
(2014) 07 MP CK 0290
In the Madhya Pradesh High Court
Case No : Writ Petition No. 958/2009

The Scindia Education Society

APPELLANT

Vs

Municipal Corporation

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 — Section 3
Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 2(4), 3
Ancient Monuments Preservation Act, 1904 — Section 2(4), 3
Madhya Pradesh Municipal Corporation Act, 1956 — Section 293, 305

Citation : AIR 2014 MP 136

Hon'ble Judges : S.K. Palo, J;S.K. Gangele, J

Bench : Division Bench

Advocate : Ankur Mody and Saurabh Jain, Advocate for the Appellant; P.D. Bidua, Advocate and S.B. Mishra, Senior Advocate assisted by Anshu Gupta, Advocate for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gangele, J.—The petitioners have filed this petition against the notice dt. 5.1.2009 (Annexure P/1) issued by the Building Officer of the Municipal Corporation, Gwalior. The Officer directed the petitioner to remove illegal construction within a period of seven days, failing which appropriate action shall be taken for removal of the construction.

2. The petitioner No. 1 is a Society registered under the Society Registration Act, 1950. A new Act was introduced in the year 1973 subsequently. The petitioner No. 1 society has been running a school, which is 100 years old. On 30.10.1956, the State of Madhya Bharat, by way of Memorandum of Understanding granted perpetual lease of area on which the petitioner No. 2 had possession on a rent of Rs. 100/- per year. The school of the petitioner society is at Gwalior Fort and it is a boarding school for boys.

3. The School proposed for construction of a hostel building at Gwalior Fort within the location. It submitted an application to the Archaeological Survey of India (ASI). It was mentioned in the application that the proposed construction of Hostel Building shall be located within 200 to 300 mtr. from the protected monument Ek Patthar Ki Baori, Gwalior, hence, sanction be granted. Superintending Archaeologist, Archaeological Survey of India, Bhopal granted permission for construction of Double Storied hostel building at a distance of 243 meters from the protected area of monument on the following conditions:-

- a. The licence is not transferable.
- b. It shall be valid for one year only commencing from the date of issue of this licence.
- c. No building of historical importance which has been in existence for more than 75 years will be demolished.
- d. If any fragment(s)/sculpture(s)/structure(s) found during excavation, the licence holder should be bound to inform the Archaeological Survey of India.
- e. Total area of proposed construction should not exceed 33,522 Sq.ft. (16,761 Sq.ft. x 2) as per the approved attached plan.
- f. The facade design of the proposed construction, section and elevation (attached herewith) should not be changed in any manner.
- g. The total height of the proposed Hostel building is restricted upto 09.50 meters.
- h. The conical and sloppy roofs indicated in the plan looks incongruous with the existing heritage structures and hence it should be flat terraces so that it merges with the surrounding area.
- i. the document submitted by the school authority regarding the ownership/lease right is not clear. Hence, the required permission should be taken from the relevant department after proving the ownership/lease right of the land.
- j. This licence is valid subjected to approval/NOC for construction from other concerned local authorities/department.
- k. If any of the above-mentioned conditions is violated the licence will be treated as cancelled.

4. The petitioner did not obtain any permission from the Municipal Corporation, Gwalior and constructed the building. The petitioner in the petition pleaded that it had submitted an application to the Municipal Corporation for grant of sanction. A copy of the letter dt. 12.1.2009 has been filed as Annexure P/6 alongwith the petition. On 24.1.2007 the Principal of the School wrote a letter to the Municipal Corporation Gwalior, M.P. It is mentioned in the letter that the institution obtained NOC from ASI and it had no knowledge that permission is necessary from Municipal Corporation. Thereafter, a notice was issued by the Commissioner

to the Principal of the School to remove the construction.

5. The Municipal Corporation in its return pleaded that the petitioner informed the Municipal Corporation that the petitioner was ready to pay fees as per the requirement of reply dt. 24.1.2007. Thereafter, the petitioners had given an undertaking in regard to construction and mentioned the fact that they had stopped the construction after receiving the notice, however, the structures were erected subsequently. It is further pleaded that the petitioner had no power and authority to make construction without permission from the Municipal Corporation.

6. The petitioner also filed an application for amendment and raised a ground that after getting the permission from the ASI, it was not necessary to receive permission from the Municipal Corporation. Aforesaid application for amendment was allowed.

