

(2019) 03 DEL CK 0001

In the Delhi High Court

Case No : Civil Writ Petition No. 7996 Of 2017, 5052 Of 2018, Civil
Miscellaneous Application No. 32963 Of 2017, 19421, 21827, 21828
Of 2018

Rajeev Kumar Yadav & Anr

APPELLANT

Vs

Archaeological Survey Of India And Ors

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Constitution of India, 1950 — Article 49
Ancient Monuments and Archeological Sites and Remains Act, 1958 — Rule 33, 34
Delhi Building Byelaws, 1983 — Rule 6.4.1
Ancient Monuments and Archeological Sites and Remains Act, 1958 — Section 2(a)
(iii), 2(j), 3, 4A, 20A, 20C, 20C(1), 20D, 20E, 20I(f)
Delhi Municipal Corporation Act, 1957 — Section 336, 345A
Ancient Monument Preservation Act, 1904 — Section 3, 3(1), 3(3), 6(3)
States Reorganisation Act, 1956 — Section 126

Citation : (2019) 258 DLT 193 : (2019) 4 AD(Delhi) 470

Hon'ble Judges : Rajendra Menon, CJ;V. Kameswar Rao, J

Bench : Division Bench

Advocate : Anil Airi, Ravi Krishan Chandna, Sadhana Sharma, Sukanya Lal,
Rajiv Yadav, Jayant Tripathi, Nayantara Roy, Dinesh Dahiya, Bibhash Kumar
Sharma, Atul Verma, Sanjeev Ralli, Kirti Uppal, Sidharth Chopra, Dev P.
Bharadwaj, Jatin Teotia, Ripu Daman Bhardwaj, T.P. Singh, Gaurav Duggal,
Archana Gaur, Ridhima Gaur, Sunil Goel, Supreet Bambra, Mayank Goel, Mrinalini
Sen Gupta, Rishikesh Kumar, Premasagar Pal

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. The present batch of writ petitions have been filed by a common petitioner alleging illegal and unlawful construction near the protected historical monument known as "Abdul Rahim Khan-i-Khanan's Tomb" located in Nizamuddin (East) on main Mathura Road, New Delhi. Subject constructions are alleged to be in violation of Rule 33 of the Ancient Monuments and Archeological Sites and

Remains Act, 1958 ("Act", for short) and Rules framed thereunder being Ancient Monuments and Archeological Sites Rules, 1959, especially Section 20A of the Act and Rule 33.

W.P.(C) 7996/2017

2. The facts in brief are:

i. Respondent no.1 Archaeological Survey of India vide order dated October 21, 2016 had granted permission to respondent no.5 to construct upon plot no. A-25, Nizamuddin (West), New Delhi.

ii. It is the petitioner's case that the said construction activity is being undertaken at a distance of about 45.12 metres from the said monument which would be impermissible in light of prohibition on construction activity being undertaken within a radius of 100 metres from such notified monument in terms of the Act of 1958. Upon visiting the site in question, the petitioner found that the entire existing structure had been demolished and construction was being undertaken at a large scale using heavy machinery.

iii. It was on June 26, 2017 that the petitioner through a representation intimated the respondent authorities about the impugned illegal and unauthorized construction. However, the Competent Authority under the Act vide order dated February 13, 2017 approved the grant of permission dated October 21, 2016.

3. A status report has been filed by the SDMC respondent No.2 in the writ petition, wherein it is stated that the building in respect of the property in question was sanctioned in favour of the M/s SDS Associates Pvt. Ltd. for construction of a residential building having provision of basement, stilt, ground floor, first floor, second floor and third floor on plot measuring 646.60 sq. metres in size. The building plan was released on October 26, 2016 having validity upto October 25, 2021. The structure from basement to third floor has come up at the site. The inspection revealed deviations against sanctioned plan in the shape of excess coverage from basement to third floor. The excess coverage comprises of both compoundable and non-compoundable coverages. The non-compoundable coverage needs to be rectified. It is submitted that the excess coverage beyond the sanctioned plan but within the compounding limit remains actionable till the same gets regularized. As such, the SDMC initiated demolition proceedings vide notice dated November 08, 2017. Subsequently, sealing proceeding under Section 345-A of Delhi Municipal Corporation Act, 1957 ("DMC Act", for short) was also initiated.

