

(2003) 03 OHC CK 0006
In the Orissa High Court
Case No : O.J.C. No. 1086 of 1994

The Universe and Another		APPELLANT
	Vs	
Government of Orissa and Others		RESPONDENT

Date of Decision : 07-03-2003

Acts Referred:

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 3

Citation : AIR 2003 Ori 139 : (2003) 1 OLR 426

Hon'ble Judges : P.K. Balasubramanyan, C.J.; Pradip Mohanty, J

Bench : Division Bench

Advocate : G.P. Mohanty, K.N. Jena, H.P. Mohanty, L. Mohapatra and R. Mohapatra, for the Appellant; A.S.C. (for No. 8), A.G.A. (for Nos. 1 to 3 and 8), S.K. Padhi, D. Mohapatra and S. Parida, (for No. 6), for the Respondent

Judgement

P.K. Balasubramanyan, C.J.—The Barabati Fort is an ancient monument as defined under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 and a protected monument as notified u/s 3 of the Ancient Monuments Preservation Act, 1904. It is situated in the town of Cuttack historically assessed to have been established in the year 989 A.D. on the confluence of rivers Mahanadi and Kathajodi. As set out in the writ petition, the Fort was constructed by the Third Ananga Bhimadev, who ruled Orissa from 1216 to 1235. The Fort had seen occupation by a series of Rulers including the British. In the year 1915, on 22-3-1915 to be exact, a notification was issued u/s 3 of the Ancient Monuments Preservation Act, 1904 (hereinafter called the "Preservation Act") declaring the same as a Protected Monument. The notification marked Annexure 1 insofar as it is relevant reads thus:--

".. ..The ancient monuments of Barabati Fortress and the ruins and remains of all ancient edifices, walls, gateways, etc., save and excepting the Mosque at Barabati situated in Mauza Cuttack Cantonment Khasmahal, Parganna Cuttack. Havili, Thana Cuttack, bearing Touzi No. 5458, in the Cuttack District. . . ."

2. Though the British took some interest in the preservation of ancient

monuments in this country, the same cannot be said of some of the State Governments and even the Union Government after independence. After independence, according to the writ petition, no attempt was made to preserve the Barabati Fort notified as an ancient monument. Nothing was also done even after the enactment of Section 126 of the States Reorganisation Act, 1956 or after the coming into force of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (hereinafter called the "Remains Act") which repealed Section 126 of the States Reorganisation Act. Even before the coming into force of the Remains Act, the State Legislature enacted the Orissa Ancient Monuments Preservation Act, 1956 with the object of preservation of ancient monuments and objects of archaeological, historical or artistic interests in the State of Orissa. But according to the pleadings in the writ petition, no serious effort was made at the Government level to preserve and protect the ancient fort with its moat, gateway, the historic structure which originally apparently had either seven storeys or seven divisions and other structures. It is seen that a Standing Order was issued by the Government that no permanent building should be constructed in the Fort area. There is a further Standing Order that no building should be constructed out of Government Fund, without selection of a site by the Site Selection Committee, a statutory Committee with the Collector as Chairman. It is seen from the proceeding of the meeting, at the instance of the Chief Secretary of the State of Orissa on 23-4-1989, that there was a consensus that the Barabati Fort area should be kept as a park and be so converted in a phased manner over a period of time. It was decided to shift some of the existing quarters inside the Fort area and to establish them on the Cantonment Road in view of the historical importance of Barabati Fort. It was decided that necessary steps should be taken to protect its remains. It is also seen that the Chief Secretary directed that plying of heavy vehicles through the main entrance gate be stopped as it affected the life and stability of the gate.

