

(2014) 08 GUJ CK 0075

In the Gujarat High Court

Case No : Writ Petition (Pil) No. 214 of 2013 and Civil Application No. 5552 of 2014 in Writ Petition (Pil) No. 214 of 2013

Iqbal Masud Khan

APPELLANT

Vs

Director General

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 19, 2(a), 2(d), 2(da), 2(dc)
Ancient Monuments Preservation Act, 1904 — Section 3
Constitution of India, 1950 — Article 14, 19, 226, 31, 32
Essential Commodities Act, 1955 — Section 2(vi), 3(I)
Gujarat Ancient Monuments and Archaeological Sites and Remains Act, 1965 — Section 3, 4, 4(1)
Penal Code, 1860 (IPC) — Section 295

Citation : (2014) 3 GLH 603

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : J.T. Trivedi, Sr. Counsel, B.J. Trivedi and Ashlesha M. Patel, Advocate for the Appellant; Parth Bhatt, Asstt. Government Pleader, Deep D. Vyas, Devang Vyas, Saurabh G. Amin and N.B. Thakore, Advocate for the Respondent

Judgement

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J.B. Pardiwala, J.—By this writ application in the nature of a Public Interest Litigation, the petitioner, a retired News Coordinator, and now a Practising Advocate, has brought to our notice that the construction of the new City Civil and Sessions Court Complex in the Bhadra Fort Precincts, situated at Lal Darwaja, Ahmedabad has been undertaken in contravention of the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (as amended by the Act No. 10 of 2010).

2. The case made-out by the petitioner may be summed up thus:

2.1 An ancient monument known as the "Bhadra Fort" is situated in the City of

Ahmedabad, which has been declared to be an Ancient Monument of Historical Importance and thus, is a protected monument. The same was built in 1411 A.D. by Sultan Ahmedshah, and is almost 600 years old. In the 17th Century there was an extension of the Bhadra Fort, and this extension came to be known as the "Azamkhan Sarai" in the name of Azamkhan who was the Subedar of Gujarat at the relevant time. "Sarai" is an Urdu word meaning "Dharamshala".

2.2. According to the petitioner, at present, the City Civil Courts and Small Causes Courts are functioning from the Azamkhan Sarai. According to the petitioner, both these properties are more than 300 years old, and are ancient monuments according to the definition of "Ancient Monuments" provided in Sec. 2(a) of The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short "the AMASR Act"). The Bhadra Fort being a protected monument, is in charge of the Archaeological Survey of India (A.S.I.) and the State Government is in charge of the Azamkhan Sarai.

2.3. According to the AMASR Act, the area falling within 100 meters of the protected area or the protected monument in all directions is called a "Prohibited Area", upon which no construction can be made, and no permission for construction can be accorded. The area falling within the 200 meters from the limits of the prohibited area of 100 meters is called a "Regulated Area", upon which construction can be made with the prior permission from the competent authority.

2.4. No sooner had the petitioner learnt that the respondents had decided to construct a multi-storied Court Complex in the Azamkhan Sarai, falling in the Regulated portion from the Bhadra Fort, than he preferred a representation with the Archaeological Department in that regard, and a detailed report was received by him from the Superintending Archaeologist, A.S.I. Vadodara Circle. In response to an application filed by the petitioner under the R.T.I. Act, a copy of the permission granted by the competent authority, along with the detailed map was also received by the petitioner.

2.5. According to the petitioner, since there was a move to construct a multi-storied Court complex in the Azamkhan Sarai, and since under the existing law no new construction within a radius of 100 meters from the Bhadra Fort was permissible, a clarification was sought from the Director General, Archaeological Survey of India i.e. the respondent No. 1 and in response to the same, the Superintending Archaeologist, Vadodara Circle submitted a report dated 26th May, 2013 whereby it was clarified that the historical monument which is popularly known as "The Bhadra Fort" is divided into two parts, known as the "Bhadra Fort" and the "Azamkhan Sarai Complex". Out of the two, only the Bhadra Fort is a protected monument in the possession and control of the A.S.I. whereas the remaining portion, viz., the Azamkhan Sarai Complex was owned by the State Government.

2.6. According to the petitioner, a detailed report submitted by the A.S.I.

Vadodara, gave a brief historical background of the Bhadra Tower stating as under:

"The Bhadra Fort is located on the elevated plain on the eastern bank of the Sabarmati River in the heart of old city of Ahmedabad. The early 15th Century Bhadra Fort Gates (A.D. 1411), clock towers built during the British Regime and the 17th Century Mogul period Azamkhan Sarai enjoining these, form part of the most Central significant historic monuments of Ahmedabad City. While the Bhadra Fort gates and the clock towers are centrally protected monuments, Azamkhan Sarai is an unprotected monument owned by the State Government. The later is currently occupied by the City Civil Court and Government Book Depot."

2.7. It is the case of the petitioner that the report aforementioned, clearly admitted that, despite the Historical Heritage Value and Central Protection Status, the historic properties, both protected and unprotected, have been subject to decay and degradation due to variety of factors. The Ahmedabad Municipal Corporation in collaboration with the A.S.I. had prepared a detailed Project Report for redevelopment of the Bhadra Fort and its precincts and up-gradation of its ambience. Therefore, according to the petitioner, the report of the A.S.I. clearly admits of the fact that the Bhadra Fort and the Azamkhan Sarai are significant historic monuments.

2.8. It is also the case of the petitioner that along with the report, a copy of the M.O.U. signed between the Ahmedabad Municipal Corporation and the A.S.I. regarding the redevelopment of the Bhadra Fort Precincts, was forwarded, and the petitioner was surprised to notice that the State Government, as the owner of the Precincts, was not a party to the said M.O.U. The M.O.U. was shown to be for conservation, maintenance and development of the historical monuments and their precincts in Ahmedabad.

2.9. According to the petitioner, there cannot be any objection so far as the improvement of the ambience is concerned. However, the matter of concern is regarding the construction within a radius of 100 meters from the protected site of the Bhadra Fort and the conservation of the Azamkhan Sarai. It is the case of the petitioner that about 50% of the existing Azamkhan Sarai Complex from the protected site of the Bhadra Fort will come within the radius of 100 meters on which no construction is permissible.

2.10. According to the petitioner, on inquiring about the proposed project, initially no reply either from the Director General, A.S.I. or S.A. Vadodara Circle was received for quite a long time and it is only after sending reminders a reply was received by the petitioner dated 17th April, 2013 from the S.A. Vadodara Circle stating that the A.S.I. Vadodara Circle had not received nor passed any proposal to demolish any portion of the Azamkhan Sarai nor any permission for the same had been granted.

2.11. According to the petitioner, the permission to construct a eight-storied

building in the compound of the City Civil and Sessions Court has been granted by the Central Government, but at the same time no permission to make any construction in the District Court Library Compound was granted as the same falls within the 100 meters area from the Ahmedshah Masjid. According to the petitioner, on the one hand the permission to make any construction in the Library Compound of the Sessions Court was not granted because it falls within the 100 meters from the Ahmedshah Masjid whereas such a permission has been granted to make new construction in the compound of City Civil and Sessions Court although 50% of that compound would fall within a radius of 100 meters from the protected area.

2.12. According to the petitioner, the permission which has been granted by the competent authority is illegal as, on the one hand it says that the permission is granted only in respect of Block-A, but on the other hand it is clear that substantial portions of the existing Complex-A, B and C will have to be demolished for the proposed construction and if the remaining portion of those blocks are not demolished, then what would be left of those complex would be only the pillars of the original ancient monuments. This would spoil the front elevation of the proposed multi-storied complex and, therefore, the remaining portion of those two complex would also have to be ultimately demolished falling within the prohibited area.

2.13. According to the petitioner, if the permission and the plan were to be read together, the same would indicate a disguised permission to totally demolish the Azamkhan Sarai and thereby erase from the map of Ahmedabad. Resultantly, the protection granted under the AMASR Act to the property situated within the prohibited area would become totally redundant.

2.14. According to the petitioner, the words repairs/renovation/reconstruction figuring in the AMASR Act are of wide import. In the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and at the same time the competent authority cannot grant permission for such reconstruction.

2.15. According to the petitioner Article- 49 of the Constitution of India speaks of the protection of monuments and places and objects of national importance, whereas Article- 51A casts fundamental duties on every citizen to value and preserve the rich heritage of our composite culture.

2.16. It is the case of the petitioner that Articles- 49 and 51-A(f) of the Constitution of India should be read harmoniously with the provisions of the AMASR Act so as to preserve the ancient monuments of historical importance in their present state and not altering or defacing them under the guise of repairs or construction.

2.17. The petitioner has also raised an issue whether any permission is required before demolishing any ancient monument of historical importance, yet not a protected monument. According to the petitioner the law does not permit

demolition of all existing structures standing in the prohibited area and regulated area and if it is otherwise interpreted then it would result in destruction of all ancient monument not declared as protected monuments. The same would be against the spirit of Article- 19 of the Constitution of India.

2.18. According to the petitioner, formerly it was permissible to grant permission to construct on the prohibited area for the "public work or project essential to the public". However, such concession has been taken away with the introduction of Sub-Sec. (4) of Sec. 20-A of the AMASR Act. Similarly, the introduction of Sec. 20-C makes it abundantly clear that only repairs and renovation is permissible in the prohibited area. Sub-clause (2) to Sec. 20-C deals with construction in the regulated area. It clearly implies that only repairs or renovation can be done in the prohibited area. According to the petitioner, if "construction" includes "demolition" then it cannot be done in the prohibited area. If "construction" does not include "demolition" then permission for construction cannot be construed to mean permission for demolition. On the strength of the permission to construct a new court complex, no demolition of the existing structures can be undertaken. However, such difficulty would only be in respect of the regulated area and not prohibited area because repair or renovation cannot mean construct or demolish.

2.19. According to the petitioner, the impugned permission is very deceptive for the reason that it is being accorded only in respect of the proposed construction of Block-A, but in the process has the effect of total annihilation of the Azamkhan Sarai which, according to the Superintending Archaeologist, Vadodara Circle, forms a part of the most Central significant historic monuments of the Ahmedabad City.

2.20. Although, the Azamkhan Sarai has not been declared as a National Monument, yet has been described by the Superintending Archaeologist, Vadodara Circle as a part of the most Central significant historic monument of the Ahmedabad City. In view of such position, the Azamkhan Sarai should be protected, in exercise of powers of this Court under Article- 226 of the Constitution of India.

2.21. According to the petitioner, if the proposed construction is permitted then the same would result in destruction of the front elevation of the monument of the Eastern side and the existing construction of the monument inside would also perish. For such reason a condition has been imposed in the permission that a plaque should be placed at the site of the new construction. Azamkhan Sarai is the finest specimen of masonry skill and craftsmanship of the 17th Century artisans and engineering marvel. It has withstood wear and tear of centuries and still stands tall with its flooring, ceiling and wood work showing no signs of erosion. The building has its inherited strength and it does not need any R.C.C. frame work for its support. Such buildings deserve to be protected for the future generations to admire the heights of the civil engineering in the ancient time.

2.22. According to the petitioner, in view of the aforesaid, the permission granted

by the competent authority dated 10th April, 2013 be declared as illegal and deserve to be quashed. It is also the case of the petitioner that there is total non-application of mind on the part of the National Monuments Authority while granting the N.O.C. According to the law it is the owner or the occupier who can apply for the permission to construct on the regulated area. In the case on hand it is the State Government who is the owner and the City Civil Court is the occupier. The N.O.C. issued by the National Monuments Authority shows the A.M.C. as the applicant and in the column of name of the owner it is written "Joint venture of A.S.I. and A.M.C.", whereas the permission granted by the competent authority shows that it is in favour of the Executive Engineer.