4. The respondent No.3, the SHO of PS Hazrat Nizamuddin has also filed a status report wherein a reference is made about the inspection of the property on November 21, 2017 and it was found that the building construction in question constitutes five floors and a basement.

5. Insofar as respondent No.5 is concerned, it has also filed a status report.

According to the status report, the property A-25, Nizamuddin (West), New Delhi belongs to a Company by the name of M/s S.D.S. Associates Pvt. Ltd. As the construction was very old, the structure in the property was demolished in February, 2017. On June 01, 2006, it filed an application with the respondent No.1 seeking permission to construct upon the property bearing no. A-25, Nizamuddin (West), New Delhi. The respondent No.1, Archaeological Survey of India conducted an inspection of the proposed site on May 26, 2016 and found that the distance between the monument in question i.e Khan-i-Khanan's Tomb and the proposed site i.e property bearing No. A-25, Nizamuddin (West), New Delhi is 88 metres from the South East corner and 95 metres from the North East corner of the front side. The said Authority vide its communication dated June 01, 2016 directed the respondent No.5 to submit a revised drawing after leaving a clear setback of 12 metres from the South East corner and 5 metres from the North East corner of the front side of the proposed site of construction. The respondent No.5 subsequently vide communication dated August 30, 2016 was informed by the National Monuments Authority, Ministry of Culture, Government of India that in the 140th meeting held on August 8th and 9th, 2016, permission has been granted to construct at the premises in question i.e A-25, Nizamuddin (West), New Delhi in the regulated area of "Tomb of Khan-i-Khanan" subject to a restriction in height of upto 18 metres. It is also stated that the National Monuments Authority exercising its powers under Section 20-I(f) of the Act in the aforesaid meeting recommended to the Competent Authority for the grant of permission as the proposed construction was in the regulated area and not in the prohibited area and thus outside the scope of the rigour of Sections 20-A and 20-C(1) of the Act. The Competent Authority vide its communication dated October 21, 2016 accorded approval to the application of the respondent No.5 for undertaking construction by stating as under:-

"Construction of Basement+Stilt+4 floors with the total height of 18 metres (including mumty, parapet, water-tank etc.) with building height not to exceed 15.00 metres with floor area of Stilt=GF-309.27 sqm. FF=SF=TF=306.47 sqm. & basement=289.06 sqm. With depth of 3.05 metres at A-25, Nizamuddin (West), New Delhi which falls partially in prohibited area of Tomb of Khan-i-Khana, a centrally Protected Monument, at a distance of 88 mtrs from South East corner & 95 mtrs from North East corner and construction start only in regulated area after leaving setback of 12 metres from South East Corner & 5 mtrs from North East corner of the proposed plot of construction."

6. Pursuant thereto, the respondent No.5 submitted application for grant of sanction for erection / re-erection of the building under Section 336 of the DMC Act to respondent No.2 SDMC, which vide communication dated October 26, 2016 informed the respondent No.5 about the grant of approval.

7. The respondent No.1 has also filed a status report wherein it is stated, as per the inspection carried out of the property on January 11, 2018 along with the team consisting of Deepak Kumar Bhardwaj, Surveyor Grade-I, Nageshwar Rao,

Sr. Photographer, Mohd. Imran, Sr. Conservation Assistant, Humanyun's Tomb, Rajeev Kaushal, Surveyor and Iftikhar Ahmed from the office of the Competent Authority, NCT of Delhi, it was observed that the distance which must have to be left by the property owner before taking up any construction work and the work has been done as per the NOC / permission granted by the Competent Authority dated October 21, 2016 i.e setback of 12 metres from South East corner and 5 metres from the North East corner has been provided in the property.

