

(2016) 04 AHC CK 0040

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 43540 of 2011.

Ramesh Kumar Sharma

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 20 B, 20A

Citation : (2016) 5 ADJ 510 : (2017) 1 AILLJ 46 : (2016) 117 ALR 367

Hon'ble Judges : Krishna Murari;Raghvendra Kumar, JJ.

Bench : Division Bench

Advocate : M.C. Chaturvedi and Dr. Y.K. Srivastava, Advocates, for the Appellant; A.S.G.I. and S.C, for the Respondent

Final Decision : Allowed

Judgement

Krishna Murari, J. - Dispute in this petition relates to plots no. 292 area 0.10 hectare, 296 area 0.53 hectare, 297 area 0.80 hectare and 298 area 0.41 hectare, total area 0.744 (hereinafter referred to as the "land in dispute") hectare situate in village Jhansi Civil, district Jhansi falling under non Z.A. Area. Petitioner is duly recorded as owner of the aforesaid plots in the revenue records. A notice dated 21.6.2011 was issued by the Superintending Archaeologist, Archaeological Survey of India, respondent no. 3 under Section 20-A and 20-B of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 as amended by Act No. 10 of 2010, contained a recital to the effect that in terms of the aforesaid provisions, an area extending up to a distance of 100 meters and thereafter a 200 meters having been declared a protected and regulated area, the construction work of boundary wall being undertaken by the petitioner falls in the regulated area of the protected Monument of Major F.W. Pinkney was illegal and attracted the penal provisions. The notice further required the petitioner to keep the construction work in abeyance and show cause as to why the alleged illegal construction be not removed or demolished.

2. In reply to the show cause notice, petitioner made an application dated 29.6.2011 stating that the construction of the boundary wall was only for the purpose of security and demarcation of the boundaries of the plots under his ownership and a request was made to grant a month's time for submitting a detail reply. Vide order dated 13.7.2011 the respondent no. 3 reiterated that the construction of the boundary wall made by the petitioner since fell in the regulated area of the protected monument, as such, it was illegal and further action shall be taken accordingly. Notice dated 21.6.2011 and the order dated 13.7.2011 passed thereon are subject matter of challenge in this petition.

3. We have heard Sri M.C. Chaturvedi, learned Senior Advocate assisted by Dr. Y.K. Srivastava appearing for the petitioner and Sri Shreesh Gopesh appearing for the respondents.

4. Facts relevant for the purpose of adjudication in the matter borne out from the pleadings of the parties are as under :

Monument of Major F.W. Pinkney situate on the hillock near the premises of Messer Eduljee Boyce and Co., Jhansi was declared to be a protected monument by the then Government of United Provinces vide notification dated 02.05.1936 issued in exercise of powers conferred under Section 3(1) of the Ancient Monuments Preservation Act, 1904 being Act No. 7 of 1904. A perusal of the notification dated 02.05.1936, filed as annexure-4 to the writ petition, goes to show that Monumnt of Major F.W. Pinkney lies in Jhansi Cantonment and is situate on the hillock near the premises of Messer Eduljee Boyce and Co. Ltd.

5. Learned Senior Advocate appearing for the petitioner contended that the plots in dispute are situate in Mauja Jhansi Civil and does not fall within Jhansi Cantonment. It was further contended that the Ancient Monuments and Archaeological Sites and Remains Act, 1958 being Act No. 24 of 1958 (hereinafter referred to as the "Act of 1958") was promulgated for preservation of ancient monuments and archaeological sites of national importance after repeal of the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 and Act No. 10 of 2010 was promulgated to amend the Act, 1958 and to make provisions for validation of certain action taken by the Central Government under the said Act.

6. Provisions 20-A and 20-B were inserted in the Principal Act No. 24 of 1958 vide amending Act No. 10 of 2010 and would only be applicable to monuments declared to be a protected monument or monument of national importance under Act No. 24 of 1958 and the same would not apply to monument declared to be a protected monument under the provisions of the Old Act No. 7 of 1904 inasmuch as in view of Section 39(2) of the Act of 1958, the Ancient Monuments Preservation Act, 1904 ceases to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under Act of 1958 to be of national importance, except as respects things done or omitted to be done before the commencement of the Act.

