
(2004) 04 DEL CK 0049

In the Delhi High Court

Case No : Writ Petition (C) No. 479 of 2004

Shri Ashok Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 12-04-2004

Acts Referred:

Citation : (2004) 111 DLT 230 : (2004) 74 DRJ 144 : (2004) 3 RCR(Civil) 365

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Sandeep Sethi and A. Mirza, for the Appellant; Sanjay Jain and Karishma, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

1 The heritage of any township lends character to it. The ancient monuments are like jewels in its crown. Delhi is replete with it and boast of a rich heritage and culture. Alas its various monuments fell into disrepair and suffered encroachments on account of negligence, lack of proper manpower, infrastructure and the will to protect such monuments.

2 The monuments of Bhure Khan, Bade Khan and Chhote Khan are three such monuments located at one place in what is now known as - South Extension, Part-I, New Delhi. These monuments are structured as tombs and are stated to be typical examples of the evolution of square tombs reflecting a distinct and harmonised architectural style. These monuments are stated to contain a treasure of inscriptions incurred stone and incised stucco in beautiful naskh alongside its arches and qibla walls. The structures of these monuments are estimated to have been built around the 15/16th Century AD and are more than 400 years old.

3 The law makers were not oblivious to the importance of preservation of such monuments and, thus, the Ancient Monuments Preservation Act, 1904 was

brought into force to provide for preservation of ancient monuments and all objects of archaeological, historical or artistic interest. Section 2 of the said Act defines ancient monument as under:-

" (1)"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 or any remains thereof, and includes-

(a) such portions of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument; and

(b) the means of access to and convenient inspection of an ancient monument."

4. In exercise of powers conferred u/s 3 of the said Act, a notification was issued dated 25.3.1918 declaring the tombs of Bade Khan and Chhote Khan as protected monuments. Subsequently vide a notification dated 11.11.1926 the tomb of Bhure Khan was also declared as a protected monument. The total area forming part of the protected limits of these monuments, as per the respondents, Archaeological Survey of India, is stated to be land measuring 5 bighas and 17 bids was located at Khasra No. 564/87 of Village Kotla Mubarkpur in respect of Bade Khan and Chhote Khan and land measuring 7 bigha and 7 bids was in Khasra No.563/87 of Kotla Mubarkpur for Bhure Khan.

5. The Constitution of India came into force in 1950 and Delhi was specified as a Part-C State. In 1956 the State Reorganisation Act was enacted and in terms of Section 126 of the said Act Ancient and Historical Monuments in Part-C States which were before 1.4.1956 declared to be protected monuments within the 1904 Act were declared to be ancient and historical monuments of National importance. Thereafter in 1959 the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter referred to as the said Act), came into force. The term "Ancient Monument" and "Protected Monument" were defined in Section 2(a) and 2(j) of the Act as under"-

"2(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 exercise 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;"

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

6. Section 3, ipso facto, declared the earlier protected monuments to be protected monuments under the Act and is 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."

7. In exercise of powers conferred u/s 38 of the said Act, Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (hereinafter referred to as the Rules), were brought into force. The expressions "prohibited area" and "regulated area" were defined u/s 2(f) of the Rules, which is as under:-

"2(f) "prohibited area" or "regulated area" means an area near or adjoining a protected monument which the Central Government has, by notification in the Official Gazette, declared to be a prohibited area, or, as the case may be, a regulated area, for purposes of mining operation or construction or both"

8. The effect of the declaration of an area as a prohibited or a regulated area is contained in Rules 31 to 33, which are as under:-

"31. Notice of intention to declare a prohibited or regulated area.____

1) Before declaring an area near or adjoining a protected monument to be a prohibited area or a regulated area for purposes of mining operation or construction or both, the Central Government shall, by notification in the Official Gazette, give one month's notice of its intention to do so, and a copy of such notification shall be affixed in a conspicuous place near the area.

2) Every such notification shall specify the limits of the area which is to be so declared and shall also call for objection, if any, from interested persons.