8. A status report has been filed by respondent Nos.6 and 7 pursuant to a joint inspection being undertaken of the subject property being A-25, Nizamuddin (West) on 19th July, 2018. It is stated that the monument in question had been declared a monument of national importance in terms of Section 3 of Act 1958 vide Notification dated 13th March, 1915 and from the wordings of the said Notification it is apparent that only the physical structure of the monument was declared as protected. It is therefore their case that in the present case "prohibited area" and "regulated area" are to be measured from the physical structure of the monument. As stated in the status report, upon inspection it was found that the subject construction was only within "regulated area" and therefore no violations in terms of the Act were made out.

9. Rejoinder to the counter affidavit filed by the respondent No.7 has been filed.

W.P.(C) 5052/2018

10. The factual matrix in this petition is similar to that in W.P.(C) 7996/2017 except for the fact that the alleged unauthorized constructed property is located at D-2, Nizamuddin (East), New Delhi which is stated to be at a distance of 68.61 metres from the outer boundary wall and 91.54 metres from the main monument itself. Permission by respondent no.1 was granted to respondent no.5 herein for the said construction activity on November 3, 2017. A representation was made by the petitioner to the Competent Authority under the Act vide letter dated 12th March, 2018.

11. It is the petitioner's case in these petitions that the said permissions have been granted to the respective respondents in violation of mandatory, statutory bars placed on such construction activity within 100 metres of concerned monument. Reference is made to Section 20A of the Act which reads as under:

1[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 metres in all directions shall be the prohibited area in respect of such protected area or protected monument:

Provided that the Central Government may, on the recommendation of the Authority, by notification in the Official Gazette, specify an area more than one hundred metres to be the prohibited area having regard to the classification of any protected monument or protected area, as the case may be, under section 4A.

(2) Save as otherwise provided in section 20C, no person, other than an archaeological officer, shall carry out any construction in any prohibited area.

(3) In a case where the Central Government or the Director-General, as the case may be, is satisfied that--

(a) it is necessary or expedient for carrying out such public work or any project essential to the public; or

(b) such other work or project, in its opinion, shall not have any substantial adverse impact on the preservation, safety, security of, or, access to, the monument or its immediate surrounding, it or he may, notwithstanding anything contained in sub-section (2), in exceptional cases and having regard to the public interest, by order and for reasons to be recorded in writing, permit, such public work or project essential to the public or other constructions, to be carried out in a prohibited area:

Provided that any area near any protected monument or its adjoining area declared, during the period beginning on or after the 16th day of June, 1992 but ending before the date on which the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Bill, 2010, receives the assent of the President, as a prohibited area in respect of such protected monument, shall be deemed to be the prohibited area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted by the Central Government or the Director-General, as the case may be, for the construction within the prohibited area on the basis of the recommendation of the Expert Advisory Committee, shall be deemed to have been validly granted in accordance with the provisions of this Act, as if this section had been in force at all material times:

Provided further that nothing contained in the first proviso shall apply to any permission granted, subsequent to the completion of construction or re-construction of any building or structure in any prohibited area in pursuance of the notification of the Government of India in the Department of Culture (Archaeological Survey of India) number S.O. 1764, dated the 16th June, 1992 issued under rule 34 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, or, without having obtained the recommendations of the Committee constituted in pursuance of the order of the Government of India number 24/22/2006-M, dated the 20th July, 2006 (subsequently referred to as the Expert Advisory Committee in orders dated the 27th August, 2008 and the 5th May, 2009).]

2[(4) 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.]

12. Reliance is further placed on Rule 33 of the Rules which reads as under:

33. Effect of declaration of prohibited or regulated area.-No person other than an archaeological officer shall undertake any mining operation or any construction-

(a) in a prohibited area, or

(b) in a regulated area, except under and in accordance with the terms and conditions of a licence granted by the Director-General.