2.23 In such circumstances referred to above, the petitioner has prayed for the following reliefs:-

"(A) That appropriate writ, direction or order be issued quashing the permission granted by the Competent Authority on 10/04/2013 vide F. No. 232/CAG/NOC/RA/BF-ASM/AHD/2013/389 in respect of Survey Nos. 4652 + 5693 Raikhad Ward-2, Ahmedabad and restraining the respondents from in any way making any demolition or new construction in any part of the ancient monument known as Azamkhan Sarai on the strength of such permission.

(B) In the alternative, if the Court comes to a conclusion that the permission granted is legal then appropriate writ, direction or order be issued restraining the respondents, their agents or contractors from making any demolition or construction in any portion of the property falling within the prohibited area of 100 meters from the Bhadra Fort or falling within the regulated areas of 200 meters from the end of the protected area of the Bhadra Fort except the portion in respect of which the permission has been granted.

(C) Appropriate writ, direction or order be issued directing the respondents to remove forthwith all sheds and rooms illegally constructed within the prohibited area of the Bhadra Fort and also such constructions made within the regulated area without obtaining prior permission.

(D) Any other appropriate writ, direction or order as your Lordships deem just looking to the facts of the present case be issued.

(E) Pending the hearing and final disposal of this writ petition, the respondents, their agents, servants and contractors be restrained from making any construction in any part of the property known as Azamkhan Sarai in the Bhadra Fort precincts at Ahmedabad on Survey Nos. 4652 + 5693 Raikhad Ward-2, Ahmedabad, and they be directed to remove forthwith all illegal constructions made in the prohibited area and regulated area of the Bhadra Fort, or such other interim relief as Your Lordships deem just and proper be granted.

(F) Pending the hearing and final disposal of this writ petition, the respondents, their agents, servants, and contractors be restrained from making any construction in any part of the property following within 100 meters to the east

of the Bhadra Fort and 100 meters to the West of Teen Dwaraja in the Bhadra Area of Ahmedabad on Survey Nos. 4652 + 5693 Raikhad Ward-2, Ahmedabad, and they be directed to remove forthwith all illegal constructions made in the aforesaid prohibited area."

2.24 At a later stage, by way of a Civil Application No. 5552 of 2014, the petitioner has prayed for the following reliefs:-

"(i) to allow this application and to direct and enjoin upon the respondents Nos. 1, 3 and 6 to remove all illegal constructions, as highlighted in the plan Annexure H and made within 100 mtr. On the western side and southern side from the Bhadra Tower which is a protected monument situated on survey No. 4652 + 5693 in ward Raikhad-2, Bhadra, Ahmedabad;

(b) to direct the respondents to maintain status quo in respect of the property popularly known as Azamkhan Sarai, situated on survey No. 4652 + 5693, in Ward Raikhad-2, Bhadra, Ahmedabad and not to demolish any part thereof or make any new construction thereon, pending the final disposal of Writ Petition (PIL) No. 214 of 2013;

(c) to restrain the respondents not to touch or to do any thing any portion of the property situated a radius of 100 mtr. from the protected monument of the Bhadra Tower;

(d) to grant such other relief, as may be deemed to be just and proper in the facts of the present lis."

3. Stance of the Respondent No. 6, Executive Engineer (R & B):

A) The High Court of Gujarat vide letter dated 22nd March, 2012 had informed regarding the construction of the new court premises along with the maps and designs. Pursuant to the letter of the High Court of Gujarat, the respondent No. 6 forwarded the said proposal to the Department of Archaeology, Gandhinagar since the City Civil Court is partly situated in the regulated Zone (i.e. beyond 100 meters of the protected monument) and partly in the prohibited Zone (within 100 meters). The Department of Archaeology had surveyed the City Civil Court premises on 4th August, 2012. On 28th August, 2012 the Inspection Report was forwarded by the Archaeological Survey of India, Vadodara Circle to the Competent Authority and Director of Archaeology, Gujarat State, stating therein that the proposed construction of Block-A building falls in the Regulated Area of the Bhadra Towers and Three Gates and Block-B falls completely within the prohibited area of the Azamkhan Mosque.

B) On 6th March, 2013 the Department of Archaeology accorded its permission to carry-out the construction at Block-B, whereas denied the permission at Block-A. However, later on realizing its mistake, the permissions were revised on 10th April, 2013 and according to the revised permission, the construction/renovation was permitted upto 25 meters at Block-A and Block-B was retained and no permission for renovation/construction was granted.

C) So far as the repairs to be undertaken in the Staff Quarters were concerned, proposal dated 1st October, 2011 was sent to the Department of Archaeology. On 22nd November, 2011 the Department of Archaeology accorded the permission to carry-out the renovation work in the Staff quarters. However, on 2nd July, 2013 a letter was received from the Department of Archaeology informing the Executive Engineer that the permission given was only for repair of the staff quarters but the Executive Engineer had completely demolished the said structure and erected a new structure. Since there was breach of the terms and conditions of the permission the same was cancelled and the Executive Engineer was directed to remove the offending structure. On 8th August, 2013 a Show Cause Notice was received by the Executive Engineer calling upon him to show cause as to why penalty provided under section 30 of the AMASR Act, 1958 be not imposed.

D) The respondent No. 6 had replied to the letter dated 29th July, 2013, clarifying that the repair work which had been carried-out by the Executive Engineer was absolutely in conformity with the permission granted and, therefore, there was no violation of the permission of the Archaeology Department.

E) The Executive Engineer had replied to the Show Cause Notice of the Department of Archaeology dated 8th August, 2013, vide its letter dated 11th September, 2013, and had clarified the entire issue. Thereafter there has been no further action at the end of the Department of Archaeology.

4. Stance of the respondent No. 1-Director General, Archaeological Survey of India, New Delhi.

A) The Bhadra Fort was built in 1411 A.D. by Sultan Ahmedshah and is almost 600 years old. In the 17th Century there was an extension of the Bhadra Fort known as the "Azamkhan Sarai". On 1st March, 1928, the Bhadra Tower and Three Gates at Ahmedabad were declared as Central Protected Monuments of National Importance by the Government Department vide Bombay Castle No. 392 under the Ancient Monument Preservation Act, 1904 (VII of 1904). After the independence, the monuments are governed under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and Rules, 1959. According to the AMASR (Amendment and Validation) Act, 2010 and the Notification published in the Government Gazette No. 1764 dated 16th June, 1992 an area upto 100 meters from the protected limits and further beyond it upto 200 meters near or adjoining the protected monuments has been declared to be prohibited and regulated area respectively. For the purpose of any construction/repair within the prohibited/regulated area of the centrally protected monument, permission from the Competent Authority (Government of Gujarat, Archaeology Department, Gandhinagar) is necessary in view of the provisions of the AMASR Act, 1958 and Rules 1959 including (Amendment and Validation Act, 2010).

B) The Executive Engineer, City (R & B) Division, Ahmedabad had approached the

competent authority (Archaeology Department), Government of Gujarat, Gandhinagar for repair of the staff quarters and the competent authority had accorded permission to undertake the repairs vide its letter dated 20th December, 2011.

C) The Competent Authority, Director of Archaeology, Gandhinagar had accorded the permission to the applicant for reconstruction of a multistoried Court building within the regulated area of Bhadra Tower and Ahmedshah Mosque, Bhadra vide letter dated 10th April, 2013.

D) The proposed multi-storied Court building is not within the prohibited area.

E) Pursuant to the order passed by this Court dated 14th July, 2014, the respondent No. 1 filed a supplementary affidavit annexing the Bombay Castle No. 392 under the Ancient Monuments Preservation Act, 1904 (VII of 1904), indicating that the Bhadra Tower and Three Gates at Ahmedabad were declared as the centrally protected monuments of national importance by the Government.

This Court also granted liberty to the respondent No. 1 to annex document showing the exact location of the area which is protected under the Government Notification. Pursuant to such order dated 14th July, 2014 a supplementary affidavit has been affirmed on behalf of the respondent No. 1 stating inter-alia as under:-

"2. In compliance with the aforesaid order dated 14.07.2014, I state that by notification Bombay Castle, No. 392 dated 01/03/1928 the monuments known as "the Bhadra Tower" and "the Three Gates" were declared to be protected monument within the meaning of the Ancient Monuments Preservation Act, 1904. A copy of the said notification Bombay Castle, No. 392 dated 01/03/1928 is annexed herewith as Annexure R-1.

3. To point out the exact location of the area which is protected under the said notification, I am annexing herewith a Location plan of the said protected monument. In the said map the area shown in orange colour is the protected area comprising of the Bhadra Tower and Three Gates notified under Bombay Castle 392. The area shown in pink colour, denotes the hundred meter prohibited area and the area shown in green colour denotes the 200 meter regulated area. A copy of the Location Plan is annexed herewith as Annexure R-2.

For further convenience, I am also annexing herewith as Annexure R-3, the site plan of the Bhadra Tower & Three Gates.

From the said maps it is evidence that the said protected monuments the Bhadra Tower and Three Gates are situated on land bearing City Survey No. 4135, 4145 to 4155 and 4653 to 4658 of Raikhad ward, Ahmedabad City.

4. I further state that the Competent Authority vide communication dated 10.04.2013 has granted permission for construction only in that part of the existing Court building (City Survey No. 4652 + 5693), designated as "Block A",

which falls within the Regulated Zone of the protected monument. A copy of the said permission dated 10.04.2013 is annexed herewith as Annexure R-4.

5. With respect to notification dated 24/09/1929 and Notification dated 19/12/1962 (produced as Annexure R-1 and R-5 respectively with my affidavit dated 12th June, 2014), I state that the same pertains to a monument "Azamkhan Palace" situated in village Ranpur, Taluka Dhandhuka, District Ahmedabad and not to the "Azam Khan Palace" situated within the City limits of Ahmedabad. The inadvertent mistake has crept in because of the same name of the monuments. I regret the inadvertent mistake and apologise for the same."

F) According to the respondent No. 1, after receipt of the report dated 2nd July, 2013 from the Senior Survey Assistant, Archaeological Survey of India, Ahmedabad it had requested the Competent Authority, Director of Archaeological, Gandhinagar to withdraw the permission for repairs of the staff quarters at the Court building vide its letter dated 9th July, 2013 and in response to the same, the Competent Authority, Gujarat had withdrawn the permission for such repairs of the Staff quarters vide its letter dated 29th September, 2013. The staff quarters were not demolished and only the sidewalk were removed upto a certain level and there has been no deviation in the plan and no vertical and horizontal extension had been carried-out at the Staff Quarters of the Court building. The staff quarters at the court building is not a protected monument or listed under the heritage structure.

In such circumstances referred to above, according to the respondent No. 1 there is no merit in the petition and the same deserves to be rejected.

5. Submissions on behalf of the petitioner:

A) Mr. J.T. Trivedi, the learned counsel assisted by Mr. B.J. Trivedi appearing on behalf of the petitioner strenuously contended before us that the Bhadra Tower was constructed in 1411 A.D. and the Azamkhan Sarai which is an extension of the Bhadra Tower was constructed in the 17th Century and therefore would fall within the purview of the Ancient Historical Monuments of Ahmedabad. Although only the Bhadra Tower has been declared to be a protected monument and the Archaeological Department is in charge of the same, the Azamkhan Sarai does not lose its importance as an ancient monument.