3. The complaint in the writ petition is that nothing has been done to preserve the Fortress and to protect the monument or the moat. The Public Work Department and the Cuttack Club are putting up unauthorised constructions within the area. The Cuttack Club is said to be a lessee under the Government of one of the structure that existed within the Fort, and covered by the notification. The other structure is occupied by the Chief Justice of the High Court as his quarters. The Public Works Department is in occupation of some areas and it has allowed some unauthorised structures to spring up. The ancient temple and the mosque exist within the Fort and the mosque alone has been excluded from the notification issued u/s 3 of the Preservation Act. The Archaeological Department started excavation of the ruins, but it stopped the same possibly due to want of co-operation from the State Government and the failure of the Government to facilitate digging by not getting removed some unauthorised structure in and around the main structure within the Fort. An indoor stadium had been constructed within the Fort by some one who had absolutely no sense of history. A Road had also been laid by filling up a portion of the moat and attempts have

been made to fill up the moat which is a historic one and which has been described in various historical records referred to in the writ petition. It is submitted that it is absolutely necessary to preserve the Fort, the gateway, and the moat in its entirety and the historic constructions within the Fort and direct removal of unauthorised constructions put up in violation of the notification and the Standing Orders restricting construction of permanent buildings. Such constructions should be directed to be pulled down. The lease in favour of the Cuttack Club is unauthorised and improper. To preserve the ancient monuments, the lease must be cancelled. At the time of arguments, it was submitted that the renewed lease would expire by 2003 and the opposite parties should be directed not to renew the lease. It is also contended that unauthorised constructions have been made by the Cuttack Club against the covenant in the lease deed produced along with the Club's counter. Counsel further submitted that constructions have been made by the Club in a haphazard manner and even without reference to the Orissa Development authorities Act and the Building Rules. It was therefore necessary to remove those structures which are clearly unauthorised. It is also prayed that the moat may be fully restored, cleared up and made suitable for rowing, so that those visitors who come to visit the ancient monuments could also use the facility of rowing which will be a further attraction.

4. In the counter-affidavit filed on behalf of opposite party No. 7, apart from questioning the locus standi of the petitioners to file this so-called Public Interest Litigation, it is submitted that after independence a mosque, a temple, a circuit house with its out-houses, a club house by converting the prison and eight temporary A.C, Sheet roofed houses were existing. It is denied that damage to the Fort was caused in various ways. It is submitted that the Public Works Department being the custodian of the place constructed temporary sheds to accommodate their officers and staff in charge of repair and maintenance which indirectly stopped further pilferage of monumental remains. The temporary structures were constructed with the sole intention that they shall be removed as and when required. Though it is admitted that there are some trespassers, it is submitted that it could not be described as a slum. It is submitted that a few permanent houses had come up. It is asserted that Government order from the Works Department was obtained for construction of permanent buildings beyond the area of excavation by the Archaeological Survey of India. No temporary structures are constructed after the Standing Order of the Government was issued. But no material is produced to show that Government orders were obtained for putting up the permanent constructions. It is submitted that as and when it would be required, the structure of the stockyard would be removed without causing any havoc to others. At present it is not causing any hindrance to the excavation. As and when requisition of the Archaeological Survey of India for the purpose of excavation is made, the residents would be asked to vacate with immediate notice from the area. A multistoreyed accommodation to house the officers who are now residing within the Fort would be got ready outside the Fort area, and the structures in the Fort area will be pulled down as and when

the multistoreyed building is ready. The excavation work has not suffered to a great extent due to non-vacating of offices and family accommodations. It may be stated that in this counter-affidavit nothing is stated about the attempt to fill up the moat and/ or on whose authority it was being done. 5. In the counter affidavit filed on behalf of opposite party No. 6, the Cuttack Club, it is submitted that the ancient monument of Barabati Fort and the ruins of Barabati are separately located and the premises of Cuttack Club is not a part of it. It was an old Club established in the year 1895. though all the old records are not available, a copy of the lease deed of 1928, marked, Annexure-A/6 was being produced. A subsequent lease deed of the year 1988 marked Annexure B/6 was also being produced. It was a premier institution of Cuttack town and had made contributions to the social life of Cuttack. It represented a "crown section" of the society. It was one of the oldest surviving Clubs. The Ancient Monuments Preservation Act is in no way infringed. There was no reason for closing down the Club. The ruins of Barabati Fort were located in an area of 200 x 250 sq. ft. and the excavation work had stopped. The petitioners would have been better advised for making a prayer for expediting the excavation of old ruins which was being carried on by the Archaeological Department instead of making a prayer to shift the Cuttack Club, and the bungalow of the Chief Justice which are existing since time immemorial. It is also asserted some what cynically that no gainful purpose would be served by preserving these places in the interests of historical factors. The Club had paid the municipal dues and land dues.