13. It is also the petitioner's case that grant of the aforesaid permissions is in direct violation of the law laid down by the Supreme Court in *Archaeological Survey of India v. Narender Anand and Ors.* 2012 2 SCC 562 wherein it was categorically held that the distance of 100 metres has to be measured from the outer boundary wall of the concerned centrally protected monument. Relevant extract of the judgment on which petitioner seeks to rely on is reproduced as follows:

"The High Court's interpretation of prohibition contained in Notification dated 16.6.1992 is correct and the distance of 100 metres has to be counted from the outer boundary wall of Jantar Mantar which has protected area of 5.39 acres and not the physical structures of the observatory."

14. It is further stated that the grant of aforesaid permissions is also in violation of the rights guaranteed under Article 49 of the Constitution. Moreover, in terms of the Act and Rules permission could have been granted by respondent no.1 only for alterations / repairs / renovation of an existing building as listed in Rule 6.4.1 of the Delhi Building Byelaws, 1983 and not for any fresh construction. It is his case that respondent no.5 in complete contravention and violation of law has been carrying out fresh construction under the garb of permission for repairs / renovation. According to him permissions for such activity within "prohibited" or "regulated" area could only have been granted under "Heritage Byelaws" framed under Section 20E of the Act. In light of the fact that no such byelaws have been framed and approved, such construction activity could not have been sanctioned in any manner whatsoever.

15. It is the petitioner's case that from a conjoint reading of the bar placed by the Act and Rules it becomes clear that the intention of the legislature was not to permit any new construction activity within the "prohibited area" and grant of the subject permissions by respondent no.1 herein manifestly defeats the very purpose of the legislation. According to him, respondent nos. 1 to 4 have failed to perform their statutory duty and responsibility to take every possible step to ensure that the ancient monuments and archaeological sites are not destroyed or depleted by encroachments or construction near such monuments.

16. A counter affidavit has been filed by respondent No.7 (respondent No.6 in terms of amended memo of parties), which is Director Antiquities, ASI and Competent Authority, NCT of Delhi wherein it is stated that after the amendment of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 in

2010, vide Section 20D, all applications for constructions within the "Regulated Area" of monuments declared to be of national importance, are to be made to the Competent Authority, in accordance with Section 20D. In the present case, the application for construction was made by respondent No.5 in respect of premises bearing No. D-2, Nizamuddin East, New Delhi. The said plot falls within the "regulated area" of the monument of "Tomb of Khan-i-Khanan". The aforesaid monument was declared to be an ancient monument under the Ancient Monuments Protection Act, 1904. In terms of the wording of the Notification, it is evident that it is the physical structure of the monument in question that was declared as protected, and as such, the "prohibited area" and "regulated area" would be measured from the physical structure of the monument. After consideration of the said application, permission was duly granted to the respondent No.5 to carry out construction on the said plot, in accordance with the terms and conditions set out in the said permission. It is also stated that subsequent to the filing of this petition, an inspection of the monument, vis-à-vis the plot in question was carried out on July 19, 2018. The team that carried out inspection comprised of officials from the office of the Delhi Circle, Archaeological Survey of India, Competent Authority and National Monuments Authority. As per the report, the distance of construction site i.e D-2, Nizamuddin East, New Delhi has been measured from the monument and it was found that the construction site falls in the "regulated area" of the centrally protected monument, which is at a distance of 104 metres. It is further stated in the affidavit, that all construction is being undertaken in accordance with the permission granted on January 25, 2018.

17. The common petitioner in response to the respective reports filed by the respondent nos. 6 and 7 jointly and respondent no. 7 states that in terms of provisions and the legislative intent behind the Act, the said distance of 100 metres from a protected monument has to be measured from the protected monument in all directions, which includes not only the physical structure of the said monument but also the adjoining area in and around the physical structure. It is therefore his case that the said distance of 100 metres has to be measured from the outer boundary wall of the protected monument or the protected area as the case may be. He would rely on the various definitions contained in the Act in this regard. It is his case that from a conjoint reading of Section 20A, 2(j) and 2(a)(iii), it becomes clear that a "protected monument" also includes its adjoining land of the peripheral boundary wall and fencing and therefore distances have to be necessarily measured from such outer boundary wall.