B) Mr. Trivedi submits that although the Azamkhan Sarai is not a protected monument, yet being more than 300 years old and of historical importance, it deserves to be protected. The Article- 49 of the Constitution of India casts an obligation to protect the ancient monuments. Mr. Trivedi submits that it is one of the fundamental duties which have been inserted by way of Article- 51A in the Constitution of India by the 42nd Amendment that it shall be the duty of every citizen of India inter alia to value and preserve the rich heritage of our composite culture and to safeguard the public property.

C) Mr. Trivedi submits that every ancient monument and structure of historical

importance, irrespective of whether it is declared as a protected monument or not is part and parcel of the "rich heritage of our composite culture" and, therefore, they need to be protected. Mr. Trivedi in support of the aforesaid submissions has placed strong reliance on the decision of the Supreme Court in the case of *Rajeev Mankotia Vs. Secretary to the President of India and others*, .

D) Mr. Trivedi submits that the proposed construction will result in demolition of a 300 years old Dargah of Umdtul Mulk Hazrat Mohammad Aminkhan situated in the Azamkhan Sarai and the same would constitute an offence under sec. 295 of the Indian Penal Code.

E) Mr. Trivedi submits that assuming for the sake of argument without admitting that the impugned permission is legal and valid as the intended construction of the new City Civil Court building is to be made in the regulated area, however, the fact remains that the part of the property which is falling outside the proposed site would come within the prohibited area of 100 meters and, therefore, the respondents have no right to do anything in respect of any property falling within the radius of 100 meters from any part of the protected monument. Mr. Trivedi submits that the authorities have decided to demolish the entire property falling outside the sanctioned site and for that no permission has been obtained and no permission can even otherwise be granted.

F) Mr. Trivedi submits that the provisions of the AMASR Act should be interpreted in such a way that it would help in preserving the ancient monument of historical importance and their present site and not altering or defacing them under the guise of repairs or construction. According to Mr. Trivedi Sec. 20-C makes it clear that only the repairs or renovation can be done in the prohibited area. Sub-clause(2) to Sec. 20C of the Act deals with construction in a regulated area. According to Mr. Trivedi, it clearly implies that only repairs or renovation can be done in the prohibited area. If "construction" includes "demolition" then it cannot be done in the prohibited area. If "construction" does not include "demolition" then permission for construction cannot be construed to mean permission for demolition. According to Mr. Trivedi on the strength of the permission to construct a new Court Complex, no demolition of a part of the building falling within the prohibited area can be undertaken.

G) Mr. Trivedi submitted that the four words used in the AMASR Act, viz. "repairs/renovation/construction and/reconstruction" are of much significance. Mr. Trivedi, placing reliance on a decision of the Supreme Court in the case of *Archaeological Survey of India and Others Vs. Narender Anand and Another*, submitted that the term "Renovation" appearing in Sec. 20C would take its colour from the word "repair" appearing in that section. It would mean that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction.

Thus, according to Mr. Trivedi, repairs or renovation do not permit demolition. Mr. Trivedi submits that the permission is illegal and deceptive as on the one hand it

says that the permission is granted only in respect of Block-A, but on the other hand it is clear that the substantial portions of the existing Blocks-A, B and C will have to be demolished for the proposed construction and if the remaining portions of those blocks are not demolished, then what would be left of those blocks would be only the stumps of the original ancient monument.

H) Mr. Trivedi submits that the question before the Court of prime importance is whether any permission is required for demolishing any ancient monument which although not declared as protected monument, yet possesses historical importance. If the Court takes the view that for the purpose of demolition of a part of the building falling within the prohibited area without any intention of making any new construction for all times to come, then according to Mr. Trivedi, it will result in destruction of all ancient monuments which are not declared as protected monuments and the same would be against the spirit of Article- 19 of the Constitution of India.

I) Mr. Trivedi submitted that the authorities concerned have exhibited total insensitivity towards preservation and protection of the rich heritage of the City of Ahmedabad. According to Mr. Trivedi, the Government could have allotted any other land for the purpose of construction of the new City Civil & Sessions Court Complex. However, there is no justification on the part of the State Government in taking decision to construct a multi-storied building at the very same place, where, as on today, the old building of the City Civil Court is standing at the cost of demolition of an ancient monument.

J) Mr. Trivedi lastly submitted that this Court, in exercise of powers under Article- 226 of the Constitution of India should issue a writ of mandamus directing the State Authorities to declare Azamkhan Sarai as an ancient monument and preserve it as a heritage structure in exercise of powers under Sec. 4 of the Gujarat Ancient Monuments and Archaeological Sites and Remains Act.

5A. Submissions on behalf of the newly added respondent No. 7, supporting the petitioner:

Ms. N.B. Thakore, the learned Advocate appearing for the newly added respondent No. 7 submits that she has nothing more to add to what has been submitted by Mr. Trivedi. Ms. Thakore submits that she would adopt all submissions canvassed by Mr. Trivedi, the learned counsel appearing on behalf of the petitioner.

6. Submissions on behalf of the respondent No. 2 State Government:

A) Mr. Parth Bhatt, the learned A.G.P. appearing on behalf of the State Government has vehemently opposed this petition and submits that where to construct the City Civil Court building and how to construct is exclusively within the domain of the State Government. The petitioner as a public spirited citizen cannot come to the Court and complain that the site selected by the State Government for the purpose of the construction of the new City Civil Court's

complex is not appropriate. The scope of judicial review at the hands of the Court is very limited.

B) Mr. Bhatt submits that the impugned permission is absolutely in accordance with law and in no manner could be termed as contrary to the provisions of the AMASR Act. Mr. Bhatt submits that the demolition of some part of the existing buildings falling within the prohibited area is permissible as, after demolition of the same, the land would be kept open and there would not be any new construction on the same.

C) Mr. Bhatt submits that the Government records maintained in the form of register known as the provincial Civil Building contains the information of all the buildings constructed upto 31st March, 1938. It has been clearly stated in the same that the District & Joint Judges Court, Small Cause Court, First Class Special Judges and Joint Judges Courts were built in the year 1901-02 at an estimated cost of Rs. 2,12,104/-. According to Mr. Bhatt, it indicates that the Court building has nothing to do with the Azamkhan Sarai. The existing City Civil Courts buildings are not part of the Azamkhan Sarai or the Azamkhan Palace as sought to be asserted on behalf of the petitioner. It is one thing to say that the Azamkhan Sarai should be protected as one of the ancient monuments, but the other to say that it is a part of the City Civil Court complex.

D) Mr. Bhatt submits that in one of the buildings situated in the City Civil Court complex, more particularly near the Advocate's chamber room No. 6, Block-B, the foundation stone of the said building could be unearthed, which indicates that the City Civil Court complex was built and inaugurated in the year 1902.

E) Mr. Bhatt submits that according to the register referred to aforesaid, the Azamkhan Sarai's Palace is the building situated in Block-E as indicated in the map. The said building was used by the Commissioner & District Officers of the General Administration Department during the post independence era as their offices. The building adjoining to and behind the Palace was used as jail by the Britishers. That part was known as "Sarai" meaning a rest-house.

F) Mr. Bhatt submits that the Azamkhan Sarai Palace is not to be touched and would remain intact while constructing the new City Civil Complex.

G) Mr. Bhatt, in such circumstances prays that there being no merit worth the name in this petition, the same deserves to be rejected as, for no valid reason, the work of construction of the new City Civil & Sessions Court building has come to a grinding halt on account of the interim order passed by this Court. Mr. Bhatt submits that the petitioner who claims to be a public spirited citizen, should also bear in mind that the construction of a new City Civil and Sessions Court is also in public interest, because for years together the lawyers and judges have worked in the most inhuman conditions, due to lack of proper infrastructure and other basic amenities, more particularly the lack of adequate space to work.

7. Submissions on behalf of the respondent No. 1:

A) Mr. Saurabh Amin, the learned advocate appearing on behalf of the respondent No. 1 has also opposed this petition and submits that the monuments known as "the Bhadra Tower" and "the Three Gates" were declared to be protected monument, within the meaning of the Ancient Monuments Preservation Act, 1904. Mr. Amin submits that the Azamkhan Sarai, is not a protected monument. It may be an ancient monument, but for the same it has to be declared by the Central Government.

B) Mr. Amin submits that the Competent Authority accorded permission dated 10th April, 2013 for construction only in that part of the existing Court building designated as " Block-A falling within the regulated zone of the protected monument.

C) Mr. Amin submits that while according the necessary permission all the relevant provisions of the AMASR Act have been kept in mind and it could not be said that the impugned permission is in any manner violative of the provisions of the AMASR Act.

In such circumstances referred to above, Mr. Amin prays that there being no merit in this petition, the same deserves to be rejected.

8. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in this petition is whether the construction of the new City Civil and Sessions Court building is, in any manner, unlawful being in contravention of the provisions of the AMASR Act, 1958 as alleged by the petitioner.

9. Ordinarily, court would allow litigation in public interest if it is found:

(i) That the impugned action is violative of any of the rights enshrined in Part III of the Constitution of India or any other legal right and relief is sought for its enforcement;

(ii) That the action complained of is palpably illegal or mala fide and affects the group of persons who are not in a position to protect their own interest on account of poverty, incapacity or ignorance;

(iii) That the person or a group of persons were approaching the Court in public interest for redressal of public injury arising from the breach of public duty or from violation of some provision of the Constitutional law;

(iv) That such person or group of persons is not a busy body or a meddlesome interloper and have not approached with mala fide intention of vindicating their personal vengeance or grievance;

(v) That the process of public interest litigation was not being abused by politicians or other busy bodies for political or unrelated objective. Every default on the part of the State or Public Authority being not justiciable in such litigation;

(vi) That the litigation initiated in public interest was such that if not remedied or

prevented would weaken the faith of the common man in the institution of the judiciary and the democratic set up of the country;

(vii) That the State action was being tried to be covered under the carpet and intended to be thrown out on technicalities;

(viii) Public interest litigation may be initiated either upon a petition filed or on the basis of a letter or other information received but upon satisfaction that the information laid before the Court was of such a nature which required examination;

(ix) That the person approaching the Court has come with clean hands, clean heart and clean objectives;

That before taking any action in public interest the Court must be satisfied that its forum was not being misused by any unscrupulous litigant, politicians, busy body or persons or groups with mala fide objective of either for vindication of their personal grievance or by resorting to black-mailing or considerations extraneous to public interest.

10. Since the permission accorded by the competent authority dated 10/4/2013 is a subject matter of challenge, we deem it expedient to reproduce the same herein below:

" Form IV

Grant of permission for undertaking construction/reconstruction/repair/renovation in the regulated area of protected monument/archaeological site and remains declared as of national importance under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (see rule 12)

Whereas, The Executive Engineer, Ahmedabad City (R & B) Division of A/5, Multi Stories Building, Lal Darwaja, Ahmedabad (Gujarat) has applied for permission for Construction in the regulated area near or adjoining Bhadra Tower and Ahmed Shah's Mosque at Bhadra district Ahmedabad, state Gujarat and has undertaken to observe the provision of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and rules made there under, I Yadubirsingh Rawat, Competent Authority, do hereby grant this permission on the basis of the approval/recommendation of the National Monument Authority, under sub rule (2) of rule 9 of the National Monument Authority (Conditions of Service of Chairman and members of the Authority and Conduct of Business) Rule, 2011 of the said rules of the said The Executive Engineer, Ahmedabad City (R & B) Division for Construction at Survey No. 4652 + 5693, Raikhad Ward-2, Ahmedabad(Gujarat) in the area indicated in red outline on the plan attached hereto.