32. Declaration of prohibited or regulated area.____ After the expiry of one month from the date of the notification under rule 31 and after considering the objections, if any, received within the said period, the Central Government may declare, by notification in the Official Gazette, the area specified in the notification under rule 31, or any part of such area, to be a prohibited area, or, as the case may be, a regulated area for purposes of mining operation or construction or both.

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 an in accordance with the terms and

conditions of a license granted by the Director General."

9. A reading of the aforesaid provisions show that the object is not only to protect the ancient monuments but even peripherals areas which under the Act have been defined as the prohibited and regulated area. This is apparent from the very definition u/s 2(a) of the said Act defining an ancient monument to include such portions of land adjoining the site of the ancient monument as may be required for fencing or covering or otherwise preserving such monument. This intent was also reflected in the definition of ancient monument even under the Act of 1904.

10. The Central Government issued a notification dated 16.6.1992 declaring the area fallen within 100 meters radius from the peripheries of the protected monument as prohibited area and to the extent of 200 meters thereof as a regulated area. Thus, no construction was permissible after the said notification within a 100 meter radius and for the radius between 100 to 200 meters, which was regulated area, construction could be made only in accordance with the terms and conditions of the license granted by the Director General.

11. The petitioner herein claims to have purchased rights in respect of certain property near these monuments. The petitioner alleges that the land with super-structures were owned by a number of Gujjar families including one Risal Singh as reported in the Jamabandi records of 1944-45 and some of the lands were purchased by DLF, which was the original colonizers of New Delhi South Extension, Part-I. However, the land in respect of Khasra No. 564/87 is stated to have continued to vest with the family of Risal Singh. Bade Khan and Chhote Khan are stated to be situated in Khasra No.563/1987, which is Government land. One Lachhman Singh S/o Risal Singh is stated to have transferred the property consisting of two plots measuring about 2 bids was or 100 Sq.Yards in Khasra No. 564/87 to Mr. Rajiv Seth and 3 bids was or 150 Sq.Yards in Khasra No. 564/86 to Mr. Manmohan Seth and his wife Mrs. Lata Seth. These persons are stated to have got demarcation done and paid the House Tax. The petitioner claims to have purchased the land through the process of an agreement to sale and registered power of attorney from the said three persons on 6.5.1996 and let out the same to M/s CMS Computers Limited. It may, however, be noticed that the said tenants have since vacated the premises during the pendency of the present writ petition and in terms of orders dated 25.2.2004 the petitioner has been restrained from creating any third party interest by sale, transfer or letting out of the property in question.

12. The petitioner claims that his property is at considerable distance from the two main tombs and even the compound of the smaller tomb is separated by a passage between the wall raised by the A.S.I. on one hand and the building of the petitioner on the other hand. There is stated to be considerable unauthorized construction around the tombs.

13. The genesis of the dispute is the notice issued to the petitioner by the Estate

Officer of the Archaeological Survey of India u/s 5(1) of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the P.P. Act) on 19.8.1996 alleging the unauthorized possession by the petitioner on Government land which was part and parcel of the three protected monuments. The petitioner was alleged to be in occupation of Khasra No.563/87, which is Government land. The petitioner claims he was unaware of any proceedings prior to the said notice and, thus, filed an appeal before the Appellate Authority of the learned Additional District Judge. In terms of the order dated 20.3.1997, the eviction proceedings were quashed and the case was remanded for fresh adjudication. Thereafter there appears to be silence on the part of the respondents till a notice dated 29.7.2003 was received by the petitioner under Rule 38 of the Rules. The petitioner filed a reply to the same and sought certain site plan and sketch plan, which were duly supplied to the petitioner. There was some communication thereafter about the receipt of the reply by the petitioner but that is not an issue because admittedly the reply was considered by the respondents. Not only this, personal hearing was granted to the petitioner. These proceedings resulted in the impugned notice/order dated 10.1.2004 under Rule 38 of the Rules in terms whereof the petitioner was asked to demolish and remove the structure within 5 days of the receipt of the notice.

