches and consider if the explanation offered is credible or believable. He relied upon decisions:

(i) Chennai Metropolitan Water Supply and Sewarage Board (supra) and in particular paragraphs 13 to 17;

(ii) State of M.P. (supra) and in particular paragraphs 19 to 25.

(iii) Narmada Bachao Andolan case (supra) and in particular paragraphs 17 to 20.

108. In the case of P.B.Roy (supra), the Apex Court referred to decision of the majority of Full Bench of of the Punjab High Court in S. Gurmej Singh V. Election Tribunal, Gurdaspur, AIR 1964 Punjab 337 (FB), wherein it is held that the delay in filing the petition was overlooked on the ground that after the admission of a writ petition and hearing of arguments, the rule that delay may 89 / 98 WP/452/2012 defeat the rights of a party is relaxed and need not be applied if his case is "positively good".

109. In the case of State of Karnataka (supra), the Apex Court considered the decision inf State (NCT of Delhi) Vs. Ahmed Jaan (2008) 14 SCC 582. In paragraph 11 of that report, it was observed that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay, intentional or otherwise, is a routine. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. In paragraph 15, after considering other decisions, it was noted that adoption of strict standard of proof sometimes fail to protect public justice and it would result in public mischief by skillful management of delay in the process of filing an appeal.

110. Mr. Seervai relied upon paragraphs 13 to 17 of of Chennai Metropolitan Water Supply and Sewerage Board (supra). In that case, the respondent was appointed as a Surveyor in the Board.

He was promoted as Jr. Engineer in the year 1989. From 28.8.1995 he remained continuously absent from duty without any intimation to the employer and did not respond to the repeated memoranda/reminders requiring him to explain his 90 / 98 WP/452/2012 unauthorised absence from duty and to rejoin duty. On 11.9.1996 chargesheet was issued to him. On 1.4.1997 he reported to duty with medical certificate for his absence from duty for the period commencement from 28.8.1995 to 31.3.1997. The inquiry was conducted against him and the inquiry officer found charges levelled against the respondent proved. The order of dismissal was passed on 16.4.1998. The Appeal preferred by the respondent was rejected by the Board on 30.6.1998. Aggrieved by the order of dismissal the respondent instituted writ petition in the High Court of Judicature of Madras. The learned Single Judge directed reconsideration of the appeal solely on the ground that the Managing Director who was disciplinary authority had taken part in the proceedings of the Board which decided the appeal.

The Appellate Authority thereafter dismissed the appeal on 1.7.2003. The respondent instituted Writ Petition No.25673 of 2007 on 7.7.2007. The learned Single Judge allowed the writ petition and order reinstatement with continuity of service without back wages. The Division Bench dismissed the writ appeal preferred by the appellant. It is against these decisions, the appellant moved the

Apex Court.

111. In paragraph 13, the Apex Court referred to paragraph of Balwant Regular Motor Service AIR 1969 SC 329 wherein it is 91 / 98 WP/452/2012 observed that "But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles of substantially equitable. Two circumstances, always important in such cases are, the length of the delay and the nature of the acts done during interval, which might affect either party and cause a balance of justice or injustice in taking the one course or other in so far as it relates to the remedy. The Apex Court also referred to the decision of State of M.P Vs. Nandlal Jaiswal (supra). In paragraph 16, it was further observed that "in certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant - a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix.

112. Mr. Seervai relied upon paragraphs 17 to 20 of State of M.P.

Vs. Nabarada Bachao Andolan (supra). In paragraph 17 of that case, the Apex Court noted that construction of dam started in October 2002 was completed in 2006. No objection had ever 92 / 98 WP/452/2012 been raised by NBA at any stage. The Narmada Development Authority gave permission by order dated 28.3.2007 to National Hydraulic Development Corporation to raise the water level of the Dam to 189 meter upon showing that rehabilitation of oustees of five villages adversely affected at 189 meter had already been completed. The Apex Court held that the petitioner was guilty of laches in not approaching the Court at earlier point of time.

113. In the present case, it has come on record that on 16.6.2003 letter was addressed by DEO Mumbai Circle to Sri Pradeep Vyas, IAS, Collector Mumbai wherein it was stated that a multy-storeyed high rise of private individual in the subject plot would dominate entire area of Army and Navy Area and other sensitive installations like TIFR. Thus, suitability of privately owned high rise may invite security implications in the longer run. That apart, on 11.7.2005 MMRDA has imposed condition (v) calling upon Architects of respondent no.4-society to obtain clearance from Defence Department (Navy Department) from security point of view and the same is not submitted.

On 6.9.2005, while granting permission for construction upto plinth level, condition no (v) was imposed by MMRDA requiring respondent no.4-society to obtain NOC from Army department before seeking approval upto plinth level. We have already held 93 / 98 WP/452/2012 that respondent no.4 has not obtained NOC and in fact and in law, MMRDA did not and could not have waived that condition.