18. It is also the petitioners case that the respondent's reliance on Notification of 1915 to conclude that it is only the structure of the monument that is protected is erroneous and in doing so they have grossly failed to understand the intent and purport of the said Notification. It stated that the entire area in and around Humayun's Tomb has similarly been declared to be a protected monument. It is moreover his case that any conditional permission for construction could have been granted by the respondent ASI only if the plot in question was clearly

beyond the "prohibited area" which is admittedly not the case for both the subject properties. He would rely on judgment of this court in *Emca Constructions v. ASI & Others*, MANU/DE/2758/2009 to state that granting relaxations with regard to constructions within "prohibited area" is completely barred.

19. Mr. Anil Airi, learned senior counsel appearing for the petitioner would apart from reiterating the stance as already noted above would submit that in terms of the Section 20A of the Act, no construction would be permissible within the "prohibited area" i.e. within a radius of 100 metres from the monument. He would submit that the respondent's practice of measuring the said distance from the inner structure of the monument is completely contrary to the scheme of the Act and therefore needs to be prohibited. The permissions granted to the respective owners of the plots in question are therefore according to him completely illegal and unsustainable in law. He would further point out that the respondents' reliance on the Notification of March, 1915 to conclude that it is only the structure of the monument that is protected is completely erroneous and contrary to the letter and spirit of the Act and Rules framed thereunder. Moreover, such interpretation is not backed by any substantive language in the said Notification. He would further draw reference to the definition of "ancient monument" to reiterate that even the adjoining area would be covered under the said definition.

20. Mr. Airi would additionally draw reference to Sections 20C and 20D of the Act to submit that the permission could have been granted by the Competent Authority only for the purposes of repair and renovation of properties already existing within the "prohibited area" and permission for construction and reconstruction could have been granted for plots within the regulated area only upon recommendation of the National Monument Authority. In this regard, he would submit that the respondent ASI has the power to grant a NOC only with regard to the subject plots for which such permission is sought and not with regard to the specific construction being undertaken thereon. Consequently, the direction issue to the respondent owner to maintain set back on the plot in question is also invalid and not in accordance with the subject building by-laws.

21. In conclusion, Mr. Airi would submit that in any case no permission for construction of a basement near a protected monument could have been granted on the both the subject properties because for construction of a basement excavation would have to be taken at a deep level such that resultant soil erosion and vibrations near the base of the said monument would have damage the monument irreparably.

22. Mr. Jayant Tripathi, who appeared for ASI would submit that this monument "Abdul Rahim Khan-i-Khanan's Tomb" is a centrally protected monument and a declaration in that regard was issued on March 13, 1915 under the provisions of Section 6(3) of the Ancient Monument Preservation Act, 1904 by the then Chief Commissioner. The said declaration is only with regard to "Tomb of Khan-i-

Khanan". He stated that it is only the structure of the monument that is protected and he also placed before us certain other Notifications issued during the same time to draw a distinction that if the Competent Authority intended to declare the surrounding areas, as a part of the protected monument, it would have said so. In this regard, he has placed before us the Notification of the then Chief Commissioner, Delhi dated January 16, 1914 with regard to Qutab area in Mehrauli, Tomb of Sikandar Lodi at Khairpur, Old Bridge with its approaches near Tomb of Sikandar Lodi at Khairpur. In other words, it is his submission, in the absence of any Notification notifying the surrounding areas of the monument as part of the protected monument, the limit of 100 metres must necessarily be measured from the monument itself.

23. Mr. Uppal, learned Senior Counsel appearing for the respondent No.5 in W.P. (C) NO. 5052/2018 submitted that the present petition, under the garb of a public interest litigation, is totally misconceived and has been filed with ulterior motive. Mr. Uppal would strongly contend that the structure on the property is beyond the prohibited area of 100 mtrs and as such the present petition is liable to be dismissed on this very ground only.

