

**(2004) 08 CAL CK 0015**

**In the Calcutta High Court**

**Case No :** Writ Petition No. 21710 (W) of 2000

Utpal Kumar Sarkar and Another

APPELLANT

Vs

Deputy Superintending Archaeologist, Archaeological Survey  
of India and Others

RESPONDENT

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**Date of Decision :** 09-08-2004

**Acts Referred:**

Ancient Monuments and Archaeological Sites and Remains Act, 1958 — Section 2, 38  
Ancient Monuments and Archaeological Sites and Remains Rules, 1959 — Rule 31, 32

**Citation :** (2005) 1 CHN 36

**Hon'ble Judges :** Soumitra Pal, J

**Bench :** Single Bench

**Advocate :** Dipankar Bose, for the Appellant; Gita Mukherjee, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Soumitra Pal, J.—This is a writ petition filed challenging the order and/or notices dated 27.10.1999, 23.11.1999, 21.12.1999 and 28.2.2000, being Annexures P-7, P-8, P-9 and P-10 respectively, the show cause notice dated 24.7.2000, being annexure P-II, the order dated 6.11.2000 being Annexure P-17 to the writ petition whereby the respondents have, amongst others, directed to stop construction of the first floor of the hotel which has been allegedly illegally erected at the site since it falls within 100 meters from protected limits and further beyond it upto 200 meters near or adjoining protected Monuments as these are declared areas under the notification No. 1764 dated 16th June, 1992 (for short "the notification") published in the Gazette of India dated 4th July, 1992.

2. The facts as contended are that the land in question was purchased for starting a hotel in Murshidabad. Plans were submitted with the Murshidabad Municipal authorities (for short "the Municipality"). The Municipality by letter dated 7th September, 1992 granted sanction to the plan for the construction of three-storied commercial building with certain conditions. The Block Land and

Land Reforms Officer, Murshidabad granted certificate of mutation in favour of the petitioner. General Manager, District Industries Centre, Murshidabad examined the scheme and certified that the said scheme of establishing a hotel was technically feasible and economically viable. The plot in question was validly converted from agricultural to non-agricultural land. Taxes were deposited with the Municipality and the construction started. Thereafter, on 21.12.1999 the respondent No. 9 issued a notice to stop construction on the ground that it was being made within the prohibited area of Hazarduari Palace at Murshidabad in violation of the Ancient Monuments and Archaeological Sites Remains Act, 1958 (for short "the 1958 Act") and the Ancient Monuments and Archaeological Sites and Remains Rules, 1959 (for short "the 1959 Rules"). It is the case of the petitioner that prior to such notification, there was no notice from the Archaeological Department and the construction of ground floor and the first floor of the building was completed by the second week of December, 1999 on the basis of the valid plan.

3. On 28.2.2000 the respondent No. 1 issued a notice alleging that the erection of the hotel at the site was illegal since it was in violation of the 1958 Act. The petitioner was directed to refrain from carrying out such erection and to demolish the additional storey.

4. Thereafter, on 24.7.2000 the respondent No. 1 issued a show cause notice calling upon the petitioner to show cause as to why an order under sub-rule (1) of Rule 38 of the 1959 Rules should not be issued to remove the building which has been constructed unauthorised since, under the notification it has been declared that the area upto 100 meters from the protected limits and further beyond it upto 200 meters near or adjoining protected Monuments to be prohibited and regulated areas respectively for the purposes of both mining operation and construction. The petitioner gave a reply to the show cause notice. However, as the same was not considered and being aggrieved, the writ petitioner has moved the instant writ petition.

5. Mr. Dipankar Bose appearing for the writ petitioner reiterating the statements made in the writ petition submitted that action by the respondents is not legally tenable as the notification appearing at page 58 of the writ petition is a general notification, under the Rules, a specific notification has to be issued with regard to every individual Monument. Mr. Bose refers to Rule 2(f) of the 1959 Rules, defining the "prohibited area" or "regulated area". Reference is also made to Rule 31 and Rule 32 of the Rules to demonstrate as to how declaration relating to prohibited area or regulated area should be made. Submission is made that the impugned order and notices issued in the instant case is on the basis of a general notification which ought not to have been done.

6. Mr. Bose in support of his contention refers to a judgment of the Andhra Pradesh High Court in the case of Smt. Gopi Bai Vs. Municipal Corporation of Hyderabad and Others, .

7. Mrs. Mukherjee on behalf of the respondents submits that since the owner of the hotel, being the writ petitioner has carried out unauthorized construction within the protected area, the action of the respondents is just and proper and consequently, the first floor of the hotel premises should be demolished. It is submitted that the notification has been validly issued and the interim order should be vacated so that further action can be taken by the respondents concerned.

8. Having heard the learned Advocates for the parties, I find that pursuant to the notification published the respondents are seeking to demolish the first floor of the hotel premises.

