

(2017) 01 MP CK 0234
In the Madhya Pradesh High Court
Case No : 389 of 2016

Prabhulal

APPELLANT

Vs

Mohommad Vasheer Khan and Others

RESPONDENT

Date of Decision : 18-01-2017

Acts Referred:

Probation of Offenders Act, 1958, Section 3, Section 4 - Power of Court to release certain offenders after admonition - Power of court to release certain offenders on probation of good conduct

Citation : (2017) 01 MP CK 0234

Hon'ble Judges : P.K. Jaiswal, Virender Singh

Bench : Single Bench

Advocate : Vijay Assudani, Peyush Jain, Rishi Tiwari, A. K. Sethi, Chetan Jain

Judgement

1. By this intra-court appeal, the appellant (writ petitioner) is challenging the order dated 26.08.2016, whereby the writ petition filed by him for declaring Bhandari Kothi built as "Heritage Monument" at Plot No.1, M. G. Road, Indore has been dismissed.

2. Brief facts of the case are that Bhandari Kothi which was built before 1920 at Plot No.1, M. G. Road, Indore was held by Holkar Government. Later on, it was purchased by M/s Pannalal Nandalal Bhandari from Holkar Government vide order No.88 dated 20.09.1937. Out of the total land, the father of the appellant Late Gajendra Singhji Bhandari purchased an area of 49906 sq. ft. from M/s Nandalal Bhandari. After death of Late Gajendra Bhandari, the appellant and other legal heirs became owner of the said property.

3. According to the appellant, Bhandari Kothi is now more than 90 years old and has acquired the status of heritage monument. By virtue of building of archaeological importance in the zoning plan of Indore Development Plan 2021, it was proposed to be preserved along with other building viz. Indra Bhawan. The appellant and his family members have sentimental attachment with the building

because of its historical and archaeological importance, therefore, they are interested in preserving the said building as heritage building. The respondent Nos.5 and 6 who are co-owner of the property are interested in demolition of the building for the propose of construction of commercial complex which the appellant came to know by way of advertisement published in the newspaper. The relation of appellant and respondent Nos.5 & 6 are not cordial, therefore, he has approached this Court by way of writ petition seeking direction to the respondent Nos.1 to 4 to preserve the building of archaeological importance and not to sanction the plan of respondent Nos.5 & 6. It is also prayed that respondent Nos.1 to 4 be directed to observe and perform their statutory duties for implementation of draft Development Plan especially condition No.3.19.

4. Respondent No.1, 2 & 4 have filed their reply to the writ petition. As per their reply, respondent Nos.5 & 6 has not violated any statutory provisions or the provisions of Master Plan 2021. Respondent Nos.1, 2 & 4 has not sanctioned any lay out plan or has granted building permission to anybody in respect of property situated at 18/1, Tukoganj, Main Road, Bhandari Kothi, Indore.

5. As per reply, an application has been filed by the respondent Nos.5 & 6 for the construction of commercial-cum-residential premises and the process of sanctioning lay out is pending for consideration before the office of the Joint Director, Town and Country Planning, Indore.

6. The property in question is an old building but the same has not been declared as the Urban Heritage by the State Archaeological Department as well as the Archaeological Department of India.

7. Clause 3.19 of the proposed Draft Plan 2021 provides for the heritage and historical property, which reads as under :- "VERNACULAR MATTER OMITTED"

8. Clause 4.8 of the Zoning Plan of 2010 reads as udner :- "4.8-Zoning Plan- The existing building of INDRA BHAVAN, BHANDARI BHAVAN, at Mahatma Gandhi Marg, have a well defined architectural form and required to be preserved. No construction shall be permitted within the open land, the owner of the building may continue the present use."

9. Under the aforesaid clause, Bhandari Kothi has not been declared as urban heritage. As per para-3.19 of the proposed Indore Development Plan 2021, Bhandari Kothi was proposed to be included for preservation. The State Government has considered the objection in detail and found that the Indore Development Plan 2021 has been finally modified and the claim of declaration of Bhandari Kothi as urban heritage has been rejected. As per Ancient Monument Preservation Act, 1904, the Central Government by notification declares an ancient monument to be protected within the meaning of this Act. The above Act was repealed by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (in short "the Act of 1958") and the monuments notified under Section 3 deemed to have been ancient and historical monument under the Act of 1958. Under Sections 3 and 4 of the Act of 1958, the Central Government is

empowered to notify in the official gazette such ancient monuments and archaeological sites to be of national importance. Sections 3 and 4 of the Act of 1958 are relevant, which reads as under :- "3. Certain ancient monuments, etc., deemed to be of national importance- All 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, or by Section 126 of the States Reorganization Act, 1956, 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 purposes of this Act.