The permission is granted subject to the provision of the Act and the Rules and is further subject to the following conditions, namely:

The Permission of construction is granted only for Block-A with the total height of

25.00 mtrs i.e. Ground +7 floors at Survey No. 4652 + 5693, Raikhad Ward-2, in the regulated area of Bhadra Tower and Ahmad Shah's Mosque, Ahmedabad (Gujarat) with the following terms and conditions:

1. Existing Block-B should be retained by the applicant.
2. It is advisable to have the design of existing facade in the new construction to maintain the character of court building.
3. The license is valid for construction in regulated area only.
4. The colour, material texture and details of the building facade should be such so as to maintain the character of the protected monument in whose vicinity it is located.
5. The applicant, particularly if it is a builder/developer may consider setting up a fund or creating a trust or a donation to the cause of waste management and environmental development around the centrally protected monument in question.
6. Applicant should consider erecting an appropriate plaque of about 3" X 3" at their construction site giving a brief background about the monument in question.

The permission is not transferable and it shall be valid for a period of three years commencing with this 10th day of April, 2013."

11. We shall now look into the Bombay Castle, 1st March, 1928 issued by the General Department published in the Bombay Government Gazette, March 08, 1928. It reads as under:-

" GENERAL DEPARTMENT. Bombay Castle, 1st March 1928.

No. 392.-In exercise of the powers conferred by subsection (3) of section 3 of the Ancient Monuments Preservation Act, 1904 (VII of 1904), the Governor in Council is pleased to confirm Government Notification No. 392, dated 21st April, 1927, declaring the under mentioned monuments in the district of Ahmedabad, Northern Division, to be protected monuments within the meaning of the said Act:-

* To be preserved in permanent good repair at Government expense.

+ To be preserved in permanent good repair at the expense of owners.

12. Since the entire petition revolves around the controversy regarding the Azamkhan's Sarai, it is necessary to consider what exactly is the Azamkhan Sarai. The word "Sarai" means a Dharmashala/Guest House.

"Azamkhan's sarai"

A "zam Khan, by name Mir Muhammad Baqir, was one of the most efficient of the sixty odd Mughal governors who administered Gujarat. He had the habit of building palace-citadels in the difficult and turbulent parts of the country he had

to govern, which earned for him the nick-name "Udai" (white ant which builds its house wherever it goes). He was born in A.D. 1576 and died in A.D. 1649. His palace at Ahmedabad, built in A.D. 1637, stands on the south-west corner of Bhadra, near the Naqqar Khana gateway and facing the Tin Darwaza. Its main block is 64.01 m by 73.15 m with a passage giving entry into the Bhadra fort on the north. The 5.49 m high entrance led into an octagonal hall which had in the upper storey a low balcony work of stone. There were cupolas on the different sections of the gallery with marble chequerings. The building was used later as a prison and hospital, and had undergone extensive renovation and structural alterations. The modern Bhadrakali temple is situated in one of the outward facing lower cells of the wall added to the palace as a caravan-serai" [See Book titled "AHMADABAD" by K.V. Soundara Rajan, published by the Director General, Archaeological Survey of India, New Delhi]

13. While defining the legislative fields, Entry 67 of List I of the Seventh Schedule enables the Parliament to enact laws on "ancient and historical monuments and records and archaeological sites and remains declared by or under law made by Parliament to be of national importance". Likewise, Entry 40 in List III of the Seventh Schedule permits both the Parliament and the State Legislature to legislate on "archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance." Entry 12 of List II of the Seventh Schedule of the Constitution of India, on the other hand, permits the State Legislature to enact laws about "..... ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance."

14. A conjoined reading of these entries clearly show that both the Parliament and the State Legislature can enact laws about the ancient and historical monuments, about archaeological sites and about remains. However, Entry 12 of List II and Entry 40 of List III are subject to Entry 67 of List I of the Seventh Schedule of the Constitution of India. Furthermore, while Parliament is enabled to deal with monuments of "national importance", the State is enabled to control and preserve those monuments which are of importance within the State.

15. This is also borne out from the Central and the State Acts before us. The object of the Central Act is "to provide for the preservation of ancient and historical monuments and archaeological sites and remains of national importance, for the regulation of archaeological excavations and for the protection of sculptures, carvings and other like objects." The State Act, on the other hand, states the object to be "for the preservation of ancient and historical monuments and records and archaeological sites and remains (other than those declared to be of national importance) in the State of Gujarat and for matters connected with the purposes aforesaid". Thus, the State Act deals with those ancient and historical monuments within the State of Gujarat and have some importance for the State.

16. Prior to the coming of the Central Act, the Ancient Monument Preservation

Act, 1904 covered the field. However, under the said Act, the Central Government could declare any monument to be "protected", whether the said monument was of "national importance" or not. But such a scheme led to confusion between the Central Government and the State Government. Hence, in order to limit the power of the Parliament, and to give more power to State Government, the Central Act was enacted. This is clear from the Statement of Object and Reasons, part of which is as under:

While the constitution has distributed the subject-matter under three different heads, the Act of 1904 governs all ancient monuments whether falling in the Central field or the State field, and vests all executive power in the Central Government. The position of the existing law relating to ancient monuments is far from satisfactory. The present Bill purports to be a self-contained law at the Center which will apply exclusively to ancient monuments etc. of national importance falling under Entry 67 of List I and to archaeological sites and remains falling under Entry 40 in the Concurrent List. Simultaneously, the State Government would be advised to enact a similar law in respect of ancient monuments, etc. falling under Entry 12 in the State List. In this manner, the Central and the State fields will be clearly demarcated and the existing confusion and overlapping of jurisdiction arising from the Act of 1904 will be eliminated.

17. We shall now consider few relevant provisions of the AMASR Act, 1958.

i. Section 2(a) defines "ancient monument". It reads as under:-

(a) "ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years, and includes-

(i) the remains of an ancient monument,-

(ii) the site of an ancient monument,

(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and

(iv) the means of access to, and convenient inspection of an ancient monument;

ii. Section 2(d) defines "archaeological sites and remains".

It reads as under:-

(d) "archaeological site and remains" means any area which contains or is reasonably believed to contain ruins or relics of historical or archaeological importance which have been in existence for not less than one hundred years, and includes-

(i) such portion of land adjoining the area as may be required for fencing or covering in or otherwise preserving it, and

(ii) the means of access to, and convenient inspection of, the area;

iii. Section 2(dc) defines "construction". It reads as under:-

(dc) "construction" means any erection of a structure or a building, including any addition or extension thereto either vertically or horizontally, but does not include any re-construction, repair and renovation of an existing structure or building, or, construction, maintenance and cleansing of drains and drainage works and of public latrines, urinals and similar conveniences, or, the construction and maintenance of works meant for providing supply of water for public, or, the construction or maintenance, extension, management for supply and distribution of electricity to the public or provision for similar facilities for public;

iv. Section 2(ha) defines "prohibited area". It reads as under:-

(ha) "prohibited area" means any area specified or declared to be a prohibited area under Section 20-A;

v. Section 2(i) defines "protected area". It reads as under:-

(i) "protected area" means any archaeological site and remains which is declared to be of national importance by or under this Act;

vi. Section 2(j) defines "protected monument". It reads as under:-

(j) "protected monument" means an ancient monument which is declared to be of national importance by or under this Act.

vii. Section 2(k) defines "re-construction". It reads as under:-

(k) "re-construction" means any erection of a structure or building to its pre-existing structure, having the same horizontal and vertical limits;

viii. Section 2(l) defines "regulated area". It reads as under:-

(l) "regulated area" means any area specified or declared under Section 20-B;

ix. Section 2(m) defines "repair and renovation". It reads as under:-

(m) "repair and renovation" means alterations to a preexisting structure or building, but shall not include construction or re-construction;"

x. Section 3 of the Act, 1958 provides that ancient and historical monuments and all archaeological sites and remains, which have been declared by The Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (Act 71 of 1951), or by Section 126 of the State Reorganization Act, 1956 (Act 37 of 1957), to be of national importance, shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purpose of the Act.

xi. Section 4 of the Act, 1958 provides power to the Central Government to declare ancient monuments to be of national importance.

xii. Section 19 lays down the restrictions on enjoyment of property rights in protected areas.

xiii. Section 20A provides for declaration of prohibited area and carrying out public work or other works in prohibited area. Section 20A also provides that every area beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of 100 meters in all directions, shall be the prohibited area in respect of such protected area or protected monument.

xiv. Sub-clause (4) of Section 20A, which came into force from 29th March, 2010, by the Act 10 of 2010 provides that no permission referred to in sub-section (3) including carrying out any public work or project essential to the public or other constructions, shall be granted in any prohibited area on and after the date on which The Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President.

xv. Section 20B of the Act, 1958 provides for declaration of regulated area in respect of every protected monument. In terms of Section 20B, every area beginning at the limit of prohibited area in respect of every ancient monument and archaeological sites and remains, declared as of national importance under Sections 3 and 4 of the Act, extending to a distance of 200 meters in all directions, shall be the regulated area in respect of every ancient monument and archaeological sites and remains.

xvi. Section 20C of the Act, 1958 provides for application seeking permission for repair or renovation of any building or structure in a prohibited area, or construction or re-construction or repair or renovation in a regulated area.

xvii. Section 20D of the Act, 1958 provides for grant of permission by competent authority within the regulated area.

18. Keeping in mind the aforesaid provisions of the Act, we proceed to consider the case of the petitioner.

On behalf of the respondent No. 1, namely, Director General, Archaeological Survey of India, New Delhi, a supplementary affidavit has been filed and along with the said supplementary affidavit, one map has been annexed, certified by the Office of the Superintending Archaeologist, Archaeological Survey of India, Vadodara Circle, Vadodara. The map, which is annexed as "R-2" at page 133 of the paper-book makes the position as clear as a noon day. The map indicates, and which has not been disputed, that there are three protected monuments, namely (i) the Bhadra Tower, (ii) the Three gates, and (iii) the Sultan Ahmadshah's Mosque. In the map, the area shown in the orange colour is the protected area comprising of the Bhadra Tower and the Three gates as notified under the Bombay Castle 392. The area shown in the pink colour denotes the 100 meters prohibited area and the area shown in the green colour denotes the 200 meters regulated area. The map further indicates that the two protected

monuments, namely, the Bhadra Tower and the Three gates are situated on land bearing City Survey No. 4135, 4145 to 4155 and 4653 to 4658 of Raikhad ward of the Ahmedabad city.

19. If we fall back to the impugned permission, then, considering the map, it is clear that the competent authority has granted permission for construction only in that part of the existing Court buildings, City Survey No. 4652 + 5693, designated as "Block-A", which falls within the regulated zone of the protected monuments.

To the aforesaid extent, there is no problem. However, the problem lies with respect to those parts of the building falling within the prohibited area as well as the regulated area. Absolutely in the centre of the map, a round circle has been shown, to be in pink colour, and in between is the Bhadra Tower and the Three gates, indicated in the orange colour. In the north-west direction, we find some part of the District and Sessions Court, shown in the pink colour and the other part in the green colour. The entire argument of Mr. Trivedi proceeds on the footing that the portion of the buildings falling within the regulated area i.e. the green coloured part, could be demolished, but those parts of the building falling within the prohibited area cannot be touched, in view of the provisions of Section 20A, read with Section 20C of the Act, 1958. According to Mr. Trivedi, any person, who owns any building or structure within the prohibited area, is desirous of carrying out any repair or renovation of any building or structure, he is obliged to make an application to the competent authority and seek appropriate permission. Mr. Trivedi's submission is that there is no such permission. However, on the other hand, the argument of the respondents is that those parts of the buildings falling within the prohibited area are to be completely demolished with no intention to construct anything at that site for all times to come. In short, the submission on behalf of the State Government as well as the Archaeological Department is that demolition of the entire building will not amount to repair or renovation of that building, and therefore, there is no legal impediment so far as demolition of the building falling within the prohibited area is concerned.