6. We may notice that in spite of receipt of notice opposite party Nos. 1 to 4 have not chosen to refute any of the allegations in the writ petition.

7. There is no dispute before us that Barabati Fort is a historic structure and is an ancient monument so notified. The essential anxiety advanced by the petitioners is about the preservation of the Fort and the ancient structures therein including the moat. Admittedly, an attempt was made to fill up the moat and no one has come forward to explain under what authority this was done and how such a thing could be done when it was a part of the ancient monument so notified under the Act. The other aspect involved is the grant of a lease of a part of the notified site to an entity like the Guttack Club, a club of so-called elites of the town and the total misuse of the premises by that Club by putting up unauthorised and permanent constructions against the covenant in the lease and in total defiance of Standing Orders in that behalf and with scant regard to the history and traditions of the Fort or the city of Cuttack, the third aspect involved is the putting up of various constructions even hampering the work of excavation to be done by the Archaeological Survey of India of the historical site and the preservation of the structures that may be exposed by the excavation. The erection of an ugly and unesthetic stadium adjacent to the ruins is also commented upon. The dangerous condition of the premises occupied by the Chief Justice of the High Court is also referred to. Though the Public Works Department and the Cuttack Club Ltd., have filed counter affidavits as detailed above, the State Government or the District Collector or the Superintendent, Archaeological

Survey of India, Excavation Branch of Orissa Circle has not chosen to bring to the notice of this Court the relevant materials to justify their actions. Once the Fort has been notified as an ancient monument, it becomes necessary to ensure that the same is preserved and that no depredators are permitted to deface the monument and the Archaeological discoveries that can be made by a proper excavation of the site. The notification of the year 1915 marked Annexure-1 clearly declares the ancient monument of Barabati Fort and the ruins and the remains of ancient edifices, wall, gate-ways etc. save and except the mosque at Barabati as a protected monument within the meaning of Ancient Monuments Preservation Act. Therefore, what is left out of the Barabati Fort, the whole of which is brought within the purview of the notification, is only the mosque situated therein. All the other remains and structures then existing are brought within the purview of the notification. Therefore, neither the Public Works Department nor the Cuttack Club could be heard to argue that the premises occupied by them is not within the notified area. Therefore, they are prevented from doing anything against the notification and the consequences flowing from the notification. We think it proper in the circumstances of the case and the historical and Public Interest involved to deal with each of the aspects separately.

8. The notification under the Protection Act and the provisions in the Remains Act make it obligatory for the State and the District Collector to protect the ancient monument. It is therefore clear that Barabati fort notified as a monument is to be preserved and protected by the State and the District Collector. The complaint that the State and the District Collector are not taking adequate steps to protect the monument has not even been sought to be controverted. It stands established by the allegations made in the petition and the facts which have emerged from the writ petition and the counter affidavits filed on behalf of opposite party Nos. 6 and 7. It is somewhat unfortunate to note that the State and the District Collector do not seem to have paid any attention to the importance of preserving the history and its heritage and to preserve the monument and protect it from invasion. We may also notice that a decision was taken on 23-4-1989 at a meeting called by the Chief Secretary regarding steps to be taken to protect the monument and to preserve it and there were suggestions as to how to preserve the Fort. The material portion of that decision reads thus :

"It was the consensus that Barabati Fort area should be kept as a park and be so converted in a phased manner over a period of time. The existing quarters inside the fort area should be pulled down in course of time. A multistoreyed building may be constructed to accommodate Govt. officials on a plot of land now vacant in Cantonment Road, the Chief Architect will prepare a plan for the area by 1st July, 1988. In view of the historical importance of Barabati Fort, Chief Secretary desired that all necessary steps should be taken to protect its remains. He directed for stoppage of plying of heavy vehicles through the main entrance gate as it affects the life and stability of the gate."