4. Power of Central Government to declare ancient monuments, etc. to be of national importance ? (1)Where the Central Government is of opinion that any 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; and a copy of every such notification shall be affixed in a conspicuous place near the monument or site and remains, as the case may be.

(2)Any person interested in any such ancient monument or archaeological site and remains may, within two months after the issue of the notification, object to the declaration of the monument, or the archaeological site and remains, to be of national importance.

(3)On the expiry of the said period of two months, the Central Government may, after considering the objections, if any, received by it, declare by notification in the Official Gazette, the ancient monument or the archaeological site and remains; as the case may be, to be of national importance. (4)A notification published under sub-section (3) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the ancient monument or the archaeological site and remains to which it relates is of national importance for the purposes of this Act."

10. The State of Madhya Pradesh has enacted a law called the Madhya Pradesh Ancient Monument and Archaeological Sites and Remains Act, 1964 (in short "the Act of 1964") for preservation of certain ancient and historical monuments and archaeological sites. Section 2(a) of the Act of 1964 means any building structure, erection etc. which has been in existence for not less than hundred years. Section 2(a), (b) & (c) of the Act of 1964 is reproduced below :- "2. Definitions- In this Act, unless the context otherwise requires--

(a) "Ancient monument" means any building structure, erection, monolith or monument or any mound or tumulus or any tomb or place of interment or any cave or any sculpture or inscription on an immovable object which is of historical archaeological or artistic interest and which has been in existence for not less than hundred years and includes,

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

(b) "antiquity" includes--

- (i) any coin, sculpture, manuscript, epigraph, or other work of art or craftsmanship;
- (ii) any article, object or thing detached from a building or cave;
- (iii) any article, object or thing illustrative of science, art, crafts, literature, religion, customs morals or politics in bygone ages;
- (iv) any articles, object or thing of historical interest, and
- (v) any article, object or thing which in the opinion of the State Government because of its historical or archaeological importance is an article, object or thing which it is desirable to preserve declared by the State Government, by notification, to be an antiquity for the purposes of this Act, which has been in existence for not less than hundred years;

(c) "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 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."

11. Under the Central as well as State Act, there has to be a declaration by the Central Government as well as by the State Government, as the case may be, then only any structure would be treated as protected structure under the Act.

12. Hon"ble Supreme Court has considered the provisions of the Act of 1958 in the case of *Rajeev Mankotia vs. Secretary to the President of India and others* reported in 1997 (10) SCC 441. Paras-4, 5 & 6 of the judgment reads as under :-
 "4. Before considering whether the Viceregal Lodge should be declared as historical heritage (monuments), let us have a look at the legal setting in that behalf. The Ancient Monuments and Archaeological Sites and Remains Act, 1958 (for short, the "Ancient Monuments Act") provides for the preservation of ancient and historical monuments and archaeological sites and remains of national importance. The Act was enacted to clarify the legal position that the Central Government regulates exclusively ancient monuments etc. of national

importance, leaving the field open to the State legislatures to enact the law on the subject, i.e., ancient monuments of State importance. Section 2(a) defines "ancient monument" to mean "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 (emphasis supplied):

- (i) the remains or 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."

5. Section 3 of the Act declares that all ancient and historical monuments and 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, or by Section 126 of the States Reorganisation Act, 1956, 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 this Act. Section 4 empowers the Central Government to declare any ancient monuments or archaeological site and remains not included in Section 3 to be of national importance by giving two months notice of its so declaring. The Ancient Monuments Preservation Act, 1904 provides for the preservation of ancient monuments and objects of archaeological, historical or artistic interest. Section 2(1) defines "ancient monument" in the same language as Section 2(a) of the Ancient Monuments Act. Section 2 (4) defines "maintain" and "maintenance" to include the fencing, covering in, repairing, restoring and cleaning of protected monument and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto. Section 3 deals with "protected monuments" and empowers the Central Government, by a notification in the official Gazette, to declare an ancient monument to be a protected monument under the said Act. Section 11 enjoins that the Commissioner shall maintain every monument in respect of which the Government has acquired any of the rights mentioned in Section 4 or which the Government has acquired under Section 10 etc. 6. It would, therefore, be manifest that all ancient and historical monuments and all archaeological sites and remains or any structure, erection or monument of any tumulus or place of interment shall be deemed to be ancient and historical monument or archaeological sites and remains of national importance and shall be so declared for the purpose of Ancient Monuments Act if they have existed for a century; and in the case of a State monument, of State importance covered by the appropriate State Act. The point of reference to these provisions is that an ancient