20. The term "repair and renovation" has been defined under the Act. The term "repair and renovation" means, alterations to a pre-existing structure or a building, but would not include construction or re-construction. In the same manner, the term "re-construction" has also been defined as "any erection of a structure or building to its pre-existing structure, having the same horizontal and vertical limits". Section 2(dc) has explained the term "construction", which also means "any erection of a structure or a building, including any addition or extension thereto, either vertically or horizontally, but does not include any re-construction, repair and renovation of an existing structure or building.

Thus, the position of law is clear. Having regard to the object of the Act, it is only when any person, which includes the Government, desires to carry out any repair or renovation of a building falling within the prohibited area, is obliged to seek

permission, but in the present case, some part of the building, which is falling within the prohibited area, is to be completely demolished, to be precise, the same will be razed to ground, and no construction at that site, of any building whatsoever, will be made by the Government and the land is to be kept open.

21. In the aforesaid view of the matter, we are unable to accept the submission canvassed on behalf of the petitioner that the demolition of a building should be read in to the definition of the term "repair and renovation" as defined under Section 2(m) of the Act. The statute has prescribed a particular definition to the term "repair and renovation". In such circumstances, we should not add words to a statute or read words into it, which are not there, especially when the literal reading produces an intelligible result. The intention of the Act, more particularly providing restriction upon areas declared as a prohibited area, appears to be very clear. The intention is to see that there should not be any construction of a new building within the prohibited area and the reason is also plain and simple because every area, beginning at the limit of the protected area, or the protected monument, as the case may be, and extending to a distance of 100 meters in all directions is to be treated as a prohibited area in respect of such protected area, or protected monument. In the present case, the area from the border of the two protected monuments, namely (i) the Bhadra Tower and (ii) the Three Gates, upto a distance of 100 meters in all directions will fall within the prohibited area. At times, the authority may even declare an area to be a protected area as defined under Section 2(i) of the Act. However, in the present case, there is no declaration of any protected area, but the declaration is one of the prohibited area. The object is to protect the monument and also to keep it visible falling within the prohibited area. In such circumstances, if new construction is permitted within the prohibited area under the garb of repair or renovation, then the protected monument might lose all its importance and significance.

In the aforesaid context, we may give one example.

One "x" has an old house falling within the prohibited area. The house is in a dilapidated condition. It is permissible for "x" to undertake the necessary repair or renovation of the house, after seeking permission from the competent authority. However, if "x" is financially not sound enough to undertake such repair or renovation and decides to raze the house to ground, then in such circumstances, could it be said that such demolition of the house would amount to repair or renovation within the provisions of the Act, and therefore, necessary permission is a must? By razing the house to the ground, the provisions of the Act, in no manner, are infringed or the object with which the Act came to be enacted, is defeated in any manner. The law does not prohibit owning of property or even transfer of property in the same condition, situated in a prohibited area. All that is prohibited is, re-construction of the building in the garb of repair or renovation. The intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said, as also as to what has not been said. As a consequence, a construction

which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford v. Spooner* (1846(6) Moore PC 1), Courts, cannot aid the Legislatures" defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (See *State of Gujarat and Others Vs. Dilipbhai Nathjibhai Patel and Another*,). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See *Stock v. Frank Jones (Tiptan) Ltd.* (1978 1 All ER 948 (HL)). Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in *Vickers Sons and Maxim Ltd. v. Evans* (1910) AC 445 (HL), quoted in *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah*, . [See *Vemareddy Kumaraswamy Reddy and Another Vs. State of A.P.*, .

22. In the aforesaid context, we may quote with profit, the observations made in a recent pronouncement of the Supreme Court in the case of *Rohitash Kumar and Others Vs. Om Prakash Sharma and Others*, .

"22. The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word. The legal maxim "A Verbis Legis Non Est. Recedendum" means, "From the words of law, there must be no departure". A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same, produces an intelligible result. (Vide: *Nalinakhya Bysack Vs. Shyam Sunder Haldar and Others*, ; *Sri Ram Ram Narain Medhi Vs. The State of Bombay*, ; *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, ; *Balasinor Nagrik Cooperative Bank Ltd. Vs. Babubhai Shankerlal Pandya and Others*, ; and *Dadi Jagannadham Vs. Jammulu Ramulu and Others*, .

23. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause."

23. In such circumstances referred to above, we reject the vociferous contention canvassed by Mr. Trivedi, the learned Senior Counsel appearing on behalf of the petitioner that only repairs or renovation can be done in the prohibited area. We also reject the submission that if "construction" includes "demolition", then, it cannot be done in the prohibited area. If we accept the submission of Mr. Trivedi, then we will have to read "demolition" also in the definition of the term "construction" as defined under Section 2(dc) of the Act.

24. The above takes us to deal with the second contention canvassed by Mr. Trivedi on behalf of the petitioner.

According to Mr. Trivedi, although the Azamkhan Sarai has not been declared as a protected monument by the Central Government under the AMASR Act, 1958, yet the mere fact that it is more than 100 years" old, would make it an "ancient monument" as defined in the Central Act.

25. We are not impressed by such submission of Mr. Trivedi for more than one reason. Section 2(j) of the AMASR Act, 1958 defines the term "protected monument" as meaning "an ancient monument which is declared to be of national importance by or under this Act". Section 4 empowers the Central Government to declare an ancient monument to be of "national importance". It prescribes the procedure for such declaration. Once an ancient monument is declared to be of "national importance", ipso facto it becomes a protected monument according to the definition of "protected monument". The Central Act deals with only monuments of "national importance" which automatically stand as "protected monument" under the Central Act. The State Legislature can enact a law dealing with those ancient or historical monuments which have not been declared by the Parliament to be of "national importance".

26. Once a monument has been declared to be of "national importance" under the Central Act, it is out of the purview of the State Act. Indisputably, in the present case, the Azamkhan Sarai has not been declared by the Parliament to be of "national importance", and hence is not "a protected monument" under the Central Act. Since the Azamkhan Sarai has not been declared to be of "national importance" by the Parliament, the State is competent to declare the same to be a "protected monument" under the State Act. Whether the State is obliged to declare a monument like the Azamkhan Sarai as a protected monument under the State Act is an issue we shall deal with a little later.

27. Section 2(a) of the Central Act defines the term "ancient monument" as under:

""ancient monument" means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years, and includes-

(i) the remains of an ancient monument,

- (ii) the site of an ancient monument,
- (iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and
- (iv) the means of access to, and convenient inspection of an ancient monument;"

28. The provisions of the Central Act apply only to those ancient monuments which have been declared of "national importance". Hence, merely because a monument is more than 100 years" old, would not automatically make it an "ancient monument" under the Central Act. In order for the Central Act to apply to the said monument, it would have to be declared as an ancient monument of "national importance". Thus, a declaration by the Parliament is a sine qua non before a monument comes within the purview of the Central Act. As stated above, the Parliament has not declared the Azamkhan Sarai to be of "national importance". Therefore, the Central Act has no application so far as the Azamkhan Sarai is concerned. Secondly, if every monument older than a 100 years is ipso facto included in the Central Act, then they need not be declared to be of "national importance". Such an interpretation would dilute Entry 12 in List II and Entry 40 in List III. For, the words "other than those declared by or under law made by Parliament to be of national importance" used in these entries would be meaningless.

29. Thus, a holistic reading of the relevant entries of List I, II and III of the 7th Schedule of the Constitution of India and of the provisions of the Central and the State Acts make it abundantly clear that the Central Act applies to those "ancient monuments" declared to be of "national importance". Hence, such monuments stand "protected" under the Central Act. The State Act applies to those "ancient and historical monuments" which are within the State and have not been declared to be of "national importance". Since the Azamkhan Sarai has not been declared to be of "national importance", the Gujarat Ancient Monuments and Archaeological Sites and Remains Act, 1965, shall apply.

30. The above takes us to deal with the third contention of Mr. Trivedi as regards the issue of mandamus to the Central Government or to the State Government to declare the Azamkhan Sarai as an ancient and historical monument. On the other hand, the contention on behalf of the respondents is that the Central Act as well as the State Act are enabling statutes and merely enables something to be done, which was previously not within the authority of the executive; and there is nothing in the scheme or the policy of both the Acts which can be said to convert what is clearly an enabling discretionary power into a duty entitling the petitioner to a mandamus for its enforcement.

31. Section 4 of the Central Act deals with the power of the Central Government to declare ancient monument etc. to be of national importance. Where the Central Government is of the opinion that an ancient monument or archaeological site and remains not included in Section 3 is of national importance, it may, by notification in the Official Gazette, give two months"

notice of its intention to declare such ancient monument or archaeological site and remains to be of national importance.

32. We may also look into Section 3 of the State Act 1965. Section 3 of the State Act reads as under:

"3. Certain ancient and historical monuments deemed to be protected monuments.-All ancient and historical monuments in the State of Gujarat, which before the commencement of this Act have been declared by or under the Saurashtra Ancient Monuments Preservation Act, 1956 (Sau. III of 1956) to be protected monument, and have not been declared by or under any law made by Parliament to be of national importance, shall be deemed to be protected monuments for the purposes of this Act."

33. Section 4 of the State Act provides for the power of the State Government to declare ancient and historical monuments to be protected monuments. Section 4 reads as under:

"4. Power of State Government to declare ancient and historical monuments to be protected monuments.-(1) Where the State Government is of opinion that any ancient and historical monument not included in section 3 and not declared by or under any law made by Parliament to be of national importance, should be a protected monument, it may, by notification in the Official Gazette, give two months" notice of its intention to declare such monument to be a protected monument; and a copy of every such notification shall be affixed in a conspicuous place near the monument.

(2) If any person interested in any such monument has any objection to the monument being declared as a protected monument, he may, within two months of the publication of the notification under sub-section (1), submit his objection in writing, to the State Government.

(3) On the expiry of the said period of two months, the State Government may, after considering the objections, if any, received under sub-section (2), declare by notification in the Official Gazette the ancient and historical monument to be a protected monument.

(4) A notification published under sub-section (3) shall, unless and until it is withdrawn by the State Government, be conclusive evidence of the fact that the ancient and historical monument to which it relates is a protected monument for the purposes of this Act."

34. The central question is, whether having regard to the subjective form and the permissive words of Section 4(1) of the Central Act as well as Section 4(1) of the State Act, it admits of being construed as merely granting a power; or whether there is something in the policy and the scheme of the Act which imposes a duty on the Government to apply its mind and to consider the question, whether any particular monument which is an "ancient monument" deserves to be declared a "protected monument" under the Act.

35. The question which we have posed for our consideration had fallen for consideration before the Division Bench of the Karnataka High Court in the case of B.V. Narayana Reddy and Others Vs. State of Karnataka and Others, . The issue before the Division Bench of the Karnataka High Court was almost the same. In that case, a petition under Article 226 of the Constitution of India was filed seeking a writ of mandamus to the State Government to consider and dispose of the representation preferred by the petitioner as to the question of declaring "Attara Cutcherry", a Government building in which the Karnataka High Court was housed, as a "protected monument" under Section 4 of the Karnataka Ancient and Historical Monuments and Archaeological Sites and Remains Act, 1961. The petition before the Karnataka High Court was filed as a sequel to the Government order which had accorded administrative approval for the demolition of the court "Attara Cutcherry" and for the construction of a new High Court building on the site.