14. The plea of the petitioner is that the structure existed on the land of the petitioner and that the same was in existence prior to the cut off date of issuance of the notification dated 16.6.1992 and, thus, would not be effected by the said notification. On the other hand, learned counsel for the respondents has contended that the structure in question came into being much before the notification and is, thus, in violation of the notification since no permission was obtained to construct in regulated area and part of the structure is in prohibited area where no construction can at all take place. It is this factual matrix which needs to be examined.

15. The petitioner has not placed on record any permission from the competent authority for the construction in question which goes up from the basement to the second story. Learned counsel for the petitioner on the basis of the material placed on record sought to contend that it could be deciphered that the construction was made prior to the cut off date of 1992. In this behalf learned counsel has referred to the House Tax receipts in the name of Shri Lakshman Singh of the year 1986 showing the ratable value of Rs. 3,240/- as compared to the bill of 1991 showing the ratable value of Rs. 66,640/-. It is, thus, contended that this difference in the ratable value of the House Tax arose on account of the construction.

16. The petitioner has interestingly only placed on record the general power of attorney by which the property stated to have been purchased. The said general power of attorney of 6.5.1996 refers to the property No. D-46A and does not define any structure constructed on the same. The agreement to sale, which have been filed, are of the predecessor-in-interest of the petitioner executed in

1985 which also do not refer to any such building or structure.

17. The aforesaid House Tax receipts have admittedly been considered in the impugned order but have not been relied upon on the ground that they do not bear the extent of construction and there is also an issue about the description of the property since the specified user is residential as per the House Tax receipts. In fact, the contention of the petitioner was that the onus was on the respondent to show that the construction was made after 1992, while the same was sought to be shifted on the petitioner. Learned counsel for the petitioner further contended that if there was such a construction in existence, there would have been no silence on the part of the respondent for such a long period of time and even post 1996 proceedings again were taken only after 7 years. Further, instead of taking out proceedings once again under the P.P. Act the proceedings are now sought to be initiated under the present Act.

18. Learned counsel for the petitioner contended that the petitioner did not obtain any permission for construction in view of the land falling in village Abadi and the provisions of the Delhi Municipal Corporation Act, 1957 would not apply to such an area. It was further submitted that whether or not by virtue of urbanization permission was required is of no consequence since the present proceedings are not for determining applicability of the Delhi Municipal Corporation Act, 1957. In this behalf learned counsel referred to the Division Bench judgment of this Court in Regal Traders Pvt. Ltd. and Another Vs. Lt. Governor of Delhi and Others, where it was held that land falling in extended Abadi can be utilized for purposes other than those specified in Section 313 of the Delhi Municipal Corporation Act, 1957 and no prior written application for sanction of lay-out plan was contemplated u/s 313 of the said Act.

19. Learned counsel for the respondents sought to rebut the plea of the requirement of the prior permission by reference to the provisions of Section 507 of the Delhi Municipal Corporation Act, which is as under:-

"507. Special provisions as to rural areas.____ Notwithstanding anything contained in the foregoing provisions of this Act,____

(a) the Corporation with the previous approval of the Government, may, by notification in the Official Gazette, declare that any portion of the rural areas shall cease to be included therein and upon the issue of such notification that portion shall be included in and form part of the urban areas;

(b) the Corporation with the previous approval of the Government may, by notification in the Official Gazette, ____

i) exempt the rural areas or any portion thereof from such of the provisions of this Act as it deems fit,

ii) levy taxes, rates, fees and other charges in the rural areas or any portion thereof at rates lower than those at which such taxes, rates, fees and other charges and levied in the urban areas or exempt such areas or portion from any

such tax, rate, fee or other charge;

(c.) the Corporation shall pay a Gaon Sabha___

i) an amount equal to the proceeds of the tax on profession, trades, callings and employments, as and when that tax is levied in the Gaon Sabha area, and

ii) an amount equal to such portion of the proceeds of the property taxes on lands and buildings in that area as may from time to time be determined by the Corporation, after deducting the cost of collection from such proceeds."

