

(2002) 10 DEL CK 0036

In the Delhi High Court

Case No : IA No's. 2912 and 4479 of 2002 in Suit No. 645 of 2002

Narender Anand and Another

APPELLANT

Vs

NDMC and Others

RESPONDENT

Date of Decision : 30-10-2002

Acts Referred:

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 39
Ancient Monuments Preservation Act, 1904 — Section 3, 3(1), 3(3)
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151
Evidence Act, 1872 — Section 114, 4, 78, 81, 90
States Reorganisation Act, 1956 — Section 126

Citation : (2003) 66 DRJ 698

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : R.K. Aggarwal and Sanjay Dua, for the Appellant; Arvind Sah, for Defendant 1 and 2; Sanjay Jain, for Defendant No. 4, for the Respondent

Judgement

K.S. Gupta, J.—This order will govern the disposal of is No. 2912/2002 filed under Order XXXIX Rules 1 & 2 and Section 151 CPC by the plaintiffs and is No. 4479/2002 filed under Order XXIX Rule 4 read with Section 151 CPC by defendant No.4.

2. Allegations insofar as they are relevant for deciding both the applications as made in plaint are that the plaintiffs are owner of plot No.14, admeasuring 3389 sq. mtrs. in Janpath Lane, New Delhi and on 11th February, 2000/18th September, 2000 vide letter No.C-2109-10/CA/BP, the defendant s 1 & 2 conveyed the sanction of building plans putting certain conditions which were complied with by the plaintiffs. Plans were released by defendants 1 & 2 on 5th March, 2001. Thereafter, plaintiffs demolished 12 flats of the old building standing on the plot and started digging foundation. When digging was in progress, the plaintiffs received letter No.D-29-31/CA/STC/N dated 23rd May, 2001 from defendant No.1 asking them not to raise any unauthorised

construction on the said plot. Thereafter, on meeting defendant No.2, plaintiffs were told that defendant No.4 had objection to the raising of construction. At a letter stage, the defendant No.1 insisted that no construction be carried out on the plot. It is alleged that after sanction of building plans, the defendants 1 & 2 had no authority to interfere with the construction of building as per sanctioned plans. It was prayed that by a decree of perpetual injunction, the defendants be restrained from interfering with the construction to be made in accordance with sanctioned building plans and/or to demolish any part thereof.

3. In aforesaid is No.2912/2002 while issuing notice for 6th May, 2002, by the order dated 22nd March, 2002, the defendant No.1 was restrained from giving effect to its letter dated 23rd May, 2001 subject to plaintiffs filing undertaking within ten days that construction on the plot shall be carried out strictly in accordance with sanctioned plans up to the height not exceeding 55 feet.

4. Defendants 1 & 2 filed joint written statement while defendant No.4 separate written statement contesting the suit. Since the dispute mainly is in between plaintiffs and defendant No.4, the pleas taken in written statement filed by defendant No.4 alone need be referred. It is alleged that by a preliminary notification dated 3rd May, 1957, the Central Government declared Jantar Mantar complex comprising of an area of 5.39 acres as a protected monument under the Ancient Monuments Preservation Act, 1904 (for short "the Act"). By notification dated 8th January, 1958, this preliminary notification was confirmed. Thus, Jantar Mantar complex is a protected monument within the meaning of said Act. It is further alleged that notifications protect not only the physical structure within the said complex but also encompass the specified area around the structure comprising of 5.61 acres of land. Ancient Monument and Archaeological Sites and Remains Act, 1958 was enacted later on. Notification dated 16th June, 1992 issued under the Rules framed in 1959 under this Act completely bans construction within 100 meter area of a protected monument. This ban cannot be given go bye in any scheme formulated by any authority/body/department. As the suit plot is within 100 meters of Jantar Mantar monument, there is statutory bar on construction over it.

5. In said is No. 4479/2002, by the order dated 31st May, 2002, the order passed in is No. 2919/2002 dated 22nd March, 2002 which continues to be extended till date, was modified to the extent that till the disposal of that application, the plaintiffs will not carry out any construction at the site beyond DPC level and further construction even up to DPC level will be at their cost and risk and if ultimately the Court comes to the conclusion that no construction at the site can be permitted, the construction up to DPC level will be liable for demolition.