36. The Division Bench of the Karnataka High Court, speaking through His Lordship M.N. Venkatachaliah, J. (as His Lordship then was) made the following observations, which are worth noting:

"17. Sri Shivaprakash says that the purpose and the policy of the "Act" is to provide for the preservation of ancient and historical monuments and archaeological sites and that the provisions of S. 4(1) though apparently couched in subjective and permissive language must not receive a bare mechanical interpretation devoid of the concept of purpose reducing them to futility, but must be interpreted in the, light of the general purpose of the, Act itself. So "purposively" construed, says counsel what appears apparently permissive becomes objective and obligatory. Sri Shivaprakash accordingly contended that where Government does not exercise the discretion vested in it that inaction itself is actionable. He relied upon the observations of the House of Lords in *Padfield v. Minister of Agriculture* (1968) 1 All ER 694 and *Secretary of State v. Tameside*. Sri Shivaprakash referred to the following passage in *Wade's Law*" Fifth Edn. Pp. 228, 229: "The hallmark of discretionary power is permissive language using words such as "may" or "it shall be lawful", as opposed to obligatory language such as "shall". But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory." Learned counsel referred to the following passage in *de-smith Judicial Review of Administrative Action*, Fourth Edn.:

"Partial or total failure to exercise a discretion may occur because the competent authority has failed to appreciate the amplitude of its discretion."

18. Learned Advocate General urged that the "Act" merely confers a power which becomes available to the authority it forms an opinion that the monument should be preserved and that it would be against all canons of construction to say that even in such a case the authority could be compelled to form an opinion one way or the other. It would be as tendentious as it would be if Government was compelled to form an opinion under the law enabling compulsory acquisition

whether a property is needed for a public purpose or not or for that matter, whether the detention is necessary under laws of preventive detention. Learned Advocate General relied on the decision in *Saroj Rawat v. Secy. Bar Council*; *R.K. Manufacturers and Others Vs. Minerals and Metals Trading Corporation of India Ltd. and Others*, and *A.K. Roy v. Union of India*. We will refer to the latter two later.

19. In a Government, by law, there is nothing like an unreviewable executive discretion. But this does not mean that wide executive discretion is inconsistent with Rule of law. The Modern pluralist, social-welfare, State which is, indeed, a "service corporation" demands for its governance discretionary powers which are necessarily as wide as they are varied, Prof. Wade says *ibid* page 347:

"It used to be thought to be classical constitutional doctrine that wide discretionary power was incompatible with the rule of law. But this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should be able to control its exercise. Modern Government demands discretionary powers which are as wide as they are numerous."

The concern of law is the primordial need for preservation of order in society; and its purpose to discipline power and prevent its abuse, All powers have legal limits.

20. The operation of a statute is not automatic and can never be so. Like other legal principles and rules it takes effect through the interpretation of courts. Interpretation is therefore a search and discovery of a meaning which, however, obscure and latent, has, none-the-less, a real and ascertainable pre-existence in the mind of the Legislature, But problems arise where the question which is raised on the statute had not occurred to the legislature, in which case the process of interpretation tends towards a guess as to what the Legislature would have intended if the point had been present in its mind.

21. Montesquieu said: "The Judges of the nation are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor." "Justice Marshall said *Osborne v. Bank of the United States* 9 *Weat* 738, 866: Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or in other words, to the will of the law". But these thoughts are legal sentiments of the part. The one almost obsessive, preoccupation of administrative law in the last thirty years has been the kindling, or the rekindling, of the concern of the courts to remedy abuse and unfairness in Government. The Judges have been embroiled in a series of battles against the misuse of power at the highest level and have established, or rather re-established, some very salutary restraints." Indeed, as has been pointed out, Marshall's own life and work is a conspicuous illustration of how he left on the American Constitution the impress of his own mind-, and "moulded it, while it

was still plastic and malleable, in the fire of his own intense convictions." Judicial review has now broken down the legislative barricade of administrative finality. The concept of unfettered discretion and its unreviewable finality are a matter of the past (Constitutional Fundamentals Pp. 42, 43). As Lord Atkin said "finality is a good thing, but justice is a better." AIR 1933 208 (Privy Council). Legislative retaliation of this expansive of judicial mood took two forms one direct and the other indirect; the former by express exclusion of jurisdiction, and the latter by resort to the now familiar legislative technique and expedient of grant of power in such wide and subjective terms that there appear to be nothing left for the court to judge. Referring to the judicial re-action to this "favourite device" Prof. Wade says:

"For over 40 years the judges have been showing signs of resistance to these insidious provisions and now in the Tameside case the House of Lords has confirmed that they are not to be disarmed so easily.....".

"Liberties are taken with the literal meaning of the words which, though not so daring the liberties taken in cases like *Anisminic*, are just as necessary if the judges are to make an effective resistance to Parliament's attempt to deprive them of their proper function. It is abuse of legislative power, as well as abuse of executive power, against which they are fighting." (Page 69)

(Underlining supplied)

Another learned lawyer spoke (In *Current Legal Problems* 1983 page 31 (The Faculty of Laws-University College London) "Changed. Attitude to Law-Fifty Years on" by Lord Lloyd of Hampste page 51) of Lord Denning's contribution in this field:

"As for statute law, the judges possess the constitutional right to interpret this and Lord Denning would doubtless approve old Bishop Hoadly's celebrated observation that "whoever hath an absolute authority to interpret an written laws. it is he who is truly the Lawgiver."

"Given sufficient strength of mind, as Lord Denning himself has repeatedly demonstrated in his own decisions, by looking at the purpose of the statute and with the presumption that Parliament's intention within the frame-work of that overriding purpose must be to do justice between the parties, statutes may always, or nearly always be construed to promote and produce that desirable end."

"In the field of administrative law Lord Denning together with judges have control of the executive....."

"..... By pointing the way to a robust exercise of the inherent power of judicial review of administrative acts, the courts have created a new form of administrative law, doubtless a good deal more limited than the jurisprudence of the French *Conseil d'Etat*, but unique in the way it deploys the jurisdiction of the ordinary courts for this purpose."

(Underlining supplied)

The old limitations that a court of construction imposed on itself in the task of effectuating the purpose of a statute is well illustrated in the following statement of Lord Symonds in *Inland Revenue Commr. v. Ayrshire Employers Mutual Insurance Association Ltd.* (1946) 1 All ER 637, 641:

"The section.... section 31 of the Finance Act 1933, is clearly a remedial section.... It is at least clear what is the gap that is intended to be filled and hardly less clear how it is intended to fill that gap. Yet I can come to no other conclusion than that the language of the section fails to achieve its apparent purpose and I must decline to insert words or phrases which might succeed where the draftsman failed."

The House of Lords referred to this as an unhappy legacy of past. It is said (1981 AC 251 at P. 280):

"The unhappy legacy of this judicial attitude, although it is now being replaced by an increasing willingness to give a purposive construction to the Act, is the current English style of legislative draftsmanship. It is wary of laying down general principles to be applied by the courts to the varying facts of individual cases rather than trying to provide in express detail what is to be done in each of all foreseeable varieties of circumstances. In the attempt to do this the draftsman will have taken account of technical and competing canons of construction that are peculiar to English written law; and will have relied heavily on precedent in his use of words and grammatical constructions and general layout used in earlier Acts of Parliament that have been the subject of judicial exegesis."

Indeed, the *Pearlsweig* case (*Liversidge v. John Anderson*, 1942 AC 206) did indicate a particular judicial inclination towards executive power formulated in subjective *Tameside*, *Padfield* cases have placed that case where it belongs; in the "War-museum".

This dynamic and activist role of the Judge against legislative fortifications of executive discretion is not without its internal-dissenters. Lord Devlin's pessimism that "Judicial interference with the executive cannot for long greatly exceed what white hall will accept and the caution that "The British have no more wish to be governed by judges than they have to be judged by administrators" are now widely known. But they are, apparently, more known than shared. Prof, Wade says Hamlyn Lectures: Constitutional Fundamentals p. 6

"..... Lord Develin spoke of possible retaliation by Acts providing that a minister's decision may not be reviewed in any court of law. "And that," he says, "puts the lid on". But the *Anisminic* case showed just the opposite when the House of Lords removed the lid and threw it away."

Lord Devlin, however, went further and said "Judges and Lawmakers"-Modern Law Review, Volume 39-January 1976, Pp. 8, 14, 2, 15:

"I have now made it plain that I am firmly opposed to judicial creativity or dynamism as I have defined it, that is, of judicial operations in advance of the consensus..... "

"Five judges are no more likely to agree than five philosophers upon the philosophy behind an Act of Parliament and five different judges are likely to have five different ideas about the right escape route from the prison of the text..... "

"My question is not about dynamic lawmaking but about whether the judiciary should be employed in it. It would seem to require a surer political touch than a judge is likely to have."

"It is this evenhandedness which is the chief characteristic of the British judiciary and it is almost beyond price. If it has to be paid for in impersonality and remoteness the bargain is still a good one."

"Thus the executive commands both the principle and the detail of the statute. Is the judge in the case to go into partnership with the government of the day?."

But in this Denning-Devlin dialogue over the philosophy of judicial creativity, Devlin appears to have lost ground, it appears to be Denning Era now.

22. So far so good. But the discovery of a "policy" of the Act, to further which a process of "purposive" construction is called into aid, should not reach a point where the court is compelled to discover and supply a "policy", not in the Act. With all this law, a mere enabling power and a matter of, what may be called, "pure judgment still remains so.

In the case before us, S. 4(l) of the Act provides that where the "Government is of opinion that any ancient monument should be declared as a protected monument, it may," initiate steps culminating in a declaration in that behalf under sub-sec. (4). The statute does not specify or give even broad indications as to what may be called, the "policy" of the Act so that in the context of that "policy" a power may become susceptible of becoming an obligation. The courts are prepared to supply omissions of the legislature and to imply into the statute legislative intention that cannot be seen on its face. But the material must be available from the statute itself; and nowhere else. The "policy-of the "Act" can only be ascertained on a construction of the statute as a whole. It must stem from the provisions of the Act It cannot be imposed ab-extra. If the "policy" is not in the words of the statute, construed as a whole, it is nowhere else. Indeed the "policy" of the statute might, itself, consist in the grant of a mere enabling permissive power.

There is ample and high authority for the proposition that the conditions whose existence or non-existence render a power into a duty, must be found in and emanate from the statute itself. It is no part of a court's function to discover or supply a "policy" where it is not in the provision of the statute. There may still be matters which remain in the area of "pure judgment" or subjective opinion. We

may now examine some of the cases bearing on the point.

In *Julius v. Lord Bishop of Oxford* (1880) 5 AC 214 a complaint was preferred by a certain Dr. Julius before the Bishop of Oxford against a Rector of the Parish alleging unauthorized deviations from the rituals in the communion service, and required the Bishop to issue a commission under the Church Discipline Act to inquire into that charge. Bishop declined.

The Queens Bench, on the application of Dr. Julius, commanded the Bishop to issue the commission. The court of appeal reversed the decision of the Queens-Bench. In the House of Lords, Lord Chancellor (Earl Cairns) adverting to the words "it shall be lawful" occurring in the third section of the Church Discipline Act asked:

"Under the words "it shall be lawful" is the bishop bound, on the application of any party, to issue a commission or has he a discretion as to whether he will issue." Lord Chancellor proceeded to answer:

The words "it shall be lawful" are not equivocal. They are plain and unambiguous, They are words merely making that legal and possible which there would otherwise be no right or authority to do, They confer a faculty or power, and they do not of themselves do more than confer a faculty power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called up to do so.....".