7. In reply, it has been submitted on behalf of the respondents that since the petitioner started unauthorized and illegal construction in the prohibited area of the centrally protected monument without seeking any prior permission from the Archaeological Survey of India/Competent Authority, which is mandatory, notice was issued to him under the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010. It was further submitted that in view of the fact that Act No. 7 of 1904 has been repealed and the new Act No. 24 of 1958 has been enacted to provide for preservation of ancient and historical monuments and archaeological sites and the provision of the new Act No. 24 of 1958 along with the amending Act of 2010 duly governs and applies to all centrally protected monument including the one in dispute, which would be deemed to be a centrally protected monuments of national importance for the purpose of this Act.

8. Before proceeding to consider the rival submissions, it may be relevant to examine the relevant provisions of Ancient Monuments Preservation Act, 1904 (Act No. 7 of 1904), the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (Act No. 24 of 1958) and the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010.

9. Act No. 7 of 1904 was promulgated to provide for preservation of Ancient Monuments and of objects of Archaeological, historical, or artistic interest. Section 3 of the said Act provided that the Central Government may, by notification in the official gazette, declare an ancient monument to be a protected monument within the meaning of the Act. Ancient monument was defined under Section 2(1) of the Act as 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, or any remains thereof and include the sites of ancient monument; 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 the means of access to and convenient inspection of an ancient monument. Section 4 of the Act, 1904 vested the Collector with the power to purchase or take on lease any protected monument with the sanction of the Central Government or to accept a gift or bequest of any protected monument. Under Section 5 of the Act, the Collector could enter into an agreement with the previous sanction of the Central Government for preservation of any protected monument in the district. The agreement executed in exercise of powers under Section 5 could have provided for the maintenance of the monument, the custody of the monument and as also the restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument. The agreement could also contain a stipulation with respect to expenses to be borne out in connection with the preservation of monument. Section 7 of the Act empowered the Collector the right of enforcement of such agreement entered into. Under Section 10 of the Act, 1904, the Central Government on an apprehension that a protected monument is in danger of being destroyed, injured or decayed, could direct the State

Government to acquire it under the provisions of the Land Acquisition Act, 1894 as if the preservation was a public purpose within the meaning of the said Act. Section 16 provided for penalties for destruction, removal, injury, alteration of a protected monument maintained by the Central Government.

10. Subsequently, Act No. 24 of 1958 was promulgated after repealing of the Ancient Monuments Preservation Act, 1904. Under the Act No. 24 of 1958, "ancient monument" is defined as 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 100 years and includes remains of an ancient monument, the site of an ancient monument, 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 the land access to, and convenient inspection of an ancient monument. "Protected area" has been defined under the Act as any archaeological sites and remains which is declared to be of national importance by or under the Act and "protected monument" means an ancient monument which is declared to be of national importance by or under the Act. Under Section 3 of the Act No. 24, 1958, certain ancient monuments are deemed to be of national importance. The said Section 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 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 purposes of this Act."

11. Section 5 of the Act No. 24, 1958 confers the power upon the Director General with the previous sanction of the Central Government to purchase or take a lease of, or accept a gift or bequest of any protected monument. Under Section 6 the Collector on being so directed by the Central Government can make a proposal to the owner of a protected monument to enter into an agreement with the Central Government within a specified period for maintenance of the monument. The agreement could provide for the maintenance of the monument, the custody of the monument as also the restriction upon the owner's right to use the monument for any purpose, to charge any fee for entry into the same, to destroy, remove, alter or deface of the monument or to build on or near the site of the monument. Under Section 9 of the Act upon failure or refusal by the owner to enter into an agreement as provided under Section 6, the Central Government can pass an order providing that the monument shall be maintained by the owner or other person competent to enter into an agreement. Section 13 of the said Act gives power of acquisition of protected monuments in case the Central Government apprehends that the same is in danger of being destroyed or misused or decay as if the maintenance

of the monument is a public purpose within the meaning of the said Act.