6. Along with written statement, the defendant No.4 has filed copies of notifications dated 3rd May 1957 Along with schedule annexed thereto, dated 8th January, 1958, 15th May, 1991 and 16th June 1992. On the strength of these notifications it was contended by Sh. Sanjay Jain for defendant No.4 that Jantar

Mantar Along with land adjoining thereto up to boundary walls is a protected monument; land beyond boundary walls up to 100 meters is prohibited area and beyond that up to 200 meters is a regulated area. Since the suit plot falls within the prohibited area, construction thereon cannot be legally carried out. Rebutting this submission, it was pointed out by Sh. R.K. Aggarwal for plaintiffs that said alleged notification dated 3rd May, 1957 under Sub-section (1) of Section 3 was never published in the Gazette. Thus, the controversy between the parties mainly centres around the fact whether Jantar Mantar is a protected monument within the meaning of Section 3 of the Act of 1904. At this stage, it will be profitable to refer to said Section 3 which reads as under:-

"3(1) The Central Government may, by notification in the Official Gazette declare an ancient monument to be a protected monument within the meaning of this Act.

(2) A copy of every notification published under Sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by the Central Government within one month from the date when it is so fixed up will be taken into consideration.

(3) On the expiry of said period of one month, the Central Government after considering the objections, if any, shall confirm or withdraw the notification.

(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act."

7. Section 39 of Ancient Monuments and Archaeological Sites and Remains Act, 1958 which came into force w.e.f. 15th October, 1959 which is material, reads thus:-

"39(1) The Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951, and Section 126 of the States Reorganisation Act, 1956, are hereby repealed.

(2) The Ancient Monuments Preservation Act, 1904, shall cease to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under this Act to be of national importance, except as respects things done or committed to be done before the commencement of this Act."

8. Alleged notification dated 3rd May, 1957 and notification dated 8th January, 1958 issued under the Act of 1904 have been saved by said Section 39(2). To be noted that at the request of counsel of defendant No.4, case was postponed on 6th August, 9th August, 16th August and 9th September 2002 to enable him to trace out and file the copy of the said Gazette notification dated 3rd May, 1957 but he failed conceding that the same had not been published in Official Gazette. However, according to the learned counsel the decision taken by the Government/

Department in the year 1957 to declare Jantar Mantar as a protected monument itself was a notification within the meaning of said Sub-section (1) of Section 3. As a part of submission, it was urged that in the notification dated 8th January, 1958 there is reference to the notification dated 3rd May, 1957 and the question if alleged notification dated 3rd May, 1957 was published in Official Gazette or not, could be examined only at the stage of final judgment after parties have led their evidence. Reliance was placed on the decisions in P.K. Shaikh Vs. State of West Bengal and Others, and R.S. Nayak Vs. A.R. Antulay and Another, . My attention was also drawn to the provisions contained in Sections 4, 78, 81, 90 and 114 of the Evidence Act. However, the submission is without any merit. What was filed Along with written statement by defendant No.4, is a copy of draft notification No. F. 3-76/50-C.1 dated 3rd May, 1957 under said Section 3(1) which was to be published in Gazette of India, Part-II, Section 3. When a power is given to do a certain thing in a way, the thing must be done in that way. Notification required by law to be published in Gazette notification is ineffective unless so published (See : Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, and Rajiv Kumar Aggarwal Vs. Union of India, . After having been conceded on behalf of defendant No. 4 that said draft notification was not published in Official Gazette, the issue of publication / non-publication thereof in Official Gazette cannot be deferred for being examined at the final stage in the case. Since said draft notification was not published in Gazette as required by Section, the same was ineffective and reference thereof in the notification issued u/s 3(3) dated 8th January, 1958 was of no consequence. As a corollary, aforesaid notifications dated 15th May 1991 and 16th June 1992 cannot be of any held to defendant No.4 in the matter. Decision by the Government/ Department to declare Jantar Mantar as a prohibited monument itself cannot tantamount to a notification under said Section 3(1). Neither of aforementioned two decisions or sections of Evidence Act have any applicability to the controversy on hand. From foregoing discussion, it must follow that plaintiffs have prima facie made out case for making absolute the order dated 22nd March 2002. Balance of convenience, obviously, is in favor of plaintiffs who are likely to suffer irreparable injury if they are not permitted to raise construction on suit plot in accordance with sanctioned building plans.

9. Consequently, while allowing is No. 2912/2002, disallowing is No. 4479/2002 and recalling the order dated 31st May, 2002, the order dated 22nd March, 2002 is made absolute.