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And the words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which according to the principles I have mentioned, creates this obligation. (vide Pp. 222 and 223)

(Underlining supplied)

Court can, indeed, go behind the words which confer the power to the general scope and object of the Act in order to find out what was intended. But the "scope" and "object" of the Act must be ascertained with reference to its provisions and their scheme. This view was affirmed in the *Padfield's* case 1968(1) All ER 694. Lord Pearce observed:

"....There is no provision as to what are the duties of a Minister in this respect. Has he a duty to further complaints of substance which have no other outlet? Or can he refuse them any outlet at all if he so chooses? Need he have, any valid reason for doing so? Or if he exempt from any interference by the courts,

provided that he either gives no reasons which are demonstrably bad or gives no reasons at all? No express answer to these questions is given in the Act of 1958. The intention of Parliament, therefore, must be implied from its structure." (vide P. 713).

(Underlining supplied)

Again in *Tameside* case (1976(3) ABER 665), Lord Wilberforce said:

"The section is framed in a "subjective" form if the Secretary of State "is satisfied". This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may no doubt, exclude judicial review on what is or has become a matter of, pure judgment."

(Underlining supplied)

In that case Lord Denning A.R. had said the same thing in the Court of Appeal:

"Much depends on the matter about which the Secretary of State has to be satisfied. If he is to be satisfied on a matter of opinion, that is one thing. But if he has to be satisfied that some one has been guilty of some discreditable or unworthy or unreasonable conduct, that is another".

(Underlining supplied)

In *Shah v. Barnet London Borough Council* (1983) 1 All ER 226, Lord Scarman said:

"Three points emerge as of critical importance in the court's judgment..... and, third, the reliance on policy considerations derived not from the education legislation itself but from the court's own view as to what Parliament could or could not have intended." (P. 237)

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The way in which they used policy was, in judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not this case..... " (P. 238)

(Underlining ours)

23. In *R.K. Manufacturers and Others Vs. Minerals and Metals Trading Corporation of India Ltd. and Others*, , relied upon by the learned Advocate-General Rama Prasada Rao. J. in Government to issue a notification under S. 3(I) of the Essential Commodities Act, 1955, in respect of one of the essential commodities enumerated in S. 2(vi) of the Act, said:

"..... Until the Central Government forms such an opinion and makes an order

and notifies the same in the official gazette and follows the prescribed procedure laid down in the said Act, there is no obligation on the part of the Central Government to fix the price of steel as if it has been accepted and acknowledged to be an essential commodity. Though the Central Government is the repository of power to act under the Essential Commodities Act, the right to exercise it is conditioned upon the circumstances enumerated above and until the Central Government assumes such a power in the manner indicated, it cannot be said that there has been an avoidance of a public duty. There may be various and myriad reasons which might not prompt the Central Government to act under the Essential Commodities Act, 1955. No statutory body, be it the Central Government, can be compelled to express an opinion under S. 3(I) if it is not otherwise inclined to do so." (vide para-17)

In A.K. Roy's case Supreme Court declined to compel the Central Government to issue a notification under S, 3 of the Constitution (44th Amendment) Act, 1978 for bringing its provisions into force. Supreme Court said:

"..... The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of "the 44th-Amendment into force, it is not for the Court to compel the Government to do that which according to the mandate of the Parliament lies in its discretion to do when it considers it opportune to do it..... "

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.... If only the Parliament were to lay down an objective standard to guide and control the discretion of the Central Government in the matter of bringing the various provisions of the Act into force, it would have been possible to compel the Central Government by an appropriate writ to discharge the function assigned to it by the Parliament..... "

As stated earlier to find out the policy of the Act and to construe S. 4(I) "purposively" to effectuate the policy of the Act, such "policy" must be gathered from the statute read as a whole. If the statute read as a whole merely grants a power and its exercise is in the area of pure judgment and of subjective-opinion of the Government, it remains so.

In the ultimate analysis, the words "where the Government is of opinion" and "it may" in S. 4(1) are distinct words of permission only, They are enabling and empowering words. They confer a right and power on the authority named to do a particular thing. Petitioners have no enforceable rights enabling them to a mandamus. The question is not whether the word "may" in S. 4(1) means something else. As Cotton LJ said (Re: Baker (1890) 44 Ch D262 (270):

"I think that great misconception it caused by saying that in some cases "may" means "must". It never means "must", so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the words "may", it becomes his duty

to exercise it."

But the real question is whether these words in S. 4(l) did or did not create a duty on the authority, Those circumstances and conditions which imposed a duty must stem from the statute itself, A "policy", to be liberated and extricated from the prison of the text by a "purposive" construction, must be pre-existent in scheme of the statute itself; otherwise the process of "construction" would, dangerously border on "legislation" in the guise of "adjudication".

The very profound remarks of Justice Frankfurter are worth recalling. "The Still Small Voice of the Herd", 32 Political Science Quarterly 315:

"Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints. Even for a Judge most sensitive to the traditional limitation of his function, this is a matter for judgment not always easy of answer..... Judges may differ as to the point at which the line should be drawn, but the only safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."

(Underlining ours)

24. On scrutiny of the Scheme of the "Act" the inference becomes inescapable that the "policy" of the law was to confer a "power" on the Government which stems into activity and becomes available only "where Government is of the opinion that any ancient monument should be declared as a protected monument". There are no provisions in the "Act" which even broadly hint that given certain objective conditions, the exercise of the power becomes obligatory and renders the repository of the power compellable to exercise it. This is still in the area of pure judgment and subjective opinion. It is not possible in the circumstances of the statute to compel the repository of the power to form an opinion, though formation of a positive opinion to make a declaration is amenable to judicial review on the accepted administrative law tests. The arguments advanced in the case way indicate and indeed stress the need and desirability for a more imaginative and purposive legislation on the topic; but that idea must be born in the precincts of the legislature. If the law is to be altered, the law is to be altered by legislation and not by judicial decision."

37. We are in complete agreement with the views expressed by the Division Bench of the Karnataka High Court referred to above and propose to follow the same in the present case.

38. We hold that there are no provisions in the Central Act or the State Act which makes the exercise of the power obligatory on the part of the respective Government.

39. This very Bench had the occasion to consider almost an identical issue in the

case of J.S. Bindra and 2 Vs. State of Gujarat and 4, . In that case, a writ petition in the nature of a public interest litigation was filed by few residents of the city of Surat, challenging the decision of the Surat Municipal Corporation to dismantle a 134-year old Hope Bridge named after Theodore Cracraft Hope, a British civil servant, in the late 1800s, standing over the river Tapi and which was the only link for almost 90 long years between the Surat city and Rander-Hazira Industrial Belt till the new bridge named Nehru Bridge came to be constructed in the year 1966-67 adjoining to the Hope Bridge.

40. The submission in the said case before us was that the Hope Bridge deserved to be preserved as a heritage structure and a mandamus was prayed for to declare the same as a protected monument as defined under the Act 1958. The petition was rejected by us on the basis of the materials on record, more particularly, taking the view that the words in the Section 4(1) "where the Government is of the opinion" and "it may" were distinct words of permission only. We took the view that they were enabling and empowering words, and conferred a right and power on the authority named to do a particular thing. We took the view that the petitioners had no enforceable right enabling them to a mandamus.

41. We also took notice of a Supreme Court decision in the case of Narmada Bachao Andolan Vs. Union of India and Others, . We relied on the observations of the Supreme Court made in para 234, which reads as under:

"In respect of public projects and policies which are initiated by the Government, the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the functions of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertakings of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision."

42. At this stage, it may not be out of place to state that the State Government has not thought fit to take any action under Section 4 of the Act 1965 (State Act) for few very obvious reasons. The building with which the petitioner is so much concerned has been used as a court building from 1901 onwards. The materials on record indicate that the office located in the Azamkhan Palace was used as a provincial civil building. The premises was being used by the Commissioners and

District Officers. The Backward Class Officers' office was also there at the Azamkhan Palace. The office of the Sub-Revenue Officers, Co-operative Societies, was also there in the Azamkhan Palace. The Magistrates' court were there in the Azamkhan Palace. The Return of provincial civil building document indicates that District and Joint Judges' court started functioning in the buildings. Such being the position, the Government of Gujarat never considered to act under Section 4 of the Gujarat Act No. 25 of 1965 till this date. It is now useless to contend that the buildings in question are of "national importance". The Government, before the independence and even after the independence, has put not only the Azamkhan Palace but even the other buildings to various uses considering to be not of national importance and it had never used Gujarat Act No. 25 of 1965 for that particular purpose.

43. The above takes us to deal with the two decisions of the Supreme Court on which strong reliance has been placed by Mr. Trivedi in support of his submissions.

44. In *Rajeev Mankotia* (supra), the subject matter of adjudication before the Supreme Court was with regard to the viceregal lodge at Shimla. The Supreme Court took notice of the architecturally grandeur and beauty of the lodge in light of the provisions of the Act of 1958. The Supreme Court had to interfere to protect the lodge as an ancient monument of rich historical heritage, because with the passage of time, the lodge had faded out and lost its real beauty. The lodge was handed over to the Indian Institute of Advance Studies in the year 1964 by the President of India. While the institute was being so run, a decision was taken by the Cabinet of the Union of India to convert the building into a tourist hotel, while purporting to maintain the main part of the building as an historical resort. A public spirited citizen approached the Supreme Court under Article 32 of the Constitution of India with a prayer to protect the lodge as the historical heritage. The Supreme Court took notice of the various provisions of the Act 1958. The Supreme Court also took notice of the stance of the Government. In the reply filed by the Union of India, it was disclosed that the Government had decided to use a part of the area for commercial purpose and the rest of the main building to maintain and restore the glory of the viceregal lodge. The Supreme Court took notice of the fact that the decision to convert the historical building into a tourist hotel was sought to be justified on the ground that the Ministry of Tourism had encouraged a scheme of heritage resort which essentially meant preservation of the old properties and their use in such a limited commercial manner so as to generate enough sources to ensure that the properties would not crumble. It was also brought to the notice of the Supreme Court that the lodge required repairs for the upkeep of the monument and the building required to be notified as a protected monument. As a large part of the building required repairs, preservation and restoration to their original form, for effectuating the grandeur and the beauty of the building, a direction was issued by the Court to look into the objections raised in the report. The Government of India was directed to notify the entire area of the lodge as a protected ancient

monument. Ultimately, the notification was issued on 6th May 1997 with the boundaries as directed in the orders. The Supreme Court made the following observations in para 21:

"It is needless to mention that as soon as the Indian Institute of Advance studies vacates the building and hands it over to the Archaeological Department, the Government should provide the necessary budget for effecting repairs and restoring to the building its natural beauty and grandeur. It is also necessary that its proper maintenance and preservation is undertaken as an ongoing process to protect the historical heritage and needed repairs are effected from time to time. We avail this opportunity to direct the Government of India to maintain all national monuments under the respective Acts referred to above and to ensure that all of them are properly maintained so that the cultural and historical heritage of India and the beauty and grandeur of the monuments, sculptures secured through breathless and passionate labour workmanship, craftsmanship and the skills of the Indian architects, artists and masons is continued to be preserved. They are pride of Indians and places of public visit. The tourist visitors should be properly regulated collection of funds by way of admission/entrance fee should be conscientiously accounted for and utilised for their upkeep and maintenance under respect regulations/rules. Adequate annual budgetary provisions should be provided. In this behalf, it may not be out of place to mention that if one goes to Williamsburg in United states of America, the first settlement of the Britishers therein is preserved as a tourist resort and though it is one in the row, its originality is maintained and busying business activity goes on in and around the area attracting daily hundreds of tourists from all over the world. Similar palaces of interest, though of recent origin, need to be preserved and maintained as manifestation of our cultural heritage or historical evidence. Similar efforts should also be made by the Government of India, in particular the Tourism Department, to attract foreign tourists and to give them good account of our past and glory of the people of India, in particular the Tourism Department, to attract foreign tourists and to give them good account of our past and glory of the people of India as message to other countries and territories. Equally all the State Governments would do well vis-a-vis monuments of State importance though given power under Entry 12, List II of the Seventh Schedule to the Constitution. From this perspective, the petitioner has served a great cause of national importance and we place on record his effort to have the Viceregal Lodge preserved and maintained; but for his painstaking efforts, it would have been desecrated into a Five Star Hotel and in no time "We, the people of India" would have lost our ancient historical heritage."