24. Mr. Gaurav Duggal, learned counsel for the private respondent No.5 in W.P. (C) 7996/2017 would submit that an application for permission under Section 20D of the Act is to be made to the Competent Authority under the Act which is in turn forwarded to the National Monument Authority for approval. It was vide communication dated 30th August, 2016 that pursuant to mandatory inspections and verifications, permission was granted to the said respondent to undertake the construction in question with the only condition being placed that such construction was to be restricted to a height of 18 metres. It was his submission that all construction being undertaken on the said plot is only in terms of the permission granted and not in violation of any of the provisions of the Act or the local building by-laws.

25. Having heard the learned counsels for the parties, the issue which needs to be considered and decided by this Court is whether the "prohibited area" and "regulated area" are to be measured from the physical structure of the monument or from the outer wall erected around the adjoining area surrounding the said monument.

26. In these two writ petitions, we are concerned with two properties i.e A-25, Nizamuddin (West), New Delhi and D-2, Nizamuddin East, New Delhi. The case of the petitioner in both the writ petitions is that plot No. A-25, Nizamuddin (West), New Delhi is situated within 45.12 mtrs from the monument whereas property bearing No. D-2, Nizamuddin East, New Delhi is situated at a distance of 68.61 mtrs from the boundary wall and 91.54 mtrs from the monument itself. It is in this background, an allegation is made that the construction activity is being undertaken within a radius of 100 metres of the monument, which is impermissible in view of Section 20A of the Act and Rule 33 made thereunder.

27. Mr. Airi had relied upon the definition of the word "ancient monument" under Section 2(a) of the Act. The same reads as under:-

2. Definitions. In this Act, unless the context otherwise requires,?

(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;

28. Section 20A has already been reproduced above.

29. According to Mr. Airi, no construction would be permissible within the prohibited area i.e within a radius of 100 mtrs from the monument. According to him, in terms of Section 20C and 20D of the Act, the Competent Authority could have only permitted repair and renovation of the properties already existing within the prohibited area and construction in the regulated area only upon recommendation of the National Monument Authority.

30. On the other hand, Mr. Tripathi, who appeared for ASI submitted that in terms of the declaration issued with regard to the monument in question i.e. "Abdul Rahim Khan-i-Khanan"s Tomb" dated March 13, 1915, is only to the effect of the Tomb. In other words, it is only the structure of the monument that is protected. He has drawn distinction between different Notifications issued declaring different monuments in that regard. The plea as advanced by Mr. Airi by relying on definition of the word "Ancient Monument" as provided under Section 2(a) of the Act to contend that by operation of law, all land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument would constitute ancient monument is appealing on a first blush but on a deeper consideration, more specifically in terms of Section 3 of the Act of 1904, under which, the Notification dated March 13, 1915 was issued, contemplates a declaration by the Central Government of its opinion to declare an ancient monument as a protected monument and which declaration shall be deemed to be a declaration for the purposes of the Act of 1958, as per Section 3, which we reproduce as under, it is clear that the declaration is only to the extent "Tomb of Khan-i-Khanan":-

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 (71 of 1951),

or by section 126 of the States Reorganisation Act, 1956 (37 of 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.

31. Now the question is, whether a portion of the land adjoining the site of an ancient monument, i.e., the Tomb which may be required for fencing or covering in or otherwise preserving such monument shall be part of the ancient monument i.e "Abdul Rahim Khan-i-Khanan"s Tomb" (in this case).

32. Before we answer that, we would like to reproduce the declaration as made on March 13, 1915 as under:-

The 13th March, 1915.

NO. 1660-Education- In exercise of powers, conferred by Section 3(3) of the Ancient Monuments Preservation Act, 1904, (VII of 1904), the Chief Commissioner is pleased to confirm Notification no. 08, dated the 5th January 1915, which declared the undermentioned monument to be a protected monument within the meaning of the Act.

Name	of	the	Monument
Locality.			

Tomb	of	Khan	Khanas	South	of
Nizam-ud-din village.					