9. The issue is whether any construction can be undertaken near the area of such ancient monument as declared by notification under the 1958 Act.

10. In order to decide the issue, it is necessary to refer to the relevant sections of the 1958 Act and the relevant Rules of the 1959 Rules.

11. Under the said 1958 Act, the expressions "ancient monument", "protected area" and "prohibited area" have been defined.

12. u/s 2(a) of the 1958 Act, "ancient monument" has been defined as under:

"2(a) "ancient monument" means any structure, erection or any tumulus or place of interment, or any cave, rock sculpture, inscription or monolith, which is of historical, archaeological or artistic interest and which has been in existence for not less than one hundred years, and includes -

(i) the remains of an ancient monument,

(ii) the site of an ancient monument,

(iii) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and

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

13. Sections 2(i) and 2(j) of the 1958 Act defines "protected area" and "protected monument". The said definitions are set out hereunder:

"2(i) "protected area" means any archaeological site and remains which is declared to be of national importance by or under this Act."

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

14. u/s 38 of the 1958 Act, power has been conferred on the Central Government to frame rules for carrying out the purposes of the Act. By virtue of the said power, the Central Government framed the 1959 Rules. Rule 2(f) of the 1959 Rules defines "prohibited area" or "regulated area". Rule 2(f) is set out hereunder:

"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."

15. Chapter VII of the 1959 Rules relates to "mining operation and construction near protected monuments" Rule 31 and Rule 32 are under the said chapter.

16. Under Rule 31 it is obligatory on the part of the Central Government to specify its intention to declare a prohibited area or regulated area by issuing notice in the Official Gazette. Rule 31 is set out hereunder :

"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."

17. Rule 32 sets out the manner in which the declaration of prohibited or regulated area is to be made by the Central Government. Rule 32 is set out hereunder :

"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."

18. From a reading of Rule 32, it is clear that in the Gazette Notification the area declared to be prohibited or regulated area should be specified. Any other interpretation would be contrary to the letter and spirit of Rule 32 as the framers of the Rule have used the words "the areas specified in the notification under Rule 31 or any part of such area."

19. The Gazette Notification dated 16.6.92 had been published on 4.7.92 as contemplated under Rule 32 of the 1959 Rules.

The Gazette Notification is set out hereunder:

"S. O. 1764.-Whereas by the notification of the Government of India in the Department of Culture, Archaeological Survey of India No. S. O. 1447 dated the 15th May, 1991, published in the Gazette of India, Part-II, Section 3, sub-section (ii) dated the 25th May, 1991, the Central Government gave one month's notice

of its intention to declare areas upto 100 meters from the protected limits, and further beyond it up to 200 meters near or adjoining protected monuments to be prohibited and regulated areas respectively for purposes of both mining operation and construction.

And whereas the said Gazette was made available to be public on the 5th June, 1991.

And whereas objections to the making of such declaration received from the person interested in the said areas have been considered by the Central Government.

Now, therefore, in exercise of the powers conferred by Rule 32 of the Ancient Monuments and Archaeological Sites and Remains Rules, 1959, the Central Government hereby declares the said areas to be prohibited and regulated areas. This shall be in addition to and not in any way prejudice the similar declaration already made in respect of monuments at Fatehpur Sikri, Mahabalipuram, Golconda Fort, Hyderabad (Andhra Pradesh), Thousand Pillared Temple, Hanamakonda, District Warangal (Andhra Pradesh), Sher Shah Tomb, Sasaram (Bihar), Rock Edict of Ashoka Kopbal, District Raichur (Karnataka), Fort Wall, Bijapur (Karnataka), Gomateswara Statue at Sravanbelgola. District Hassan (Karnataka), Elephanta Caves, Chanpur, District Kolaba (Maharashtra)."

20. From a reading of the Gazette notification, I find it is of general nature. The area or the names of Hazar Duari Palace and the Imambara do not figure in the Gazette notification published on 4.7.92 as contemplated under Rule 32 of the 1959 Rules. Thus, the Gazette notification cannot be said to be applicable to Hazar Duari Palace and the Imambara. The judgment cited by the petitioner is applicable in facts and circumstances of the case.

21. Hence, the writ application is allowed.

22. The impugned order and/or notices dated 27.10.1999, 23.11.1999, 21.12.1999 and 28.2.2000, being Annexures "P-7. "P-8", "P-9" and "P-10" respectively, show cause notice dated 24th July, 2000, being Annexure "P-II" to the writ petition, the demolition order dated 1.2.2000, being Annexure "P-16" and the letter order dated 6.11.2000, being Annexure "P-17" to the writ petition are set aside and quashed.

23. There will be no order as to costs.

24. Urgent xerox certified copy of this order be given to the, appearing parties, if applied for, on priority basis.