45. The aforementioned decision of the Supreme Court is of no avail to the petitioner as the Supreme Court was dealing with a lodge which had its own beauty and grandeur. The Supreme Court traced the entire history of the same, and finally in the facts of that case, took the view that the monument deserved to be protected and preserved as an ancient monument of rich heritage. It would all depend on individual monument. All monuments of more than 100 years old

need not necessarily be termed as "historical monuments". We have already discussed in our judgment that the buildings have been used past more than ten decades not only as court buildings but even as the Government offices.

We are of the view that this decision is not helpful to the petitioner in any manner. No mandamus could be issued solely on this decision of the Supreme Court.

46. In Archaeological Survey of India (supra), the Central Government had issued notification dated 4th October 1956, declaring "Jantar Mantar", New Delhi, to be a protected monument, which was published in the Official Gazette on 13th October 1956. "Jantar Mantar" situated at New Delhi is one of the five unique observatories built between 1699 and 1743 by Maharaja Jaisingh(II) of Jaipur who was a great mathematician and astronomer. The Supreme Court took notice of an amazing instrument called "Jaiprakash" which has two concave hemispherical structures used to determining the position of the Sun and celestial bodies. The Supreme Court took notice of other "yantras" also situated at the "Jantar Mantar". It was brought to the notice of the Supreme Court that some of those "yantras" had been rendered unworkable or had become nonfunctional. One of the main reasons for the "yantras" to fail was the construction of a multi-storeyed structures which had come up in the vicinity of "Jantar Mantar" in the last 25 to 30 years. On 16th June 1992, another notification was issued which was duly published in the Official Gazette declaring an area upto 100 meters from the protected limits and further beyond it upto 200 meters adjoining the protected monument to be prohibited and regulated areas respectively for the purposes of mining operations and construction. A building plan of the respondent Nos. 1 and 2 who owned a plot in "Janpath" lane was sanctioned some time in September 2000. Thereafter, the respondents demolished the structure which was in existence and dug a foundation for the new building. On 5th May 2001, the Conservation Assistant of the Archaeological Survey of India lodged a complaint about excavation and construction undertaken by the respondents, which was in violation of the prohibition contained in the Notification dated 16th June 1992. The Archaeological Survey of India also informed the NDMC that the sanction accorded by it was contrary to the notification. The NDMC also issued a notice to the respondents directing them to stop the construction and to obtain the necessary permission from the Archaeological Survey of India. The respondent Nos. 1 and 2 challenged the letter of the NDMC and prayed that the restrictions imposed on the construction of building be declared as a nullity. The learned Single Judge of the High Court found that in the absence of publication of the notification dated 3rd May 1957, the notification was ineffective and the subsequent notification dated 8th January 1958 in which reference was made to the earlier notification dated 3rd May 1957 was also ineffective and the prohibition contained in the notification dated 16th June 1992 could not have been made applicable to the plot of the respondent Nos. 1 and 2.

47. It appears that during the pendency of the appeal filed against the order of the Single Judge, the Heritage and Culture Forum, New Delhi, filed a writ petition in the nature of a public interest litigation and prayed for issue of a mandamus for stopping the construction of the multi-storeyed building on the plot owned by the respondent Nos. 1 and 2.

48. The respondents beside challenging the locus standi of the Heritage and Culture Forum, New Delhi, to challenge the permission granted for the construction of a building, pleaded that "Jantar Mantar", New Delhi, could not have been treated as a protected monument because the notification dated 3rd May 1957 was not published in the Official Gazette, and as such, the prohibition contained in the notification dated 16th June 1992 was not applicable to them.

49. During the pendency of the appeals, the Ancient Monuments and Archaeological Sites and Remains Act, 1958 was amended by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 and Sections 20-A and 20-B were inserted with effect from 16th June 1992 and Sections 20-C to 20-Q were inserted with effect from 29th March 2010.

50. The Supreme Court took notice of the fact that the "Jantar Mantar" was one of the historical monuments of national importance. Some of its instruments had become unworkable/non-functional and the same was largely due to the construction of multi-storeyed structures around "Jantar Mantar". In such circumstances, the Supreme Court took the view that the High Court was not justified in directing the Central Government to review or reconsider the notification dated 16th June 1992, and to that extent, the Supreme Court set-aside the judgment of the High Court. The Supreme Court made the following observations, which are quoted below:

"What has been done by enacting Sections 20A and 20B is to give legislative mandate to the concept of prohibited and regulated areas respectively for the purposes of mining operation and construction. Before the 2010 amendment, the Central Government could issue notification under Rule 31 read with Rule 32 and declare an area near or adjoining a protected monument to be a prohibited area or a regulated area for the purposes of mining operation or construction or both. With the insertion of Section 20A it has been made clear that every area, beginning at the limit of the protected area or the protected monument, as the case may be, and extending to a distance of one hundred meters in all directions shall be the prohibited area in respect of such protected area or protected monument.

Not only this, by virtue of proviso to Section 20A(1) the Central Government has been clothed with the power to extend the prohibition beyond 100 meters by issuing a notification in the Official Gazette keeping in view the classification of any protected monument or protected area, as the case may be, under Section 4A. Of course, this power can be exercised only on the recommendations of the Authority as defined in Section 2(da) and constituted under Section 20F.

Somewhat similar provision has been made in Section 20B for the regulated area in respect of every ancient monument and archaeological site and remains. Proviso to that section empowers the Central Government to issue notification in the Official Gazette and specify an area more than two hundred meters to be the regulated area having regard to the classification of any protected monument or protected area, as the case may be, under Section 4A.

In terms of Section 20A(2), it has been made clear that no person other than an Archaeological Officer shall carry out any construction in any prohibited area. This is subject to Section 20C, which can be treated as an exception to Section 20A(2). That section lays down that any person who owns any building or structure, which existed in a prohibited area before 16.6.1992 or had been subsequently constructed with the approval of the Director General may carry out any repair or renovation of such building or structure by making an application to the competent authority. The term "renovation" appearing in Section 20C will take its colour from the word "repair" appearing in that section. This would mean that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction.

Section 20A(3) lays down that the Central Government or the Director General can, in exceptional cases and having regard to the public interest, pass a reasoned order and permit a public work or any project essential to the public or other construction in a prohibited area provided that such construction does not have substantial adverse impact on the preservation, safety, security of, or access to the protected monuments or its immediate surrounding. The use of the expression "such other work or project" in clause (b) of Section 20A(3), if interpreted in isolation, may give an impression that the Central Government or the Director General is empowered to allow any other work or project by any person in the prohibited area but, in our view, the said expression has to be interpreted keeping in view the mandate of Article 49 of the Constitution and the objects sought to be achieved by enacting 1958 Act, i.e. preservation of ancient and historical monuments, archaeological 38 sites and remains of national importance. This would necessarily imply that "such other work or project" must be in larger public interest in contrast to private interest.

In other words, in exercise of power under Section 20A(3), the Central Government or the Director General cannot pass an order by employing the stock of words and phrases used in that section and permit any construction by a private person dehors public interest. Any other interpretation of this provision would destroy the very object of the 1958 Act and the prohibition contained in notification dated 16.6.1992 and sub-section (1) of Section 20A would become redundant and we do not think that this would be the correct interpretation of the amended provision. It also needs to be emphasized that public interest must be the core factor to be considered by the Central Government or the Director General before allowing any construction and in no case the construction should

be allowed if the same adversely affects the ancient and historical monuments or archaeological sites."

51. The aforesaid decision has been relied upon by Mr. Trivedi in support of his submission that in the garb of renovation, the owner of a building cannot demolish the existing structure and raise a new one and the competent authority cannot grant permission for such reconstruction. There cannot be any debate on the proposition of law laid down by the Supreme Court. However, we fail to understand how this decision of the Supreme Court is helpful to the petitioner in any manner. The authorities in the case at hand have made it plain and simple. The parts of the building falling within the prohibited area are going to be demolished i.e. they would be razed to ground with no intention to make any construction upon the same.

52. The case at hand is not the one of repair or renovation. The case at hand is one of a complete demolition and the site thereafter would be kept open for all times to come. It would, on the contrary, serve the purpose and the object of the Act of protecting the historical monument, viz. the Bhadra Tower and Three Gates. By relying on the observations made by the Supreme Court in para 47 what probably Mr. Trivedi wants to contend is that, there cannot be any demolition of any part of the structure falling within the prohibited area for facilitating construction in a regulated area.

53. We are afraid, we are unable to accept such submission of Mr. Trivedi as discussed above. What weighed with the Supreme Court in the Archaeological Survey of India (supra) was that the respondents wanted to demolish the structure which existed in the guise of undertaking repair or renovation, and at the same time, wanted to raise a new one. If a new multi-storeyed building would come up, it would add more to the detriment of the "Jantar Mantar", and this is exactly what the Supreme Court wanted to avoid. The "Jantar Mantar" works on the Sun and it is only because of cluster of multi-storeyed building around the "Jantar Mantar", one of its instruments, viz. "Jaiprakash" had failed. The idea is to keep the area open so that the instruments can work properly with the help of the Sun. We are of the view that this decision is also of no avail to the petitioner.

54. Mr. Trivedi, the learned advocate appearing on behalf of the petitioner made one last frantic effort to convince us that we should ask the State Government to reconsider its decision of constructing the new City Civil and Sessions Court building at the very same place where it exists as on today. According to Mr. Trivedi, the State Government should select any other site or location for the purpose of constructing the new City Civil Court and Sessions Court building, as such decision would save the existing building from being demolished.

55. We are afraid, we are unable to accept such submission of Mr. Trivedi. It is a settled law that suitability of the site or location for the purpose of construction of a Court building is not to be adjudged by the Court in exercise of power under

Article 226 of the Constitution of India. It is for the appropriate authority/ Government to decide as to which particular site or location would be more suitable for the construction of the Court building. In the aforesaid connection, we may quote with profit the observations made by the Supreme Court in the case of State of Punjab and Another Vs. Gurdial Singh and Others, . In paragraph 8 of the reported decision, the Supreme Court observed thus:-

"This power to select is left to the responsible discretion of Government under the Act, subject to Articles 14, 19 and 31 (then). The Court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of the executive and judicial circumspection keeps the Court lock-jawed save where power has been polluted by oblique ends or is otherwise void on well-established grounds. The constitutional balance cannot be upset."

56. For the foregoing reasons, the petition fails and is hereby rejected. The interim order granted earlier stands vacated forthwith. However, in the facts and circumstances of the case, there shall be no order as to costs.

In view of the order passed in the main writ-application, the connected Civil Application also stands disposed of.

FURTHER ORDER

After this order is passed, Mr. Trivedi, the learned advocate appearing on behalf of the petitioner prays for stay of operation of our order on the ground that his client wants to move the Supreme Court of India against our order.

Since we passed interim order during the pendency of this proceeding, we stay operation of our order for a further period of two weeks, i.e. till 22nd August, 2014.