20 It was, thus, contended that once the land is declared to be an urban land, it could no longer be classified as village Abadi land within the definition of the Delhi Land Reforms Act, 1954 and, thus, the provisions of the DMC Act would apply. In this behalf reliance was placed on the notification dated 28.5.1966 declaring the entire revenue estate of the Kotla Mubarkpur ceasing to be a rural area.

21. In my considered view the mere thought process of the petitioner is not important but what is of relevance is whether the land was, in fact, outside the purview of the Delhi Municipal Corporation Act. The notification dated 28.5.1966 clearly provides that Kotla Mubarkpur, where the land is situated, ceased to be a rural area. Thus, it cannot be doubted that the provisions of the Delhi Municipal Corporation Act would apply. The judgment of the Division Bench in Regal Traders Pvt. Ltd. (supra) would, thus, not apply to the present case since the land no more remained with village Abadi after 1966.

22. In Trikha Ram Vs. Sahib Ram, this Court held that once in pursuance to a notification issued u/s 507(a) of the Delhi Municipal Corporation Act the land is declared to be urban land or ceases to be agriculture land, it can no longer be classified as village Abadi land within the definition of the Delhi Land Reforms Act. It is, in fact, the same notification of 28.5.1966 which was in issue and the judgment in Regal Traders Pvt.Ltd. (supra) was sought to be relied upon. Learned single Judge of this Court observed as under:-

"In my view, the aforesaid judgment would not advance the respondent's case. The judgment as noticed earlier was delivered in the context of whether any sanction for construction of the building under Sections 332 and 333 of the Delhi Municipal Corporation Act was required or not? The Division Bench did not have the occasion to consider the effect of notification issued under the Delhi Municipal Corporation Act u/s 507(a) of urbanising the land. It would be at this stage pertinent to notice the definition of Rural Area and Urban Area as given in Sub-section 52 of Section 2 and Sub-section 61 of Section 2. The effect of a notification u/s 507(a) is that the area mentioned therein ceased to be rural area and from the date of notification is included in urban areas. Even the definition of "Rural Area" in Section 2(52) of the Delhi Municipal Corporation Act excludes areas, which by virtue of notification u/s 507 cease to be so. In Regal Traders Pvt. Ltd. & Ors. v. Lt.Governor of Delhi & Ors., Court was considering the effect

of the notification u/s 507(b) by which certain provisions of Building Regulations were not apply to rural areas. It was not considering, whether provisions of Delhi Land Reforms Act would apply to land that ceases to be rural and becomes urban area. A meaningful reading of Section 3(13) of the Act would show that in the instant case to begin the property in suit fell within "village Abadi". The question that we have to consider is once the provisions of the Delhi Land Reforms Act are applicable on account of the same falling within Section 3(13)(b), whether the same would continue even if it is ceased to be "village Abadi". In my view this would be a case falling within 3(13)(b) and not under 3(13)(d), where the requirement for notification by the Chief Commissioner arises for exclusion of the provisions of the Delhi Land Reforms Act. It appears to me that once by virtue of notification issued u/s 507(a) of the Deli Municipal Corporation Act, the land is declared to be urban land it could no longer be classified as "village Abadi land" within the definition of "land" under the Delhi Land Reforms Act. The provisions of Land Reforms Act would not be applicable."

23. The petitioner cannot be permitted to contend that this aspect is of no meaning. There is no doubt that the present proceedings are not one to determine whether the construction was or was not sanctioned under the Delhi Municipal Corporation Act. However, in order to determine whether the construction did or did not take place prior to the cut off date of 1992, such sanction would be a material piece of evidence to determine this aspect. In the absence of any valid sanction from the Municipal authorities, the burden would lie heavy on the petitioner to substantiate how this construction was made and whether it was so made before the cut off date of 1992. The petitioner cannot merely rely on certain bills of the MCD which show change in ratable value to substantiate the extent of construction specially when the building is stated to be for residential use as per the House Tax bills. The petitioner claims to have purchased the property through the process of an agreement to sale and general power of attorney without any registered sale deed. However, this agreement to sale has also not been filed before this Court to substantiate the extent of construction when the petitioner purchased the property. The general power of attorney, in fact, refers only to the land.