114. Mr.Seervai relied upon the decision in State of M.P. Vs. Nandlal Jaiswal, (supra) and in particular paragraphs 19 to 25. In that case, the Sub-Committee, inter-alia, made recommendations, namely:

(A) Transfer of ownership of distilleries;

(B)Allotment of lands for construction of distilleries at new places;

(C) Letter of Intent, for grant of D.2 Licences;

(D) Construction of lagoon, etc., for making arrangement for passing water from distilleries;

(E) Construction of laboratories for liquor test;

(F) Arrangement for manufacturing liquor from mahuwa;

(G) Period of D.2 licences;

(H) Fixation of liquor price;

(I) Control of Excise Department on the distilleries.

115. The Finance Department submitted a report raising certain points against the recommendations made in the report of Cabinet Sub- Committee. Cabinet Committee in its meeting held on 30.12.1984 endorsed recommendations of Cabinet Sub-

Committee. Pursuant to the policy decision dated 30.12.1984, a 94 / 98 WP/452/2012 LOI dated 1.2.1985 was issued. This was followed by a Deed of Agreement dated 2.2.1985 executed by and between the Governor of Madhya Pradesh acting through the Excise Commissioner and each of respondents 5 to 11. Pursuant to the Letter of Intent and the Deed of Agreement, each of respondents 5 to 11 selected with the approval of the State Government the new site at which the distillery should be located, purchased land at such new site, started constructing buildings for housing the distillery and placed orders for purchase of plant and machinery to be installed in the distillery. The Apex Court considered the question of laches and delay in filing the writ petitions from paragraphs 23 onwards and it was observed that the petitioners were guilty of gross delay in filing writ petitions with the result that by the time the writ petitions came to be filed, respondents 5 to 11 had, pursuant to the policy decision dated 30.12.1984, altered their position by incurring huge expenditure towards setting up the distilleries.

116. In paragraph 24, it was observed that if there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The rule of laches or 95 / 98 WP/452/2012 delay is not a rigid rule which can be cast in a strait-

jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But,

such cases where the demand of justice is so compelling that the High Court would be inclined to interfere inspite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; ex hypothesis every discretion must be exercised fairly and justly so as to promote justice and not to defeat it.

(emphasis supplied)

117. In the present case, the petitioner has raised a very serious issue about security threat posed by the building of the 4th respondent. When national interest is pitted against private interest, naturally national interest must be protected as against the private interest. Technical objections of delay and latches will not come in the way of the court in exercising its extra ordinary jurisdiction under Article 226 which is undoubtedly equitable jurisdiction and the Court will grant relief for protecting national as well as public interest. We, therefore, hold that petition cannot be dismissed on the ground of gross delay and laches.

96 / 98 WP/452/2012 Question no.(vi) is answered accordingly.

118. Before parting with this matter, it is also necessary to issue direction to the Ministry of Defence. As noted earlier, building of the 4th respondent is on the neck joining Colaba Island. The petitioner has contended that GOCs between 1999 and 13.7.2010 and their family members were allotted flats in Adarsh building. We do not intend to comment on the role of these officers as they are not made party to the petition. It is, however necessary to find out as to why the petition was not instituted at the earliest available opportunity. Ministry of Defence is, therefore, directed to hold an in-depth inquiry for finding out lapses or reasons on the part of its officers for not instituting writ petition at the earliest available opportunity as also finding out whether these GOCs compromised with security of CMS in lieu of allotment of flats in the building of the 4th respondent-society.

119. In the light of the aforesaid discussion, we prohibit respondents no. 1 to 3, namely (1) State of Maharashtra through Secretary, Urban Development Department, (2) The Mumbai Municipal Corporation of Greater Mumbai, through Municipal Commissioner, (3) The Mumbai Metropolitan Regional Development Authority, through its Metropolitan Commissioner) from granting any building/development permissions in the vicinity of and/or within the Colaba Military Station without an 97 / 98 WP/452/2012 NOC from the Army Authorities.

120. We further direct respondents no.1 to 3 to forthwith demolish the building of the fourth respondent-Adarsh Co-

operative Housing Society Ltd.

121. We also direct Ministry of Defence to hold an in-depth inquiry for finding out the lapses or reasons on the part of its Officers for not instituting writ petition at the earliest available opportunity as also for finding out whether the GOCs between 1999 and 13.7.2010, namely, (1) Maj.General ig A.R.Kumar (2) Maj.General V.S.Yadav, (3) Maj. General T.K.Kaul, (4) Maj. General Tejinder Singh, (5) Maj.General R.K.Hooda compromised with security of CMS in lieu of allotment

of flats in the building of the fourth respondent-Adarsh Co-operative Housing Society.

122. Rule is made absolute in the aforesaid terms. In the circumstances of the case, there shall be no order as to costs.

123. At this stage, Mr. Seervai orally applies for stay of this order for the period of 12 weeks from today. Learned counsel for petitioner opposed this application.

124. Having regard to the fact that the petition is pending in this Court since the year 2012 and respondent no.4 intends to challenge this order in the higher court, we find that request made by Mr. Seervai is reasonable. Hence, this order shall remain stayed for a period of 12 weeks from today subject to 98 / 98 WP/452/2012 clear understanding that no further request for extension of time shall be entertained.

(R.G.KETKAR,J.) (RANJIT MORE,J.)