Even those decisions have not been given effect to by the District Collector or by the State. It is in that situation that the petitioners have approached this Court and this Court is compelled to step in for the protection of the monument.

(i) THE MOAT :

Admittedly the moat is an ancient one and it is a part of the Fort. It is alleged and it is not denied that an attempt was made to fill up the moat. In fact, a road was created by filling up a portion of the moat and the writ petition was filed subsequent to said filling up and probably preventing further destruction of the moat. An interim order dated 8-7-1994 was also passed by this Court restraining putting up of new constructions and from filling up the Gadkhai without prior permission of the court. It was submitted during the hearing that attempts were also being made to reclaim the area covered by the moat and its surrounding. When a site is notified as an ancient monument as an archaeological site, how the Government or the local authority could interfere with the site or the monument is something beyond our comprehension. How could the authority ignore the historical importance of such an ancient fort known as Barabati fort and interfere with its character and destroy its more important features ? We find it difficult to appreciate such action. That a State like Orissa with its great culture and hory traditions could indulge in such activities can only be described as painful. No justification has been put forward before us for trying to close up the moat or disturb its continuance or reclaim the area. No authority has also been shown which permitted the creating of a road by filling up a portion of the moat. We have to take note of the notification under the Act of 1904 and the need to preserve this historical Fort for posterity to remind it of the great heritage of the country and the State. We have no hesitation in directing opposite party Nos. 1 to 4 and 7 to forthwith restore the moat fully to its original condition with continuity right through and without obstruction. Any obstruction that has been caused to the moat should be removed within a period of three months by opposite party Nos. 1 to 4 and 7 and the moat fully restored. It is not very clear why a road should be provided through the monument and adjacent to a historical ruin, a construction that survives as a great monument of the engineering skill of ancient India. Even if it is considered that a road is necessary, it should be made causing no obstruction to the excavation of the original site and subject to the area being made available for further excavation when needed. Certainly no road could be laid by closing a portion of the moat or by filling up a portion of the moat. In other words, if the authorities take the view that it is absolutely necessary to have a road they should construct a high over-bridge over the moat, after restoring the moat and without in any manner interfering with the free flow of water in the moat and the movement of row-boats, if at a subsequent stage it is thought that rowing should be introduced in the moat as prayed for by the petitioners. It appears to us that it is necessary for the State Government and the Archaeological Department to consider whether the road adjacent to the ruins should not be closed down as a whole especially in the interests of preserving that site and preserving the gateway, an aspect referred

to in the decision taken on 23-4-1989.

In *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*, the Supreme Court rejected the argument that a construction having already been made it should not be directed to be removed, Here the moat is involved which is of great historical importance as detailed in the writ petition and there is no reason why the portion of the moat now filled up should not be restored. The prayer in that behalf by the petitioners has only to be allowed.

(ii) THE LEASE TO THE CUTTACK CLUB :

As we have noticed, the Cuttack Club or its premises originally leased has not been excluded from the notification issued under the Act. Therefore, the site of the Cuttack Club is part of the notified site as an ancient monument. Why a part of the site should be leased out to a social Club is difficult to fathom. That it is set up by the elites or high officials or prosperous business men, is no justification for leasing out a portion of an Archaeological site to a social Club.

The original lease has not been produced. But, Annexure-A/6, a copy of the lease deed of the year 1928 has been produced, therein, there is a clear covenant that the lessee would not cut any trees or branches without the permission of the Collector or do anything likely to cause the destruction of fruit bearing trees. The lessee has to keep the boundaries of the holding unaltered and well-defined. More particularly, the lessee without the previous written consent of the Collector, would not do any act which would diminish the value of or in any other way injure the holding or make any permanent alteration therein or erect any building thereon or dig or permit digging, sink or permit sinking of any tank or well on the land. The lease was a renewal for a period of 15 years from 1-4-1928. If the lessee had observed all the conditions duly, it was entitled to a renewal at intervals of 30 years. The second lease deed produced Annexure-B/6 dated 19-12-1988 also contained similar covenants. The lessee cannot cut down or in any way injure any tree and make any permanent alteration or erect any building or dig or permit digging, sink or permit sinking of any excavation, tank or well on the land without previous written consent of the Collector. The lease is for the period from 1-4-1973 to 31-3-2003. The lease is to be renewed thereafter in accordance with the conditions mentioned in the lease deed. There is a renewal clause on the conditions of the lease being duly observed in terms of the renewal clause in the earlier deed.