monument is of historical, cultural or archaeological or sculptural or monolithic or artistic interest existing for a century and is of national importance or of State importance. In other words, either of them are required and shall be protected, preserved and maintained as national monuments or State monuments for the basis which not only gives pride to the people but also gives us insight into the past glory of our structure, culture, sculptural, artistic or archaeological significance, artistic skills and the vision and wisdom of our ancestors, which should be preserved and perpetuated so that our succeeding generations learn the Skills of our ancestors and our traditions, culture and civilization. They would have the advantage to learn our art, architecture, aesthetic tastes imbibed by the authors of the past and to continue the same tradition for the posterity. Preservation and protection of ancient monuments, is thus the duty of the Union of India and the State Governments concerned in respect of ancient monuments of national importance or those of State importance respectively to protect, preserve and maintain them by preserving or restoring them to their original conditions."

13. The State Government within the powers granted under Section 3 of the Act of 1964 can declare ancient monuments to be State protected monuments or archaeological sites to be a State-protected area. Section 3 of the Act of 1964 reads as under :- "3. Power of State Government to declare ancient monuments to be State-protected monuments or archaeological sites and remains to be State-protected area (1)Where the State Government is of the opinion that it is necessary to protect against destruction, injury, alteration, mutilation, defacement, removal, dispersion or falling into decay any-

(a) ancient monument,

(b) archaeological site and remains, it may, by notification in the Official Gazette give two months notice of its intention to declare such ancient monument to be a State-Protected monument or such archaeological site and remains to be a Stateprotected area, as the case may be, and a copy of every such notification shall be affixed in a conspicuous place on or near the monument or site and remains, as the case may be.

(2)Any person interested in any such ancient monument or archaeological site and remains may, within one month after the issue of notification, object to the declaration of the monument to be a State-protected monument or of the archaeological site and remains to be a State-protected area, as the case may be.

(3)On the expiry of the said period of two months the State Government may, after considering the objections, if any, received by it, declare by notification in the Gazette, the ancient monument to be a State-protected monument or the archaeological site and remains to be State-protected are, as the case be.

(4)A notification published under this section shall, unless and until withdrawn, be conclusive evidence of the fact that the monument or the archaeological site and remains to which it relates, is a State-protected monument or State-

protected area, as the case may be."

14. As per reply filed by the respondent Nos.1, 2 & 4, the draft plan for declaring the property in question as historical and archaeological importance was published. The department has received number of suggestions in respect of property of historical importance and heritage and the final draft Development Plan 2021 was published. The property in question i.e. Bhandari Kothi has not been included under the urban heritage or protected area.

15. The appellant and other family members of the appellant after publication of the final draft raised certain objections. The competent authority considered the objections raised by the appellant as objection No.78 and duly decided vide order dated 27.08.2012 and held that the declaration of draft office / property as the Urban Heritage against the principle of natural justice.

16. A clarification was also sought vide letter dated 11.04.2014, the issue was forwarded to the State Government seeking clarification in respect of Bhandari Kothi and the State Government vide letter dated 08.08.2014 has clarified that the rejection of objection of the appellant virtually means that in case as per the provision of Central and State Department dealing with the monuments of archaeological monuments and protection, it is required to protect disputed property then only in that case the disputed property will be declared as Urban heritage.

17. As per the M.P. Ancient Monuments and Archeology Sites and Remains Act, 1964, the property can be declared as an ancient monuments if the state Government is of the opinion that it is necessary to protect the same. The Archaeological survey of India has also clarified that Bhandari Kothi is not an urban heritage and ancient monuments to be preserved. All the competent authorities have taken a unanimous decision that Bhandari Kothi is not a heritage building or ancient monuments to be protected.

18. Considering the aforesaid, we are of the view that no case is made out by the appellant to direct the respondents to declare the Bhandari Kothi as Urban Heritage and ancient monument when all the competent authorities have already taken a decision against the appellant. The learned Writ court has rightly refused to issue the writ of mandamus directing the respondents to declare the property in question as urban heritage. Writ appeal filed by the appellant has no merit and is accordingly, dismissed. No orders as to costs.