12. In view of Section 39(2) of Act of 1958, the provisions of Ancient Monuments Preservation Act, 1904 ceased to apply in respect of ancient and historical monuments archaeological sites remains declared to be of national importance under Act of 1958. The said Section reads as under :

"39. Repeals and saving. - (1) ?.....

(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 omitted to be done before the commencement of this Act.

13. Subsequently by the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 (hereinafter referred to as the "Act, 2010"), certain amendments were incorporated in Act No. 24 of 1958. Relevant amendments for adjudication of the case are being reproduced hereunder :

"2. Amendment of Section 2. - On and from the 16th day of June, 1992, in the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) (24 of 1958) (hereinafter referred to as the principal Act), in Section 2. -

(i) ?.....

(da) ?.....

(db) "competent authority" means an officer not below the rank of Director of Archaeological or Commissioner of Archaeological of the Central or State Government or equivalent rank specified by notification in the Official Gazette, as the competent authority by the Central Government to perform functions under this Act:

Provided that the Central Government may, by notification in the Official Gazette, specify different competent authorities for the purpose of Sections 20-C, 20-D and 20-E.

(dc).....

(ii) after clause (h), the following clause shall be inserted and shall be deemed to have been inserted, namely -

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

(iii) ?.....

(k) ?.....

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

4. Insertion of new Section 20-A. - On and from the 16th day of June, 1992, after Section 20 of the principal Act, the following section shall be inserted and shall be deemed to have been inserted, namely -

"Prohibited and Regulated Areas"

20-A. Declaration of prohibited area and carrying out public work or other works in prohibited area. - 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:

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 meters to be prohibited area having regard to the classification of any protected monument or protected area, as the case may be, under Section 4-A.

(2) Save as otherwise provided in Section 20-C, 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 in accordance with 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 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 f

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)."

5. Amendment of Section 20-A. - In Section 20-A of the principal Act (as so inserted by Section 4 of this Act), after sub-section (3), the following sub-section shall be inserted, namely -

"(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."

6. Insertion of new Section 20-B. - On and from the 16th day of June, 1992, after Section 20-A of the Principal Act, the following section shall be inserted and shall be deemed to have been inserted, namely -

"20-B. Declaration of regulated area in respect of every protected monument. - Every area, beginning at the limit of prohibited area in respect of every ancient monument and archaeological site and remains, declared as of national importance under Sections 3 and 4 and extending to a distance of two hundred meters in all directions shall be the regulated area in respect of every ancient monument and archaeological site and remains :

Provided that the Central Government may, by notification in the Official Gazette, 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 4-A :

Provided further 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 regulated area in respect of such protected monument, shall be deemed to be the regulated area declared in respect of that protected monument in accordance with the provisions of this Act and any permission or licence granted for construction in such regulated area 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."

7. Insertion of new Section 20-C. - After Section 20-B of the principal Act (as so inserted by Section 6 of this Act) the following sections shall be inserted, namely, -

"20-C. Application for repair or renovation in prohibited area, or construction or re-construction or repair or renovation in regulated area. -

(1) Any person, who owns any building or structure, which existed in a prohibited

area before the 16th day of June, 1992, or, which had been subsequently constructed with the approval of the Director-General and desires to carry out any repair or renovation of such building or structure, may make an application to the competent authority for carrying out such repair or renovation, as the case may be.

(2) Any person, who owns or possesses any building or structure or land in any regulated area, and desires to carry out any construction or reconstruction or repair or renovation of such building or structure on such land, as the case may be, may make an application to the competent authority for carrying out construction or re-construction or repair or renovation, as the case may be.

Grant of Permission by Competent Authority

20-D. Grant of permission by competent authority within regulated area. - (1) Every application for grant of permission under Section 20-C of this Act shall be made to the competent authority in such manner as may be prescribed.

(2) The competent authority shall, within fifteen days of the receipt of the application, forward the same to the Authority to consider and intimate impact of such construction (including the impact of large-scale development project, public project and project essential to the public) having regard to the heritage bye-laws relating to the concerned protected monument or protected area, as the case may be.

Provided that the Central Government may prescribe the category of applications in respect of which the permission may be granted under this sub-section and the application which shall be referred to the Authority for its recommendations.