7. Learned counsel for the petitioners has submitted that it was not necessary to take permission from the Municipal Corporation because the Society had taken permission from ASI in view of the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958. Learned counsel further submitted that even if the permission was necessary, then the Society submitted an application to the Corporation for grant of permission and hence, after certain period of time, there would be deemed permission. In support of this contentions, learned counsel relied on the following judgments:

- (i) Rajeev Mankotia Vs. Secretary to the President of India and others, .
- (ii) Archaeological Survey of India and Others Vs. Narender Anand and Another, .
- (iii) Nahata Traders and Builders Pvt. Ltd. Vs. Director General, Archaeological Survey of India and Others, .

8. Contrary to this, learned counsel for the respondent Corporation and State have submitted that the area on which the petitioner has made construction is within the limits of Municipal Corporation, hence, the permission from the Municipal Corporation is necessary. It is further submitted that the ASI granted conditional NOC to the petitioner with condition that the petitioner has to receive permission from the Municipal Corporation.

9. It is an admitted fact that the petitioner had not received any permission before construction or after construction from the Municipal Corporation in regard to construction of Boys Hostel.

10. The question for consideration is that whether the permission is necessary or not.

11. Chapter XXIV Section 293 of Municipal Corporation Act, 1956 prohibits erection or re-erection of building without permission. The aforesaid section reads as under:-

293. Prohibition of erection or re-erection of buildings without permission.-(1) No person shall-

(i) erect or re-erect any building; or

(ii) commence to erect or re-erect any building; or

(iii) make any material external alteration to any building; or

(iv) construct or re-construct any projecting portion of a building which the Commissioner is empowered by Section 305 to require to be set back or is empowered to give permission to construct or re-construct,-

(a) unless the Commissioner has either by an order in writing granted permission or has failed to intimate within the prescribed period his refusal of permission for the erection or re-erection of the building or for the construction of re-construction of the projecting part of the building; or

(b) after the expiry of one year from the date of the said permission or such longer period as the Commissioner may allow or from the end of the prescribed period, as the case may be:

Provided that nothing in this section shall apply to any work, addition or alteration which the Corporation may bylaw declare to be exempt.

(2) If a question arises whether a particular alteration in or addition to an existing building is or is not a material alteration the matter will be determined by the Commissioner.

(3) Any person aggrieved by the order of the Commissioner in this behalf may appeal to the district court within thirty days of such order in the manner prescribed therefor and the decision of the district court shall be final.

12. Initially an act named as "The Ancient Monuments Preservation Act, 1904 (hereinafter shall be referred to as the Act of 1904) enacted by the Appropriate Government for the purpose of preservation of Ancient Monuments. Section 2(4) and (5) of the Act of 1904 defines, "maintain" and "maintenance and "land", which are as under:-

(4) "maintain" and "maintenance" include the fencing, covering in, repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto;

(5) "land" includes a revenue-free estates, a revenue-paying estate, and a permanent transferable tenure, whether such an estate or tenure be subject to incumbrances or not;

13. The Parliament enacted an Act named as the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 (hereinafter shall be referred to the Act of 1951). The

object of the Act was to declare certain ancient and historical monuments and archaeological sites and remains in Part A States and Part B States to be of national importance. In the Schedule, the name of Gwalior Fort with following description has been mentioned at S.No. 104 as under:

Gwalior fort:

Chaburbhuj temple

Mansingh's Palace

Rock cut Jain colossi

Sas Bahu temples

Teli ka Mandir

14. In accordance with Section 3 of the Act of 1951, all ancient and historical monuments and all archaeological sites and remains declared by this Act to be of national importance shall be deemed to be protected monuments and protected areas, respectively, within the meaning the Ancient Monuments Preservation Act, 1904. The relevant portion of Section 3 is as under:-

3. Application of Act VII of 1904 to ancient monuments, etc., declared to be of national importance.-All ancient and historical monuments and all archaeological sites and remains declared by this Act to be of national importance shall be deemed to be protected monuments and protected areas, respectively, within the meaning of the Ancient Monuments Preservation Act, 1904, and the provisions of this Act shall apply accordingly to the ancient and historical monuments or archaeological sites and remains, as the case may be, and shall be deemed to have so applied at all relevant times.