24. The petitioner sought to rely on the judgment of the Metropolitan Magistrate dated 6.6.1996 which formed part of the communication by the Archaeological Survey of India to the Tehsildar, Mehrauli Tehsil in respect of the removal of unauthorised construction around the three monuments.

25. The mere fact that the earlier proceedings under the P.P.Act did not succeed against the petitioner is not of much significance because those proceedings were based on a presumption of the ownership of the land vesting with the Government. The present proceedings are on the basis that within the specified area no construction could have been made after 1992 and the construction had been made after the said date. The respondents have also placed on record a letter dated 20.1.2004 from the Municipal Corporation of Delhi to the effect that

the lay out plan of NDSE Part-I shows the sites of the tombs and the area around therein to be maintained as green. There are also certain proceedings filed before the Metropolitan Magistrate in 1987 when the ASI took steps in respect of the unauthorised encroachments and constructions. During the proceedings photographs had also been produced by the respondents which were filed herein showing the situation of the monuments and the structures around it. The encroachment around the area were only single- storied brick structures. It was those proceedings which resulted in the order in 1996 against the encroachers who filed an appeal which was disposed of on 18.4.2001 by the learned Additional District Judge. The learned Additional District Judge had visited the site and the order records the position of the monuments and around that area. The area around the monuments was not sold to the DLF and apparently remained untouched and unsold.

26. The respondents have also relied upon certain other photographs during the various visits to the sites and the original inspection register in that behalf was produced before the Court and perused by this Court. There was no such structure at that time and the complaints made show that these structures have arisen sometime in the year 1996 which is the time period when the petitioner got the power of attorney executed in his name. The DLF, in fact, in response to a query at that point of time state that no construction had been made by the DLF around the archaeological monuments. The Explanation given for the proceedings under the P.P.Act was that it was under bonafide misconstrued perception and that cannot preclude the proceedings being taken under the present Act. The S.O., Delhi Circle in his communication to the Superintendent, A.S.I on 6.6.1996, in fact, stated that a multi storeyed building was under construction. There is, in fact, even an issue of the description of the property in the present case which is stated to be the own creation of the petitioner wherein it is referred to as opposite D-46 while at the same time being described as D-46 even in the House Tax bills.

27. The structures in existence, if at all, prior to 1992 were brick structures while the present structure is a complete building of basement to second-storey as is apparent from the lease deed in favor of M/s CMC Computers. There was also subsequent electricity connections taken.

28. The best evidence to establish the claim of the petitioner would have been the records of the Municipal authorities to substantiate the stage of construction. The petitioner, however, sought to construct without obtaining any sanction and cannot now shift the onus on the respondents to state that it is for the respondents to establish that the construction was made post-1992. If the petitioner carries on construction without sanction, the onus must be on the petitioner to establish that such construction was made prior to 1992. This is apart from the aspect of the total illegality of construction without permission.

29. The photographs taken at the relevant stage of time which are substantiated by the entry register of the respondent do not show the existence of the

construction prior to 1992. In fact, photographs taken even on 9.10.1991, which were produced in Court with the register and negatives, show the addition of a long wall of 7 feet to the pre-existing cluster of encroachments. These constructions are of bricks. The impugned order has taken note of the material placed by the petitioner. The order has dealt with all the aspects raised by the petitioner and is well reasoned order. The petitioner has obviously constructed this structure sometime in 1996 or after that.

30. Such rampant unauthorised construction is a problem plaguing the city of Delhi. The structure is the long structure with small width and runs from the basement to the second-floor. The petitioner seeks interference with the impugned order from this Court in exercise of jurisdiction under Article 226 of the Constitution of India having admittedly constructed the property without any proper sanction. The property is within the prohibited zone. The mere inaction of the respondents for a long period of time cannot be construed as a license for the future to the petitioner to continue unauthorised construction or to maintain it in violation of the provisions of the Act and the Rules.

31. The writ petition is without any merit and the same is dismissed with costs of Rs. 10,000/-.