By order,

G.F. DEMONTMORENOY,

Personal Assistant to the Chief Commissioner, Delhi Province

33. We would also like to reproduce a declaration given in with respect to certain other monuments by the then Chief Commissioner, Delhi on January 16, 1914.

16th January, 1914

NO. 387-Education- In exercise of powers, conferred by Section 3(3) of the Ancient Monuments Preservation Act, 1904, (VII of 1904), the Chief Commissioner is pleased to confirm Notification no. 8453 - Education, dated the 12th November 1913, which declared the undermentioned monuments to be a protected monuments within the meaning of the Act.

Monuments

Locality

1. Tomb of Mumammad Shah known as Mubarik Khan Ka Gumbaz.

Khairpur.

2. Tomb of Sikandar Lodi, with its enclosure walls and bastions, gates and

compound.

Khairpur.

3. Old Lodi Bridge with its approaches.

Near Tomb of Sikandar Lodi, Khairpur.

4. Mosque with its dalans and courtyard and the Bara Gumbaz (the domed entrance to the mosque).

Khairpur.

5. Unknown tomb with blue tile decoration known as Shisha Gumbaz.

Khairpur.

6. The Qutub archaeological area as now fenced in, including the mosque, iron pillar, Minar of Qutbud Din, unfinished Minar, all colonnades, screen arches, tomb of Altamash, college buildings of Alaud Din, Tomb of Imam Zamin and all carved stones in the above area with gardens, paths and water channels and all gate ways including the Alai Darwaza; also all graves in the above area.

Mehrauli.

7. Tomb of Adham Khan (Rest House)

Mehrauli.

8. Tomb of Mumammad Quli Khan.

South of Qutb Dak bungalow, Mehrauli.

34. A perusal of both the Notifications would reveal that wherever the Competent Authority intended to include in the Notification, the land adjoining the site of an ancient monument, it had said so. For example, in the Notification dated January 16, 1914 with regard to Tomb of Sikandar Lodi, the Authority has included enclosure walls and bastions, gates and compound as part of the declaration. Similarly, for Qutb Archaeological area has also included mosque, iron pillar, Minar of Qutbud Din, un-finished Minar, all colonnades etc. Similarly, against Sl. No.4 of the same Notification, states Mosque with its dalans and courtyard and the Bara Gumbaz (the domed entrance to the mosque). Whereas in the case of monument in question i.e. "Khan-i-Khanan"s", there is no reference to the land adjoining the site of the Tomb.

35. We also find that the Supreme Court in the case reported as (2012) 2 SCC 562, Archaeological Survey of India v. Narender Anand and Ors, while considering a similar issue with regard to Jantar Mantar, New Delhi had referred to a Notification of the year 1956, which reads as under:-

"MINISTRY OF EDUCATION

ARCHAEOLOGY

New Delhi, the 4th October 1956

S.R.O. 2306. - In exercise of the powers conferred by sub-section

(1) of Section 3 of the Ancient Monuments Preservation Act, 1904 (7 of 1904), the Central Government hereby declares the ancient monument described in the Schedule annexed hereto to be a protected monument within the meaning of the said Act.

Sl. No.

District

Locality

Name of monument

Area

Boundary: East, South, North, West

Whether in religious use

Ownership

Remarks

Delhi

New Delhi

Jantar Mantar

Protected area 5.39

South: South India Club, 9, Jantar Mantar Road

East: Low land with a modern temple and well

West: Jantar Mantar Road

North-East: Partap Singh Building

North-West: Parliament Street

No

Maharaja of Jaipur

[No.F-3-76/50-C-1]

D. CHAKRAVARTI

Under Secretary"

36. The Supreme Court in para 37 has referred to an observation made by the Division Bench with regard to the aforesaid Notification wherein the High Court

has, by giving reference to the words "protected area 5.39" under the head "area" has held that the entire area of 5.39 acres falls under prohibited area.