(3) The Authority shall, within two months from the date of receipt of application under sub-section (2), intimate to the competent authority impact of such construction (including the impact of large-scale development project, public project and project essential to the public).

(4) The competent authority shall, within one month of the receipt of intimation from the Authority under sub-section (3), either grant permission or refuse the same as so recommended by the Authority.

(5) The recommendations of the Authority shall be final.

(6) In case the competent authority refuses to grant permission under this section, it shall, by order in writing, after giving an opportunity to the concerned person, intimate such refusal within three months from the date of receipt of the application to the applicant, the Central Government and the Authority.

(7) If the competent authority, after grant of the permission under subsection (4) and during the carrying out of the repair or renovation work or re-construction of building or construction referred to in that sub-section, is of the opinion (on the basis of material in his possession or otherwise) that such repair or renovation work or reconstruction of building or construction is likely to have an adverse

impact on the preservation, safety, security or access to the monument considerably, it may refer the same to the Authority for its recommendations and if so recommended, withdraw the permission granted under sub-section (4) if so required :

Provided that the competent authority may, in exceptional cases, with the approval of the Authority grant permission to the applicant referred to in sub-section (2) of Section 20-C until the heritage by-laws have been prepared under sub-section (1) of Section 20-E and published under sub-section (7) of that section.

14. Specific case set up by the petitioner in the writ petition is that monument of Major F.W. Pinkney was declared to be a protected monument vide notification dated 02.05.1936 under Section 3(1) of the Ancient Monuments Preservation Act, 1904 being Act No. 7 of 1904 and after enforcement of Act No. 24 of 1958, there is no notification declaring the monument in question to be a protected monument or monument of national importance in terms of Act No. 24 of 1958 and thus the provisions contained under Section 20A and 20B inserted in the Principal Act No. 24 of 1958 vide Amending Act No. 10 of 2010 would not stand attracted.

15. In the counter affidavit in paragraph 15, it has been admitted that Monument of Major F.W. Pinkney was in the list of centrally protected monuments since 1936. The allegation made in the writ petition that on enforcement of Act No. 24 of 1958, no notification was issued under the said Act in respect of the monument in question has not at all been denied in the counter affidavit. On the contrary, what has been stated is that after repeal of the Act No. 7 of 1904 and enactment of Act No. 24 of 1958, the provisions would automatically govern and apply to all centrally protected monument including the one in dispute, which would be deemed to be a centrally protected monument of national importance for the purpose of this Act. The thrust of the oral argument advanced on behalf of the respondents is also to the same effect.

16. Admittedly, since no declaration under the Act of 1958 has been made in respect of the monument in question, the Act of 1904 will not cease to have effect in respect thereof and will still continue to govern the same.

17. Monument of Major F.W. Pinkney cannot be deemed to be of national importance under Section 3 the Ancient Monuments and Archaeological Sites and Remains Act, 1958 inasmuch as it has not been declared so either 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 nor any notification in respect of the same has been issued in exercise of powers conferred by Section 4 of the Act of 1958. This being the factual position, it would not be a protected area as defined under Section 2(i) or a protected monument under Section 2(j) of the Act of 1958 as under both the aforesaid clauses protected area and protected monument requires a declaration

by or under the said Act. That being so, the amendment incorporated in 2010 Act extending the area in and around the distance of the protected area or protected monument also do not stand attracted and cannot be held to be attracted. For the same reason, the provisions prescribed by Section 20-C to 20Q under the Amending Act, 2010 in respect of making of an application for repair and renovation in prohibited area or construction or reconstruction or repair in a regulated area and the procedure for grant of such permission also do not stand attracted and are totally inapplicable.

18. In view of above facts and discussions, the only irresistible conclusion is that provisions of the Act of 1958 are not applicable to the monument of Major F.W. Pinkney and the land of the petitioner situate near or adjacent to the said monument cannot be held to be situate within the prohibited area or regulated area defined under the said Act so as to attract the provisions of Section 20-A and 20-B incorporated vide amending Act of 2010.

19. In view of above, the impugned notice dated 21.6.2011 and the consequential order dated 13.7.2011 are rendered illegal and hereby quashed.

20. Writ petition stands allowed.

21. However, there shall be no order as to costs.