It is submitted on behalf of the petitioners that the Cuttack Club had put permanent constructions against the covenants in the lease without obtaining the previous written consent of the Collector, and in clear violation of the notification issued under the Act. It is also submitted that some constructions have been made in such a haphazard manner that even the mandatory provisions of the Orissa Development Authorities Act have not been complied with. Constructions have been made even after the writ petition was filed and an interim order was passed. That a Club consisting of so-called elite people should be so indifferent to

the historical and Archaeological importance of the site and to the need for fulfilling the covenants in the lease and requirement the Orissa Development Authorities Act is also commented upon. As against these, the Club could not produce even a scrap of paper to show that it had taken prior written permission from the Collector for making permanent constructions within the area leased out to it. Nor is any argument advanced in the counter affidavit that such permanent structures could be erected in the site which had been notified as an Archaeological site. At the time of argument too, nothing could be shown to justify the action of the Club in making constructions totally inconsistent with the notification of the site as an ancient monument and militating against the ethos of the historical constructions existing therein.

In the absence of any material forthcoming on the side of the Club, it is clear that most of the constructions put up by it are in clear violation of the covenants in the lease deed and also against the terms of the notification issued under the Ancient Monuments Preservation Act and the purpose sought to be achieved by the Ancient Monuments and Archaeological Site and Remains Act, 1958 enacted by the State. The lease granted in favour of the Club is to expire on 31-3-2003. We direct opposite party Nos. 1 to 3 to seriously consider whether the lease of the site of an ancient monument should be renewed in favour of a Club like the Cuttack Club. After all, a Club like the Cuttack Club may not have any difficulty in finding resources for having a premises of its own elsewhere in the city and there is no reason why such a Club should be permitted to exist within the area of the Fort declared as an ancient monument. Whether there is any violation of the covenants of the lease by the putting up of constructions without prior written consent of the Collector will also be considered by the Government and the Collector before taking a decision on the question of renewal of the lease. Whether the Standing Orders have been violated will also have to be considered. This is necessary, in view of the clear provision in the renewal clause that renewal was available only in case the lessee had scrupulously observed all the conditions of the lease. In case of renewal, the authorities will also consider whether the constructions put up by the Club are not liable to be removed since the site was notified as an ancient monument and is protected both by the Monuments Act and by the Remains Act. It is also necessary to consider whether the constructions are consistent with the Orissa Development Authorities Act. We therefore issue a direction to opposite party Nos. 1 to 3 to consider all these aspects before taking a decision on the question of renewal of the lease in question. Opposite party Nos. 1 to 3 will also be bound to consult the Government of India and the Archaeological Survey of India regarding the works involved and the manner of preservation of the monument, The Barabati Fort, while taking the decision on the question of renewal of the lease. Why the lessee should have an option to renew for such long periods should also be considered by the Government, if at all it ultimately decides to grant a renewal.

(ii) THE GATE-WAY :

The decision dated 23-4-1989 itself indicates that heavy traffic should not be permitted through the Gate-way, lest the Gateway crumbles. It is necessary for opposite party Nos. 1 to 4 to ensure that the Gate way is preserved and maintained as a beacon light of our ancient civilization and development.

(iii) THE RESIDENCE OF THE CHIEF JUSTICE :

Though it was contended on behalf of the petitioners that the building was in such a dangerous condition that it was not fit for human occupation, the same was controverted by the Additional Government Advocate, the Public Works Department and the High Court. After all, if for the preservation of the Barabati Fort and the structures therein, it is necessary to find another residence for the Chief Justice, there should be no hesitation on the part of opposite party No. 1 to provide a residence to the Chief Justice elsewhere and to take the necessary steps to preserve the building since it was also in existence at the site when the notification was issued in the year 1915.