37. In fact, the Supreme Court in para 53 of the Judgment has held as under: -

"53. The appeal of Respondents 1 and 2 is wholly meritless. The High Court, in our view, has rightly held that even though the Notification dated 3-5-1957 did not become effective because the same was not published in the Official Gazette, the earlier Notification issued on 4-10-1956 remained effective and the same was saved by Section 39(2) of the 1958 Act. We may add that even though the Notification dated 3-5-1957 was issued in supersession of the Notification dated 4-10-1956, the same remained alive because of non compliance of Section 3(2) of the 1904 Act. The High Court's interpretation of the prohibition contained in the Notification dated 16-6-1992 is correct and the distance of 100 m has to be counted from the outer boundary wall of Jantar Mantar which has protected area of 5.39 acres and not the physical structures of the observatory. The High Court has given detailed reasons for rejecting the plea of Respondents 1 and 2 that the provisions of the DDA Act would prevail over those contained in the 1958 Act and we entirely agree with it."

From the above conclusion of the Supreme Court it is clear that in terms of the Notification issued with respect to Jantar Mantar, Delhi the whole area of 5.39 acres is the protected area and not just the physical structure of the observatory. So, the Supreme Court has based its observation on the Notification issued in that case.

38. In view of the aforesaid, we agree with the submission made by Mr. Tripathi that wherever the Competent Authority intended that the land adjoining the site of an ancient monument need to be included in the definition of "ancient monument", it would have said so. In the case in hand, it cannot be construed that the area adjoining the Tomb is part of the monument. We also say within 100 metres of the monument in terms of Section 20A of the Act and the judgment of the Supreme Court in the case of Archaeological Survey of India v. Narender Anand and Ors. (supra), no construction activity is permissible being prohibited / protected area.

39. Having said that, in the case in hand, the premise on which the petitioner has filed the petitions is that the construction activity is being taken within 100 mtrs from the outer wall of the monument. In view of our conclusion above, the premise on which the petitioner has filed the petition is fallacious.

40. Having said that, with regard to the property No. A-25, Nizamuddin (West), New Delhi, it is the case of the Director Antiquities, ASI and Competent Authority, NCT of Delhi that under the Act as depicted from the joint inspection report carried out on July 19, 2018, the Competent Authority has issued permission to the respondent No.5 for construction in regulated area after leaving a clear setback of 12 metres from the South East corner and 5 metres from the North East corner of the front side of the proposed site of construction.

By this direction, the Competent Authority had directed the respondent No.5 to make construction beyond 100 metres of the monument by directing in the manner stated above. In other words, the intention of the Competent Authority is to bring the construction in continuity with the provisions of the Act / law laid down by the Supreme Court that no construction activity is permissible in the protected / prohibited area, i.e., within 100 mtrs from the monument.

41. Insofar as the property bearing No. D-2, Nizamuddin (East), New Delhi is concerned, it is represented before the Court that the property is at 104 mtrs i.e. beyond the protected area, i.e., the monument. If that be so, the impugned action of the respondent cannot be faulted. We may state here, that it is not the case of the petitioner that permission has not been granted by the Competent Authority under the 1958 Act for construction to the petitioners.

42. Having said that we find that a stand has been taken by the SDMC that the construction made in A-25, Nizamuddin (West), New Delhi is beyond the permissible limit; some part of the construction is within the compounding limit and the other being not and the proceeding for sealing has been initiated. We say nothing except that the SDMC is bound to take action in accordance with law.

43. In so far as the reliance placed on the Judgment of this Court in Emca Construction (supra) is concerned, suffice it to state, a co-ordinate bench of this Court has inter alia, held, that there is no provision for construction / renovation in a prohibited area. There is no dispute on the said proposition. The judgment has no applicability in these facts.

In view of our above discussion, we do not see any merit in the petitions. The same are dismissed.

CM APPL. 32963/2017 in W.P.(C) 7996/2017

CM APPLs. 19421/2018, 21827-28/2018 in W.P.(C) 5052/2018

Dismissed as infructuous.