15. Parliament has enacted an act named as "The Ancient Monuments and Archaeological Sites and Remains Act, 1958" (hereinafter shall be referred to "Act of 1958"). The aforesaid Act provides for the preservation of ancient and historical monuments and archaeological sites and remains of national importance. The Act was enacted to clarify the legal position that the Central Government regulates exclusively ancient monuments etc. of national importance. Section 3 of the Act of 1958 declares that all ancient and historical monuments and archaeological sites and remains which have been declared by the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951, or by Section 126 of the State Re-organisation Act, 1956, to be of national importance shall be deemed to be ancient and historical monuments or archaeological sites and remains declared to be of national importance for the purpose of this Act.

16. Certain parts of the Gwalior Fort were declared as of national importance because it was in the schedule of the Act of 1951 as mentioned earlier, hence, the provisions of Act of 1958 would be applicable in the aforesaid case.

17. Section 2(4) of the Act of 1958 defines "maintain" and "maintenance" to include the fencing, covering in, repairing, restoring and cleaning of protected monument and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto.

18. As per the petitioner society, the perpetual lease was granted by the Secretary to Government, Education Department, State of M.P. vide memorandum dt. 26th October 1956. A copy of the memorandum has been filed as Annexure P/3 alongwith the petition. The relevant clause in regard to grant of lease is as under:-

(g) The Government Lands and buildings in the Gwalior Fort which are at present in the possession of the Scindia School will be granted to the Society on perpetual lease, on a nominal rent of Rs. 100/- per year, subject to the conditions that all expenses pertaining to upkeep and repairs of the said property shall be met by the said Registered Society which will also be responsible for always maintaining the said property of the Government in perfectly good condition.

19. In accordance with the aforesaid clause, the petitioner was granted lease of the land and buildings in the Gwalior Fort, which were on the possession of Scindia School. No boundaries have been mentioned in the aforesaid memorandum. It is a vague description because there is no mention to the fact that over what area Scindia School was in possession. It is also a fact that after coming into force of State Re-organisation Act, certain portion of the Fort was part of Schedule of the Act of 1951 and the State Government had no power to grant the lease of the land which was of a part of the Schedule of the Act of 1951. The lease must be for a particular area, but in the present case no boundaries of the area were mentioned in the memorandum. In such circumstances, the Superintending Archaeologist, ASI granted licence for construction of the building to the petitioner with certain conditions. Those conditions have been quoted earlier in the order. Condition No. (i) and (j) are important. In condition No. (i), it is mentioned that from the document submitted by the School authority regarding the ownership/lease right is not clear. Hence the required permission should be taken from the relevant department after proving the ownership/lease right of the land and the aforesaid condition was rightly imposed because as discussed earlier in this order, in accordance with the memorandum, by which the lease was granted to the society, it is not clear that what was the area of the land on which the lease was granted by the State Government. Hence, it was obligatory on the part of the society to submit an application to the State Government clarifying the area. If the State Government is the owner of the land, then the permission has to be obtained from the State Government and if the land is of protected monument, then no permission for construction can be granted within the area of protected monument. The next condition is that the petitioner was to obtain approval or NOC for construction from local authorities or department. It means that it was obligatory on the part

of the petitioner to obtain permission from the Municipal Corporation, Gwalior. This condition is also quite natural because the Corporation can very well consider the fact that whether the construction is in cemetery or whether it violates the corporation plan. When the ASI itself imposed the conditions, then it can not be said that the State Government or the Municipal Corporation has no power and authority or there was no necessity to take permission from the Municipal Corporation. The conditions are stipulated in the licence itself, which was granted to the petitioner for the purpose of construction under the provisions of sub-rule (1) of Rule 35 of the Rules of Ancient Monuments and Archaeological Sites and Remains Rules, 1959.

20. Admittedly, the petitioner has not taken any such permission from the Corporation or government. Hence, the notice issued by the Corporation is in accordance with law. Apart from this, in our opinion, it is necessary for the State Government to fix the exact area of lease of the land, which was granted to the petitioner vide memorandum dt. 26th October 1956. Considering the provisions of Act of 1951, Act of 1958 and also the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act, 2010 we do not find any merit in this petition. It is hereby dismissed.

No order as to costs.