(iv) SUNDRY BUILDINGS ERECTED BY PUBLIC WORKS DEPARTMENT AND THE ENCROACHERS :

Though in its counter affidavit it has been stated" by the Public Works Department that it was making arrangements for providing accommodation elsewhere for its staff, it is not brought to our notice that anything has been done to achieve that object. We notice that the counter affidavit was dated 20-3-1997 and even in the year 2003 there is no argument on the side of opposite party No. 7 that the offices and the staff had been shifted to any other building outside the area. It is necessary for the Public Works Department to proceed with the shifting of its offices and the staff quarters from Barabati Fort and it is also necessary for the State and the District Collector and the Archeological Department to get removed the unauthorised constructions that might have sprung up in the area. We direct opposite party Nos. 1 to 5 and 7 to ensure that these steps are taken immediately. We also direct the District Collector, the State and the Public Works Department to ensure that no permanent constructions are permitted within Barabati Fort notified as an ancient monument, on any ground. We restrain all parties from putting up permanent constructions.

(v) THE EXCAVATION :

Admittedly, excavation was started within the Fort. But, the contention is that it was abruptly stopped because the State Government refused to co-operate with the Archaeological Department. Though in the counter affidavit filed on behalf of the Public Works Department this allegation is sought to be denied, the fact remains that the excavation was stopped and no one has disclosed the reason why the excavation was not completed and the historical remains exposed and the ancient civilization and its glory not made known to the people. It is therefore necessary for the Archaeological Survey of India to take up the work of excavation in right earnest and it is absolutely necessary for the State Government to extend its co-operation for such excavation. The present

generation is entitled to know what were the achievements of our ancestors and the State cannot refuse to lend the necessary aid and assistance to the Archaeological Survey of India to carry out its work.

9. The fact that this Court had to be approached for preserving the cultural heritage of the State famous for its art, culture and history, is a sad commentary on the state of affairs obtaining in the State. It is more disturbing to see that in spite of the filing of the writ petition in the year 1994 and the receiving of notice therein, absolutely no steps have been taken by the State Government or the District Collector or the Archaeological Department to rectify the situation, which as submitted by counsel for the petitioners, is going from bad to worse. That a State like Orissa could permit a destruction of its historical traditions and monuments shows how, we as a State, have failed posterity to whom we owe an obligation to preserve the ancient traditions and historical monuments. The fact that this Court has interfered now, we hope, would make the State alive to its responsibilities.

10. We, therefore, allow this writ petition and direct opposite party Nos. 1 to 5 and 7 to protect and preserve the Barabati Fort as a national monument and to prevent the putting up of any constructions within the notified area and to remove all the structures and buildings not required for the preservation of the monument and for the continuance of the excavation work in the Fort. We further direct the Government to consider the question whether the lease in favour of opposite party No. 6 should be renewed at all in view of the notification: or for breach of covenants and Standing Orders or for putting up indiscriminate or unauthorised constructions in the notified site, We further issue a writ of mandamus directing opposite party nos. 1 to 5 and 7 to immediately open up fully and clean the moat around the Fort by removing the obstructions caused to it and re-excavating the filled up portion. We direct opposite party Nos. 1 to 5 and 7 to consider whether it is necessary to have a road at all through the side of the monument and if it is necessary, to ensure that the road does not block the moat and that an over-bridge of adequate height is constructed over the moat ensuring that the continuity of the moat is not broken. There will be a direction to the said opposite parties to take steps to preserve and protect the moat and the monument. There will be a further direction to opposite party Nos. 1 to 4 to assist the Archaeological Department to complete the work of excavation in the site which has been commenced and stopped abruptly. Opposite party Nos. 1 and 3 are also directed to see to it that all unauthorised constructions are removed including those put up by opposite party No. 6 and opposite party No. 7 and ensure that no further construction activity is permitted in the notified area.